ILS
ABHIVYAKTI LAW JOURNAL
2022-23

100 Years of Excellence
1924-2023

ARTICLES

CASE COMMENTS

LEGISLATIVE COMMENTS

TEACHERS' AND RESEARCH SCHOLARS' SECTION

ILS LAW COLLEGE, PUNE

ISSN 2348-5647

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Principal's Page

I am delighted to present yet another edition of *Abhivyakti law Journal*. As we navigate through our centennial year witnessing rapidly changing legal landscape, this journal stands as a testament to the enduring relevance of thoughtful legal inquiry, rigorous analysis, and the pursuit of justice. In this edition, we continue our tradition of providing a platform for scholars, practitioners, and students to engage with the pressing legal issues of our time.

This journal is more than just a compilation of articles it is a space for dialogue, debate, and the exchange of ideas that shape the law and influence policy. Our contributors come from diverse backgrounds, offering insights that stretch across multiple fields of law, from constitutional principles to demonetization, sustainable future. The topics addressed in this volume reflect the dynamic nature of legal scholarship, with a focus on both global perspectives and local implications.

In addition to the insightful articles contributed by our students on these subjects, this edition also features comments on two landmark judgments. The case Bar Council of India vs Bonnie Foi Law College highlights significant gaps in the current legal education system, particularly the absence of practical training, which results in lawyers who are not fully prepared for real-world challenges. Furthermore, the comment on the Indian Ex-Servicemen Movement v. Union of India case critically appreciates the Supreme Court's decision to direct the payment of arrears under the One Rank One Pension Scheme.

I would like to express my gratitude to our editorial board, whose commitment and expertise make this journal possible. Their tireless efforts in curating the submissions and ensuring the highest standards of scholarship are invaluable to the continued success of The *Abhivyakti law Journal*. I would also like to thank our esteemed contributors whose work enriches our understanding of the law in all its complexities.

With pride and gratitude.

Dr. Deepa Paturkar

Professor;
Additional Charge, Principal,
ILS Law College, Pune

EDITORIAL

This academic year, we take a moment to reflect on the incredible journey we have shared in coming back to the offline mode. The recent Covid experiences have not only enriched our lives but have also reinforced the values of integrity, empathy, and cooperation.

With the celebrations of the centenary year of the Indian Law Society (1924-2023), we look to the future and resolve to keep encouraging and supporting one another while being steadfast in undertaking our pursuit of educating and uplifting the society.

The *Abhivyakti Law Journal* continues to remain a platform of education for the students to showcase their intellectual acumen and writing skills. The submissions this year may be few but are inspiring by themselves in the students' resoluteness to bounce back to all the regular activities of college life.

"It always seems impossible until it's done." - Nelson Mandela

Writing, indeed, cultivates a critical thinking and a reasoning skill to empower our students to navigate challenges and find solutions that benefit all. We believe that the transformative power of education certainly helps create a positive change in the world.

So, let us continue to ignite the flame of creativity and excellence in everything we undertake.

We would like to acknowledge the efforts of the student editors for their contributions to this year's publication.

We invite you to immerse yourselves in the insightful perceptions shared in these pages.

Dr. Banu Vasudevan

Ms. Parul Raghuwanshi

Faculty Editors
Abhivyakti Law Journal
2022-23

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I, Principal Dr. Deepa Paturkar, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Dr. Deepa Paturkar
Professor;
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Acknowledgments

We congratulate each of the student author who has helped us in bringing out yet another interesting and thought-provoking annual edition of the *Abhivyakti Law Journal* 2022-23.

We also appreciate the sincere and diligent editorial skills of our student editors.

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ARTICLES

Addressing Societal Demonization of the Blackstone's Principle: Expounding the Underlying Rationale

Aharon Pardhe
III B.A., LL.B.

I. Introduction

India is witnessing a marked rise in the number of "encounters" by the police.[1] These extra-judicial killings are being hailed as "divine justice"[2] by the citizens of India. Social legitimization and approval of these encounters with a showcased demand for more of such "action" is a major cause for concern. This general trend of dissipating faith in courts of law poses a serious challenge to the authority of the Indian Criminal Justice system.

When a layperson is bombarded with news of heinous crimes being committed in broad daylight with unprecedented impunity it leads to a quick conclusion of a failing criminal justice system. They blame it on the ineffectiveness of the law-and-order machinery, which movies and other mass media have widely popularized. The media attributes any "wrong" acquittal to the infamous principle that it is better to let ten guilty walk than one innocent be punished. In the legal fraternity, this principle is known as Blackstone's Principle. It is due to these circumstances that people are contemptuous of the said controversial principle.

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[1] Peter Ronald Desouza, *Encounter killings and the strongman phenomenon*, The Hindu, May 04, 2023, <https://frontline.thehindu.com/the-nation/encounter-killings-analysing-the-strongmanphenomenon/article66792943.ece#:~:text=Encounter%20killings%20in%20India,killings%20from%202016%20to%202022>; Priya Pillai, Extrajudicial killings: India's long history of "fake encounters", THE INTERPRETER, (Jan 29, 2019) <https://www.lowyinstitute.org/the-interpreter/extrajudicial-killings-india-s-long-history-fake-encounters> last visited on <date>.

[2] *UP Minister Calls Atiq Murder Divine Justice, Mayawati Says 'Encounter Pradesh',* The Quint, April 16, 2023, <https://www.thequint.com/news/india/atik-ahmed-killed-political-reactions-prayagraj-encounter-up-police>.

This essay attempts to purge the contempt harboured by the general public against Blackstone's Principle. It further highlights the underlying logic behind our Criminal Justice System adopting this principle. It also seeks to plant the principles of the rule of law and order while punishing offenders in the public morality.

II. Blackstone's Principle:

Voltaire wrote, "*...it is better to run the risk of sparing the guilty than to condemn the innocent.*"[3]

This exposition evolved and developed into a principle that is commonly known as the Blackstone principle.

The Blackstone's Principle is named after Sir William Blackstone, an English Jurist, and Judge due to his modern formulation of Voltaire's idea. He asserted, *"[B]etter that ten guilty persons escape, than that one innocent suffer.*"[4]

The rationale behind Blackstone's Principle is explained as, *"... that in distributing errors in criminal punishment, our justice system should strive to minimize false convictions, even at the expense of creating more false acquittals and more errors overall."*[5]

The said principle was based on the presumption that the criminal justice system would commit errors in the exercise of administration of justice. However, it propounded that these errors should not result in wrongly punishing an innocent person even if that entails wrongful acquittal of the guilty.

III. Questioning Blackstone's Principle:

For the legal fraternity, Blackstone's Principle is a truism, that needs no further propagation, but for the general masses, the importance and rationale behind this principle remain inadequately expounded and emphasized. Therefore, people question this principle time and again.

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[3] VOLTAIRE, ZADIG (1748).
[4] 4 WILLIAM BLACKSTONE, COMMENTARIES 352 (1769).
[5] Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV 1068-1069 (2015).

As a law student, I have often been asked and observed a common question by different people, why not kill the rapists? Why not publicly behead the child molesters? Why not encounter the terrorists or murderers who indiscriminately massacre women, children, and the aged?

I recall having the same questions. Why is an eternity spent in bringing someone to justice? Why does prosecution require years and years to make its case which oftentimes turns out to be futile? Why do offenders get to walk away unscathed merely on a technicality? Why is the capital sentence for rapists and terrorists commuted?

To some people including me at one point in time, the adoption of Blackstone's Principle seemed an over-conscious decision that gave undue weightage to the protection of "innocents" for the crimes they did not commit as even now, an innocent person is likely to be punished for the crimes he/she did not commit.

Sometimes, the criminal justice system may appear to be set in a way to let offenders walk away. To a certain extent, it is true, except it is not designed to let "offenders" walk out, it is in fact designed to protect the innocent from being mistakenly thrown in the gallows.

With increasing exposure to law and the underlying principles of criminal jurisprudence, my perspective has evolved and I have become a staunch supporter of some of the principles engrained in our existing system we follow, one of which is Blackstone's Principle.

In order to further understand the rationale underlying the adoption of Blackstone's Principle we shall understand importance of liberty and different facts of the Criminal Justice System.

IV. Constitution and Right to Life and Personal Liberty:

Article 21 of the Constitution of India provides that, *"No person shall be deprived of his life or personal liberty except according to procedure established by law."*[6]

[6] Article 21, Constitution of India, 1950.

The Hon'ble Supreme Court in *State of A.P. v. Challa Ramkrishna Reddy* has held that:

> *"22. The right to life is one of the basic human rights. It is guaranteed to every person by Article 21 of the Constitution and not even the State has the authority to violate that right."*[7]

This stand has been consistently reiterated by the Apex Court and various High Courts in a catena of cases.

Therefore, we can conclude that the Constitutional mandate holds that no one including the State, has any authority to deprive a person of his right to life except according to procedure established by law. It necessarily follows that to "punish" a person for his/her crime rests with the State, and the State has to follow the procedure established by law while punishing any person.

V. Distinction between 'Accused' and 'Convict' and Burden of Proof:

We as a society, commit a fatal fallacy of categorizing the accused as guilty. We have come to use the terms 'accused' and 'convict' interchangeably. Herein, lies the root of a serious problem whereby society endorses the encounters of an accused.

An accused means, "*Person charged with a criminal offence*."[8] It is further provided that, "*in India, it is when the First Information Report is lodged with the police naming a particular person as being responsible for committing an offence, that he can be regarded as an accused. Their guilt is to be proven in the competent courts of law.*"[9]

Whereas, a convict means, "*one found guilty of the offence by verdict of jury, A convict is one who has been condemned by a competent Court; one who has been convicted of a crime or felony*."[10]

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[7] State of A.P. v. Challa Ramkrishna Reddy, (2000) 5 SCC 712: 2000 SCC OnLine SC 809 (India), pg. 723.
[8] *Accused,* Advanced Law Lexicon- The Encyclopaedic Law Dictionary with Legal Maxims, Latin Terms, Words & Phrases (6th ed. 2019).
[9] Ibid.
[10] *Convict,* Advanced Law Lexicon- The Encyclopaedic Law Dictionary with Legal Maxims, Latin Terms, Words & Phrases (6th ed. 2019).

The Criminal jurisprudence as a matter of principle, considers an accused, innocent until proven guilty. It further lays the burden to prove the guilt of an accused on the prosecution.

At this point one may ask, why has the criminal justice system adopted such a stand? Does it not make it easier for the accused to escape the rigors of law?

In order to answer this question, one must also be aware of another leading principle of criminal jurisprudence viz. any person may lodge a complaint/FIR against any person. So, if the burden to prove charges were not to be on prosecution, a mere accusation that may not have any substance would be sufficient to frame an innocent person. This would entail that an innocent person would have the unnecessary burden to prove how he/she is not guilty or not connected in any way to the alleged offence etc.

Therefore, a person accused is presumed to be innocent until the charges against him are proved by the prosecution beyond a reasonable doubt in competent courts of law.

There is a general misconception that a conviction by the courts is a matter of mere formality. It is important to note that a person accused is not necessarily guilty. The courts after appreciation and consideration of material facts and circumstances and more importantly after giving the accused a free and fair trial, determine whether the accused is guilty or not.

VI. Free and Fair Trial:

In order to uphold the rule of law, the State must ensure every conviction is in accordance with the procedure established by law. As mentioned earlier, every accused is entitled to have a free and fair trial. Various Constitutional Courts in India have tried to elaborate the features of a free and fair trial through different judgments.

In *Zahira Habibulla H. Sheikh v. State of Gujarat*, The Hon'ble Supreme Court stated that,

> "36. *The principles of the rule of law and due process are closely linked with human rights protection… It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to*

all concerned. There can be no analytical, all-comprehensive, or exhaustive definition of the concept of a fair trial, and it may have to be determined in a seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted…Each one has an inbuilt right to be dealt with fairly in a criminal trial… A fair trial obviously would mean a trial before an impartial judge, a fair prosecutor, and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly a denial of a fair trial. (emphasis supplied)"[11]

Therefore, it can be inferred that every accused has a right to a free and fair trial which entails impartiality and unbiased approach and strict adherence to rule of law.

The Hon'ble Supreme Court while making a reference to other cases in *Babubhai v. State of Gujarat has held that*:

"32. The investigation into a criminal offence must be free from objectionable features or infirmities (emphasis supplied) which may legitimately lead to a grievance on the part of the accused that the investigation was unfair and carried out with an ulterior motive. It is also the duty of the investigating officer to conduct the investigation avoiding any kind of mischief and harassment to any of the accused. The investigating officer should be fair and conscious so as to rule out any possibility of fabrication of evidence and his impartial conduct must dispel any suspicion as to its genuineness. (emphasis supplied) The investigating officer "is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth". (Vide R.P. Kapur v. State of Punjab, AIR 1960 SC 866,

[11] Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158: 2004 SCC (Cri) 999: 2004 SCC OnLine SC 464 (India) pg. 184.

Jamuna Chaudhary v. State of Bihar, (1974) 3 SCC 774, para 11 and Mahmood v. State of U.P., (1976) 1 SCC 542)"[12]

Hence, it is to be noted that the investigative agencies like the Police, Central Bureau of Investigation (CBI), etc. are duty-bound to conduct a fair investigation to bring out the truth of the matter. Furthermore, it is worth emphasizing powers of State Police authorities are restricted to investigation and do not extend to adjudication of guilt. Extra-Judicial Killings or Encounters necessarily means that the Police exercise the role of the Judge, Jury and Executioner. This usurpation of power is not desired and does not in any way fit within the prescribed contours of rule of law.

If impartial investigation and fair trial are given a go-by, it is highly likely that "punishments" would be according to the whims and fancies of the investigative agencies or criminal courts. This would lead to a complete breakdown of the rule of law, as no person notwithstanding his innocence would be guaranteed of immunity from "punishments".

VII. Incentive-Disincentive Mechanism for Regulation of Human Behaviour:

Some people would argue that an innocent being punished can be unfortunate collateral damage, but a necessary one in the grander scheme of things. This argument is marred by a lack of appreciation for individual liberties and the right to live a dignified life. It further shows cold apathy to the victims of State excesses and complete disregard for abuse of power under the garb of functions of State Policing.

Human behaviour is regulated by an incentive-disincentive mechanism, wherein good behaviour is to be protected and valued as against criminal behaviour which needs to be disincentivized to create a deterrent effect.

John Adams while arguing for the defence in the *Trial of the Boston Massacre* succinctly highlighted the importance of saving innocent people even if it meant letting the guilty walk out. He stated,

[12] Babubhai v. State of Gujarat, (2010) 12 SCC 254 (India).

> *"We are to look upon it as more beneficial, that many guilty persons should escape unpunished than one innocent person should suffer. The reason is that it's of more importance to the community, that innocence should be protected than it is, that guilt should be punished; for guilt and crimes are so frequent in the world, that all of them cannot be punished; and many times, they happen in such a manner, that it is not of much consequence to the public, whether they are punished or not. But when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, 'It is immaterial to me, whether I behave well or ill; for virtue itself, is no security.' And if such a sentiment as this, should take place in the mind of the subject, there would be an end to all security whatsoever."*[13]

This excerpt suggests that society would fare well when the community had the confidence that innocents would not be hanged. It is to this effect that society should give more importance as opposed to punishment of cent percent offenders.

VIII. Imprisonment and Reluctance to Convict:

There is a general perception that the criminal justice system in its view to protect the innocent even at the cost of sparing offenders, is incorrigibly wrong and flawed. We want quick justice, we want the accused, arrested, incarcerated, or better yet hanged, killed, or beheaded without the long delays of the courts. Let me reiterate that an accused is not necessarily guilty. They may as well be innocent. This is evidenced from the data of National Crime Records Bureau which reported that during the calendar year of 2022, a total of 10,760 prisoners were acquitted by higher courts on appeal[14], which means that these people wrongly convicted and later their conviction was overturned by the appellate court.

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[13] John Adams, *Adams' Argument for the Defense: 3–4 December 1770*, FOUNDERS ONLINE, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016#LJA03d031n1-ptr.

[14] *Prision Statistics Report* (2022) *National Crime Reports Bureau*. Available at: https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1702359055 Chapter7-2022.pdf.

The perception of justifying the incarceration of innocents as necessary and lesser evil for the greater good, as mentioned previously, stems from ignorance, or neglect of the gravity of what it means to be stripped of the liberties we enjoy. This again has its roots in our attitude toward liberty, which we take for granted. We neither appreciate the liberties we have nor do we value them as much as we should.

Imprisonment seems not so dire a punishment to the members of this general public especially when it is being considered for some distant person, unknown to them personally. Imprisonment entails submission of your liberties. You cannot move freely; you cannot talk to your relations as frequently as you would like. There's no choice of food or clothing. You will always be tethered, monitored, supervised, and dictated to do things. This is, to say the least. The reality of prisons is far from this "ideal".

The courts recognize their infallibility, they are aware of the condition of the prisons. The courts which consist of human beings like you and me are capable of committing an error. They are in an impossible position where they have to decide whether or not a person is guilty, thereby actually deciding the fate of that person. That is the reason behind the reluctance of the courts to readily convict an accused.

We are accustomed to convicting someone as guilty or acquitting someone as innocent sitting in the comfort of our homes or standing on the chai-stalls based on little or no knowledge of the complexity of the case.

Now as I tip-toe in the ocean of law, I always give myself a test before passing such judgments. Imagine you being framed, tried, and convicted for an offense you didn't commit. Imagine your loved one being incarcerated in prison because he/she was framed. It does the trick and makes me more conscious of what I am saying.

IX. Conclusion:

Societal condemnation of an accused as guilty and the demand for the incarceration or killing of the accused is a cause for concern. Indian Criminal Justice system adopts a principle that promulgates the protection of one innocent even if it means a few guilty going unpunished. The legislative intent

underlying this principle is to give citizens a promise of guarantee that the State will not do any wrong to the innocent even if it means some guilty walk without penalty. The absence of such security would lead to the breakdown of the rule of law.

“Extra-Judicial Killings” or Encounters are against the rule of law. We as a community should repose our faith in the judiciary and the criminal justice system for bringing criminals to the books according to the due process of law. We should further abstain from glamorizing and legitimizing the wanton extra-judicial killings and go even further to register our protest against such abuse of power by the police authorities.

Decriminalization of Corporate Offences

Anna Rose
II B.A., LL.B.

The advent of globalization and industrialization in today's world at rapid pace has resulted in the emergence of crimes that are difficult to detect. The institutionalization of these crimes over the period makes it difficult for the authorities to convict individuals and companies. In a global economy, corporate crimes can affect countries both on a large scale and small scale. Therefore, stringent laws have been established by the government to combat these crimes both on a domestic and international level.

The Ministry of Corporate Affairs and Security Exchange Board of India regulates the listed companies within the country. The Indian corporate governance regulated by the Companies Act, 2013 (hereinafter referred as Act) has undergone several changes throughout the years. The Companies Act 2013 has been constantly criticized for its stringent and complex regulatory procedures that allow criminal action even for minor offences. The association of criminality with violations of provisions of laws may result in a disproportionately severe penalty for minor offences[1]**.** With the threat of minor technical or procedural lapses resulting in the threat of prosecution, relatively new entrepreneurs will be discouraged from setting up businesses and incorporating companies.

Therefore, the recent decision by the government to decriminalize certain corporate offences is a significant move. Decriminalization of corporate offences would facilitate the smooth functioning of business and minimize lengthy litigation. On 13th July 2018, the Ministry of Corporate Affairs established a review committee under the Chairmanship of Mr Injeti Srinivas.

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[1] Decriminalization of offences under companies act, 2013, TaxGuru. Available at: *https://taxguru.in/company-law/decriminalization-offences-companies-act-2013.html,* (Accessed: 23 December 2023).

The committee aimed to review the various compoundable offences under the Act and to examine whether any of these offences can be decriminalized, thereby making the defaulting party liable to penalty instead of punishment. The committee also examined the non- compoundable offences to analyse whether the offences can be recategorized as compoundable offences and finally suggested certain improvements that can be made in the existing mechanism of levying penalties

The report submitted in September 2019 recommended a large number of possible changes and amendments that can be adopted to facilitate the ease of doing business and reduce the burden on the courts.

The recommendations of the committee mainly included decriminalization of 16 out of 81 compoundable offences.[2] The committee suggested the establishment of an in-house adjudication framework to address the non-compoundable offences wherein the defaulter is subject to penalty by the adjudication officer. The in-house adjudicating mechanism should be both transparent and technology-driven and minimize physical interference by conducting the proceedings online and publishing the orders on the website.

The Companies Amendment Bill 2020 (hereinafter referred as Bill) introduced and approved in the Union Cabinet after the Srinivas Report of 2019 proposed changes to the Companies Act of 2013. The proposed Bill of 2020, decriminalizes 16 offences, therefore if the Bill is passed of the remaining 66 penal provisions, it would decriminalise 46 of them. The Bill also proposed other major additions such as referring the cases to the In- house Adjudication Mechanism (IAM), omitting seven offences from the Act, a proposal of alternative forms of the framework for five serious offences and condoning the fines pertaining to twenty-two provisions of the Act.

The in-house adjudication mechanism also known as IAM, provided under section 454 of the Act deals with simple defaults excluding cases of fraud, wherein the nature of lapse is procedural. The IAM has a jurisdictional limit

[2] Rajesh Verma, Report of the Company Law Committee on Decriminalization of the Limited Liability Partnership Act, 2008, Ministry of Corporate Affairs, January 2021 https://www.mca.gov.in/Ministry/pdf/Report%20of%20the%20Company%20Law%20Committee%20on%20Decriminalization%20of%20The%20Limited%20Liability%20Partnership%20Act,%202008.pdf, (last visited 16 Feb 2023)

and can only deal with cases with a monetary penalty lesser than or equal to 2.5 million. The cases that exceed the above-mentioned limit, will be taken up by the National Company Law Tribunal (NCLT). If the decision of the adjudicating officer is not satisfactory to the aggrieved party, an appeal can be filed before the Regional Director. The objective of introducing IAM was to reduce the burden on the criminal justice system, thus allowing it to focus on grave offences.

The Bill just like Section 21 of the Act[3] proposed omitting the punishment of three year imprisonment for defaulting Section 13(5) of Act which mandates the minimum share of profit to be spent under the CSR contribution or to transfer the amount not spent in CSR fund.[4]

Decriminalization of corporate offences is beneficial for both the government and the corporates. This judiciary would be relieved from the trivial offences it has been burdened with easing the burden on the criminal justice system. The cases referred to IAM do not require subjective evaluation by special courts. The corporates, on the other hand would benefit from the decriminalization of offences as it would improve the ease of doing business, boosting the number of domestic and global players in the market and encouraging flow of investments.

The presence of a *mens rea* (criminal mind) and *actus reus* (wrongful act) is an essential condition to hold the alleged accused liable in the court. The Supreme Court in its judgement, *Director of Enforcement v MCTM Corporation* held that conduct which is blameworthy is the *sine qua non* as in civil liability and guilty mind is not to be considered as a precondition because in civil cases it is not required for the plaintiff to prove the guilt beyond a reasonable doubt rather it is essential to prove the guilt upon a preponderance of liability.[5]

In the case of civil imposition, blameworthy conduct is a prerequisite whereas a guilty mind is not a necessary precondition. In civil cases, unlike a criminal, the standard of proof is much lower. Therefore, in corporate cases the efficacy of criminal law is questionable. Since criminal prosecution is both prolonged

[3] Section 21, The Companies (Amendment) Act, no 18, Acts of the Parliament, 2013
[4] Section 135(5), The Companies (Amendment) Act, no 18, Acts of Parliament, 2013
[5] Director of Enforcement v MCTM Corporation, AIR 1996, SC 1100

and time taking. Therefore, it is logical to replace criminal prosecution with civil for corporate misconduct as it involves less cost and regulatory burden. Serious and fraudulent cases that affect the interest of the public will be prosecuted under criminal law.

Although the process of decriminalization has various advantages, there are disadvantages as well to the existing legislation and the possible changes that can be made. It is impractical to adopt the proposed formula for determining the fine of all the companies. There exists a diverse set of companies with respect to their size and mode of operation. Therefore, the application of the proposed formula might affect the smaller companies or startups to a larger extent in comparison to corporate giants. Adoption of a proportionality test wherein different fines are imposed on different companies based on the difference in their size and operations would be a logical solution to the issue at hand. Secondly, the Companies Amendment Bill 2020 allows the Adjudicating Authority, a non-judicial body the power to impose fines. As per the Bill, these adjudicating authorities can be Registrar of Companies or Regional Director which come under the Central Government. Although decriminalization reduces the workload of courts and tribunals, transferring authority to adjudicating officers who are essentially government employees might encourage political influence and corruption whereas the proceedings conducted by an individual with a judicial background would be neutral and not arbitrary in nature. Therefore, a person with a judicial bent such as a retired judge of the High Court, Supreme Court or the Special Tribunals can better serve the purpose. Thirdly the penalty imposed may be insignificant in comparison to the gain through violation of the regulations. Therefore, it is important to relook into the imposition of penalties in the Bill as there is a possibility that the fine imposed might be proportional to the nature of violation and gains by the corporates.

Decriminalization of corporate offences is one of the major steps taken by the government to ensure better corporate governance and to boost the growth of the economy. While the Bill can improve the ease of doing business as well as reduce the burden on the criminal justice system, it is also important to look into the various disadvantages of the Bill. The Bill's disadvantages which make it less impactful should be addressed so that it can be better catered to the needs of the society.

UAPA and the Right of Dissent: A Critical Analysis

Anushka Tiwari, Insha Khan & Manya Singh
III B.A., LL.B.

Introduction-

The inception of the anti-terrorism laws in India can be traced back to the Criminal Law Amendment Act of 1908. This Act was introduced by the colonial British government to suppress the voices of the Indian leaders who fought for the independence of the country. After the independence, however, a Committee, that is, National Integration and Regionalism appointed by the National Integration Council, was constituted to analyse and propose measures to safeguard the unity, integrity, and sovereignty of the nation. The Committee submitted its reports based on which the Constitution of India was amended in 1963. The amendment allowed the Central Government to ban any organization which poses a threat to the nation. The Unlawful Activities (Prevention) Act (UAPA or the Act) was subsequently enacted by the parliament in the year 1967. Over the years this Act has been amended and moulded. The most recent amendment took place in 2019, which is also quite controversial and would be discussed in detail in the latter part of this article. This article aims to critically analyse the UAPA by contrasting its purpose with the ground realities of its invocation in the present times. In doing so, it also aims to critically examine its provisions under the lens of Fundamental Rights and the principles of fair trial enshrined in them.

Purposive Justifications of UAPA: A Misplaced Faith?

The defenders of the Act support it by striking the key argument against the UAPA that it violates the fundamental right guaranteed under Article 19(1) (a) of the Constitution of India. They make this argument by resorting to the purpose of the Act. The right to freedom of speech and expression is one of the most basic rights and is granted to all citizens. However, if there were any questions about the constitutionality of the legislation, it would present a

dilemma between the right to freedom of speech and expression of citizens on one side and concerns about national security on the other. While it is ideal to find a solution that satisfies both concerns without sacrificing either, it is important to note that limitations imposed for the purpose of preventing terrorism and protecting national security are fundamentally different from other restrictions designed to discourage violence or social unrest. As per Article 19(2) of the Constitution of India, "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence." Therefore, it is permissible for the State to impose reasonable restrictions, to safeguard the interests of the nation. Comparable restrictions have also been acknowledged by the International Covenant on Civil and Political Rights (ICCPR)[1], wherein Article 19(3) specifies that special duties and responsibilities come with the exercise of the right granted in Article 19(2).

Moreover, the Act is necessary for combating terrorism. The law of the Republic of India allows law enforcement agencies to enact such laws to prevent terrorism and to prosecute the individual involved in terrorist activities. The UAPA provides for judicial review, so any individual who is not satisfied with the actions of law enforcement agencies may approach the court for redressal. The UAPA is consistent with the standards laid down in various international platforms for combating terrorism. The Act is designed in such a way that it fulfils the standards of international treaties that India is a signatory to, which is in accordance with Articles 51 and 253 of the Constitution of India. The UAPA, at least in its purpose, is not in violation of the fundamental rights of citizens, as the Constitution permits reasonable restrictions on fundamental rights in exceptional circumstances to safeguard the greater public interest. However, stated purpose of the UAPA and ground realities of its application appear to be strikingly dissimilar. And this is where

[1] ICCPR, 1966, Article 19, General Assembly resolution 2200A (XXI)

the arguments in opposition of UAPA arise from. The ground realities and present scenario of the application of the UAPA has been discussed at length in the next section.

Present Scenario of Application of UAPA-

The UAPA was initially introduced to suppress terrorist activities, however, it has been used as a tool to stifle the dissenting voices of activists and journalists who speak out against the societal injustices. The same can be seen through the recent rise in cases registered under the UAPA and the emerging pattern in their judgments. It is reported that there was almost a 72% rise in the number of cases registered under UAPA in 2019, however, the conviction rate remains very poor at only 3%[2]. There are various instances of unjust arrest under the draconian provisions of UAPA., For instance, the Bhima Koregaon event where prominent social rights activists were arrested and not just that one accused, that is father Stan Swamy even passed away after waiting nine months in jail for bail.

Further, the UAPA is used as a tool to suppress the voices of students who express their opposition to the decisions of the ruling government. To name an incident, Safoora Zargar[3] who was a student of Jamia Millia Islamia and 21 weeks pregnant was denied bail even on humanitarian ground. She was in jail for almost 3 months during the peak of pandemic. Ordinarily the provision for granting bail as laid down under CrPC is that within 15 days of arrest if court is satisfied bail is granted however it can maximum stretch up to 90 days. However, in cases relating to UAPA this statutory period extends up to 180 days. This is why accused end up arrested for months in jail. This shows how the Act is used to detain individuals for extended periods without bail.

Furthermore, the Act is also used to silence the journalist who strives to report on the abuses of the ruling elite. This is reflected in the declining rank of India

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[2] *The Hindu: Recent surge in UAPA cases*, March 09, 2021, available at https://www.thehindu.com/news/national/parliament-proceedings-over-72-rise-in-number-of-uapa-cases-registered-in-2019/article34029252.ece(last visited May 14, 2023 , 9:45pm)

[3] *Arrest of Safoora Zargar*, The Economic Times, April 20, 2020, available at https://economictimes.indiatimes.com/news/politics-and-nation/arrests-in-jamia-violence-ne-delhi-riot-cases-made-after-analysis-of-forensic-evidence-police/articleshow/75245943.cms?from=mdr(last visited May 14, 2023)

in the World Freedom of Press Index (161 out of 180 in 2023, 150 out of 180 countries in 2022 and so on)[4]. The UAPA serves to stifle the dissent of the media and intimidate the truth-seeking journalists. The unwarranted arrest and detention makes the journalist to operate in most difficult environment[5]. The central government supresses the dissent by labelling them as anti-national forces[6]. The most recent example of the arrest of a journalist who went to report the social injustice would be the arrest of Siddique Kappan[7], who was arrested by UP police while he was enroute to report on the rape and murder of a Dalit woman. Academics and journalists have shown their frustration over arbitrary invocation of UAPA and its impact on voices of dissent. After looking at the ground realities under which the UAPA is being invoked and the manner in which it is being used, in the next sections, the article will critically examine its provisions in the light of fundamental rights and principles of fair trial.

Critical Analysis of the Act-

Overview-

The provisions under UAPA have been criticised for being draconian and being violative of natural rights of human beings. It violated some of the basic provisions laid down under the Constitution of India namely, Articles 14, 19, 21 and 20. Further with the latest amendments to the Act, it has been used by the government as a tool to supress the dissent and target the journalists and activists.

The regulations under the UAPA are arbitrary and vague, leading to a chilling effect on the freedom of speech and expression granted under Article 19(1)(a) of the Constitution of India.

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[4] World Press Freedom Index , available at https://rsf.org/en/index (last visited May 14, 2023)

[5] By IPI Contributor Salomé Cloteaux, *Kashmir: Unabated attacks against journalists exacerbate media repression International press Institute*, , July 14, 2022, available at https://ipi.media/kashmir-unabated-attacks-against-journalists-exacerbate-media-repression/ (last visited May 14, 2023)

[6] *India Press Freedom at Stake*, Geopolitical Monitor, March 05 2024, available at, https://www.geopoliticalmonitor.com/india-press-freedom-at-stake-amid-growing-narrative-management/ (last visited May 14, 2023)

[7] *846 days: Timeline of Siddique Kappan's case*, India Today, February 02, 2023, available at https://www.indiatoday.in/india/story/846-days-timeline-of-siddique-kappans-case-as-he-walks-out-of-jail-2329454-2023-02-02- (last visited May 14, 2023,)

The phrase *"any other means of whatever nature"* used in Section 15(a) allows the authorities to tag any activity as a terrorist activity. Additionally, the use of the expression *"as soon as may be"* in informing the suspect about the charge adds vagueness to the procedure, allowing authorities to use it according to their whims and violate the rights of the arrested individual. Furthermore, the proviso to Section 43D (5) of the Unlawful Activities (Prevention) Act denies a person charged under the Act the right to be released on bail if there are reasonable grounds for the court to believe that the accusation against them is prima facie true. This Proviso is arbitrary and violates Articles 14, 19, and 21 of the Constitution of India, as it denies an individual their fundamental rights based solely on untested and unproven allegations.

Denying an individual's freedom based on mere allegations without justifiable grounds violates the principles of natural justice and the constitutional rights of individuals. It is crucial to ensure that any restrictions on an individual's freedom are based on clear and justifiable grounds. Therefore, the Proviso to Section 43D (5) of the Act must be reviewed and revised to ensure that it does not violate the principles of natural justice and the constitutional rights of individuals.

Furthermore, in *DK Basu v. State of West Bengal*[8], the Court upheld that the arrested individual has the right to claim a lawyer under all circumstances of detention and at all times where he is supposed to make statements. However, no such a right is allowed as per the provisions of this Act which goes on to violate the principles of natural justice or fair trial.

ARREST-

Section 43A of the Act confers wide-ranging powers on designated authorities to make arrests based on their whims or information provided by any individual. This provision is in contrast to the Supreme Court's ruling in *Joginder Kumar v. State of Uttar Pradesh*[9], where it was held that-

[8] DK Basu v. State of West Bengal (1997) 1 SCC 416
[9] Joginder Kumar v. State of Uttar Pradesh (1994) 4 SCC 260 (Para 20)

"No arrest can be made because it is lawful for the police officer or the government to do so. The existence of the power of arrest is one thing and the justification for the exercise of such power is quite another."

BAIL-

The Unlawful Activities (Prevention) Act includes a provision under Section 43D(5) that prohibits the grant of bail to individuals charged under the Act without the public prosecutor being heard. This provision was implemented to prevent the misuse of bail by those accused of terrorism-related offences who may pose a threat to national security if released. However, the concern is that this provision could contradict the established legal doctrine that *"bail is the norm and jail is the exception"*. The decision of the Supreme Court in *NIA v. Zahoor Ahmad Shah*[10] where the apex court established that in such cases there shall be presumption of guilt until proven not guilty has also been criticized by some for or potentially undermining principles of natural justice and the presumption of innocence until proven guilty. It is important to consider various factors, including the nature of the offence, the available evidence, and the probable chances of the accused fleeing or tampering with evidence, when determining whether bail should be granted.

Ultimately, it is the responsibility of the legislature and the judiciary to balance the interests of national security with fundamental principles of justice and individual rights.

STANDARDS-

The substantive standard laid down under section 35(2) for the central government to exercise its power against any organisation, is *"only if it believes that such organisation or individual is involved in terrorism"* which should be interpreted as reasonable grounds to believe and this standard is lower than both the criminal and civil standards where the standards are beyond reasonable doubt and proof of balance of probabilities.

[10] NIA v. Zahoor Ahmad Shah (2019) 5 SCC 1

Presumption of Innocence Until Proven Guilty-

The principle of 'innocent until proven guilty' is a fundamental aspect of natural justice, recognized by the Indian legal system and it is also a well-recognized principle at the global level. Article 14 of the International Covenant on Civil and Political Rights (ICCPR), of which India is a signatory, also recognizes this principle. In India, Article 20 of the Constitution establishes this principle, and the same has been upheld by the Supreme Court of India in the landmark case of *Babu v. State of Kerala*[11]. However, in the Unlawful Activities (Prevention) Act, the accused is not given this right, and this is the most contentious aspect of the Act. Section 43E(b) of the Act states that *"Unless the contrary is shown, the court shall presume that the accused had committed the offence."* Thus, the burden of proof is on the accused to establish their innocence for the alleged terrorist act, whereas the prosecution only needs to show that there is a likelihood that an individual or organization is to cause terrorist activities or terror in public. In conclusion, the Act violates the most basic principle of natural justice and is violative of precedents laid down by the Supreme Court holding the said principle.

Articles 14, 19 and 21: The Golden Triangle of Fundamental Rights

The very foundation of the Act is an iniquitous attack on the fundamental rights of the citizens particularly freedoms granted under Articles 14, 19, and 21 of the constitution of India, insofar as it grants unreasonable powers to the State to act against those who dissent from the ruling party. The right to dissent is an integral part of the right to freedom of speech and expression as interpreted in *Maqbool Fida Hussain v. Rajkumar Pandey*[12] and hence cannot be compromised under any situation except the circumstances mentioned under Article 19(2). The UAPA, on the other hand, empowers the government to impose restrictions on the right of individuals in the guise of suppressing terrorism. Further, the Act gives unrestrained power to declare an individual a terrorist if the central government believes so. This provision is wholly arbitrary and is violative of Article 14 of the constitution, so far as it provides

[11] Babu v. State of Kerela (2010) 9 SCC 189
[12] Maqbool Fida Hussain v. Rajkumar Pandey, 2008 CriLJ 4107

arbitrary and unbridled powers to the government to identify an individual as a terrorist.

Article 21 of the Constitution of India guarantees the right to life and personal liberty, which includes within it the right to reputation, which is violated by the UAPA act. The individual, even before the actual commencement of the trial, is tagged as a terrorist. Further, this doesn't amount to following the "procedure established by law." The Supreme Court in *KS Puttaswamy's* judgement[13] held that the right to life and personal liberty cannot be curtailed except according to the due process of law. Lastly, the Amendment of 2008 to the UAPA increased the period of detention from 90 to 180 days. The person under detention has no fundamental rights, so a mere statement of investigation being under progress is enough for government to claim custody of the accused for up to 180 days. This contrasts with other systems such as the USA, which allows detention for only 7 days, and Australia, which permits detention for only 24 hours. Hence the provisions of the Act are wholly out of line and are also against the Supreme Court judgement of *Maneka Gandhi v. Union of India*[14], where it was determined that procedural laws must be just, fair, and reasonable.

Article 20 of the Constitution of India-

Article 20 enshrines the Principle of Audi Alterum Partem, which means let the other side be heard. This principle is violated when the accused has not been given the right to present his arguments before a competent court of law. The UAPA Amendment 2019 has done all it can to infringe on the fundamental rights of the accused in the best possible way.

AMENDMENTS-

The amended provisions of the parent act have tried to limit the chances of judicial review of the arrest. An arrested individual can file an appeal before the Central Government for review under Section 36(1) of the Act. If the Central Government refuses to delist the individual from the Fourth Schedule of the Act, the individual may choose to file a review petition to the Review

[13] K.S Puttaswamy v. Union of India (2017) 10 SCC 1
[14] Maneka Gandhi v. Union of India (1978) 1 SCC 248

Committee constituted by the Central Government in the exercise of its power under Section 36 (4) of the Parent Act. The nature, scope and composition of the Review Committees has been defined under Section 37 of the Act which states that the Central Government can appoint a Review Committee with a maximum of three members, one being a chairperson who must be a Judge of any High Court in India. However, the concern with the appeal under UAPA is twofold. Firstly, the Act has ardently tried to remove the role of the judiciary to interfere in the arrests of individuals. Secondly, the review committee is very vague, with the government having absolute powers to appoint the members of the committee, thereby violating the principle of *Nemo Judex in Sua Causa*, which is a principle of natural justice. Further, there is no time limit mentioned in the act regarding the declaration of verdict by the review committee. In other words, the Act grants unlimited time to the committee to decide upon the detention of the accused, Lastly, the committee is not even responsible to give reasons for their verdict.

Conclusion-

"By passing some draconian laws terrorism and crime will not be reduced." Curtailing civil liberties will lead to obstruction in the growth of the nation. Democracy and liberty must go hand in hand.

The UAPA curtails one of the basic fundamental rights that is right to dissent. In the name of terrorism the Central Government target the voices of dissent. The application of the UAPA on individuals such as social activists, human rights advocates, academics, journalists, and students who voice their opinions in public against the policies of the government has cast a negative light on the world's largest democracy. These individuals are detained in prison even when there is insufficient evidence to prove their guilt. Due to the stringent provisions of this Act, it is extremely difficult for an average person to defend themselves, and obtaining bail is a great challenge under this Act. In order to nip the threat of terrorism in the bud, it is equally important to enact laws that promote minority inclusion, and social and economic development, address uneven development, allow for political dissent and debate, and so forth.

Furthermore, there is a need to establish a review commission to review periodically the laws designed to combat terrorism. The committee should

rationally examine the provisions of the Act with respect to the present societal norms and should recommend changes accordingly. The Judiciary must also play an active role in the effective operation of the Act and it must ensure that the authorities under the sanction given in the provisions of the Act do not infringe on the basic human rights of the individuals.

Powering the Sustainable Future with Hydrogen Energy

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Introduction

It is well said that "*We do not inherit the earth from our ancestors, we borrow it from our children*." [1]

The worldwide growth of population and industrialization has resulted in a general rise in environmental and anthropologically induced greenhouse gas emissions. Consequently, well-established economies are seeking to transform the existing fossil fuel-based economy into a clean energy-based economy. For achieving this, the most promising alternative fuel resource is Hydrogen. Hydrogen is an energy carrier that has no emission except for water vapour when used in internal combustion engines or fuel cells[2]. The storage and production of hydrogen as a potential fuel are the only issues of intense research due to the characteristic low density of hydrogen.[3]

The aim of this research paper is to elucidate the potential of hydrogen as a fuel for the future, methods of green ways of producing hydrogen, and importantly the policy consideration at the global level and at the national level for effective implementation of an alternative fuel resource that is hydrogen. The widespread adoption of hydrogen as an alternative energy resource holds a key

[1]Chief Seattle, Bob Desautels, available at https://www.bobdesautels.com/blog/2019/7/30/we-dont-inherit-the-earth-we-borrow-it-from-our-children-chief-seattle#:~:text=%E2%80%9CWe%20don't%20inherit%20the,.%E2%80%9D%20Chief%20Seattle%20%E2%80%94%20Bob%20Desautels (Last visited on April 5, 2024)
[2] Office of Energy Efficiency & Renewable Energy, US Department of Energy, *Alternative Fuels Data Center*, available at https://afdc.energy.gov/fuels/hydrogen-benefits#:~:text=Hydrogen%20can%20be%20produced%20from,water%20vapor%20and%20warm%20air (Last visited on April 5, 2024)
[3] Office of Energy Efficiency & Renewable Energy, US Department of Energy, *Hydrogen Storage,* available at https://www.energy.gov/eere/fuelcells/hydrogen-storage (Last visited on April 5, 2024)

to mitigating environmental degradation and addressing the challenges posed by Green House Gas Emission.

Production of Hydrogen-

As said by Jules Verne "*Water is the coal of the future. The elements hydrogen and oxygen decomposed by the electric current will in the future supply the Earth's energy*."[4]

Hydrogen is the most abundant element in the universe. However, unlike other fossil fuels, reservoirs of hydrogen are not found on Earth. The atoms of hydrogen are bound together by other elements forming a molecule. This hydrogen then has to be extracted from the molecule so that it can be used as a fuel cell. [5]

There are various sources from which hydrogen may be produced, this includes renewable resources such as water or sunlight, and non-renewable resources such as fossil fuels, and can also be produced through biomass. some of the most common ways of producing hydrogen are Steam Methane Reforming, electrolysis, biomass gasification, and solar water splitting.[6]

Environmental Impact of Hydrogen-

Hydrogen as a fuel and as an alternative to fossil fuel has enormous benefits, the most evident one is that using hydrogen instead of fossil fuel-based energy can considerably reduce air pollution and thereby improve our environment[7]. The impact of air pollution on the health of an individual is one of the major concerns and is one of the key drivers of energy policy decisions, and hence

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[4] Jules V. The Mysterious Island. Pierre-Jules Hetzel Publisher; Paris, France: 1874.
[5] US Energy Information Administration, *Hydrogen Explained*, last updated on *June 23, 2023, available at* https://www.eia.gov/energyexplained/hydrogen/, (Last visited on April 5, 2024)
[6] Office of Energy Efficiency and Renewable Energy, US Department of Energy, *Hydrogen Production Processses,* available at https://www.energy.gov/eere/fuelcells/hydrogen-production-processes (Last visited on April 5, 2024)
[7] Guihua Wang, Joan M. Ogden, Daniel Sperling, *Comparing air quality impacts of hydrogen and gasoline,* Vol 13, Issue 7, ScienceDirect, 4, October 2008, available at https://www.sciencedirect.com/science/article/abs/pii/S1361920908001028 (Last visited on April 7, 2024)

governments across the world are concerned about reducing emissions and adopting a cleaner energy source. Hydrogen, hence, is the best alternative as when it is used in vehicles, it does not emit sulphur dioxide or carbon dioxide rather the only by-product that it produces is water vapours.[8] However, for hydrogen to be used it has to be produced first. Presently, the most widespread method of producing hydrogen is the Steam Methane Reforming method[9]. This method of production of hydrogen leads to the emission of carbon dioxide, a greenhouse gas, and hence results in global warming and climate change[10]. Hence, a greener way of production of hydrogen is the need of the day.

Policies-

"*A nation that cannot control its energy sources cannot control its future*"[11] quoted by one of the most popular world leaders Barrack Obama.

The energy sector is the world's most crucial sector which plays an exquisite role in defining the growth and function of any country and hence it plays a key role in governing the economic growth of the country as well. The growth in the energy sector directly affects the GDP of the nation. One of the most intrinsic examples of this could be the 1970s oil crisis, which clearly showed how the energy sector can affect the economic growth of the nation[12]. Hence, effective policies for the energy sector play a defining role in driving the nation forward in a sustainable manner.

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[8] Office of Energy Efficiency and Renewable Energy, US Department of Energy, *Hydrogen Benefits and Considerations,* available at https://afdc.energy.gov/fuels/hydrogen_benefits.html (Last visited on April 5, 2024)

[9] Office of Energy Efficiency and Renewable Energy, US Department of Energy, *Hydrogen Production: Natural Gas Reforming,* available at https://www.energy.gov/eere/fuelcells/hydrogen-production-natural-gas-reforming (Last visited on April 5, 2024)

[10] Ibid.

[11] Barack Obama, The Audacity of Hope: Thoughts on Reclaiming the American Dream

[12] Federal Reserve History, *Oil Shock of 1973–74* , November 22, 2013, ¶ 1, available at Oil Shock of 1973–74 | Federal Reserve History (Last visited on April 6, 2024); *See also* Daniel Yergin, *The 1973 Oil Crisis: Three Crises in One—and the Lessons for Today,* Center on Global Energy Policy at Columbia, October 16, 2023, available at The 1973 Oil Crisis: Three Crises in One—and the Lessons for Today - Center on Global Energy Policy at Columbia University SIPA | CGEP (Last visited on April 6, 2024)

This section will seek to explore ways in which actions can be taken to promote the use of hydrogen as a promising clean energy source that can contribute significantly to the ongoing global energy transition. The upcoming decade shall be recognized as a pivotal chance to expand hydrogen technologies and supply chains, allowing them to realize their full potential. So we need to outline measures that can be taken by governments, corporations, and other stakeholders worldwide, both in the short and long term.

Based on the policies and actions that various governments have already implemented, it is projected that the demand for hydrogen will increase to 115 MT by 2030[13]. However, only a small portion of this demand, less than 2 MT, will be attributed to new applications[14]. To meet the current climate commitments, 130 MT of hydrogen will be required by 2030[15]. Furthermore, if we aim to achieve net zero emissions by 2050, we will need almost 200 MT of hydrogen by 2030.[16] Use of the low-carbon hydrogen technologies is the way ahead to meet the global targets for environmental protection. By 2030, there is a possibility that the demand for low-carbon hydrogen may surpass 50 MT H2 in the existing industrial applications and gas grids.[17]

The global community can develop a gradual method of constructing hydrogen supply chains, expertise, and infrastructure. Investing in a particular sector or application in the short term can have positive impacts and stimulate the long-term implementation of other interrelated sectors.

Procedure for Transition – Key Policy Methods

To achieve the aspiration of transitioning to hydrogen as a new green alternative fuel, the world needs to devise some policy actions while keeping in mind certain important factors.

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[13] *International Energy Agency, Global Hydrogen Review 2022, September, 2022, 5, available at https://www.iea.org/reports/global-hydrogen-review-2022, (Last visited on April 7, 2024)*
[14] Ibid.
[15] *Supra note 12*
[16] *Supra note 12*
[17] *International Energy Agency, Global hydrogen demand in the Net Zero Scenario, 2022-2050 , available at Global hydrogen demand in the Net Zero Scenario, 2022-2050 – Charts – Data & Statistics - IEA (Last visited (April 7 2024)*

The nations must establish long-term policy objectives, to achieve an embedded role of hydrogen as a crucial driving force of the economy by 2050. This will help increase the confidence of all stakeholders that a market for low-carbon hydrogen and associated technologies are anticipated to develop in the future, thereby encouraging investment and collaboration between nations and corporations. It may encompass blueprints and objectives for national hydrogen use, emission control standards, industrial schemes, international conventions, and treaty commitments. For example, individual countries' targets and routines to fulfil the global emission goals of the Paris Agreement could play a crucial role in promoting sustainable practices across various sectors of the economy, including the potential use of hydrogen as a fuel.

Secondly, there needs to be an effort for increasing the demand for hydrogen as a fuel across various sectors of the economy. The rationale is based on the fundamental economic principle that the higher the demand for an entity, the more would be the supply of it. The recent conflict between Russia and Ukraine has highlighted the importance of reducing reliance on fossil fuels. This has created momentum in Europe to search for low-emission hydrogen and other alternative energy sources, which in turn has the potential to increase demand for hydrogen as a fuel[18]. Governments may offer incentives or subsidies to encourage the adoption of hydrogen in new applications, thereby increasing its competitiveness with conventional fuels. Such policies could include tax credits and grants for research and development of hydrogen technologies and direct investment in hydrogen projects. Imposing limitations on the use of fossil fuel-driven technologies such as carbon pricing is one way to increase the demand for greener ones like hydrogen. By providing a clear economic signal, governments can stimulate private sector investment and foster the growth of a sustainable hydrogen economy.

[18] International Energy Agency, Global Hydrogen Review 2022, September, 2022, 233, available at, https://iea.blob.core.windows.net/assets/c5bc75b1-9e4d-460d-9056-6e8e626a11c4/GlobalHydrogenReview2022.pdf (Last visited on April 7, 2024)

A significant obstacle in the transition is, the high cost associated with low-carbon hydrogen[19]. The considerable expenses involved in the production of green hydrogen make it more infeasible than grey hydrogen, which is produced using fossil fuels.[20] There is a need for policies that can effectively mitigate the risks associated with both capital and operational costs. Several strategies can be employed to encourage private investment in discrete facilities during the initial stages of scale-up when the primary risks are related to uncertain demand, unfamiliarity, and complexity within the value chain. One approach is to offer financial incentives to investors, such as tax breaks or subsidies, to reduce the perceived risk and increase the potential return on investment. Another strategy is to provide technical assistance and training to help potential investors better understand the market and the complexities of the value chain, thus reducing uncertainty and increasing confidence in the investment.

Additionally, policymakers could work to establish a favourable regulatory environment that encourages private investment, such as streamlined permitting processes and regulations that minimize red tape and expedite the development process. Furthermore, public-private partnerships could be formed to share the risks and benefits of the investment, creating a collaborative approach to scale-up that encourages private investment. Recently the G7 leaders have committed to mobilize $600-billion in private and public funds for five years to support essential infrastructure development in developing nations[21]. One of the key goals of this initiative is to address the issue of climate change.[22]

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[19] Policy Briefing, The Royal Society, *Options for producing low-carbon hydrogen at scale*, January 2018, 25-26, available at Options for producing low-carbon hydrogen at scale: Policy briefing (royalsociety.org) (Last visited April 9, 2024)

[20] Working Paper, OECD, *Financing cost impacts on cost competitiveness of green hydrogen in emerging and developing economies*, November 27, 2023, 13-14, available at https://one.oecd.org/document/ENV/WKP(2023)19/en/pdf (Last visited April 9, 2024); *See also* Scita, Rossana, et al. *"Barriers to the Implementation of a Clean Hydrogen Economy." Green Hydrogen: The Holy Grail of Decarbonisation? An Analysis of the Technical and Geopolitical Implications of the Future Hydrogen Economy*, JSTOR, October 1, 2020, 3.1, available at https://www.jstor.org/stable/resrep26335.5?seq=2 (Last visited on April 9, 2024)

[21] World Economic Forum, *G7 pledges to invest $600 billion into infrastructure for developing countries*, June 27, 2022, available at G7: Leaders pledge $600 billion to fund new infrastructure | World Economic Forum (weforum.org) (Last visited on April 8, 2024)

[22] Ibid.

Governments have a crucial role to play in driving innovation and facilitating the development of early-stage high-risk projects. One of the key ways they can do this is by setting the research agenda and providing funding for these projects, which can help to address key societal challenges and foster technological advancements. Moreover, early-stage projects are often associated with high levels of risk, making them less attractive to private investors. Governments can help to address this issue by taking on early-stage risks themselves, which can make them more attractive to private investors.

Technology acts as another key enabler in driving the transition towards a more sustainable future. There is a need for improved technologies that are not only better performing but also more cost-effective to produce, install, and operate in an integrated manner. Advancements in technology can significantly enhance the efficiency of low-carbon energy systems. Green hydrogen requires a significant amount of energy input often from renewable energy sources like solar or wind.[23] However, renewable energy sources are often intermittent and subject to fluctuations in availability, which can make it difficult to produce and store hydrogen efficiently. Innovations in energy storage, such as battery technology, can help to address this challenge by providing a way to store excess renewable energy generated during peak periods and release it when needed. This can help to balance the supply and demand of energy, reducing the need for fossil fuels and increasing the use of hydrogen. While by using data analytics and advanced sensors, smart grids can monitor energy usage in real-time, enabling more efficient energy distribution and reducing the need for costly infrastructure investments. The technology related to electrolysers is also critical in the development of green hydrogen, and it is essential to incorporate methods that improve their efficiency, durability, and cost-effectiveness.

[23] Sundus Cordelia Ramli, World Economic Forum, *Why green hydrogen could play a major role in powering our sustainable future,* December 7, 2023, available at Hydrogen is a key fuel for our sustainable future | World Economic Forum (weforum.org) (Last visited on April 9, 2024); *See also* IRENA, *Green Hydrogen: A guide to policy making,International Renewable Energy Agency,* November, 2020, 9, available at https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2020/Nov/IRENA_Green_hydrogen_policy_2020.pdf (Last visited on April 9, 2024)

Lastly, to create effective policies, it is important to consider minimizing or eliminating unnecessary regulatory barriers that can impede the adoption of new approaches. Specifically, regulations that hinder the development, production, and trade of clean energy technologies must be re-evaluated. Trade regulations also need to be relaxed as they can create major obstacles that limit the effectiveness of policies. By streamlining regulatory processes and establishing common standards, businesses can more easily navigate the regulatory landscape, facilitating the flow of goods and services across borders.

Efforts Undertaken So Far-

United Nations -

The Global Programme for Green Hydrogen in Industry by the United Nations Industrial Development Organization (UNIDO) is a pioneering initiative that can establish a benchmark for boosting the utilization of hydrogen in industries. The program seeks to facilitate the exchange of knowledge regarding policies, technical guidelines, and standards while promoting technical cooperation for industrial applications.[24] In November 2022, a joint declaration was signed by the Director Generals of the International Renewable Energy Agency (IRENA) and the UNIDO to advance the transition towards sustainable energy through green hydrogen.[25] The declaration aims to enhance information sharing among relevant stakeholders and establish effective facilitation mechanisms to promote the production and industrial implementation of green hydrogen.[26]

[24] United Nations Industrial Development Organization, Global Programme for Hydrogen in Industry, avaialable at https://www.unido.org/hydrogen#:~:text=This%20five%2Dyear%20Programme%20aims,knowledge%20and%20information%20exchange%20platform (Last visited on April 7, 2024)
[25] Press release, International Renewable Energy Agency*, IRENA and UNIDO Support Global Energy Transition Through Green Hydrogen,* November 8, 2022, available at https://www.irena.org/News/pressreleases/2022/Nov/IRENA-and-UNIDO-Support-Global-Energy-Transition-Through-Green-Hydrogen (Last visited on April 7, 2024)
[26] Ibid. at 6

European Union -

To achieve energy independence from Russian fossil fuels before 2030, the European Commission unveiled the REPowerEU plan in March 2022.[27] This plan has two key goals: firstly, to produce 10 MT of green hydrogen within the member states, and secondly, to bring in an extra 10 MT of green hydrogen through imports by the same year.[28]

In November 2021, the Clean Hydrogen Partnership was established to replace the Fuel Cells and Hydrogen Joint Undertaking.[29] This public-private partnership aims to promote research and innovation in hydrogen technologies in Europe.[30]

G7 Hydrogen Action Pact -

The G7 launched a Hydrogen Action Pact in May 2022.[31] The G7 countries have made commitments to accelerate the development of low-carbon and renewable hydrogen and its derivatives, establish regulatory frameworks, and exchange best practices.[32]

Mission Innovation: Clean Hydrogen Mission 2021 -

It is a global initiative launched during the Mission Innovation Ministerial (MI-6) in June 2021.[33] The initiative aims to accelerate the development,

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[27] Press Release, European Commission, *REPowerEU: A plan to rapidly reduce dependence on Russian fossil fuels and fast forward the green transition*, May 18, 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3131 (Last visited on April 6, 2024)

[28] Ibid. at ¶ 6

[29] Clean Hydrogen Joint Undertaking, 2021, European Union, available at https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/clean-hydrogen-joint-undertaking_en (Last visited on April 7, 2024)

[30] Ibid.

[31] Andrea Triki, Kuat Abeshev, Alexandra Goritz, and David Ryfisch, Germanwatch, *G7 in 2022: Towards a Green G7 Hydrogen Action Pact*, August 2022, available at https://www.germanwatch.org/sites/default/files/germanwatch_towards_a_green_g7_hydrogen_action_pact.pdf (Last visited on April 8, 2024)

[32] Ibid.at 2, 1

[33] Joint Mission Statement, Mission Innovation, *Clean Hydrogen Mission: Building a global clean hydrogen economy*, June 2, 2021, available at https://mission-innovation.net/wp-

deployment, and scale-up of clean hydrogen technologies to achieve a clean, secure, and affordable energy future.[34] The mission brings together 23 countries and the European Commission (on behalf of the European Union).[35] It aims to achieve significant cost reductions in clean hydrogen production to reach $2 per kg for end-users by 2030.[36]

Other Noteworthy Initiatives -

Countries worldwide have undertaken numerous efforts, especially in the past five years to invest in low-carbon hydrogen technologies and drive the energy transition. While discussing all of them is beyond the scope of this paper, we will mention some recent developments in selected countries.

China's Hydrogen Industry Development Plan has a target to reach 100-200 kilotonnes (KT) by 2025.[37] The target of the plan is twofold, firstly for the Hydrogen fuel cell vehicles in the country to reach 50,000 and the renewable hydrogen production capacity of the nation would be between 100,000 and 200,000 tons per year.[38]

The United Kingdom launched its Energy Security Strategy in April 2022[39], which includes a doubling of its ambition for low-emission hydrogen production. The new target is to achieve 10 GW of low-emission hydrogen output by 2030[40]. The UK government also announced that it will invest 1 billion euros to support the development of low-carbon technologies as part of its Net Zero Innovation Portfolio, including hydrogen projects and

content/uploads/2021/05/Clean-Hydrogen-Joint-Mission-Statement.pdf (Last visited on April 8, 2024)
[34] Ibid. at 2, 4
[35] Mission Innovation, *Catalysing Clean Energy Solutions For All,* available at https://mission-innovation.net/ (Last visited on April 8, 2024)
[36] *Supra note* 32 at 2, 3
[37] International Energy Agency, *Hydrogen Industry Development Plan (2021-2035*), available at https://www.iea.org/policies/16977-hydrogen-industry-development-plan-2021-2035 (Last visited on April 9, 2024)
[38] Energy Iceberg, *China's National Hydrogen Development Plan,* April 6, 2022, available at https://energyiceberg.com/national-hydrogen-development-plan/ (Last visited on April 7, 2024)
[39] British Energy Security Strategy, 2022, Government of United Kingdom, dated April 7, 2022, available at
British Energy Security Strategy (publishing.service.gov.uk) (Last visited on April 8, 2024)
[40] Ibid. at 22

infrastructure.[41] Further the Engineering and Physical Sciences Research Council (EPSRC) has announced funding worth £25million to support the establishment of 2 hydrogen research hubs in the UK.[42]

Another unique policy is the Hydrogen Jobs Plan of the Government of South Australia. Its objective is to build a 200 MW power plant using green hydrogen.[43] This plan is noteworthy as it is one of the few policy actions that specifically target power generation. This project is expected to generate around 1000 jobs during construction of the hydrogen facility in Whyalla.[44]

Indian Green Hydrogen Mission

India is aiming for net-zero emissions by 2070 through the Green Hydrogen Mission, which seeks to establish India as a leader in Green Hydrogen production, usage, and exportation.[45] This will support India's goal of becoming self-reliant in clean energy, while also decarbonizing the economy and reducing dependence on fossil fuel imports. The Mission aims to produce a minimum of 5 MMT of Green Hydrogen annually by 2030, with the potential to increase to 10 MMT with the growth of export markets.[46] Green Hydrogen will replace fossil fuels and feedstocks in various sectors such as ammonia production, petroleum refining, steel production, and transportation.[47] Additionally, the Mission will position India as a leader in the manufacturing of electrolysers and other enabling technologies for Green Hydrogen.[48] These

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[41] Net Zero Innovation Portfolio, Government of United Kingdom, March 3, 2021, available at https://www.gov.uk/government/collections/net-zero-innovation-portfolio (Last visited on April 7, 2024)
[42] Hydrogen, Department for Business and Trade, Government of United Kingdom, available at https://www.great.gov.uk/international/content/investment/sectors/hydrogen/ (Last visited on April 7, 2024)
[43] Hydrogen Jobs Plan power plant project, Government of South Australia, available at Hydrogen Jobs Plan power plant project | Office of Hydrogen Power South Australia (ohpsa.sa.gov.au)
[44] Ibid. at Workforce and accommodation | Office of Hydrogen Power South Australia (ohpsa.sa.gov.au)
[45] National Green Hydrogen Mission, Ministry of New and Renewable Energy, Government of India, January 2023, 2.1, 10.4 available at https://cdnbbsr.s3waas.gov.in/s3716e1b8c6cd17b771da77391355749f3/uploads/2023/01/2023012338.pdf (Last visited on April 8, 2024)
[46] Ibid. at 3.2
[47] *Supra note* 45, at 3.2
[48] *Supra note* 45, at 3.2

objectives will drive India's transition to clean energy, promote sustainability, and encourage a global Clean Energy Transition.

Certain Obstacles -

Significant deep reforms and political shifts, such as the phasing out of fossil fuel subsidies, are necessary for these transitions to occur. However, it is important to consider the political ramifications of such a phase-out, as a large part of the Indian population depends on subsidized fossil fuel energy.[49] Even with subsidies, some people cannot afford energy access, and the implications of removing subsidies must be carefully considered.

Furthermore, it is not feasible to upskill all fossil fuel workers for renewable energy jobs. For instance, Coal India alone employs approximately 2,40,000 people[50], and it is not possible to find a one-to-one replacement of a fossil fuel job with a renewable energy job. The political ramifications of this shift also need to be taken into account. For example, Jharkhand's economy depends on coal, and phasing out coal would adversely impact its economy.[51] From a geopolitical perspective, countries like Saudi Arabia or Oman, whose economy largely depends on revenue from oil trade, would be hardest hit if fossil fuels are removed. Therefore, it is crucial to contemplate the repercussions of such a shift on the economies of these countries.

Harmonising Policies with Legal Standards for Effective Implementation

Currently, India lacks any dedicated legislation to regulate hydrogen as a fuel. To effectively implement policies and to meet its global targets, a comprehensive regulation would be needed. A recent step in this direction involves the petroleum ministry proposing amendments to the Oilfield (Regulation and Development) Act, 1948 through the Oilfields (Regulation and

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[49] International Institute for Sustainable Development, *Unpacking Government Support to Fossil Fuels and Renewable Energy in India*, Global Subsidies Initiative, available at https://www.iisd.org/gsi/faqs/india (Last visited on April 8, 2024)

[50] Ministry of Coal, Public Sector Undertakings, *Annual Report 2022-23*, 5.1, available at https://www.coal.nic.in/sites/default/files/2023-03/chap8AnnualReport2023en.pdf (Last visited on April 8, 2024)

[51] Singhal K; Gupta P; Mohammad F; *Coal transition- Jharkhand Working Paper*, National Foundation For India, September 2022, 7, available at https://www.nfi.org.in/sites/default/files/publication/Working%20Paper%20Jharkhand-Book-11-11-22%20%281%29.pdf (Last visited on April 8, 2024)

Development) Amendment Bill, 2021.[52] The amendment aims to classify hydrogen under the definition of 'mineral oils', which encompasses not only hydrocarbons but also the next-gen fuels viz. 'other gases which capable of being used as fuels occurring in association with mineral oils or can be produced from mineral oils such as hydrogen'.[53] The Bill also seeks to offer stable terms for lease to encourage investment in the industry.[54] This change would help the government to facilitate opportunities for exploration, development and production of the next-generation cleaner fuels such as hydrogen to promote 'Ease of Doing Business'. [55]

However the decision to regulate hydrogen in a similar way to those of the other mineral oils and gases might not be feasible. The production of hydrogen as a fuel poses numerous regulatory challenges, including attracting investment, securing financing, locating adequate site to accommodate its unique requirements (particularly its high water consumption), fulfilling operating demands, addressing storage and transportation concerns, and sourcing electrolysers, among others.

Other countries have started to recognize the need for a separate legislation. Among them South Korea became the first country to promulgate a law on hydrogen.[56] The Hydrogen Economy Promotion and Hydrogen Safety Management Act aims to develop the national economy and ensure public safety by establishing the groundwork for fostering the hydrogen economy, systematically developing the hydrogen industry, and prescribing matters related to the safety management of hydrogen.[57] Similarly the European Union has adopted two Acts which forms a part of the broad EU regulatory framework

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[52] The Oilfields (Regulation and Development) Amendment Bill, 2021, Ministry of Petroleum and Natural Gas, Government of India
[53] Ibid. at § 2(b)
[54] Explanatory note on the Oilfields (Regulation and Development) Amendment Bill, 2021, Ministry of Petroleum and Natural Gas, Government of India, 3
[55] Ibid.
[56] Kim Byung-wook, *World's first 'hydrogen law' takes effect. What's in it?,* The Korean Herald, February 8, 2021, available at https://www.koreaherald.com/view.php?ud=20210208000926 (Last visited on April 8, 2024)
[57] Hydrogen Economy Promotion and Hydrogen Safety Management Act, 2021, available at Statutes of the Republic of Korea (klri.re.kr)

for hydrogen.[58] The first delegated Act outlines conditions under which hydrogen-based fuels or other energy carriers can qualify as renewable fuels of non-biological origin.[59] The Act is based on the principle that generation of renewable hydrogen incentivizes an increase in the volume of renewable energy.[60] The second Act establishes a methodology for calculating life-cycle greenhouse gas emissions for such renewable fuels.[61]

Both South Korea and EU have opted to implement a separate regulatory framework, rather than incorporating within the existing framework so as to focus on fostering market growth and establishing effective governance. Given these developments other governments should also assess the feasibility of a comprehensive legislation specifically tailored to hydrogen fuel so as to reap the full benefits of the opportunity and minimizing governance loopholes.

Conclusion

As of April 2021, 44 countries and the European Union have pledged to meet a net-zero emissions, with many incorporating them into their laws, resulting in significant efforts to meet these targets by 2050.[62] These targets account for over 70% of global CO2 emissions and GDP, and 40% of the global population.[63]

While there will be a significant shift in energy to meet these net zero targets, it does not imply the complete removal of oil and gas, which will still be part of the economy. However, their share in the economy will be substantially reduced by 2050. Unabated use of fossil fuels, i.e., without carbon capture or any mechanism to reduce emissions, will be only a small fraction of their current use. Green hydrogen is expected to be a game-changer for the global

[58] Press Release, European Commission, *Commission sets out rules for renewable hydrogen*, February 13, 2023, available at Commission sets out rules for renewable hydrogen (europa.eu) (Last visited on April 8, 2024)
[59] Ibid. at 2
[60] *Supra note* 58, at 2
[61] *Supra note* 58, at 7
[62] International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector*, October 2021, 1.2.2, available at Net Zero by 2050 - A Roadmap for the Global Energy Sector (windows.net) (Last visited on April 8, 2024)
[63] Ibid.

energy transition, as renewables cannot fully replace oil and gas. Green hydrogen holds the key to powering heavy industries such as shipping, aviation, transport, iron, and steel without relying on fossil fuels. With continued innovation and investment in the development of green hydrogen technologies, we will likely see a growing shift towards this promising fuel in the coming years.

Right to be Forgotten in the Indian Legal Landscape

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Introduction

At present, the whole world is covered under the veil of social networking sites. The unprecedented growth of the technological era has taken a toll on the minute details of human lives, both positively and negatively. Apparently, search engines have become an indispensable element for internet users and now it is the social media world which handles one's fame and respect in the eyes of the audience. The frontier of privacy is on the verge of getting infringed. Privacy, derived from the Latin word *'Privatus'* means to set apart, belonging to oneself and not to the state. It permits an individual to safeguard their personal interests from the trap of society and public at large. Sadly, privacy is being easily infringed nowadays and the data is loosely circulated among the public. Hence, upholding the rights and establishing a proper legal framework becomes the need of the hour.

It has been felt time and again that each individual has the right to dissociate from any legal proceeding once they have stopped their involvement in it. This is where "Right to Be Forgotten" comes into play. It means that the personal data which has become irrelevant, unwanted, and obsolete must be removed completely from all the official public records, internet sites and other online databases because today the information is not only confined to newspapers but also globally with the help of internet. The transformation in the scope and nature of personal data has given rise to confronting arguments on the table. Therefore, a rationalistic equilibrium is required to protect the intrinsic rights of the citizens without hampering the analytical database.

The right to privacy is a fundamental right under Part III of the Indian constitution, guaranteed to all under Article 21. In European countries, where this right is also known as the Right to Erasure, the respective governments have enacted GDPR, i.e, General Data Protection Regulation framework in May 2018 which allows an individual to have their personal data deleted from

internet sites. The main idea behind the origination of these rights is to cover several aspects of privacy which stretches its domain up to the protection of personal data as perfectly quoted by Justice S.K. Kaul, "*the right to manage one's own life and personal information includes the freedom to manage one's online presence."*[1]

Origin and Evolution

Right to be Forgotten is relatively a new term but was conceptualized in 1995, when the European Data Protection Directive was introduced. The directive aimed to regulate the processing of personal data within European Union member states and provided individuals with certain rights, including the right to request the erasure of their personal information. The 'Right to be Forgotten' was solidified as a human right by the judgment given by the European Court of Justice in the case of *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González (2014).* This was a derivative of the French law 'Right to oblivion' or *Droit a loubli*, 2010.

The current EU General Data Protection Regulation provides protection and exemption for "media" companies, but Google opted out of being listed as a media company which was later ruled by the EU judges where google was classified as a ''data collector'' due to its function as a data aggregator. These "data controllers" are required under EU law to remove data that is "inadequate, irrelevant, or no longer relevant", making this directive of global importance[2].

Finally, in 2012 a draft of European Data Protection Regulation was disclosed by the European Commission superseding the previously published directive by way of a specific protection of the right to be forgotten through Article 17 replacing the wide *Right to be forgotten* with a more specific *Right of erasure.*

In the Indian context, it can be easily summarized that there is no specific law which has the provision for the right to be forgotten but has been in discussion through various laws, judgements, and bills. The landmark case of *K.S.*

[1] Chatterjee, Sohini (2017) In India's right to privacy, a glimpse of a right to be forgotten, The Wire.
[2] Arthur, Charles (14 May 2014). "Explaining the 'right to be forgotten' – the newest cultural shibboleth". *The Guardian*.

Puttaswamy v. Union of India[3], held that the right to privacy was a fundamental right, further stating that the Right to be forgotten was a part of right to life under article 21.

Meanwhile, the Supreme Court ruled that "Right to be Forgotten" has certain limitations and cannot be used if the material in question is used for the following: Exercising your right to freedom of expression and information, compliance with Legal Obligations, fulfilment of public interest or public health obligations, protecting Information in the Public Interest, and for conducting scientific or historical research or statistical purposes, thus addressing the legal claims.

Various parliamentary and standing committees have given recommendations expressing the need for a dedicated legislation on data protection and privacy. Justice B.N. Srikrishna Committee which drafted The Personal Data Protection Bill 2019, delved into the conception of a relatively new right with the aim to protect personal data.

Furthermore, some recent developments include, the case of *Jorawar Singh Mundy vs Union of India*, where the Hon'ble Court directed the respondents to remove the judgment in further order. Additionally, the Digital India Bill 2023 also talks about the digital privacy of an individual and has been largely proposed, but is yet to be passed by the parliament.

Viewpoints

Social Ostracism

The involvement in any sexual offences lead to terrifying social stigmas for both the parties. Many times, the unwanted photos and videos of sexual activity gets leaked on internet which causes a great harm to the survivors. Currently, there is no law or statute in India that guarantees the right to be forgotten which gives the right to the organization to remove images permanently from social networking platforms' servers. However, some of the High Courts have recognized the Right to be Forgotten under the ambit of article 21, which is a step in the right direction. As ruled in the case *State of Punjab v. Gurmeet Singh*

[3] Puttaswamy v. Union of India, MANU/SC/0911/2017.

and Ors[4]., the Supreme Court upheld that the dignity of victims of sexual offences can be safeguarded if their anonymity is being secured.

Undoubtedly, the whole individual credibility and reputation is now being assessed by the social web which almost takes a lot of time to build and some seconds to destroy through any sort of derogatory acts or words. In a significant case of *Sri Vasunathan v. Registrar General*[5], the complainants requested from the court that the name of their daughter be deleted from the High Court's digital records so that search engines like Google and Yahoo cannot access them as the daughter's name was displayed in the judgment and in the list of causes. They feared that, the court's ruling may be made public along with her name, upon conducting a name-based search on the search engines, harming both her reputation in society and "*the prospects of her marriage*." Justice Bypareddy observed that this is consistent with western trends of Right to be forgotten in sensitive cases including rape or harming the modesty of the person concerned. The Supreme Court ruled in the favour of the complainant, protecting their dignity but an appropriate legal framework is still awaited by the citizens, which will be free from any social ostracism.

Protection of Data and Privacy

Often privacy and data protection go hand in hand. Privacy is linked to human lives since time immemorial but its subjectivity is still questioned. The issue of privacy was first explicitly recognized by the judiciary in the *K.S. Puttaswamy v. Union of India*[6] landmark case and was considered as an essential component of right to privacy. Moreover, the Privacy Bill 2014 aimed to uphold the rights by limiting the gathering, transfer, and processing of personal data that can be used to identify a specific person. In the case of *Sreedharan T v. State Of Kerala, Civil*[7], a writ petition was filed seeking instructions from the court to remove personal details and name of rape survivors from search engines. Subsequently, the court ruled in favour of the petitioner by recognizing the right to be forgotten and granted an interim order

[4] State of Punjab v. Gurmeet Singh and Ors,MANU/SC/0366/1996.
[5] Vasunathan v. Registrar General, 2017 SCC OnLine Kar 424.
[6] K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1.
[7] Sreedharan T v. State Of Kerala, WP(C).No. 24234 of 2014 (D).

instructing the search engine to delete the petitioner's name from orders posted on its website until additional orders were issued. Getting a quick action on such matters is a far-fetched reality but cooperative actions taken by the High Courts are commendable while efforts are being made for it through parliamentary discussions and privacy related bills.

Effect on The Golden Trinity

Golden Trinity refers to the interconnection of Article 14, 19 and 21 of the Indian constitution which represents equality before law, freedom of speech and expression and right to life and personal liberty respectively. It is also known as Golden triangle because they mutually coexist. This was held in the landmark case of *Maneka Gandhi vs Union of India*[8] which later came to be known as the bulwark of democracy in which Justice P N Bhagwati stated that in accordance with Article 21 of the Constitution, it provided a fresh and wide-ranging understanding of what "life and personal liberty" means. Additionally, it broadened the scope of free speech and expression, such that it is no longer constrained by national borders. Again, in *Prem Shankar Shukla v. Delhi Administration*[9] Justice Krishna Iyer, held "*when we realize that to manacle man is to dehumanize him and, therefore, to violate his very personhood*, *too often using the mask of "dangerousness" and security, the positive provisions of Articles 14, 19, and 21 spring into action*." It is evident that courts are constantly working for a better outcome while broadening the scope of right to be forgotten under article 21 along with article 14 and 19.

Dichotomy of Right to Information

In the international sphere, right to be forgotten can be applied for the removal of original records, libellous and highly sensitive information. Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) states that *"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice"*. Parallelly, according to India's Right

[8] Maneka Gandhi vs Union of India (1978) 1 SCC 248.
[9] Prem Shankar Shukla v. Delhi Admn., (1980) 3 SCC 526.

to Information Act, 2005, empowers the citizens, by encouraging accountability, combatting corruption, and upholding the spirit of a democracy. However, there are certain limitations in displaying data in the public domain if it is harming the dignity of the individual. At times, transparency of the information becomes synonymous with right to information in the internet domain. One of the interpretations of the Right to Information includes the right to access the court files which ensures good governance and transparency. It was in the case of *Subhranshu Rout @ Gugul vs State of Odisha*[10] that Odisha HC observed, information in the public domain is like toothpaste, once it's out of the tube, there's no getting it back. As a result, a clear distinction is a must so that it doesn't overlap with each other.

Right to Be Forgotten Vs Right to Information

Court judgements, inadvertently, become key sources of personal details in cases that comprise of intricate details and events of an individual or legal entities' natural course of things. Hence, it becomes a contention as to whether it is private or public information which is often brought to light in various debates regarding the matters of privacy. In the case of *Raj Narain Vs State of Uttar Pradesh*[11], the Hon'ble Supreme Court ruled for the first time that right to information was to be treated as a fundamental right under Article 19 of the Indian Constitution. The Right to Information Act, 2005, defines the term 'information' under its Section 2(f) as- *"Any information that can be accessed by a public authority under another currently in effect law, which includes records, documents, memos, e-mails, opinions, advice, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, and models."*

That court judgements are public records, was reiterated in the case of *YN Prasad v. PIO* [12] that judicial proceedings and records are public records, thus it comes under the existing definition of "information." In *R. Rajagopal vs State Of T.N*[13] (1994), while defining the scope of Right to Privacy, the Supreme Court held that "publication of court records will not constitute any violation

[10] Subhranshu Rout v. State of Odisha, 2020 SCC Online Ori 878.
[11] Raj Narain Vs State of Uttar Pradesh,1975 AIR 865, 1975 SCR (3) 333).
[12] YN Prasad v. PIO, CIC/DSESJ/A/2016/305423.
[13] R. Rajagopal vs State Of T.N,1994 SCC (6) 632.

of the right to privacy but was subject to exceptions, as per the court's discretion keeping in mind the interests of decency of parties of the case". Hence, it would not be wrong to derive that the Indian legal system is unclear regarding its stand on the ambit of the right creating a lacuna. The court judgements are one of the records which are not directly restricted by right to be forgotten, and various search engines, online record sites and information aggregators would require an explicit order from a competent court, regarding the removal of details of the case. In case of public records, there is no such literature to give a conclusive opinion regarding the right encompassing the same but since public records are a part of information and that too an integral part of the administrative machinery, it can only be assumed that the court has the discretion to decide what can and cannot be removed.

To Express or to Forget?

The Right to Be Forgotten and the Right to Privacy are the two complimentary rights under Article 21 of the Indian Constitution. While these go hand in hand, another fundamental right under Article 19(1)(a) i.e Right to Freedom of Expression, is perceived as an antithesis to the former in general discussions.

The Right to Freedom of Expression is accepted in virtually every national constitution and most international human rights treaties, including the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the African Charter of Human Rights (1981), American Declaration of Human Rights and Obligations (1948) and American Convention on Human Rights (1969) and European Convention on Human Rights (1950). Hence, it is more widely accepted and popular in comparison to the right to be forgotten.

A major argument against Right to be Forgotten is that it restricts the freedom of press. In the case of *Romesh Thapar Vs. State of Madras*[14], the court had propounded that the press was one of the key foundations of a democracy.

But as it has been widely opined in contemporary world, journalism has proven to care less about privacy. Stings in the private spaces of a family or individuals, media trials, opinion formulating etc, are very common in the new age

[14] Romesh Thapar Vs. State of Madras, AIR 1950 SC 124

journalism. In the case of *Zulfiqar Ahmad Khan v Quintillion Business Media Pvt. Ltd* [15] the Plaintiff sought a permanent injunction against the Defendant, who penned two articles as a part of #MeToo Campaign accusing him of harassment. The Defendants agreed to remove the messages, but other websites subsequently reposted the articles.

Hence, relief in such matters is also complicated and hardly absolute. But regardless of the same, Right to be Forgotten has the potential to be misused as the government or private institutions can utilize it to create impediments in reporting of news and information by journalists. This means that an exploitative censorship could result from the right itself. Hence, there needs to be more deliberations regarding the harmonious existence of both, the rights to freedom of expression and the right to be forgotten in the Indian legal system.

Conclusion

In today's hyper digital society, where information is vastly spread across the internet, the protection of an individual's privacy is one of the most crucial functions of legal machinery of any country. The Right to be Forgotten is one of the biggest tools to achieve this security. But as it is the case with most laws, the effects and implications of the right are very broad, the reason being that the decision to apply the right is left to the discretion of courts. Irrespective of the fact that Right to be Forgotten is covered under the umbrella of a fundamental right, it is not implemented or enforced effectively by the Indian legal system. We need comprehensive debates and discussions by the legislative and the judicial institutions of the country to recognise the right and formulate a law accordingly. Since, the courts have the discretion to grant the right to be forgotten in cases it deems fit, the aggrieved party often has to file another case to avail the right. This not only increases the party's cost to attain legal relief but also makes ill use of the court's precious time as well, therefore a legal recognition accompanied with the right legal framework of the right is the need of the hour. Having said that, while we acknowledge the need of the right in today's times, we must be wary of the drawbacks that the law might pose in the legal landscape. The restrictions posed to the right to freedom of

[15] Zulfiqar Ahmad Khan v Quintillion Business Media Pvt. Ltd,CS (OS) 642/2018.

expression and freedom of press are only some of the many obstacles that the absolute implementation of the right could pose for the legal machinery.

Therefore, it can be concluded that Right to Be Forgotten is essential in today's techno-global society which requires a legal statute that encompasses the enforceability along with requisite care to prevent misuse and violation of other fundamental rights. If successful, the law can usher a new era of privacy laws in India.

The Impact of Reservation on India's Human Development

Sakshi Chakrawati Waghmare & Shreya Pillai
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Introduction:

The history of reservation in India shows that it was the outcome of a long process of struggle to gain recognition and representation for the weaker section. One of the major issues that the nation has faced and is still facing is social inequality. Reservations serve to limit the damage from discrimination in the past. If the reservation is to be connected with the development of nations, then it acts as an essential element as it gives equal opportunities to people who are considered weaker sections of society. It may appear discriminatory, but in reality, reservation policies provide a counterbalance to some of the prevailing practices, such as untouchability.

As it helps in the overall development of human beings, which will lead to a developed nation. As a result, caste-based reservations were considered one of the means to accomplish social equality by the Constitution's founding fathers. Yet, it does not seem that any attempt was made to assess how well this approach worked in terms of obtaining the desired outcomes, considering thorough human development today.

Origin:

Caste-based reservations would remain incomplete if we did not mention caste-based discrimination. The origin of this caste-based discrimination can be traced back to the period of the Varna system. In Hinduism, "Varna" refers to a social class in the hierarchical caste system. This is the form of social stratification where ranking is given to different groups based on their socio-economic abilities, as explained in the text Manusmriti.[1] This system was prevalent during the early Vedic period, but after the British invaded India, they popularized the four varna system for their benefit. In which the Brahmins were

[1] Jha, Vivekanand. "Caste, Untouchability and Social Justice: Early North Indian Perspective." *Social Scientist*, vol. 25, no. 11/12, 1997, pp. 19–30. *JSTOR*, https://doi.org/10.2307/3517591. Accessed 24 May 2023.

a privileged class and other classes were below them. Brahmins became privileged because they believed that they were the only ones who had knowledge and were educated. In one of the incidents during the pre-independence period, Warren Hastings took the initiative in 1772 to formulate the Hindu-Muslim Law. For this, he hired eleven Brahmin pandits, who took advantage of the situation and applied Vedic laws even more widely.[2] Brahmins took advantage of the jobs and educational possibilities that the British provided. For instance, Lord Hardinge the viceroy of India in the 1910s decided that all the seats in public services would be filled by an open competition exam that would be conducted in English[3].

The Brahmins took huge advantage because they were the only ones with privileged access to learning the English language. Brahmins, who comprised only 3% of the population, occupied more than 80% of the positions. It is visible to us how the British Raj increased the divide between upper and lower castes. The caste system in India was rigid but not prevalent. After the British invaded India, this entire system changed and became more discriminatory and rigid. As The great scholar M. Srinivas correctly points out, *"people still defend the Varna system because the British made social mobility even more difficult."*

Patrons of Reservation:

To tackle this problem of discrimination and untouchability, many people came forward, but the three major proponents who stood for providing reservation and eliminating the caste system were Rajashri Shahu Maharaj, Jyotirao Phule, and Dr. B.R. Ambedkar. These great leaders believed that the only way through which the condition of lower caste people could be improved was through reservation policies. Rajashri Shahu Maharaj [4]of Kolhapur was the first person in India to implement reservation during his Kolhapur reign. Whereas Jyotirao Phule was inspired by the struggle of the slaves in America, compared

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[2] Kishwar, Madhu. "Codified Hindu Law: Myth and Reality." *Economic and Political Weekly*, vol. 29, no. 33, 1994, pp. 2145–61. *JSTOR*,http://www.jstor.org/stable/4401625 . Accessed 24 May 2023.
[3] Bhagwan Das. "Moments in a History of Reservations." *Economic and Political Weekly*, vol. 35, no. 43/44, 2000, pp. 3831–34. *JSTOR*, http://www.jstor.org/stable/4409890 . Accessed 24 May 2023.
[4] Bhagwan Das. "Moments in a History of Reservations." *Economic and Political Weekly*, vol. 35, no. 43/44, 2000, pp. 3831–34. *JSTOR*, http://www.jstor.org/stable/4409890.Accessed 24 May 2023.

the situation of slaves with that of lower caste people, and worked for the upliftment of lower caste people in India. In 1873, he established "Satya Shodhak Samaj." He refused the sacrosanctity of the Vedas and rejected to believe that only the Brahmins should have control over the Hindu religion. The biggest contribution against the caste system has been done by Dr. B.R Ambedkar in the 20th Century. He was demanding separate representation, that is a separate electorate for the lower caste people, which he also referred to as the "oppressed" or "depressed" class. Gandhiji started a “fast unto death” [5]in response to Ambedkar's request. He believed that separate electorates for Dalits would hinder their integration into the mainstream status.

In the end, Dr. Babasaheb Ambedkar sided with Gandhiji, and the Poona Pact of September 1932 was the consequence. The Poona Pact [6]was the communal reward given by the British government. In the provincial legislature, 148 seats were requested to be allocated to underprivileged classes. 19% of the seats in the Central Legislature would be set aside for members of the Depressed Classes.

Post-Independent Incidents:

Due to the discrimination and atrocities faced by lower caste people in the past, they became vulnerable and downtrodden. After independence, they encountered the same issue as well. Their socio-economic conditions are adversely affected because of caste-based discrimination, which reflects that not only Britishers but also so-called upper caste people have perpetuated the practice of untouchability. Discrimination is not only visible in rural India but also in urban India. Even though the literacy rate is high in urban India, people tend to practice untouchability, which highlights that the caste system is dominant in India rather than education and equality.

Even today, in the 20th century, people who belong to lower castes face discrimination. Not because they are born in a particular caste but also because of the occupation they carry. This is shown in a situation where a woman named

[5] https://www.britannica.com/place/India/Constitutional-reforms#ref486411
[6] http://www.columbia.edu/itc/mealac/pritchett/00ambedkar/timeline/1930s.html

Seema opened a samosa stall in the local market in Bihar.[7] After a while, other vendors found out that she belonged to a lower caste, which was the reason they yelled at her customers for buying samosas from her. They even threatened her until she gave up. The sole reason being her "caste". Not only in occupation but also in many other fields, people from lower castes face discrimination; they don't have equal access to adequate resources. For instance, the discrimination faced by a 9 y/o Dalit [8]boy in Rajasthan. He was allegedly beaten up by his school principal for touching a drinking water pot. The boy succumbed to death due to grievous injuries. Widespread discrimination against lower-caste students in educational institutes has given rise to many horrific events. Several students from their colleges have committed suicide due to discrimination on campus. There are several cases where students belonging to lower castes have committed suicide because of discrimination in educational institutions. Senthil Kumar[9], a University of Hyderabad student, died by suicide in 2008. Jaspreet Singh[10], a medical student, died by suicide the same year. In his suicide note, he stated that a professor discriminated against him because of his caste. Manish Kumar [11]of IIT Roorkee jumped from the fifth floor of his hostel in 2011 following months of caste-based abuse. In 2016, Rohith Vemula [12]of Hyderabad Central University was also pushed to commit suicide. Payal Tadvi [13]died by suicide in her hostel room on May 22, 2019. Three of her seniors were accused of ragging, torturing, and harassing her because of her caste. And many more students from lower castes are forced to take this extreme step. The deeply rooted caste system has taken the lives of so many bright students.

Every instance in which a person belonging to a lower caste has encountered prejudice, whether it be while operating a small business, sipping water from a

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[7] https://au.news.yahoo.com/indias-untouchable-women-face-discrimination-210957195.html
[8] https://indianexpress.com/article/cities/jaipur/dalit-boy-dies-kin-say-assaulted-for-touching-upper-caste-water-8088753/
[9] https://frontline.thehindu.com/cover-story/a-suicide-retold/article8182904.ece
[10] https://www.thehindu.com/news/national/In-Dalit-student-suicides-the-death-of-merit/article13881245.ece
[11] https://timesofindia.indiatimes.com/india/student-of-iit-roorkee-commits-suicide/articleshow/7443366.cms
[12] https://indianexpress.com/article/india/india-news-india/behind-dalit-student-suicide-how-his-university-campus-showed-him-the-door/
[13] https://timesofindia.indiatimes.com/city/mumbai/dr-payal-tadvi-suicide-case-two-accused-move-discharge-pleas/articleshow/90720837.cms

pot, or encountering it on campus. Many debates and discussions have happened on the topic of the reservation where points were raised to remove it. But the policy of reservation is protected by the Constitution of India. In one of the landmark judgments of *Indra Sawhney v. Union of India*[14], the Supreme Court of India affirmed the 50% rule of reservation and stated that the reservation cannot ever exceed the 50% limit established in *Balaji's* case[15]. The court further noted that the carry-forward provision is unlawful and in violation of Article 16(4) of the Constitution if the reserve reaches 50%. The Constitution was amended, and Clause 4 A was added to Article 16[16], enabling the State to make provisions for reservation in matters of promotion to any class or classes of positions in the services under the state in favor of SCs and STs where they are not adequately represented. This was done in order to protect the interests of SC and ST and to extend the reservation even during the promotion Further, in the case of *Ajit Singh v. State of Punjab*[17], the Supreme Court has explicitly stated that articles 16 (4) and 16 (4A) are simply enabling clauses that authorize the state to consider providing reservation and neither grant nor impose any fundamental rights or constitutional duties.

Reservation as A Developmental Path:

Persons belonging to the SC and ST castes face discrimination every time, knowingly or unknowingly. Knowingly in the form of a direct form of discrimination that is visible through actions where the principles of pollution and purity are considered. Whereas "unknowingly" means without their knowledge they are being discriminated against, for instance, a person from a lower caste lacks access to proper guidance from his senior, who belongs to an upper caste. Caste has become a barrier to the development of an individual and society. By exerting disadvantages on some and facilitating economic mobility for others through its rigid social control and networks, caste creates obstacles for people. The overall development of a human being due to the caste system, which is discriminatory by nature, has become impossible.

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[14] Indra Sawhney v. Union of India 1992 Supp (3) SCC 217
[15] M R Balaji v. State of Mysore AIR 1963 SC 649
[16]https://ncst.nic.in/sites/default/files/documents/ncst_reports/first_annual_report_of_ncst/PART%20II%20-%20Ist%20Report%20NCST%202004-20059004168620.pdf
[17] Ajit Singh II v. State of Punjab, AIR 1999 SC 3471

Reservation is particularly one of the many paths toward promoting equality, which ensures those from lower castes equal participation in social, political, and economic life. Human development incorporates social and economic aspects for the development of an individual. In particular, priority is given to the quality of life a person enjoys in a community. Human development focuses on people's choices towards the path of development. People-centric planning has always been the guiding principle in India. [18] Initially proposed in the late 1980s, the concept of human development was based on the insights given by Amartya Sen and Mahbub ul Haq. Economic growth and wealth are viewed under the human development method as means of development rather than as an aim in themselves, placing people at the center of the development agenda[19]. In a nutshell, the basis of the development of human being approach is the notion that the objective of development is to improve human lives by increasing not only income and also the number of things that an individual can become and do, such as being healthy, educated, and able to engage in equal life opportunities in society. In this light, development is the procedure of reducing constraints on what a person may do in life for instance, if we take an anti-reservation agenda that acts as a hurdle to be removed and equal opportunities made sure for every citizen be it from backward classes or less represented ones in the society residing in varied parts of India. This ultimately allows an aspirational individual to participate and give his best within the political, social, and economic arenas. This will, in the end, ensure a fair share of rights for everyone without any discrimination, which is the ultimate goal.

Reservation as A Boon:

The entire world has seen that the ranking of India in the Human Development Index (HDI)has always been low. The HDI is measured by the World Health Organization using the statistical tool of a nation's overall achievement in its economic and social dimensions. [20]These social and economic dimensions of a nation are the basis of the literacy rate of the citizens, living conditions, and health of people. A nation may only attain a high rating on the Human Development Index (HDI) if it is performing well in both social and economic

[18]https://www.undp.org/sites/g/files/zskgke326/files/migration/in/human_development_analysis_to_action.pdf
[19] https://blog.oup.com/2017/09/mahbub-ul-haq-philosophy-economics/
[20] https://www.who.int/data/nutrition/nlis/info/human-development-index

domains. In the 2022 Human Development Index Report, India ranked 132nd among 191 countries. [21]The reason behind this position is that India has caste-based discrimination, which remains a threat to human development. The purpose of the provision of the reservation is to promote equality and opportunity, which promote individual growth and aid in the general development of the nation. The contributions of SC/ST and OBC are very important for achieving development, but due to caste-based discrimination, they lag behind. The caste system is pervasive in India, which is why it is not yet regarded as a developed nation. The caste-based discrimination can be eliminated completely from India through reservation policies. Individuals tend to think that reservation has negative effects on the HDI, yet this is not true. As it serves as a betterment policy for the underprivileged.

The reservation issue has continued to be a source of contention between the reserved and non-reserved segments of society. As the unreserved sections of society keep opposing the reservation policy, the benefits and provisions of the same are unknown to the reserved parts. Caste-based quota is necessary owing to historical injustice and neglect towards those underprivileged communities, so let's start with the positive consequences. Since it is difficult for economically underdeveloped areas to suddenly compete with those who have had access to education, skills, and economic mobility for years, reservations thus create a level playing field. As for the third point, while a meritocracy is essential, it cannot exist without equality. Additionally, caste-based reservations greatly diminished the disparity between upper and lower castes. Research indicates that reservations' quality has increased rather than their administrative effectiveness declining. The clearest example is Indian Railways, which employs more SC and ST workers and produces better outcomes. [22]

Also, reservation brings about a feeling of self-confidence in every underprivileged individual and gives them a chance to prove their capabilities to the world at large. Reservation has never affected people negatively but has

[21] https://www.undp.org/india/press-releases/india-ranks-132-human-development-index-global-development-stalls
[22] https://mittalsouthasiainstitute.harvard.edu/wp-content/uploads/2018/11/Deshpande.Weisskopf.WD_.pdf

always played a significant part in the betterment of people. Reservation is to mitigate lost opportunities due to the practice of untouchability and caste-based discrimination. People from the privileged class tend to say that opportunities should be given on the basis of merit without having the mildest idea about the condition of people from lower castes or why it is important to give them reservations. It must be acknowledged that if there aren't enough members of lower castes who can compete with upper castes on an equal footing, this lack of "merit" is the outcome of thousands of years of restrictions on their access to education and power. The purpose of the reservations is to lessen the harm caused by this discrimination and stop it from happening in places that are essential for their empowerment. Although they may seem discriminatory, they really act as a check against many of the current discrimination.

Conclusion:

The nation has seen first-hand how reservations have blended into Indian culture. Reservations have played only a significant role in promoting social justice, uplifting marginalized communities, and fostering inclusivity in various aspects of life. It has provided opportunities for individuals who have historically faced discrimination and limited access to resources, helping them overcome barriers and achieve their full potential. From a political standpoint, it is the most controversial and divisive issue, but from a social one, it is essential to the overall development of the nation's population. Many people frequently believe that India's reservation policy prevents it from being a developed country, but in reality, it is the reservation policy that has made India a developing nation. Overall, one could say that reservations have always been a boon and not a bane.

The Concept of Choice and Bodily Autonomy: Can the State and Society leave Patriarchy Behind?*

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It has become a fashion to say "we believe in equality or feminist ideology" without having the foggiest idea about the thought or the ideology. The world has always preached the significance of equality, except when it comes to gender. Because the culture of patriarchy has existed in society since recorded history.[1] The world has seen men's dominance over other genders. Does patriarchy mean only domination? The answer is no because the term has a much broader meaning than simply "dominance." Patriarchy draws attention to the totality of oppression and exploitation to which not only women but other genders are also subjected. As it projects gender inequalities into the political domain, it also shows the superiority of males and how they hold power in the political, social, and economic spheres. Patriarchy is the name for the system that privileges men. It is not a small group of men sitting in a room and actively making rules, but it is a historically given name that describes the society in which men rule. Patriarchal culture exploited not only women's rights but also the rights of the LGBTQ+ community. in the Indian context, where men are considered the breadwinners and women are considered only for household chores. In this case, the inequalities stem from society's most important social institution, "family." The constitutional provisions of India talk about equality, liberty, and freedom, but the state has always violated them due to patriarchy. This can be observed in the landmark case of *"Shayara Bano,"* which shows how patriarchy has taken over the legal system. This case is popularly known as the "Triple Talaq" case related to divorce. In this case,

* Winning entry - Raghavendra Phadnis Case Comment, Essay Writing, and Legislative Comment Competition 2022-23)

[1] https://asiapacific.unwomen.org/en/news-and-events/stories/2021/05/bodily-autonomy https://ohrh.law.ox.ac.uk/the-indian-supreme-court-declares-the-constitutional-right-to-privacy/

the judgment was delivered by 5 judges, among whom there was no female judge. In this case, everything was decided by the men on the panel without any interference from women, and here we can observe how patriarchy has taken over the judiciary. The judiciary is referred to as the custodian of people; if the custodian is heavily influenced by patriarchy, how can we expect society to be egalitarian? This is the reason why society has always perpetuated patriarchy. Even in the case of Bhanwari Devi, she was sexually assaulted by her employers while working at the farm. After the violation of her bodily autonomy, she went to file a police complaint against the accused, but the police were reluctant to file a complaint as she belongs to a lower caste and the accused men were of an upper caste. Here we can see how her choice of work and bodily autonomy has been violated. When the case was finally tried in court, the accused were acquitted, and Bhanwari Devi never received justice. But thanks to her, India got the "Vishaka Guidelines" for the protection of women in their workplace and for providing a safer working environment for women. There are several cases of sexual harassment at workplaces that go unreported. because victims have lost faith in the State's protection. Many times, women's choice of profession is violated due to patriarchy. Due to sexual harassment at workplaces, women choose work that does not involve more male participation. They are not allowed to do much work because society thinks they are not eligible for that work. Not only is women's choice of profession, but also their sexual orientation frowned upon in society. Here the question arises: if a person is asexual, will society accept them? People in society do not believe in asexuality because they believe that no one can be asexual and that everyone has sexual feelings. Asexuality, on the other hand, is a completely natural process, and its sexual orientation is the same as being straight or gay.

The theory of "sexual repression" was developed by Sigmund Freud. This theory talks about how embarrassment or shame causes harm to a person because of the words they contain, such as "sex," "masturbation," etc. In simple words, anything that talks about sex can trigger awkwardness if a person is sexually repressed. Many times, people learn in their childhood that sex is immoral, bad, or just for marriage. Even parents tell their children that masturbating or thinking about sexual activities is sinful. Therefore, one

learns to avoid it to protect themselves. This is the reason why sex is taboo in society. A sexually repressed person has restricted ideas and attitudes when it comes to sex. They are not comfortable sharing it. This repression happens mostly to women because they are the ones subjected to it. As our society is patriarchal by nature, women are often told to be shy or repressed and not openly talk about their sexual desires. Even though having sexual desires and fantasies is very natural, it causes hormonal as well as mental changes. Most sexual desires, including sexual thoughts and sexual attractions, emerge during puberty.[2]

Many times, women's sexual choices are not valued, and they are expected to hide them even from their own spouses. This is also a violation of their bodily autonomy, as they have no choice about what to do with their partner. There are a number of cases where violations of bodily autonomy take place due to male dominance. For instance, in rape cases, the burden of proof lies with the victim, who has to prove they have been subjected to violence. In contrast, rape cases are filed only by women and not by transpeople, when in reality, transpeople are the ones who are subjected to more sexual assaults, molestation, and rape than women. When they go to file a complaint, police officers never register it, or they face criticism because, due to their gender, they are not treated as equals and are overlooked by society. The state never enacted any laws to protect them from sexual abuse. Because the state and society do not think there has been a violation of their bodily autonomy, perhaps bodily autonomy for women is still a distant reality after looking at the percentage of sexual violence cases that go unreported. In India, on average, 86 rapes take place daily, according to the latest government report on crimes in the country for 2021. Still, there are many cases that are not reported due to fear of society and the State. Even the state is not ready to accept the fact that rape also takes place after marriage, which we term "marital rape." In India, marital rape is legalized. When a couple gets married, they own the other partner's body and can do anything with it. Even a husband can have forced sex with his wife without

[2] https://www.unfpa.org/press/bodily-autonomy-fundamental-right

her consent. Nearly 1 in 3 women have suffered marital rape.[3]

Despite the fact that Article 21 of the Indian Constitution guarantees the right to life as a fundamental right, *"All a husband wants is for his wife to serve food during the day and sex at night,"* one critic said of the film "Piku." It's a caustic way of explaining patriarchy at its worst—not to forget that dominance over the fairer sex is not limited to the aforementioned. In the Indian context, marital rape does not exist, as Indians do not believe in it. According to many news reporters, when they asked people about their views on marital rape, the responses were unexpected. Many of them said, *"Man gets a license for sex after marriage, and this will not amount to rape even if it is willingly or unwillingly done by women."* Whereas others agreed on the point, women become the property of men after marriage, and as a result, men have full rights over them. Even many women supported these views and said, "It's the duty of the wife to provide her husband with sex even if they are not in the mood for sexual activities." Due to the influence of societal norms, all forms of domestic violence, including forced sexual intercourse, are normalized by society and legalized by the state. India has borrowed its constitution from many different countries. India borrowed fundamental rights from the United States, whereas the United Kingdom adopted a parliamentary form of government. In the USA, marital rape is criminalized, but in India, it is not. [4]The following laws apply in the Indian context:

Section 375 of the IPC, which deals with rape, states, "Sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape."

Section 376 of the IPC, which provides punishment for rape, states the rapist should be punished with imprisonment and a fine "unless the woman raped is his own wife."

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[3] https://cjp.org.in/bodily-autonomy-safe-abortion-a-right-under-article-21/#amp_tf=From%20%251%24s&aoh=16702460828816&referrer=https%3A%2F%2Fwww.google.com&ampshare=https%3A%2F%2Fcjp.org.in%2Fbodily-autonomy-safe-abortion-a-right-under-article-21%2F

[4] https://www.bbc.com/news/world-asia-india-39265653

Section 122 of the Indian Evidence Act prevents evidence of marital rape from being admissible in court unless it is a prosecution for battery or physical and mental abuse.

Only civil remedies are provided under the Domestic Violence Act of 2005 to a victim of marital rape. In comparison to other countries, India lags behind because it has not criminalized the very act that is naturally wrong. When we are talking about bodily autonomy, one of the major topics is "abortion." The meaning of the term "abortion" is "termination of pregnancy." It is a medical procedure to end a pregnancy. The Parliament of India has enacted an act for legally terminating a pregnancy, "The Medical Termination of Pregnancy Act 1971," (MTP Act) and it was amended again in 2021.

The Supreme Court of India has declared that all women, married or unmarried, are entitled to safe and legal abortions until 24 weeks of gestation under the MTP Act 2021, whereas in the MTP Act 1971 it was until 20 weeks of gestation. Though the law provides legal rights for abortion, on the other hand, it violates women's bodily autonomy as there are many restrictions in the MTP Act. Under this act, women do not have the right to choose whether or not to terminate their pregnancy if they do not meet the State's abortion criteria, which means that men on a panel decide what a woman should do with her body. Despite the fact that the Act has been amended to empower women and provide them with legal support, it still reflects a patriarchal nature. And this is how the State violates the bodily autonomy of women, directly or indirectly.

Whether it is marital rape or abortion, the state has always violated bodily autonomy. [5]Article 21 of the continuation of India deals with the right to life and personal liberty, and the MTP Act restricts one's choice. The woman should have a choice over her reproductive activities and her own body. But India is a country where patriarchy is praised, which leads to continuous

[5] %2F%2Fwww.thehindu.com%2Fnews%2Fnational%2Findia-lodged-average-86-rapes-daily-49- offences-against-women-per-hour-in-2021-government-data%2Farticle65833488.ece

violations of women's rights.[6]

Women have faced tremendous violations of their bodily autonomy. For instance, female genital mutilation. (FGM) According to the World Health Organization, FGM is defined as "all procedures involving partial or total removal of the external female genitalia or injury to the female genital organs for non-medical reasons."[7] FGM is believed to be practiced for traditional beliefs, values, or attitudes. This type of practice mainly affects women physically, emotionally, and psychologically. There are two terms used for FGM: (i) female genital cutting and (ii) female circumcision. FGM is an extremely harmful practice and a violation of the bodily autonomy of women. The State must take strict action against such human rights violations. Gender-based discrimination is prevalent not only in India but throughout the world. People do not have control over their own bodies. It is not just the private lives of individuals where manifestations of patriarchal violence cause unequal relations. Because it is generally accepted, gender-based discrimination appears in social institutions and legislation. Since these have an important role in shaping ethical norms, they indirectly affect the attitudes of individuals. Thus, inequality is reaffirmed, and it becomes impossible to question its justification.

The world has come across a long history of patriarchal violence and exploitation, but now it is time to overcome this. The patriarchy must be abandoned by the State, and society must follow suit. The State can put an end to sexism, sexist exploitation, and oppression and achieve full gender equality in law and practice. By tracing its origins, the state can put an end to patriarchy. Overturning patriarchy does not mean replacing men's dominance with women's dominance. That would merely maintain the patriarchal pattern of dominance. We need to transform the pattern itself. Maria Mies said that if *"Patriarchy has a specific beginning in history, it can also have an end."*

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[6] https://www.thehindu.com/news/national/india-lodged-average-86-rapes-daily-49-offences-again st-women-per-hour-in-2021-government-data/article65833488.ece#amp_tf=From%20%251%24s&aoh=16699872232632&referrer=https%3A%2F%2Fwww.google.com&ampshare=https%3A

[7] https://www.verywellmind.com/sexual-repression-definition-causes-and-treatment-5217583 https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation

A System That Makes a Difference: Busting Myths About Presidential Democracy

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Introduction

The adoption of a parliamentary form of government had been opposed by various stalwarts both in pre and post-independent India. Many of them had advocated for a switch to presidential democracy. This list includes former president of India and member of Constituent Assembly R. Venkataraman[1], Eminent jurist Nani Palkhivala[2], veteran journalist and former Member of Parliament Kuldeep Nayyar[3], former Cabinet Minister Arun Shourie[4] among others. Dr. Ambedkar, widely regarded as the architect of Indian Constitution in March 1947, seven months prior to his appointment as the Chairman of the Drafting Committee mentioned in the Memorandum to the Constituent Assembly's Sub-Committee on Fundamental Rights[5], "that the British type of the Executive is entirely unsuited to India. Indians who are used to the English form of the Executive forget that this is not the only form of democratic and responsible government. The American form of Executive is an equally good type of democratic and responsible form of government."

Despite strong support from such great thinkers,the debate around adopting a presidential form of government has largely remained confined to academic and intellectual circles outside the general public discourse.This has happened due to several misconceptions that shroud both systems of governance and an overall lack of awareness about the working of a presidential form of government. A closer look at its workings is essential to understand the merits of that system and identify the flaws in our current system of government. An

[1] Lecture at India International Center, New Delhi on 16th October 1999.
[2] Palkhivala, N.A. (2009), We, the people, New Delhi: UBS Publishers, P.242-46.
[3] Kuldeep Nayyar: Presidential Form of Government,May 15, 2012, The Economic Times.
[4] Arun Shourie, The Parliamentary System 2007, ASA Publications, Rupa & Co.
[5] STATES AND MINORITIES - Dr. Babasaheb Ambedkar: https://drambedkar.co.in/wp-content/uploads/books/category2/11states-and-minorities.pdf

important point to note here is that every mention of the presidential form of government alludes to the system of the United States of America (USA/America) and not to its hybrid versions like France, Turkey etc.

Concentration of Powers

Quite often the President of the United States is depicted as the most powerful man on the planet. This leads to the erroneous impression that America's President has dictatorial powers to run the country in an autocratic manner. The fact that many dictators around the world call themselves as 'President' further fuels the fear that the Presidential system can bring about dictatorship in a country. The system of government in countries which have dictators ruling as 'President' is completely distinct from the US system. The entire Presidential system has been designed for the purpose of avoiding concentration of powers in a few hands, a fact which is evident in almost every aspect of that system. The Westminster model of democratic government confers executive as well as legislative powers to the Prime Minister, whereas the Presidential model grants only executive power to the President while lawmaking powers are vested entirely in the legislature. This is the most unique feature of the Presidential system which distinguishes it from its Parliamentary counterpart. The Parliamentary system by its very design allows for accumulation of powers. All the executive powers are exercised by the PM in the name of the President. The office of Prime Minister is occupied by the leader of the party or coalition which holds a majority in the legislature (Lok Sabha in case of India). Thus the executive is always guaranteed a majority in the legislature. What people often fail to realize are the terrible consequences this has for the nation.

This fusion of executive and legislative powers is often branded as a Responsible form of government. The government is believed to be more responsible due to its continuous assessment by the Parliament. Upon losing the confidence of the legislature it is expected to resign immediately. But a logical analysis of the system leads to a contrary conclusion. The imbecility in this argument lies in the fact that the government is expected to be ousted by those who enjoy power due to that very government. Save for one instance in 1979, never has a No-confidence motion in Lok Sabha resulted in the

resignation of Council of Ministers. Also, the Head of the government i.e. the Prime Minister holds the power to dissolve the parliament at any time. Since the existence of both (executive and legislature) depends on one another any kind of check on either of them is effectively eliminated. In reality a parliamentary government is unseated from power not because of its own actions, but because another faction in the parliament has managed to gain more seats, thereby bringing the government into a status of minority.This situation arises mostly due to defections or withdrawl of support by coalitions partners in exchange for ministerial berths. Quite often this results in deal making by the government of the day to stay in power. The entire notion of 'Collective Responsibility' is a means to shirk any kind of responsibility because a government with an absolute majority can never be removed from office. The requirement of unanimity in the Cabinet can easily be fulfilled by having loyalists as ministers. Secondly the concept of a coalition is incompatible with this principle because a PM in a coalition government is forced to keep a minister in his/her cabinet due to the so-called 'coalition compulsions'. So in spite of de facto disagreement on certain policy matters the responsibility has to be shared by both.. Things like Question hour and adjournment motions which people often confuse as a check on the government are nothing but a form of protest by the opposition because such tools are not capable of halting a government proposal. The only relevant purpose served by them is to give the MPs an opportunity to show loyalty towards their support base.

A Presidential system ensures the accountability of both the executive and the legislature by firstly keeping them separate and secondly by assigning specific roles to both the branches of government so that accountability can be easily placed on either of them for their respective actions. Neither branch is dependent on the other for its existence and thus can check the other branch in an effective manner. The Legislature can make laws to curtail overreach by the executive and carry out investigations of executive actions. At the same time President can veto laws passed by the legislature. This system of institutional checks prevents either branch from acting in an irresponsible manner. The idea behind vesting all executive powers in a single individual (President) rather than an executive council as in the case of a Parliamentary system was to ensure that accountability cannot be diluted by passing the blame on to someone else

and more importantly to ensure decisiveness in the discharge of his/her duties. According to Alexander Hamilton,[6] one of the founding fathers of American constitution "In the legislature, promptitude of decision is often an evil than a benefit. The differences of opinion.... often promote deliberation and circumspection, and serve to check excesses in the majority. But no favorable circumstances atone for the disadvantages of dissension in the executive department. They serve to embarrass and weaken the execution of the plan or measure to which they relate, from the first step to the final conclusion of it." Thus legislative powers are best exercised when there is multiplicity of opinions whereas the proper execution of laws requires vigor and expedition on the part of executive which would be hampered if the powers are vested in a group or council. What is today known as the Cabinet of the United States is not a creature of the constitution but merely an advisory body created by the first President George Washington when he met various officials of his administration. No executive powers are assigned to this body.

Among the powers conferred to the President, the power to veto laws is often the most contentious. The first underlying reason behind this power is to enable the president to defend himself. According to Hamilton[7] without such a power in his hand the President "might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in one mode or the other the legislative and executive powers might speedily come to be blended in the same hands." The second reason is that it provides a check against the enactment of improper laws by the legislature. This argument does not presumes that a single individual would be wiser than an entire assembly of men but rather it looks at the other side of the story—that the legislature cannot be presumed to be infallible and while accepting the fact that "the power of preventing bad laws includes that of preventing good ones", Hamilton notes that " the injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones." In order to ensure that this power is not used in an authoritarian fashion the US system grants legislature with the power to override this veto with a two-thirds

[6] Federalist No. 70.
[7] Federalist No. 73.

majority in both houses. Thus laws which enjoy a broad consensus cannot be stopped by the President.

Need for Better Laws

Apart from their veto power the President has very little powers in the process of making laws. On the other hand, in a system of governance like ours, the fusion of executive and legislative powers results in laws of poor quality. Since only laws proposed by the government have any real chance of being approved by the house, there is lack of initiative on the part of other members. No side is interested in improving the quality of laws. The government is hardly bothered because its proposals are almost always assured passage. The opposition will be benefited only if the law proposed by the government is defeated and not if it is improved. Thus, lawmaking in India is a purely partisan exercise. An astounding fact about America is that historically, notable laws are often passed by the Congress with two-to-one margins, and with bipartisan support[8]. There are several reasons behind such bipartisan majorities.

Firstly, consider the fact that the US system gives teeth to political minorities by dividing powers among various branches of the government and implementing a check on each of them to make it harder for a single group or ideology to control the entire government. Even in the legislature the two houses- the Senate and House of Representatives have equal legislative powers, which helps to foster broad consensus. A strong federal structure in the country makes it extremely difficult to pass or execute laws which encroach upon the rights of the States. It makes sense to pursue only those laws in such a system which enjoy a broad consensus.

Secondly, each member of the Congress is free to vote according to his own independent assessment of an issue or proposal irrespective of the stand taken by the party. Every Congressman can initiate and hope to pass legislation notwithstanding the numerical strength of his party in the house and thereby make a name for himself by working hard to get an important legislation passed. Since this system provides real powers to opposition, people expect the powers to be used in a constructive manner and not just for the sake of defeating

[8] Mayhew, Divided we govern, p.119.

the other party's proposals. Policies and issues rather than politics take center stage and large coalitions are made based on issues to secure the passage of legislation through the various hurdles created to stop the majority from running amok. Broad support pulls the policies towards the center which ensures reasonableness.

The state of lawmakers as in the case of laws is equally disappointing in India. As rightly noted by Dr. Shashi Tharoor[9], MP from Thiruvananthapuram *"Our Parliamentary system has created a unique breed of legislator, largely unqualified to legislate, who has sought election only in order to wield executive power.... this limits the executive posts to those who are electable rather than those who are able. The PM cannot appoint a cabinet of his choice, he had to cater to the wishes of political leaders of several parties.... our upper house too has largely remained the preserve of full-time politicians so the talent pool has not widened."*

The Case of Judiciary

The US system has established a Judiciary which is completely distinct from both the Executive and Legislative branches. The American Constitution has authorized the Congress to set up additional courts as and when necessary and decide their respective jurisdictions. Accordingly, US Courts of Appeals, Federal District Courts and Tribunals have been set up by the Congress. Being a federation, each State government has established its own system of justice, resulting in a decentralized judiciary. A truly independent Judiciary requires freedom of judges which is only possible if their appointment is free from undue control. This motive is served by dividing the authority between the executive and the legislature. The judges are nominated by the President and approved by the Senate. The procedure of appointment is also intertwined with the issue of accountability. People's representatives having a say in the appointment process indirectly makes the judiciary accountable to the people. The judicial appointment process has been a bone of contention in our country for several decades and remains an unresolved issue to this day. Until 1993 the

[9] Changing to a presidential system is the best way of ensuring a democracy that works: https://indianexpress.com/article/opinion/columns/rajasthan-political-crisis-parliamentary-system-shashi-tharoor-6522100/

Prime Minister enjoyed exclusive powers to appoint and transfer judges. Post the Second Judges Case, [10] the judges themselves held almost complete control over appointment and transfer of judges. But the fundamental problem in the appointment process remained - a single authority held exclusive power to appoint and transfer judges. The authority needs to be divided to ensure an independent and accountable judiciary.

The decentralized structure of American judiciary allows all local disputes to be handled in local courts under the state judiciary. The US Supreme Court does not have the powers to hear cases related purely to State law. The ruling given by a State Supreme Court in such cases is final and binding on all State and federal courts.

The jurisdiction of various federal courts is regulated by the Congress except in certain specific cases where the constitution grants original jurisdiction to the Supreme Court, for example in case of a dispute between two or more states.

A large and diverse nation like India is not suited for the current unified and centralized system of judiciary because it obstructs a litigant's right to approach the court due to his/her geographical remoteness and results in delayed justice. The country needs separate federal and State courts with the former having jurisdiction over inter-State and national issues while latter deciding intra-State cases. A report by the Law Commission in 1988 concluded that the Supreme Court of India enjoys one of the widest jurisdictions of any apex Court in the world[11]. Such a wide jurisdiction has not only overburdened the court but also allowed it to transgress the boundaries of legislative and executive domains. A similar trend can be observed with various High Courts across the country. This shows that the courts just like other branches of the government must have some form of external checks on their powers. The legislature can provide such restrictions, if it is given the power to determine and regulate the jurisdiction of courts.

[10] Supreme Court Advocates-on-Record Association V/s Union of India (1993) 4SCC4441
[11] Report No.125, available at https://lawcommissionofindia.nic.in/report_eleventh/

The Role of Political Parties

A common argument against adopting a presidential form of government is that it requires a two-party system to function. While it is true that America has only two major political parties, a deeper understanding of the system would help to know that America's two party polity is an outcome rather than a requirement of the Presidential system. The process of conducting direct elections especially the election of the President through electoral college has resulted in the emergence of two dominant political parties because such a system ensures that the chances of a third-party candidate winning the presidency are next to impossible. Third parties do not have any incentive to compete because there is no reward for winning a small portion of the votes say 15 or 20 percent. Presidential candidates are awarded all of a State's electoral votes as long as they receive a plurality of vote in a State. So, parties which are on the verge of a split try everything to avoid third party candidates because they will split the votes and help the other party candidate to win with a plurality. Thus, both major parties accommodate a broad range of political ideologies instead of having narrow interests which is a losing formula in such a system.

At the same time this system can operate even without political parties since they are not required for its functioning. A Presidential government, unlike a parliamentary one is not formed by a party or coalition having a majority in the legislature. The members of the Congress and the President are elected directly by the people through different elections. In fact, there were no political parties at the time of America's first presidential election in 1789. The first political parties of the country were floated by the colleagues of the first President George Washington and quite often the Presidency and the Congress are won by different parties which is known as a 'Divided Government.' This prevents either party from running amok with power.

The Indian system based on the Westminster model requires political parties to function but is devoid of any provision to regulate them. The only provision introduced in the form of anti-defection laws has worsened the problem of centralization of powers. Unlike the US where candidates are chosen in open primaries, only those candidates are chosen by party bosses in India who are personally loyal to them. Moreover, elections in US are conducted by States

themselves which helps in the decentralization of parties and provides local leaders the power to manage their own affairs.

Conclusion

Separation of powers is required in any system of government, not only to protect the liberty of citizens but also deliver efficient governance. If each branch is given specific tasks that are most apt to its abilities, it provides every organ of the government with the advantage of focus and thus helps to fulfill its role with dispatch and deliver quality in its work. Instead of unifying powers, like in our current system, India needs to separate them to ensure accountability as well as efficiency in governance.

Long Live the Crisis

Soham Sachin Lambe
I B.A., LL.B.

Chants of "Recognition of Taliban -Violation of women's rights" and "Afghan people, hostages of Taliban" echoed in the streets of Kabul on 29th April 2023. Approximately 25 women held a demonstration in the city to discourage foreign nations from officially recognizing the Taliban government at the United Nations (UN) summit scheduled in the first week of May, 2023. The issue of women rights has been an area of concern since the new Taliban regime gained political control over the land of Afghanistan in 2021. Until now, not a single nation has recognized the Taliban rule since it came to power, after the US forces left the land[1]. The US entering the Afghan nation in the first place has a history of its own.

The tragic events of 9/11 in the year 2001 resulted in a war between the US and Taliban. In October 2001, the United States along with the British forces initiated a series of airstrikes against targets in Taliban-ruled Afghanistan. Americans started bombarding terrorist bases which reportedly belonged to the al-Qaida network[2]. Following these fierce clashes with the Taliban, the US-British alliance entered Kabul. The Taliban now seemed much weaker and had to flee southwards towards the city of Kandahar. The militants left their last bastion in Kandahar as their control over Afghanistan was crumbling. Two days later, the militia leaders surrender its final Afghan territory, the province of Zabul. The effects of the US takeover of Afghanistan led to the first elections on the Afghan land after more than 30 years. This led to the Afghan parliament's first meeting in December of 2005. At last, in 2011, under the leadership of Barack Obama, US successfully executed al-Qaida leader and the perpetuator of the 9/11 attack, Osama bin Laden. After this the White House

[1] AFP, Afghan women protesters urge against foreign recognition of Taliban, (2023), https://www.thehindu.com/news/international/afghan-women-protesters-urge-against-foreign-recognition-of-taliban/article66794102.ece, (last visited Dec 21, 09:50 am)
[2] Al-Qaeda, a broad-based militant Islamist organization founded by Osama bin Laden in the late 1980s became one of the world's most notorious terrorist organizations after carrying out the attacks of September 11, 2001.

announced a timely withdrawal of the US troops from Afghanistan by 2016. In the summer of 2021, Biden announced a complete withdrawal of the United States forces from the land of Afghanistan. Following this, the Taliban took control over Kabul as the Afghan government collapsed[3].

The Taliban extremist rule over the Afghan land has led to oppression of human rights and women's rights to a terrible extent all over the nation. There is a deep divide among diplomats and aid agencies regarding the recognition of the Taliban government in Afghanistan. These agencies are of the belief that the international community could use the promise of recognition to persuade the Taliban leadership to reserve the restrictions on women's rights. A parallel set of critics believe that the recognition of Taliban even by one country could encourage them to execute their methods and ideology. The exclusion of Taliban from the Doha Meet 2023, gives a chance to international agencies in discussing "baby steps" in recognition of Taliban with a certain set of conditions. The female protestors in Afghanistan are of the belief that this recognition will only motivate the forces to oppress even more. "For those who are oppressed, and our rights taken away, it increases our concern" says Shamail Tawana Nasiri (protestor)[4].

Elaborating this topic even further, we will now be discussing different issues concerning the rule of Taliban over Afghanistan. To comprehend the fundamental challenges faced by the people of Afghanistan, particularly women, it is crucial to have a comprehensive understanding of the history and beliefs of Afghanistan and the Taliban. Afghanistan has a rich and turbulent history, marked by numerous conquests and internal conflicts. This land, situated at the crossroads of Asia and Europe, has been a coveted prize for powerful empires throughout history. Among the notable conquerors who have left their mark on Afghanistan are Darius I of Babylonia, who conquered the region around 500 B.C., and Alexander the Great, who marched through the

[3] News Desk, A historical timeline of Afghanistan, (2021), https://www.pbs.org/newshour/politics/asia-jan-june11-timeline-afghanistan, (last visited Dec 21, 09:50 am)

[4] AFP, Afghan women protesters urge against foreign recognition of Taliban, (2023), https://www.thehindu.com/news/international/afghan-women-protesters-urge-against-foreign-recognition-of-taliban/article66794102.ece, (last visited Dec 21, 10:21 am)

area in 329 B.C. However, perhaps the most renowned conqueror of Afghanistan was Mahmud of Ghazni, who rose to power in the 11th century and established an empire that stretched from Iran to India. Mahmud was a Muslim ruler who embarked on a series of military campaigns to expand his territories and spread Islam throughout the region. He is credited with laying the foundations of the Ghaznavid Empire, which lasted for over a century after his death. Mahmud's conquests were marked by great military skill and strategic brilliance. Mahmud was also a patron of art and culture, and he is credited with promoting Persian literature and scholarship in his court. His reign marked a significant period of cultural and artistic flourishing in Afghanistan. Overall, Mahmud of Ghazni is considered one of Afghanistan's greatest historical figures, a military genius who expanded his empire and spread Islam, while also fostering a vibrant cultural scene in his court.

The Taliban is a conservative religious and political organization that originated in Afghanistan during the mid-1990s. It emerged following the withdrawal of Soviet troops, the fall of the country's communist government, and the ensuing turmoil. The original members of the Taliban were a group of Afghan religious scholars and students who aimed to address corruption and crime. This group, which started small, was later named Taliban, which means "students" in Pashto, in reference to their initial members' academic background. Following the Afghan War from 1978 to 1992, the newly established Afghan administration struggled to maintain civil order beyond Kabul, resulting in rising crime and theft by local militias. The Taliban later gained power after this period of war, which led to a significant displacement of the population. During this time, many Afghans found comfort and support in the religious language of the Mujahideen resistance. They also saw opportunities in Islamic schools, known as *madrasahs*, located in southern Afghanistan and northern Pakistan, where they could pursue Islamic studies. In 1994, a group of former fighters linked to a religious school in a village located in Kandahar province took control over a warlord. They then proceeded to establish stability in the surrounding areas. The faction gained support from the local population due to its religious zeal and security pledges, and it rapidly evolved into what we now know as the Taliban. By the end of 1996, the Taliban had captured the capital

city, Kabul, and had taken control over roughly two-thirds of Afghanistan[5]. The Taliban faced considerable resistance, particularly due to the imposition of its own version of law and order. Its strict religious ideology was a combination of Deobandi traditionalism and Wahhābī puritanism, along with a conservative Pashtun social code referred to as *Pashtunwali*. This fusion of ideologies resulted in a harshly oppressive regime[6]. This regime established its rule yet again in Afghanistan when US retreated in 2021.

The Taliban's severe ideologies have prompted international organizations to consider ways to address the escalating human rights violations, particularly concerning women's rights. Recently, according to a spokesperson from the United Nations, the Taliban issued a directive to ban Afghan women who are employed by UN staff from working in any capacity in Afghanistan[7]. The United Nations Security Council unanimously condemned the Taliban's decision to prevent Afghan women from working for the United Nations in Afghanistan. The move was seen as a violation of humanitarian principles and human rights. The resolution called for the full and equal participation of women and girls in Afghanistan, including their access to education, employment, freedom of movement, and participation in public life. The resolution also called on the Taliban to reverse its policies that restrict women's rights, and urged all states and organizations to use their influence under the UN Charter to address the issue[8]. This is just one example of many incidents where the Taliban has been observed violating human rights, women's rights, minority rights, and other fundamental freedoms within their territory. In order to achieve a peaceful and safe environment for the people of Afghanistan, it is

[5] The Editors of Encyclopaedia Britannica, Taliban, (2023), https://www.britannica.com/topic/Taliban, (last visited Dec 21, 10:31 am)
[6] The Editors of Encyclopaedia Britannica, Taliban, (2023), https://www.britannica.com/topic/Taliban, (last visited Dec 21, 10:31 am)
[7] Aljazeera, UN says its female staffers banned from working in Afghanistan, (2023), https://www.aljazeera.com/news/2023/4/4/un-says-its-female-staffers-banned-from-working-in-afghanistan, (last visited Dec 21, 10:54 am)
[8]United Nations Security Council, Security Council Condemns Decision by Taliban to Ban Afghan Women from Working for United Nations in Afghanistan, Unanimously Adopting Resolution 2681 (2023), (2023), https://press.un.org/en/2023/sc15271.doc.htm#:~:text=The%20Security%20Council%20today%20unanimously,human%20rights%20and%20humanitarian%20principles., (last visited Dec 21, 10:45 am)

necessary for the United Nations to take specific actions. On the other hand, sudden withdrawal of US troops from Afghanistan worsened the already dire situation for the oppressed population. This withdrawal should have been executed in an effective manner. UN experts in human rights, in 2021 warned the international community to protect the people of Afghanistan from the rule of Taliban which will result in a humanitarian crisis[9]. Over this period, the situation in Afghanistan seems to get even worse and it is high time, the community should now investigate this matter as to protect the people of Afghanistan, especially women.

From August 2021 onwards, the Taliban have been responsible for a multitude of violations of human rights, with their severe mistreatment and marginalization of women and girls in society being especially appalling. There has been no other location in the world where women's rights have been targeted in such a widespread and methodical manner, with all aspects of their lives being restricted in the name of moral values and manipulation of religious beliefs. Discrimination and violence are unacceptable in any situation. No encouraging signs can be found, and the state of human rights is not getting better. Instead, there are regular reports of violence such as unlawful killings, disappearances, unjustified imprisonment, torture, increased risk of exploitation of women and girls, particularly for forced or child marriage, and a breakdown in the legal system. All of this leads us to doubt Taliban's commitment to uphold human rights, pledged at the first official news conference held in Kabul, following the takeover of Taliban over Afghan Lands in 2021.

Since Taliban's Pledge towards their commitment of upholding human rights, it has become crucial to take immediate and stronger actions to hold the Taliban accountable for any violations of international human rights and humanitarian. Allowing impunity will only result in more violations and a worsening of the human rights situation in the nation. It is time that international organizations

[9] United Nations Human Rights of High Commissioner, Afghanistan: UN human rights experts warn of bleak future without massive turnaround, (2022), https://www.ohchr.org/en/statements/2022/08/afghanistan-un-human-rights-experts-warn-bleak-future-without-massive-turnaround, (last visited on Dec 21, 10:49 am)

should call on the Taliban to comply with all its international obligations and commitments related to human rights and humanitarian law. The Taliban should uphold the human rights standards they have previously committed to, particularly with regards to ensuring that girls and women have access to education, employment, and participation in public life. Additionally, it should respect the rights of minority groups and work collaboratively with human rights mechanisms, provide unrestricted entry and mobility to human rights observers and aid workers across the entire country, including sites that may be considered delicate, such as all detention facilities. Additionally, it is important for the Taliban to reinstate the Afghanistan Independent Human Rights Commission(AIHRC)[10], as well as other administrative organizations such as bar associations, and ensure that they are able to carry out their functions without any hindrance or interference. They must take immediate action to remove all restrictions and limitations on women's mobility, clothing, employment, and political participation. Furthermore, all forms of violence against women must be put to an end. They must restore girls' access to high-quality education by reopening all secondary schools for them[11].

Cooperation between the Taliban and the international community in key sectors can contribute to creating a peaceful and free environment where individuals can express themselves without oppression. As there are expectations from the Taliban to follow a certain set of rules and to amend their highly conservative administrative system, the international community is also expected to guarantee that all citizens have equal access to humanitarian assistance and collaborate with women and minority communities to make sure that aid is being delivered to those who need it the most. The Taliban should provide assistance and resources to Afghan women leaders, intellectuals, and civil society organizations, including women's rights advocates, to support their

[10] AIHRC promotes respect for and understanding of human rights by the members of society, prevention of human rights systematic violation, strengthening the capacity of civil society activists and human Rights defenders, and engagement of law enforcement organs in implementing of human rights international rules and standards in Afghanistan.
[11] United Nations Human Rights of High Commissioner, Afghanistan: UN human rights experts warn of bleak future without massive turnaround, (2022), https://www.ohchr.org/en/statements/2022/08/afghanistan-un-human-rights-experts-warn-bleak-future-without-massive-turnaround, (last visited on Dec 21, 11:15 am)

efforts to create and implement a plan to promote the rights of women and girls, with specific targets and criteria, guided by Afghan women. In addition, the Taliban should ensure that international and domestic sanctions policies have robust exemptions for humanitarian purposes, in accordance with international human rights and humanitarian law. These exemptions should be designed to prevent interference with humanitarian activities protected under international law and aimed at addressing the current humanitarian crises, as well as to prevent sanctions from exacerbating the human rights crises faced by the people of Afghanistan[12].

The foundation of human existence is the freedom to live one's life as one chooses, which not only promotes peace and stability in the country but also improves that State's economic efficiency because everyone has a role to play in that State's economy. Additionally, the Taliban are impeding the social development of the State by prohibiting women from working and pursuing higher education.

The Taliban have regained control of Afghanistan after two decades, and they are no longer facing any significant armed resistance. However, they are now facing a serious economic crisis that could worsen the already severe humanitarian situation in the country. Since the Taliban seized power in Afghanistan on August 15, 2021, the country's banking system has ceased functioning, leading to long queues outside banks and non-functional ATMs. The situation has left the population in dire need of cash, further exacerbating an already vulnerable economy that heavily relied on foreign aid. According to the World Bank, Afghanistan is one of the most aid-dependent countries globally, with foreign aid contributing about 40% of its GDP. As the Taliban's takeover became evident in year 2021, the United States and Germany halted foreign aid to the Afghan government. Furthermore, the International Monetary Fund (IMF) suspended access to its Special Drawing Rights (SDR) and other IMF resources to the country. These aid cuts were a significant blow to the country's economy, which was already struggling due to years of conflict,

[12] United Nations Human Rights of High Commissioner, Afghanistan: UN human rights experts warn of bleak future without massive turnaround, (2022), https://www.ohchr.org/en/statements/2022/08/afghanistan-un-human-rights-experts-warn-bleak-future-without-massive-turnaround, (last visited on Dec 21, 11:22 am)

corruption, and mismanagement. With aid accounting for such a large portion of its economy, the country now faces an economic collapse that could worsen the already dire humanitarian crisis[13]. The situation in Afghanistan keeps getting worse day by day, and if proper actions are not taken the people will go on suffering the repercussions of the authoritative Taliban regime. It's high time that the UN along with the other international communities forms a nexus and works out in favour of the 4.01 crore people who reside on an oppressed land. As rightly said by Desmond Tutu, "*it means a great deal to those who are oppressed to know that they are not alone. Never let anyone tell you that what you are doing is insignificant."*

Conclusion

The common people, the women are the ones who are most affected by the conservative ideologies of a group which is irrelevant to humanity. Individuals that receive differential treatment do not benefit from it. As global citizens, it is crucial for us to grasp the severe plight of the Afghan people. They bear no blame for their circumstances, and they endure profound hardship. Many are compelled to struggle for their very survival, and the outlook for the future seems bleak for a population that has already endured immense suffering. It is high time that we talk about this oppression and discrimination in order to protect the prosperity of humanity. It is our collective responsibility to address situations where human rights and humanity are being threatened, whether it be in conflicts between any Sovereign Nations or in case of oppression such as the Taliban's treatment of the people of Afghanistan. The onus lies on all international organizations, states, governments as well as the people of the global civilization, who must work together to find solutions and promote peace. Martin Luther King Jr. famously said that, ***"****a right delayed is a right denied*." The situation in Afghanistan is just one example of how humanity is being threatened. Restoring peace in Afghanistan will set a precedent for resolving conflicts around the world. We must wait and see where this protest by 25 courageous women takes us.

[13] Ashitha Nagesh, Afghanistan's economy in crisis after Taliban take-over, (2021), (Dec 21, 2023, 11:24 am), https://www.bbc.com/news/world-asia-58328246.

Reshaping Accountability: Exploring the Dynamics of Medical Negligence and Compensation

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Introduction

In olden times, the medical field was reflected as an honourable line of work. Doctors were considered gods because of their nature of work of saving people's lives and altruists because of their compassionate relationship with the patients. Therefore, doctors were greeted respectfully and they were provided with immunities under the common law. As a result, patients were restricted to file any grievance against the doctors regarding their treatment and care.[1]

But over time, things have changed now. Development in the medical field, improvement in technology and enhancement of societal norms have transformed the doctor-patient relationship such that if any issue arises during any treatment procedure on behalf of the doctor or any other staff, the patients have the leverage to bring legal recourse against the medical professionals. And the ambit of 'medical professionals' has widened to include not only doctors but also nurses, pharmacists, paramedics and hospital administrative staff. This also suggests that there have been cases in the medical profession that have occurred due to malpractice or negligence of the doctor or any hospital staff. These factors together have led to the medical negligence tort.

Among the varied categories of tort, medical negligence is one of the important and relevant torts in today's world. Nowadays, there is a surge of litigation in India against medical professionals because of the increasing awareness of patients' rights and the negligent acts of medical practitioners. Currently, common law concepts relating to negligence, tainted consent, and violation of confidentiality are taken into account during the adjudicating process for

[1] Aneesh V. Pillai, *Medical negligence, liability of hospitals and civil framework* (2020), https://thedailyguardian.com/medical-negligence-liability-of-hospitals-and-civil-framework/.

medical professional liability, be it in a consumer forum or a regular civil or criminal court.

Medical negligence happens when there is a negligent, careless or rash act committed by the medical staff or even the hospital administration. The staff under the hospital adminastrative team are also held liable for the negligent acts of the medical staff, although they are not the ones treating the patients. This is also called liability on the hospital for medical negligence.

Responsibility of Compensation: Doctor or Hospital?

The contemporary notion now has been that doctors should focus on patient care and those with management skills shall administer the hospital's day-to-day business. While hospitals often boast brilliant doctors, it is the administrators, particularly the main trustees, who are primarily focused on turning the institution into a profitable business. These administrators often majorly control the medical practices of practitioners. Complexity arises in managing the patients whenever there is a conflict between proper care (doctor's duty) and financial profits (manager's duty). The hospital's administrative team is fundamentally involved in generating profits and pressurizing the doctors by imposing targets and deadlines on them. In such situations, a pertinent question arises: who should be held liable to pay compensation, the doctor or the administration department of the hospital?

Initially, the hospitals weren't held liable for compensation to the victims. But presently, because of the increasing dominance of the hospital management staff on the medical practitioners, they are held vicariously liable for the negligent acts committed by the doctors and nurses. The tort of vicarious liability is clubbed with the tort of medical negligence because the hospital acts as an employer and doctors are the employees. The concept of employer encompasses not only the hospital itself but also any entity or individual that exercises control or supervision over the negligent healthcare provider. The vicarious liability tort clearly states that the employer is liable for the acts committed by the employee which comes under the scope of employment. Here, the scope of employment corresponds to the activities authorized by the hospital (employer) rather than the work hours. In many cases, the hospitals and the doctors have both been made to pay damages. For instance, in *Kusum*

Sharma & Ors v. Batra Hospital & Medical Research Centre & Ors (2010), the Delhi High Court held both the hospital and the doctors responsible for medical negligence.[2] Generally, the burden of paying compensation is not feasible for the doctor unless the hospital is also made a party to the case. The rationale to make hospitals also liable is that they are in a position to pay damages and patients can easily recover the same. Another viewpoint is that hospitals can become more cautious and responsible each time they are made a party to the suit of medical negligence, thereby reducing the number of cases.

ADR in Medical Negligence Cases

Alternative Dispute Resolution (ADR) in cases of medical negligence has been brought to light in various forms of remedies for patients. They range from informal to formal forms of ADR. The most informal form is negotiation, where two parties discuss the dispute and reach to some resolution. Some programs have been designed to mitigate the conflicts within a limited time and give reasonable solutions to the affected parties. These programs are called early disclosure and apology programs.

The essential driving force of medical negligence case is an explanation and apology as far as doctors and hospital teams are concerned. But bringing litigation process deters this. Medical practitioners and hospital systems fear that the apology might be used against them as accepting of negligence and free discussion on this may give leverage to the plaintiff's attorney. In 35 countries, some forms of the 'I am sorry' statute have been passed allowing physicians to offer inadmissible apologies.[3] But apologies are only safeguarded if the doctor discloses adverse effects as early as possible. An arbitration clause from a nursing home preadmission agreement from New Jersey came into question in the legal case of *Estate of Ruszala v. Brookdale Living Communities*. This kind of agreement establishes certain rights and responsibilities of both the patient and the nursing home. A 2003 New Jersey law, prohibiting such agreements

[2] Meghana S Chandra & Suresh Bada Math, *Progress in medicine: Compensation and medical negligence in India: Does the system need a quick fix or an overhaul?* Annals of Indian Academy of Neurology (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5109756/
[3] David H H. Sohn & B Sonny Bal, *Medical malpractice reform: The role of alternative dispute resolution Clinical orthopaedics and related research* (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3314770/

was broken by the deal. Nevertheless, the Appellate Court determined that the arbitration clause was not inherently void. It was due to the Federal Arbitration Act's pre-emption of the New Jersey statute. There have been many such instances showing trend among courts, including those in States traditionally resistant to tort reform, to endorse ADR methods. In today's time, ADR is getting a lot of prominence because of its cost-effectiveness and high satisfaction to the plaintiff. Arbitration, Mediation, Negotiation, early disclosure and apology programs are being successfully implemented in the medical field.

No Fault Liability

The principle underlying this term is that a person can be held liable even if there was no negligent act and has diligently taken due care and caution. Interestingly, doctors and hospitals can be held liable even when they have acted with reasonable care. For instance, the National Vaccine Injury Compensation Program (VICP) in the United States provides compensation to individuals who suffer certain adverse effects from vaccines covered by the program, without the need to prove fault on the part of the vaccine manufacturer or healthcare provider. Minimum monetary compensation to the victims who have allegedly claimed medical negligence is given in the case of no-fault liability. The basis on which no fault liability is claimed is that medical errors committed by the doctors enable the patients/victims to get compensation through specific tribunals which analyse the amount payable to the plaintiff purely on the grounds of medical error without having to prove any negligence on the part of a specific party. This kind of process exists in New Zealand, Sweden and Denmark.[4]

This kind of liability gives the patients an advantage in reporting cases of medical negligence and gives assurance to them that they would get some compensation, even if it is substantially lesser. By providing compensation for all injuries, not just those that were the result of wrongdoing, no-fault schemes aim to increase the number of claims. Any rise in compensation expenses

[4] Shivkrit Rai & Vishwas H Devaiah, *The need for healthcare reforms: Is no-fault liability the solution to medical malpractice?* Asian bioethics review (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7747425/

should be partially compensated by the no-fault system's cheaper administrative costs when compared to traditional tort litigation. Sceptics cast doubt on these advantages and the ability of no-fault systems to disperse risk and keep providers on board. Additionally, they claim that no-fault systems are unconstitutional.

Lessons from other countries experiences can be applied to the reforming system. For example, only birth-related neurological injuries were covered by Florida's use of no-fault principles. According to the law, only injuries to the brain or spinal cord of live infants weighing at least 2,500 grams at birth who suffer permanent and severe physical impairment as a result of oxygen deprivation or mechanical trauma during labour or delivery are eligible for compensation. Accelerated compensable events, also known as designated compensable events, are a different idea that is being tested in the US.[5] Without demonstrating responsibility, certain defined medical injuries are paid for. The system is utilised in obstetrics, and the incidents are typically preventable. Some see it as a step closer to a no-fault system in the United States.

Angle of Consumer Protection Act, 2019

Cases of medical negligence may be brought under the 2019 Consumer Protection Act (CPA). In the CPA, 2019, under Sec. 2(1)(i), a deficiency in medical service is any flaw, imperfection, shortcoming, or inadequacy in the calibre, nature, or manner of performance that must be upheld by or in compliance with any law currently in force or has been agreed to be performed by someone under a contract or in any other way regarding medical service. In a similar vein, a plaintiff must be a patient who is offered medical treatment to qualify as a consumer.

In the famous case of the *Indian Medical Association vs. V.P. Shantha and Ors.,* the Supreme Court finally decided to cover medical services under the term ‘services’ in the Consumer Protection Act, of 2019.[6] With this decision of

[5] Farrell, Anne-Maree and Devaney, Sarah and Dar, Amber, *No-Fault Compensation Schemes for Medical Injury: A Review* (2010). https://ssrn.com/abstract=2221836

[6] S V Joga Rao*, Medical negligence liability under the Consumer Protection Act: A review of Judicial Perspective Indian journal of urology* : IJU : journal of the Urological Society of India (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2779962/

the Supreme Court, doctors and patients have become more vigilant. Therefore, patients can bring cases of medical negligence under the ambit of deficiency of service and can claim compensation under this Act. The fact that medical negligence and deficiency in services are used interchangeably, does not change the fact that these two terminologies are different. To determine whether the service was deficient or not, a simple breach needs to be established with or without injury. Whereas, if this breach causes damage to the consumer/patient, then it becomes a tort of medical negligence. In essence, under the CPA, the patients or the victims are given larger scope to bring a legal action against the healthcare providers by simply establishing a breach, unlike in the case of medical negligence.

The principle of informed consent can be an example under CPA, 2019. The meaning of informed consent refers to the provision of necessary information and risks associated with treatment to avoid probable negligence. However, as mentioned above, if there is a breach of informing the patient about the risks even if it does not amount to any damage, a patient can sue the medical professional under this Act. This is the beauty of the Consumer Protection Act wherein the patient has a broader scope of getting necessary remedy.

Critical Analysis

A researcher by the name of Navin Kumar Koodamara has eloquently described the error of judgement and vicarious liability in cases of medical malpractice in India. According to him, a doctor cannot be liable for an error of judgement unless it is followed by negligence. He gives a different perspective while interpreting medical negligence.[7] A fine line is drawn between medical negligence and error of judgement which has made the readers understand the concept better. Similarly, other researchers have brought distinguished angles to the compensation aspect of medical negligence, for example, arguments favouring large compensations, tort reforms, etc. To hold a medical practitioner liable for medical negligence, not only the essentials but

[7]N.K. Koodamara, *Error of judgment and vicarious liability of the hospitals in case of Medical Negligence in India* ResearchGate, https://www.researchgate.net/publication/330828358_Error_of_Judgment_and_Vicarious_Liability_of_the_Hospitals_in_case_of_Medical_Negligence_in_India

factors like work environment, type of medical practice, etc, are also taken into consideration. While providing compensation in the form of lost wages and/or hospital costs does not, in and of itself, address certain growing concerns- that is, an increase in the frequency of medical negligence cases, the dire state of India's health sector, as well as the need to regulate the industry- there are many risks in addressing negligence using punitive compensation as deterrence. Additionally, it puts into perspective issues that many jurisdictions have been working to resolve. However, given the limitations that patients and doctors deal with in the health as well as the legal sectors, it would be erroneous to simply translate arguments for or against substantial compensation in medical negligence lawsuits from any other country to India.

The provision of Alternative Dispute Resolution in medical negligence cases has made this tort more interesting and insightful. Researchers have proved that ADR is an effective method in medical negligence cases with authentic statistical data. Litigation as a primary dispute mechanism is expensive and irrational compared to ADR. However, in India, ADR has not been much used maybe because of a lack of awareness among people. The judiciary system in India can replicate the systems of ADR in countries like New Jersey and Colorado with the required modifications. One reason for the lack of recognition of ADR might be distrust. Even though ADR has been recognised as plausible dispute resolution in other fields, it is lagging in the health sector. And it is not just because of unfamiliarity but also because it has been tried out and did not work. A possible solution may be in creating a national apology law. Providing apology and disclosure protection in medical malpractice cases on a national basis is something that Australia, British Columbia, England, and Wales all do; India may want to take a page out of their book.

One of the social welfare laws passed to defend the general public is the Consumer Protection Act. With its primary foundation in the idea that service delivery is inadequate, the CPA significantly relieves patients' suffering. The Consumer Protection Act offers a quick and affordable recourse for the resolution of such claims. Any suit brought before the consumer courts is exempt from court costs. Therefore, those in need who have received subpar care from doctors, hospitals, or nursing homes can easily seek restitution.

However, to treat consumers fairly, the law must change to meet the demands of a rapidly evolving society; to do so, it must be flexible and adaptive. Due to the country's population growth and a lack of medical facilities in public hospitals, private hospitals have become increasingly important.

The principle of no-fault liability in cases of medical negligence has given yet another respite to the patients and a conundrum to the medical community. A shift to a no-fault liability system would necessitate these organisations to establish restrictions at a level that is more suitable and practical for both medical professionals and patients. Another recommendation that has been raised often is to develop a different platform for handling incidents of medical misconduct. A no-fault liability system offers a solution to the "knowledge asymmetry" issue, which is one of the main causes of medical errors, even though there may not be sufficient actual data to support its effectiveness in medical malpractice cases. Such a legislative change could result in safer medical treatment, lower socioeconomic costs, and more societal efficiency.

Conclusion

Medical negligence cases have been on the rise since it growing awareness among people. As a result, the question regarding compensation, as in whether the hospital or doctor should pay, often pops and in each case different interpretation is made subjected to its individuality. It is also important to note that the basic essentials of duty of care, breach, causation of damages for constituting medical negligence are required but there might be other factors as well which differ from case to case. When we talk about remedies, other than simply establishing a negligent act on the part of doctor and suing him/her, beneficial resolutions like Consumer Protection Act, Alternate Dispute Resolution, No-fault liability and other mechanisms have been brought to light while deciding cases of medical negligence. These solutions have given reinforcements to the victims and compensated whatever loss they have faced. In fact, in the case of *Balram Prasad v. Kunal Saha*, the Supreme Court awarded a compensation worth 11 crores rupees in a medical negligence case which is claimed to be the highest awarded damages in the history of medical

negligence cases.[8] This essentially implies that advent of high compensation awards can ensure that doctors are not negligent.

In India, although medical negligence cases pile up rapidly, there is hardly any shift from the conventional litigation to other dispute redressals like ADR and CPA. As discussed in this article, these are some cost-effective methods which are less time consuming. Even though these may have some limitations and obstacles, our judiciary system can at least try these mechanisms with the help of laws in other countries and shape them as and when required. One of the ways through which the healthcare industry in India is to try and administer the alternative mechanisms as previously mentioned as well as implementing quality assurance programs which encourage healthcare facilities to adopt evidence-based practices, patient safety protocols, and quality improvement initiatives.

[8] Meghana S Chandra & Suresh Bada Math, *Progress in medicine: Compensation and medical negligence in India: Does the system need a quick fix or an overhaul?* Annals of Indian Academy of Neurology (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5109756/

A Precedential Backdrop into The Seat V. Venue Debate in India

Vismaya Hari

V B.A., LL.B.

The Arbitration and Conciliation Act, 1996 (Arbitration Act), despite having been in force for over 25 years, has failed to provide an adequate distinction between the terms 'seat' and 'venue'. In simplified terms, seat refers to the governing law of the arbitral proceedings, i.e., which determines the procedural aspect of arbitration. Venue, on the other hand, refers to the geographical location where the proceedings are to be conducted.

As an example, two companies, A and B enter into an arbitration agreement and have decided on the seat as Mumbai and the venue as Singapore. This means that in the event of a dispute, the proceedings will be governed by the Arbitration Act and Singapore is determined as the location where the proceedings will be held.

The conflict, however, arises because the Arbitration Act has defined neither seat nor venue. Instead, the drafters have adopted the term 'place of arbitration' to be used interchangeably with both the terms. Section 2(2) of the Arbitration Act under General Provisions states that "*This Part shall apply where the place of arbitration is in India*". Here, the place is intended to be substituted by seat, thereby explaining that Part I of the Arbitration Act applies when the procedural aspects are supervised by the jurisdiction of Indian Courts.

On the other hand, Section 20(1) of the Arbitration Act states that "*The parties are free to agree on the place of arbitration.*" This sub-section makes a reference to both seat and venue. Section 20(3) states, "*the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property*." This sub-section, however, implicitly suggests that the place of arbitration refers singularly to the venue of arbitration.

Disputes arise owing to the ambiguity in the drafting of agreements and the obscurity in the meaning of 'place of arbitration' in the Arbitration Act. This conflict in distinguishing between the specific meanings of 'seat' and 'venue' has persisted, with various courts providing contrasting rulings. The following cases provide a brief insight into the principles established by the Supreme Court and the uncertainty and contradictions of its own decisions.

2009: In *Roger Shashoua & Ors. v. Mukesh Sharma* (Shashoua Case)[1], it was ruled that when parties determine the designation of a venue for arbitration proceedings but also have not expressly determined an alternate seat of arbitration, it becomes clear that the 'venue' should be considered the 'seat' of arbitration proceedings. This seat (derived from the venue) confers exclusive jurisdiction over arbitration proceedings. It established the *significant contrary indicia test* which stipulates using the venue agreed upon as the seat if no 'contrary indicia' is found.

2012: In the famous case of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service*, *Inc*. (BALCO)[2], the Court ruled that there can be concurrent jurisdiction for:

- the cause of action of a lawsuit and;
- designation of the seat.

Multiple venues are a matter of convenience and are provisional. The principle laid down in the Shashoua Case has been relied on in the BALCO judgment and is not intended to replace the contrary indicia test.

The Court further clarified that the seat is the "*centre of gravity of the arbitration*" and the venue is the geographical location of the proceedings.

2018: In *Union of India v. Hardy Exploration and Production* (Hardy Exploration Case)[3], the court regarded the venue as a 'convenient geographical location' and that the venue of arbitration could not be automatically designated the seat. In order to determine the seat, something else must be added to it as a concomitant. However, this provides no clarity as to what these additions could

[1] Roger Shashoua & Ors. v. Mukesh Sharma, (2017) 14 SCC 722 (India)
[2] Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, (2012) 9 SCC 552 (India)
[3] Union of India v. Hardy Exploration and Production, (2018) SCC 7 SCC 334 (India)

be. The Court thus deviates from the clarifications provided by the Supreme Court in the preceding decisions of BALCO and the Shashoua Case, causing further confusion.

2019: In the case of *BGS SGS Soma JV v. NHPC Ltd.* ("BGS Soma Case")[4], conflicts arose on whether the venue agreed on between the parties can be considered the seat of arbitration if there was no specific indication to the contrary. The arbitration clause stated that proceedings would be held at New Delhi/Faridabad. The Supreme Court clarified the ambiguity by ruling that the designation of a venue can indicate the seat of arbitration unless there are any contrary indications. Further, this choice of seat would automatically confer exclusive jurisdiction over proceedings.

The Bench concluded that since the Hardy Exploration Case ignores the Shashoua principle which was sanctioned in BALCO, it was no longer considered a good law. BGS Soma Case would now become a placeholder for the seat v. venue debate.

2020: In *Mankatsu Impex Pvt. Ltd. v. Airvisual Ltd.* (Mankatsu Case)[5], the Supreme Court has once again diverged from the established principle in the BGS Soma Case. The arbitration agreement specifies that the arbitration would be administered in Hong Kong, but stated that the jurisdiction lies with the Courts of New Delhi. Despite the clear expression of party autonomy to confer jurisdiction in India, the Court declared that Hong Kong would be the seat of arbitration. The rationale of the Court was that the place of arbitration cannot be presumed as the seat of arbitration. Other factors, such as the behaviour of the parties may act as a guide to determine the seat.

2021: In *S.P. Singla Constructions Pvt. Ltd. v. Construction and Design Services*, *UPJL* (SP Singla Case)[6], the Delhi High Court has once again equivocated to the BGS Soma Case and established that if the parties have decided on a venue, and there is no exclusive seat provided, then the venue of arbitration is to be interpreted as the seat and all other courts lose their jurisdiction.

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[4] BGS SGS Soma JV v. NHPC Ltd., (2020) 4 SCC 234 (India)
[5] Mankashu Impex Pvt. Ltd. v. Airvisual Ltd., (2020) 5 SCC 399 (India)
[6] S.P. Singla Constructions Pvt. Ltd. v. Construction and Design Services, UPJL, Arb. P. 450/2021 (India)

However, this author would like to reflect that despite the practicality of the clarified law, what is to become of those agreements already entered into which do not interpret 'venue' as 'seat'? Would the intentions of the parties be taken into consideration?

Furthermore, is the Hardy Exploration case considered to be overruled if both judgements were passed by three bench judges of the Supreme Court?

The Law Commission of India in its 246th report suggested a multitude of amendments to the Arbitration Act, including substituting 'place' in Section 20(2) with seat and with 'venue' in Section 20(3) to avoid the prevailing ambiguity.[7] Despite this, the relevant changes were not made to the 2015 Act.

Owing to wavering and unsteadfastly decisions by the Supreme Court, and the subsequent obscurity of the High Courts, it may thus become necessary to embark on a discussion

[7] Law Commission of India, *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India,* Report No. 246 (August, 2014)

CASE COMMENTS & LEGISLATIVE COMMENTS

Bar Council of India vs Bonnie Foi Law College[1]

Abhishek Joshi
II B.A., LL.B.

"Quality of lawyers is an important aspect and part of administration of justice and access to justice. Half Baked Lawyers serve no purpose"[2]

Introduction

The case travelled in form of a civil appeal to the Supreme Court in 2016, delving into the powers of the Bar Council of India (BCI), specifically in relation to conducting a pre-enrolment examination before the admission to the Bar. Considering the significance of the issues at hand, which concerned the legal profession and the prevailing legal standards in the country, the case was referred to a five-judge Constitution Bench.

Facts and Background

The original dispute dates back to 2009 when the respondents sought affirmation from the BCI to offer a legal study course. Upon inspection, the BCI recognized certain shortcomings in the college's infrastructure and functioning. The Court established specific requirements that the respondent college was later claimed to have met.

During the course of this matter, it was discovered that legal education at many law colleges in India was not up to par. As a result, a Committee was formed to investigate issues related to affiliation and recognition of law colleges, identify areas that need fixing, and address factors that are stopping existing standards from being implemented.

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[1]Bar Council of India vs Bonnie Foi Law College**,** 2023 SCC OnLine SC 130 (India)
[2] ibid

The report identified two important aspects that are necessary to improve standards in the legal profession:

1. The introduction of a Bar examination.
2. Pre-enrolment training: A compulsory apprenticeship requirement under a senior lawyer before being admitted to the Bar.

The provision for pre-enrolment training was originally present under Section 24(1)d of the Advocates Act, 1961. However, with the Amending Act 60 of 1973, the aforementioned provision was omitted, thereby discontinuing the practice.

The report also noted that the 1973 Amendment excluded Section 28(2)(b) from the mentioned Act, which allowed State Bar Councils to establish rules concerning training and the Bar examination. In 1994, a high-powered Committee on Legal Education suggested reintroducing the apprenticeship prerequisite and Bar examination. As a result, the BCI formulated the BCI (Training) Rules in 1995 to fulfil the mandate of the High-Powered Committee.

Nevertheless, the BCI's 1995 Rules were invalidated in the case of *V. Sudeer v. BCI.*[2] The Court held that since the statutory amendment had explicitly removed provisions related to Sections 24(1)(d) and 28(2)(b), neither the reintroduction of the apprenticeship nor the Bar examination was permissible.

Pursuant to the recommendations of the committee, the BCI issued the All India Bar Exam Rules, 2010, with which it was mandatory for the advocates to pass the All India Bar Examination (hereinafter 'AIBE') to practice law in India. The petition before the Supreme argues that the Rules go against the decisions of *V Sudeer* wherein the Supreme Court held that the BCI cannot impose subordinate rules on advocates and it goes against the Advocates Act, 1961.

Issues involved

With proceedings taking its course, on March 2016 the reference order passed by the three-judge Bench headed by the CJI held that the questions that are

[2]V. Sudeer vs Bar Council of India, (1999) 3 SCC 176

under determination are of vital importance and need to be authoritatively answered by the Constitution Bench, as under:

"1. Whether pre-enrolment training in terms of BCI Training Rules, 1995 framed under Section 24(3)(d) of the Advocates Act, 1961 could be validly prescribed by the BCI and if so whether the decision of this Court in Sudeer vs. BCI requires reconsideration.

2. Whether a pre-enrolment examination can be prescribed by the BCI under the Advocates Act, 1961.

3. In case question Nos. 1 and 2 are answered in the negative, whether a post-enrolment examination can be validly prescribed by the BCI in terms of Section 49(1) (ah) of the Advocates Act, 1961."[3]

Arguments

Amicus Curiae V. Vishwanathan emphasized the supreme authority of the BCI over State Bar Councils, as stated in Section 7(1)(g) of the Advocates Act. He highlighted the BCI's role in exercising supervision and control, ensuring uniformity through examinations.[4]

Amicus pointed out certain fallacies in the *V Sudeer* judgement. He argued that the State Bar Councils and the BCI have different areas of jurisdiction, with the BCI having broader powers. He further stated that when the Amendment Act of 1973 removed the powers of the State Bar Councils, it did not necessarily diminish the powers of the BCI. He explained that the functions of the State Bar Councils primarily involve maintaining rolls and admitting advocates, whereas the BCI, under Section 49(1) (ag) of the Advocates Act, has the authority to establish rules specifying the eligibility criteria for enrolment as advocates within specific classes or categories.

Apart from asserting the need for a pre-enrolment exam and questioning the validity of *V. Sudeer* that struck it down on the pretext of being beyond the

[3] https://main.sci.gov.in/jonew/ropor/rop/all/554200.pdf
[4] Sarah Thanawala, *Overview of AIBE challenge hearing by Constitution bench of Supreme Court* (September 9, 2022), (https://theleaflet.in/overview-of-aibe-challenge-hearing-by-constitution-bench-of-supreme-court)

competency of BCI, Viswanathan submitted that there was no need for a post-enrolment examination.

Attorney General KK Venugopal, while addressing the issue of pre-enrolment training, expressed the opinion that such training may not be necessary as students acquire substantial knowledge and experience through mandatory internships during their law study course.

Judgement

The Constitution Bench upheld the validity of the All India Bar Examination and recognized the right of the BCI to prescribe such a condition for practice which directly concerns the standards of the legal profession in the country.

The bench observed that the powers of the State Bar Council and that of the BCI are not *pari materia*. Hence the legislative intent of the Amending Act, which was not to confer powers to the State Bar Councils to mandate additional requirements for practice, could not affect the position of power of the BCI. The court additionally held that the *V Sudeer* judgement interdicted the powers of the BCI, which cannot be sustained.

Additionally, the Constitution Bench noted that the legislature grants the BCI broad and comprehensive powers, encompassing the statutory authority to establish rules (section 24(1) of the Advocates Act), which relate to the qualifications necessarily to be met by Advocates to be admitted in the State roll and qualify for practice. Hence the provision for pre-enrolment examination is well within the purview of powers of the BCI. Also, the decision of whether to conduct the AIBE at the post or pre-stage is to be left to the discretion of the BCI.

Along with the ruling, the Court also laid down some suggestions to the BCI regarding the conduct of AIBE:

- AIBE should be conducted twice a year as per the schedule to prevent law degree holders from being idle.
- Final-year law students who have passed all exams before their final semester should be allowed to participate in the AIBE.

- Law graduates can perform legal profession-related tasks, except for acting or pleading in court, between passing the enrolment exam and their actual enrolment.
- Individuals with a substantial break should follow BCI stipulated norms, including re-examination and retaking the AIBE, to regain their qualification.
- The BCI should ensure a uniform pattern of enrolment fee nationwide.
- The validity of the AIBE result may be time-limited, subject to the policy decisions of the BCI.

Conclusion

The judgment sheds significant light on the delineation of powers between the BCI and State Bar Councils. Additionally, the pre-enrolment examination in the form of AIBE serves a distinctive purpose by upholding the quality standards for Advocates entering the Bar, thereby ensuring the delivery of justice in our country.

The Bench's additional suggestions promise an advantageous position for students enrolling in the Bar, fostering a nationwide uniformity in the admission process. However, it is crucial for the Bar to guarantee that the examination's quality aligns with the legal requirements of the country and remains adaptable to the future needs of legal professionals and the society at large.

The verdict not only clarifies the roles and responsibilities of the BCI and State Bar Councils but also emphasizes the importance of maintaining high standards in the pre-enrolment examination. By incorporating the Bench's recommendations and keeping the examination dynamic, the Bar can effectively meet the evolving demands of the legal profession and ensure the delivery of justice to society.

The Indian Ex-Servicemen Movement vs Union of India*[1]

Rutuja Bhand
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Introduction

The government's balancing of pensions within defense policy persists with the Supreme Court's OROP judgment. A two-judge bench composed of Justices Dr. D.Y. Chandrachud and Surya Kant affirmed the Union Government's One Rank One Pension (OROP) policy on March 16, 2022. The OROP case is grounded in fundamental variations in how stakeholders regarded the policy that originated from the obfuscations of election promises and Executive documents. This conflict influences how the pensions apportioned under OROP will impact India's 26 lakh defense pensioners.

OROP is a mechanism that provides a homogeneous pension to armed forces servicemen who retire with the same rank and with the same years of service irrespective of when they retire. A retired serviceman's pension is determined as a percentage of the last sketched salary. Salaries are evaluated and generally enhanced on a routine basis by the authorities. As a result, some who retired sooner garnered a lesser pension compared to those who retired afterward.

Case Summary and Judgement

The Union Government introduced the OROP scheme in November 2015 to confront thisdiscrepancy. Ex-servicemen questioned the Union's OROP strategy in the Supreme Court, asserting that it was ambiguous, stigmatizing, and infringed on the comprehension of the OROP articulated in the Koshyari Committee Report.

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* Winning entry - Raghavendra Phadnis Case Comment, Essay Writing, and Legislative Comment Competition 2022-23

[1] Indian Ex Servicemen Movement & Ors. Versus Union of India & Ors. (March 16, 2022), https://main.sci.gov.in/supremecourt/2016/19818/19818_2016_34_1501_34168_Judgement_16-Mar- 2022.pdf

Why Are the Petitioners Objecting to the Union's OROP Policy?

Pensions are calculated as a percentage of a worker's most recently drawn salary, which is premised on a wage scale. In India, the Pay Commission determines government pay scales. It reviews and raises pay scales and pensions on interannual grounds. Defense personnel who retired before the pay scales were amended would obtain a lower pension, based on a federal policy terse on OROP. Following the revision of the scales, personnel of a similar rank and similar service year would innately receive a greater pension.

OROP intends to tackle this. State evaluates pensions for various ranks over a particular period of time. Following that, these elevated benefits will be greatly expanded to every retiree with that rank, regardless of when they retired.

The third Central Pay Commission abolished OROP schemes in 1973, per the 2011 Koshyari Committee report, after which they were still in use. Former Finance Minister P. Chidambaram declared the government's acknowledgement of the OROP principle in 2014 based on the Koshyari Report's recommendations in 2011 and uprisings by the defense pensioners. After winning the 2014 General Elections by a landslide, the NDA government implemented the policy as a component of its campaign platform, which included a commitment to do so and to endorse India's armed forces.

Military promotion policies caused pensioners of the same rank to receive diverse pensions. The estimations used by the OROP added to these discrepancies. Retirees who resigned before 2014 and those that retired after had different starting salaries from which to evaluate their pensions. Due to this, pensioners with similar ranks receive disparate pensions. Additionally, it might imply that lower-ranking pensioners get bigger payouts than higher-ranking retirees. According to Mr. Srinivasan, "If the discrimination already exists then that disparity will persist even if pension prices are amended after 5 years."

The Court addressed two major issues.

1. **Was the 2015 OROP policy of the Union arbitrary and discriminatory?**

According to OROP, servicemen who retired after January 1, 2014 are

authorized to a pension centered on their final crafted pay. Servicemen who retired before this date would be authorized a pension based on the estimate of their rank's minimum and maximum salary in 2013. The authority declared that pension rates would be amended every 5 years instead of automatically, with the initial modification planned for 2019. Till the modification, older retirees would receive a lesser pension than younger.

The Modified Assured Career Progression Scheme (MACP) impacted OROP pension. According to the MACP scheme, a serviceman is authorized a pay raise with every 8, 16, and 24 decades of service. If the serviceman does not serve the required number of years, he will not be eligible for updated pay. This implies that two servicemen retiring at a similar rank but with varying service years will not obtain the same wage and, subsequently, pension.

Ex-servicemen questioned the OROP policy, asserting that it was ambiguous and exclusionary under Articles 14 and 21 of the Constitution because it developed classifications of pensioners who, notwithstanding retiring at the similar rank, got different pensions.

The plan, as per the Court, was not exclusionary. This is due to the fact that the same interpretation of OROP pertains to all retirees, regardless of when they retired. It is not true that the pension of one group of retirees is automatically evaluated while the other is evaluated on regular basis.

It was a policy decision to use the approximate minimum and maximum income derived for the rank in 2013 as the basic pay for elderly pensioners. The Court cannot intervene in this policy issue, as it is preferable that such issues be discussed by political officials.

Furthermore, there is no lawful obligation that pensioners of a similar rank receive the similar pension; all that is required is that the concept of pension estimation is applied uniformly. The MACP evaluation, the 5-year periodic revision, and the January 1st, 2014 cut-off date would all be kept.

2. Was the 2015 OROP scheme in conflict with the Government's original policy decision?

As evidenced by comments given by Ministers of Finance and Defence in 2014, Ex-servicemen contended that the structure for the OROP articulated

by the Defense Ministry in 2015 differed significantly from the Union Government's previous comprehension of OROP. The Union's previous position was founded on the Koshyari Committee Report. According to the Report, OROP implied that armed services personnel who retired at a similar rank and with the same service years would receive a homogeneous pension. It was regardless of retirement date, and increases in pensions would be 'instantaneously' transferred onto the previous retirees. The Court affirmed the defense ministries' communication from November 2015. It contended, since the Union stated that it would enforce the OROP strategy at varying stages throughout 2014, it didnot specify how it would be executed. Until 2015, the Union did not make policy choices. The correspondence couldn't be quashed solely since it breached the 'initial comprehension' of the OROP. OROP is a policy decision. The policy makers have complete control over how the policy is executed. The Court also ordered the Union to carry out the awaiting 5-year OROP re-fixation beginning July 1, 2019. Pensioners' unsettled delinquencies must be paid within 3 months.

How did the OROP judgment influence the policies and pensions?

According to the authorities, the exchequer would incur 1,451,000 crore rupees and that much more expense if pensioners were paid using base pay that were equivalent. Despite a 30% increase in military budget allotments since FY 2018–19, these expansions taken literally increase the cost of an already-existing pension obligation. According to the Union, it has already paid out pensions totaling 32,385 crores over a six-year period under OROP.

According to Dr. Laxman Kumar Behera, Associate Professor at JNU's Special Centre for National Security Studies and writer of India's Defence Economy,[2] *"pension is a key element in the defense spending, accounting for about 23% of Defense ministries allocations."* "With wages,it accounts for more than 60% of the total defense budget." 1.19 lakh crores of the 5.25 lakh crores allotted to defense in Budget 2022 were set aside for paying pensions. The Union might be concentrating on other significant matters instead, the Court noted while acknowledging numbers.

[2] scobserver.in/journal/orop-balancing-people-and-the purse/
[3] Ibid

In light of the safety conflicts on India's northwest and northeastern flanks, *"The proportion snapped up by pensions puts a smaller proportion for equipment renovation and maintaining the existing munitions."* Notwithstanding this, the authority has placed a high priority on militarization, with spending rising by 60% from FY 2018–19 to FY 2022–23 due to an increase in safety concerns. [3]

The logistical execution of the policy is yet another concern. It would be difficult to reassess the pension for all current retirees. "This is particularly true while attempting to match the greatest pension approved the prior year for employees who resigned from the similar rank and same service year. This is what the petitioners appear to be asking for. It will take a lot of work to create perfect algorithms that can adjust the pensions of over two million retirees annually without introducing inter-se oddities.

In the end, the Court might have agreed with this sentiment because it held the Union's right to determine policy on its own aspects, implying that the officials may not be able to assist retirees equally within the time scales that they desire. *"Heavily relying on Courts to fix issues of sheer policy erodes the position of other governmental systems in settling disputed problems of political and social policy, which necessitate a democratic discussion,"* the Bench states in the judgment.

The final deadline invalidates the plan and is thus unjustified and vague. In Mr. Srinivasan's opinion. *"By capturing a discovery that there's no formal definition of OROP, this facet of thescenario is dismissed."* Mr. Srinivasan is alluding to the 26 lakh defense pensioners in India, anumber that rises by 60,000 pensioners every year. [4]

Some pensioners, even among them, may risk losing more than others. Only 4% of the army-units are commissioned officers, particularly in the Indian Army.

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[4] Arathi Ganesan, Impact of the OROP Judgment on Policies and Pensions, SCO, (March 19, 2022), https://www.scobserver.in/journal/impact-of-the-orop-judgment-on-policies-and-pensions/#:~:text=In%20Indian%20Ex%20Servicemen%20Movement,entitled%20to%20the%20same%20 pension.

Military-men comprise the remaining 96%, according to the former officer. As of 2021, there are 12,048 officers and 1,38,792 airmen in the Air Force, 11,100 officers and 63,515 sailors in the Navy, and 53,569 officers and 11,35,799 soldiers in the Army. [5]

Contrasting the pay scales of soldiers, sailors, and airmen to commissioned officers in their various offices, the former three are markedly smaller. As a consequence, they obtain lesser pensions premised on their wage spectra than commissioned officers; the actual configuration of OROP may have an impact on this.

The retired officers claim that they are the individuals who patrol the boundaries and travel throughout India. They are most likely to end up losing from the disparity in pension payments brought on by OROP and from delaying pension rate revisions for an additional 5 years. *"To guarantee that these soldiers and army widows receive comparable pay, we lobbied heavily at their behest."*

"Why do we spread the word about the OROP plan if it charges the Union very much?" Dr. Behera continues, *"Of course, there would be some extra burden had the SC judgment gone in favor of the petitioners. However, the authority wouldn't have incorporated OROP in the initial position ifthe cost of doing so had been a large determinant.* [6]

At the core of this case is a disagreement over how OROP should be interpreted as a policy. The Judgment's modification of policy making will affect how India's public sector retirees are paid for their contributions in the coming years. The retired officer claims that a serviceman is inevitably the one who sacrifices their life to ensure India's safety. *"I sincerely honor the SC's decision. However, it really stings if we tally up chunks of $2,000 when it comes to equitably compensating soldiers."* [7]

[5] https://pib.gov.in/PressReleasePage.aspx?PRID=1847047
[6] Supra note, 7
[7] Supra note, 8.

Indian Antarctic Act, 2022*[1]

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Antarctica is Earth's southernmost and least-populated continent. Antarctica is, on average, the coldest, driest, and windiest of the continents, and it is mainly a polar desert. About 70% of the world's freshwater reserves are frozen in Antarctica, which, if melted, would raise global sea levels by almost 60 meters (200 ft). Antarctica is governed by about 30 countries, all of which are parties of the 1959 Antarctic Treaty System. According to the terms of the treaty, military activity, mining, nuclear explosions, and nuclear waste disposal are all prohibited in Antarctica. Tourism, fishing and research are the main human activities in and around Antarctica.

The Bill is in pursuant to India's accession to Antarctic Treaty, the Protocol on Environment Protection (Madrid Protocol) to the Antarctic Treaty and to the Convention on the Conservation of Antarctic Marine Living Resources.[2] The key objectives of the Treaty are to establish it as a zone free of nuclear tests, regulate the disposal of radioactive waste, and to ensure that it is used for peaceful purposes only; to promote international scientific cooperation in Antarctica and to set aside disputes over territorial sovereignty. Treaty encourages its signatory parties to have proper legislative instrument to ensure safeguards. Indian Antarctic Act 2022 was introduced in Lok Sabha on April 1, 2022 and passed by Parliament on August 1, 2022 without any amendment to the text of the Bill. Indian Antarctic Act is first such legislation entirely dedicated for protecting the Antarctic environment and associated ecosystems. Major features of the Act are: to form a central committee to decide matters regarding expedition, permits, waste disposal and pollution. The Act also discusses penalties for offences regarding Antarctic environment and funds for welfare of Antarctic research work.

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* Winning entry - Raghavendra Phadnis Case Comment, Essay Writing, and Legislative Comment Competition 2022-23

[1] https://pib.gov.in /Press Release Page.aspx?PRID=1847047

[2] Ibid

Some features of The Act are as follows:

1. **Applicability**: The Act shall apply to citizens of India and companies, firms, body corporates registered in India, and vessels or aircrafts which are part of Indian expeditions to Antarctica. Any vessel, aircraft registered in India but chartered by any other party to enter into the Antarctica will also have to abide by this Act. The Act is applicable to well defined area of Antarctica which includes: all areas of the continental shelf that are adjacent to that continent or to those islands that are south of 60 ñ South Latitude. The Act will also apply to Antarctic marine living resources that include populations of fin fish, mollusca, crustaceans and all other species of living organisms, including birds, found south of the area south of 60º South latitude.[3]
2. **Definitions**: Being the first attempt to regulate activities in Antarctica, the Act incorporates definitions for the new words like: “Operator" means owner or person controlling management of a vessel or aircraft.[4] “Antarctic Environment” means ecosystems dependent on and associated with the Antarctic environment; "Indian expedition" means a journey undertaken by any person or persons to the Antarctica organized by India; "Consultative Parties" means any State Party signatory to the Antarctic Treaty and the Protocol on Environmental Protection to the Antarctic Treaty; Vessel will include any ship, boat, sailing vessel, or other description of vessel used in navigation.[5] The Act gives definition of “Waste” applicable here as : any solid, liquid or gaseous matter which generator wants to discharge and any radioactive component of dismantled facilities.[6]
3. **Central Committee**: Convention On the Conservation Of Antarctic Marine Living Resources makes for contracting parties to establish committee.[7] Union government will establish a statutory committee for Antarctic governance, various permits and inspections of activities.

[3] Article 1 of Convention on the Conservation of Antarctic Marine Living Resources
[4] Section 3. (a) (o) of Indian Antarctic Act, 2022
[5] Clause (55) of section 3 of the Merchant Shipping Act, 1958
[6] Section 3. (a) (x) of Indian Antarctic Act, 2022
[7] Article 14 of Convention On the Conservation Of Antarctic Marine Living Resources

- Structure of Committee: Secretary of Ministry of Earth Science will be Ex-officio chairman of the committee. Ten members not below rank of joint secretary will be nominated from the field of defense, external affairs, fisheries, law, shipping, tourism, environment and space.
- Functions of the committee:
  1. Granting permits for various activities.
  2. Monitoring emission standards and programs relating to Antarctica.
  3. To determine the terms and conditions for permits, expeditions, tourism.
  4. Ensure compliance of the relevant international laws.
  5. Maintain records pertaining to the programmes and activities conducted by Parties in Antarctica.

4. **Activities which require permissions**:

   1. Indian Citizens to enter and remain in Antarctica.
   2. Indian vessel to enter or remain in Antarctica.
   3. Person or vessel to use mineral resources for scientific purpose.
   4. Activities which can disturb native animals or birds.
   5. Disposal of waste by person or vessel or aircraft.
   6. Introduce in Antarctica any animal of a species that is not indigenous to Antarctica.
   7. Any person who intends to go to Antarctica for the purpose of commercial fishing.

Committee before issuing permit for the above-mentioned activities may require Environment Impact Assessment.

5. **Prohibited Activities and Offences**: The Act prohibits certain activities like:

   1. To discharge into the sea any oil or oily mixture, effluent, bilge water or any food waste.
   2. Discharge of garbage or plastic into the sea.
   3. Nuclear explosion or disposal of radioactive waste.

4. Kill, injure, capture, handle or molest a native mammal or native bird unless such act was done to protect the life of a person.
5. Use of a vehicle or vessel, including a hovercraft and a small boat, intentionally in a manner that disturbs any concentration of native birds or seals
6. To introduce non-sterile soil into any part of Antarctica.

The offences are coupled with various penalties of imprisonment and fines. For the purposes of providing speedy trial of offences, the Central Government will specify one or more Courts of Sessions to be the designated court.

Conclusion

Untouched ice, unpolluted air and clean water of Antarctica has enormous value to humanity. They help us understand how the Earth's environment is changing – both naturally and because of human activity[8]. Tourist has every potential to damage Antarctica. Climate change is the greatest threat to the region. India is a coastal country. Mumbai, Kolkata, Kochi, Chennai, Goa are located near sea. Any rise in sea level can adversely affect them. Therefore the Indian Antarctic Act, 2022 will play an important role in conserving this popular continent.

Hunting for fish and seals in the early years of the 19th century had caused major destruction in their population. Section 16 of the Act which makes permit mandatory for fishing is need of the hour. Another less known fact about this issue is "introduction of non-native species". Invasive species are capable of causing extinctions of native plants and animals, reducing biodiversity, competing with native organisms for limited resources, and altering habitats.[9] To introduce non-native animal or plant species, the Act makes it mandatory to have permission from another party to protocol.[10] These strict biodiversity

[8] https://www.antarctica.gov.au/about-antarctica/environment/human-impacts-in-antarctica/#:~:text=harvesting%20some%20Antarctic%20species%20to,discharging%20sewage%20to%20the%20sea
[9] https://oceanservice.noaa.gov/facts/invasive.html
[10] Section 9 of Indian Antarctica Act, 2022

measures are necessary so as to reduce the risk spreading diseases to Antarctica wildlife.

Mr. Baskut Tuncak, 'Special Repporteur on Toxics and Human Rights' recently said in Geneva, "Nuclear testing is one of the cruelest example of environmental injustice witnessed."[11] That's the reason, it is imperative for every consultative party to have a strong legal framework for safeguarding the Antarctic Environment.

[11] https://news.un.org/en/story/2020/07/1068481

PROJECT WORK - DIPLOMA IN HUMAN RIGHTS & LAWS

Human Rights Due Diligence in Supply Chain*

Alok Panigrahi

Introduction

In our globalized economy, businesses across all sectors increasingly source all manners of goods and services from complex chains of suppliers that often span multiple countries with radically different legal, regulatory, and human rights practices. According to the International Labour Organization (ILO), more than 450 million people work in supply chain-related jobs.[1]

While complex global supply chains can offer important opportunities for economic and social development, they often present serious human rights risks that many companies have failed to mitigate and respond to effectively.[2]

Individual companies' global supply chains often involve large numbers of suppliers or subcontractors, including some who are part of the informal sector. The people most affected by human rights abuses in a company's supply chain often belong to groups who have no realistic opportunities to call attention to these problems themselves or secure a remedy, such as women workers, migrant workers, child labourers, or residents of rural or poor urban areas.[3]

International norms, such as the United Nations Guiding Principles on Business and Human Rights[4], recognized that companies should undertake "human rights due diligence" measures to ensure their operations respect human rights

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* Project work submitted as a part of Diploma in Human Rights & Laws (2022-23) conducted by ILS Law College, Pune.

[1] Office of the High Commissioner for Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. HR/PUB/11/04 (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

[2] Ibid.

[3] Ibid.

[4] United Nations Guiding Principles (UNGP) on Business and Human Rights (2011) Res 17/4

and do not contribute to human rights abuses.[5] Human rights due diligence includes steps to assess actual and potential human rights risks, take effective measures to mitigate those risks and act to end abuses and ensure remedy for any that occur in spite of those efforts. Companies should also be fully transparent about these efforts.

However, the UN Guiding Principles on Business and Human Rights and other international norms for companies are not legally binding. Companies can and sometimes do ignore them, or take them up half-heartedly and ineffectively.[6] Many companies have inadequate or no human rights due diligence measures in place, and their actions cause or contribute to human rights abuses. For more than two decades, in every region of the world, Human Rights Watch has documented human rights abuses in the context of global supply chains in agriculture, the garment and footwear industry, mining, construction, and other sectors.[7]

The 2016 International Labour Conference, a global summit of governments, employers, and trade unions on labour issues, presented a unique opportunity to bring about fundamental change. For the first time, the International Labour Conference had focus on decent work in global supply chains.[8] Governments have the primary responsibility to protect human rights, including those of people working in global supply chains, but have often failed to oversee or regulate the human rights practices of companies domiciled on their soil. In the absence of legally binding standards, ensuring that all companies take their human rights due diligence responsibilities seriously becomes extremely difficult. Voluntary standards, while valuable, are not enough.[9]

Human Rights Watch urges governments, employers, and trade unions attending the International Labour Conference to seize the opportunity to begin

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[5] See the UN Guiding Principles Reporting Framework with implementation guidance, available online at https://www.ungpreporting.org/framework-guidance/ (last accessed 12 may 2024).
[6] Human Rights Watch, Human Rights in Supply Chains: A Call for a Binding Global Standard on Due Diligence, https://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence
[7] Ibid.
[8] International Labour Organization, report IV, Decent work in global supply chains (2016)
[9] Ibid.

the process for the adoption of a new, international, legally binding standard that obliges governments to require businesses to conduct human rights due diligence in global supply chains.

What is human rights due diligence?

Human rights due diligence is a key part of the corporate responsibility to respect human rights. *UNGP 15* spells out that, to meet their responsibility to respect human rights, business enterprises should have in place *"a human rights due diligence process to identify, prevent, mitigate, and account for how they address their impacts on human rights"*.[10]

"In exercising human rights due diligence business enterprises should undertake four key actions:

- Identify and assess actual or potential adverse human rights impacts with which they may be involved, either through their own activities or because of their business relationships.
- Integrate the findings arising from these assessments across relevant internal functions and processes and take appropriate action.
- Track the effectiveness of their response (e.g. risk management and mitigation efforts); and
- Account for how they address their human rights impacts (e.g. through reporting externally)."

"The UNGPs also set out some parameters:[11]

- Human rights due diligence should cover adverse human rights impacts that the business enterprise may cause, or contribute to, through its own activities, or that may be directly linked to its operations, products, or services by its business relationships.
- Human rights due diligence will vary in complexity according to the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations.

[10] Office of the High Commissioner for Human Rights, Corporate human rights due diligence – identifying and leveraging emerging practices, https://www.ohchr.org/en/special-procedures/wg-business/corporate-human-rights-due-diligence-identifying-and-leveraging-emerging-practices (last visited May 15, 2024)
[11] Supra note 2.

- Human rights due diligence should be ongoing, recognising that the human rights risks may change over time as the business' operations and operating context evolve."[12]

Implementation of human rights due diligence by businesses has been swift and widespread

Since the endorsement of the UNGPs, the implementation of human rights due diligence has been constantly improving. Ten years on, an ever-increasing number of companies of all sizes, sectors, structures, and geographies are carrying out human rights due diligence. Their efforts are supported by a host of industrial bodies, and other international and national organisations, which have incorporated the human rights due diligence approach into their standards, guidance, and practical implementation tools. We can see that the engagement of companies is extremely dynamic and that businesses are constantly learning how to improve due diligence processes and make them more effective.[13]

Human rights due diligence:

A fundamental issue in the discussion of business and human rights Due diligence on human rights is actively promoted by a wider ecosystem of parties. Non-governmental organisations ('NGOs'), trade unions, many policymakers, and other societal groups are demanding legislative frameworks for human rights due diligence by companies. The expectations often go beyond the UNGPs; many stakeholders, for instance, regard corporate liability for adverse impacts in global supply chains as an essential part of any legislative approach to human rights due diligence.[14]

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[12] Ibid.

[13] Organization for Economic Co-operation and Development, The Essentials: Characteristics of Due Diligence, https://mneguidelines.oecd.org/Essentials%20of%20due%20diligence.pdf (last visited May 16, 2024)

[14] International Organisation of Employers (IOE), " Key developments in mandatory human rights due
diligence and supply chain law" (2021), https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=156042&token=ee1bad43bfa8dbf9756245780a572ff4877a86d5. (last visited May 14, 2024)

What do the UN Guiding Principles say about supply chain liability?

UN General Principles No. 15[15] and 22[16] require remedies in cases where the enterprise has caused or contributed to the human rights violation. Thus, the UNGPs do not foresee that a company is automatically required to provide remedies for adverse impacts in the supply chain, but only where it caused or contributed to the violation. These provisions thereby reflect the basic legal premise adopted in most countries that liability should only be imposed where a clear and foreseeable link exists between the victim's harm and the business held responsible.

What do the UNGPs recommend regarding State policy and regulatory measures?

UNGP 1[17] explains that States have the duty to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. UNGP 2[18] clarifies that *"States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction."*

"UNGP 3[19] then gives recommendations to States on their general regulatory and policy functions. These recommendations include:

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[15] UN General Assembly, United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/RES/17/4 (2011), Principle 15, https://www.ohchr.org/sites/default/files/Documents/Issues/Business/A-HRC-17-31_AEV.pdf

[16] UN General Assembly, United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/RES/17/4 (2011), Principle 22. https://www.ohchr.org/sites/default/files/Documents/Issues/Business/A-HRC-17-31_AEV.pdf

[17] United Nations Human Rights Council, United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/RES/17/4 (2011), Principle 1. https://www.ohchr.org/sites/default/files/Documents/Issues/Business/A-HRC-17-31_AEV.pdf

[18] United Nations Human Rights Council, United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/RES/17/4 (2011), Principle 2. https://www.ohchr.org/sites/default/files/Documents/Issues/Business/A-HRC-17-31_AEV.pdf

[19] United Nations Human Rights Council, United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/RES/17/4 (2011), Principle 3. https://www.ohchr.org/sites/default/files/Documents/Issues/Business/A-HRC-17-31_AEV.pdf

- Enforcing laws that require business enterprises to respect human rights, periodically assessing the adequacy of such laws, and addressing any gaps.
- Ensuring that existing laws and policies that govern the creation and operations of business, such as corporate law, enable business respect for human rights.
- Providing effective guidance to business on how to respect human rights throughout their operations.
- Encouraging, and where appropriate, requiring companies to communicate how they address their human rights impacts."

Considerations regarding mandatory human rights due diligence

"The Office of the United Nations High Commissioner for Human Rights ('OHCHR') has developed guidance on mandatory human rights. The Guidance distinguishes three types of legislative approaches:

- Category 1: regimes that require companies to prevent harm through the exercise of human rights due diligence (for which the occurrence of harm is a key element of the breach);
- Category 2: regimes that require companies to carry out human rights due diligence (i.e. liability arises from the failure to exercise human rights due diligence, and whether or not that failure has resulted in actual harm is immaterial to establishing non-compliance); and
- Category 3: regimes that contain no explicit requirement to carry out human rights due diligence but which create strong incentives in that direction (e.g. regimes that permit the company to use the fact that it had carried out human rights due diligence as a defence to legal liability for causing harm, or which permit levels of compliance with human rights due diligence standards to be taken into account "in mitigation" in deciding on an appropriate sanction for a legal breach)."[20]

[20] UN Office of the High Commissioner for Human Rights, A Rough Guide to the OHCHR, https://www.universal-rights.org/human-rights-rough-guides/a-rough-guide-to-the-ohchr/ (last visited May 15,2024)

"Key issues requiring clarification for any mandatory human rights due diligence include in view of OHCHR:

- Who should be the duty bearer? (Which natural or legal persons, with what connections to the jurisdiction).
- What kinds of relationships and activities might give rise to legal liability? (What business relationships/entities will be covered).
- What kinds of legal obligations are imposed? (Requiring companies to prevent harm vs. requiring companies to carry out human rights due diligence vs. providing other incentives to carry out human rights due diligence).
- Should the regime be comprehensive or issues-based? (Covering all internationally recognised human rights vs. specific areas of human rights).
- Should the regime seek to apply to all business activity or be sector based?
- What should the consequences of non-compliance be? (Criminal liability vs. sanctions respectively administrative enforcement vs. civil actions (and issues of standing).
- What supporting regulatory institutions and arrangements may be needed? (Supervisory institutions to support implementation and compliance)."[21]

Recommendations

To Governments, Employers, and Workers at the International Labour Conference

"At the 2016 International Labour Conference, it was decided to initiate the process for a new, international legally binding standard that obliges governments to require businesses to conduct human rights due diligence across the entirety of their global supply chains. Such due diligence should include, at a minimum, the following elements:

[21] Office of the High Commissioner for Human Rights, Mandatory human rights due diligence (MHRDD), https://www.ohchr.org/en/special-procedures/wg-business/mandatory-human-rights-due-diligence-mhrdd (last visited May 14, 2024)

- Adoption and implementation of a clear policy commitment to respect human rights, embedded in all relevant business functions;
- Identification and assessment of actual and potential adverse human rights impacts;
- Prevention and mitigation of adverse human rights impacts;
- Verification of whether adverse human rights impacts are addressed;
- External communication of how adverse human rights impacts are being addressed; and
- Effective processes designed to ensure that adversely affected people are able to secure remediation of any adverse human rights impacts a business has caused or contributed to."[22]

Human rights violations in the context of global supply chains

For more than two decades, Human Rights Watch has documented human rights abuses in the context of global supply chains. We have interviewed thousands of workers, employers, government officials, and other affected individuals in a variety of sectors in every region of the world.[23] Below are a few select examples that illustrate the most pervasive human rights problems we have found in the supply chains of many companies across sectors in countries around the world.[24]

Labour rights violations

"Around the world, millions of people work in global supply chains—for example, in factories producing branded apparel and footwear for consumers worldwide, on farms growing tobacco purchased by cigarette manufacturers, or in small-scale mines digging gold that is destined for the global market. Many of these workers endure abuses such as poor working conditions, including minimum wage violations; forced overtime; child labour; sexual

[22] Human Rights Watch, Human Rights in Supply Chains
A Call for a Binding Global Standard on Due Diligence, ((May 30, 2016)
https://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence (last visited May 14, 2024)
[23] Ibid.
[24] Ibid.

harassment, exposure to toxic substances and other extreme occupational hazards; and retaliation against workers who attempt to organize. Workers facing these abuses often lack access to complaints mechanisms, whistle blower protections, or legal recourse."[25]

Under international law, governments have an obligation to protect labour rights, including the right to protest and form unions—but many fail to do so. Globally, an estimated 21 million people are victims of forced labour.[26]

The April 2013 Rana Plaza disaster in Bangladesh put the spotlight on poor working conditions and labour rights abuses in factories producing global apparel and footwear brands. The eight-story Rana Plaza building was located outside Bangladesh's capital, Dhaka, and housed garment factories that employed over 5,000 workers.[27]

"The building's catastrophic collapse killed over 1,100 workers and injured over 2,000. In the wake of the disaster, major apparel brands launched new initiatives to protect the safety of workers in their supply chains. Three years on, Bangladesh has seen concrete improvements on fire and building safety, but apparel and footwear supply chains are still plagued by serious human rights problems. For example, Human Rights Watch has documented how many apparel workers in Bangladesh and Cambodia experience forced overtime, pregnancy-based discrimination, and denial of paid maternity leave. Anti-union abuses are common. Workers attempting to organize in both countries have been threatened, harassed, and dismissed from their jobs in retaliation."[28]

Labour rights violations are also rife in Qatar, the United Arab Emirates, and other Gulf States, where construction workers have suffered serious abuse in the context of supply chains in large-scale construction and engineering

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[25] Ibid.
[26] International Labour Office (ILO), ILO Global Estimate of Forced Labour, https://www.ilo.org/media/357126/download (last visited May 15, 2024)
[27] Mary Jane Bolle, *Bangladesh apparel factory collapse: Background in brief* in Congressional Research Service (CRS) report for Congress (2014), https://www.researchgate.net/publication/292428313_Bangladesh_apparel_factory_collapse_Background_in_brief (last visited May 15, 2024)
[28] Ibid.

projects. These low-paid migrant workers face hazardous, and sometimes deadly, working conditions, and are often bound to abusive employers through the *kafala* (sponsorship) system. Passport confiscation is systematic and many workers arrive with significant debts on account of extortionate recruitment fees, which can take several years to repay. Migrant workers are unable to form or join trade unions, and there is generally little or no possibility of judicial redress for abuse. This combination of control mechanisms can lead all too easily to trafficking and forced labour.[29]

Child labour

"Child labour is still a serious problem in the global economy. Over 168 million children are involved in child labour globally, and 85 million of them are engaged in hazardous work that puts their health or safety at risk. Many child labourers endure physical and psychological abuse, exploitation, and trafficking. In addition, many are denied educational opportunities and are therefore more likely to end up trapped in poverty. Companies may contribute to and benefit from child labour in their supply chains, for example, by children harvesting export crops, mining precious minerals, processing leather, and sewing apparel. Under international law, the grave forms of child labour are prohibited, but many governments have failed to take effective steps to end it."[30]

"Many children suffer pain, sickness, and injury, and, in some cases, even death from the dangerous jobs they do. Globally, most child labourers work in agriculture for local or global markets.[31] Child labour in agriculture is hazardous when children handle toxic pesticides or other harmful substances, work with sharp tools or heavy machinery, or are exposed to extreme heat. "For example, Human Rights Watch found that Palestinian children grow and harvest crops in Israeli agricultural settlements in the West Bank in conditions that are hazardous due to pesticides, dangerous tools, and extreme heat. A

[29] Supra note 4.
[30] Press Release, UNICEF, Child labour rises to 160 million – first increase in two decades (June 12, 2021) https://www.unicef.org/press-releases/child-labour-rises-160-million-first-increase-two-decades
[31] International Labour Organization, Child labour in agriculture, available at https://www.ilo.org/international-programme-elimination-child-labour-ipec/sectors-and-topics/child-labour-agriculture (last visited May 15, 2024)

substantial amount of this produce is exported abroad, including to Europe and the United States."[32]

"One particularly harmful agricultural crop for children is tobacco. Children who come into contact with tobacco plants risk suffering acute nicotine poisoning. Human Rights Watch has documented hazardous child labour in tobacco farming in the United States and Indonesia, interviewing many children who reported symptoms consistent with acute nicotine poisonings, such as nausea, vomiting, headaches, and dizziness. This tobacco enters the supply chains of major cigarette manufacturers."[33]

Another highly hazardous form of child labour is mining. An estimated one million children work globally in artisanal mines that generally rely on simple machinery and a large workforce. Approximately 15 percent of the world's gold originates from artisanal mines.[34] Many children process gold with mercury, a highly toxic substance that causes brain damage and other lifelong health conditions. Child miners also risk their lives when working in unstable pits that frequently collapse.[35] Human Rights Watch has documented hazardous child labour, including the deaths of children working underground, in artisanal gold mining in Ghana, Mali, Tanzania, and the Philippines. Much of the gold produced in these settings finds its way onto the international markets.[36]

Environmental damage and violations of the right to health

Through their global supply chains, many businesses risk contributing to the more than 12 million deaths that are attributable to unhealthy environments each year.[37] International norms and many domestic legal frameworks set out government obligations to protect the right to environmental health, but these

[32] Human Rights Watch, Ripe for Abuse: Palestinian Child Labor in Israeli Agricultural Settlements in the West Bank, available at https://www.hrw.org/report/2015/04/13/ripe-abuse/palestinian-child-labor-israeli-agricultural-settlements-west-bank (last visited May 15, 2024)
[33] Ibid.
[34] International Labour Organization, Child Labour in Mining and Global Supply Chains, available at https://www.ilo.org/media/406936/download (last visited on May 16, 2024)
[35] Ibid.
[36] Human Rights Watch, A Poisonous Mix, available at https://www.hrw.org/report/2011/12/06/poisonous-mix/child-labor-mercury-and-artisanal-gold-mining-mali (last visited May 16, 2024)
[37] Supra note 4.

are often ignored or inadequately enforced. For example, in the Hazaribagh neighbourhood of Bangladesh's capital Dhaka, around 150 tanneries—many of them producing leather as raw materials for the products of well-known brands— expose workers and local residents to untreated tannery effluent that contains chromium, sulphur, ammonium, and other chemicals that cause a serious health problem.[38]

"Government officials, tannery association representatives, trade union officials, and staff of NGOs all told Human Rights Watch that no Hazaribagh tannery has an effluent treatment plant to treat its waste. Tannery workers described and displayed a range of health conditions including prematurely aged, discoloured, itchy, peeling, acid-burned, and rash-covered skin; fingers corroded to stumps; aches, dizziness, nausea; and disfigured or amputated limbs. The output of Hazaribagh's tanneries makes up around 90 percent of Bangladesh's total leather production, most of which is for export."[39]

"Many mining operations have also caused ill-health and environmental damage. For example, in 2011, Human Rights Watch looked at how the Porgera mine (of Barrick Gold, a Canadian global mining company) in Papua New Guinea was dumping 14,000 tons of liquid mining waste daily into a nearby river, potentially causing environmental damage and ill-health to downstream communities."[40]

Similarly, Human Rights Watch found that small- and medium-scale iron mines in India had destroyed or contaminated water sources that residents depended on for drinking water and irrigation in two states. Indian legal and regulatory frameworks meant to prevent such harms were hobbled by weak institutional capacity and a basic lack of political will to implement regulations. A large proportion of iron ore mined in India is destined for the international markets. Artisanal and small-scale gold miners in many countries use mercury

[38] Human Rights Watch, Toxic Tanneries, https://www.hrw.org/report/2012/10/09/toxic-tanneries/health-repercussions-bangladeshs-hazaribagh-leather (last visited May 15, 2024)
[39] Ibid.
[40] Human Rights Watch, Papua New Guinea: Serious Abuses at Barrick Gold Mine Human, https://www.hrw.org/news/2011/02/01/papua-new-guinea-serious-abuses-barrick-gold-mine (last visited May 15, 2024)

to process gold, emitting more than 700 tons of this toxic metal annually, and causing mercury poisoning to many small-scale miners.[41]

Violations of the rights related to land, food, and water

Communities have suffered human rights abuses when companies acquire land for large-scale mining, agribusiness, or other commercial enterprises linked to global supply chains. The rights of whole communities can be at risk in the context of large-scale land deals, with women often facing distinctive and additional risks. Under international law, the rights to water[42], food[43], and housing[44] are protected. Governments are obligated to take steps to progressively realize full access to these rights over time. Yet, when local communities have been resettled to make way for commercial enterprises, their access to water and their ability to grow their own food has sometimes been impeded, with particularly severe impacts on women.[45]

"For example, when communities were resettled to make way for large-scale coal mining operations in Mozambique, they were pushed into unacceptable new living situations that led to violations of their rights to water and to food."[46]

Indigenous communities are in a particularly vulnerable situation in the face of large commercial land acquisitions because their culture and livelihood are tied to their land. Under international law, governments or companies seeking to work on land where indigenous peoples live often have a responsibility to seek their free, prior, and informed consent before moving forward.[47] But this right has been widely disrespected. Human Rights Watch found that mining companies in Uganda, for example, have failed to secure free, prior, and

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[41] Supra note 4.
[42] UN General Assembly, Resolution 64/292, The Human Right to Water and Sanitation (2010).
[43] UN General Assembly, Universal Declaration of Human Rights, G.A. Res. 217A (III) (1948), art. 25.
[44] UN General Assembly, Universal Declaration of Human Rights, G.A. Res. 217A (III) (1948), art. 25.
[45] Supra note 4.
[46] Human Rights Watch, Mozambique: Mining Resettlements Disrupt Food, Water, available at https://www.hrw.org/news/2013/05/23/mozambique-mining-resettlements-disrupt-food-water (last visited 14 May 2024)
[47] UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 (2007), art. 10.

informed consent from indigenous communities before they started exploration;[48] similarly, the government of Ethiopia has cleared land for the purposes of export-oriented commercial agriculture without seeking free, prior, and informed consent from indigenous people.[49]

Violations of International Humanitarian Law

Companies have caused, contributed, or been directly linked to violations of international humanitarian law (also known as the laws of war) in situations of armed conflict or military occupation.

For example, during the height of the armed conflict in the Democratic Republic of Congo, AngloGold Ashanti—a leading gold mining company—established relations with the Nationalist and Integrationist Front, an armed group responsible for serious human rights abuses including war crimes and crimes against humanity. In return for the armed group's assurances of security for its operations and staff, AngloGold Ashanti provided logistical and financial support to the armed group and its leaders. In this way, the company may have contributed to serious human rights abuses carried out by those armed groups.

Another example is the role of businesses with operations linked to Israeli settlements in the occupied West Bank. These businesses contribute to Israel's violations of international humanitarian law and human rights abuses that dispossess and discriminate against Palestinians. In particular, they facilitate the presence and growth of settlements and contribute to Israel's unlawful confiscation of Palestinian land and other resources. They also benefit from abusive government policies that discriminate against Palestinians by virtually barring Palestinian economic and residential development in 60 percent of the West Bank.[50]

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[48] Human Rights Watch, "How Can We Survive Here?", available at https://www.hrw.org/report/2014/02/03/how-can-we-survive-here/impact-mining-human-rights-karamoja-uganda (last visited May 15, 2024)

[49] Moreda, T., *Large-scale land acquisitions, state authority and indigenous local communities: insights from Ethiopia*, Volume 38-Issue 3, Third World Quarterly, 38(3), 698–716 (2017) https://doi.org/10.1080/01436597.2016.1191941

[50] Occupation, Inc.: How Settlement Businesses Contribute to Israel's Violations of Palestinian Rights, hrw.org, (January 19, 2016), https://www.hrw.org/news/2016/01/19/occupation-inc-how-settlement-businesses-contribute-israels-violations-palestinian (last visited May 15, 2024)

Why a Binding Global Standard on Human Rights Due Diligence is needed: companies' lack of adequate rights safeguards in supply chains

Lack of State action: Governments do not regulate business enough

The primary responsibility for upholding human rights lies with governments. In order to protect human rights, governments have a duty to effectively regulate business activity and to put in place and enforce robust labour laws, in line with International Labour Organization **(**'ILO'**)** standards. In practice, Human Rights Watch research has found that loopholes in labour law, weak labour inspections, and poor enforcement often undermine labour rights and other human rights.

Governments also should oversee and regulate business human rights practices domestically and abroad. While governments do generally regulate company behaviour at the domestic level, they do so with varying degrees of seriousness and effectiveness. Governments have consistently failed to oversee or regulate the extraterritorial human rights practices of companies domiciled on their soil. In the absence of legally binding standards, ensuring that all companies take their human rights due diligence responsibilities seriously becomes extremely difficult. [51]

While some companies may take their human rights responsibilities seriously and implement robust human rights due diligence, their competitors may decline to take any such steps and may suffer no adverse consequences. Even companies that do voluntarily undertake human rights due diligence can benefit from strong practical guidance in the form of reasonable government regulation. A new international legally binding standard on human rights due diligence in global supply chains would be a major step towards enhancing responsible businesses around the world.[52]

Where states have imposed mandatory human rights due diligence, company transparency has improved. This has been, for example, the case of the Dodd Frank Act[53], a United States law requiring companies to publicly report on the

[51] Ibid.
[52] Ibid.
[53] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, No. 4173, Act of the U.S. Congress, 2010, (US.)

extent to which they have conducted due diligence to ensure their mineral supply chains do not fuel armed conflict in the Democratic Republic of Congo.[54]

In 2015, the Modern Slavery Act[55] entered into force in the United Kingdom, obliging companies to report annually on steps taken to ensure that neither slavery nor human trafficking exist in any part of their business operations or supply chains. While it is too early to judge the full impact of the law, it has the potential to increase transparency about companies' efforts to avoid the involvement of modern slavery or trafficking in their supply chains. Brazil is an interesting example of a country producing for the global market where legal requirements imposed on foreign companies sourcing tobacco have helped prevent child labour, coupled with other government measures.[56]

Step in the right direction: government regulation of business

How governments can oblige businesses to conduct due diligence: Brazil's measures to eliminate child labour in tobacco farming

Brazil, the world's second-largest tobacco producer, has taken steps to enforce a ban on child labour in tobacco farming[57] and hold both farmers and businesses in the supply chain accountable for violations of that ban.[58] Because of the hazardous nature of tobacco farming, Brazil has prohibited all work by children under 18 in the crop and established penalties severe enough to dissuade farmers from allowing children to work in this sector. Penalties under Brazilian law apply not only to farmers but also to companies purchasing the tobacco, creating an incentive for the tobacco industry to ensure that children are not working on farms in their supply chains. Human Rights Watch research found that companies' contracts with farmers generally included an explicit ban on child labour, and provided for financial penalties if children were found working. Companies also made a point of sending "instructors" to visit farmers

[54] Supra note 11.
[55] Modern Slavery Act 2015, § 54, No. c. 30, Act of the Parliament of the United Kingdom, 2015, (Eng.)
[56] Supra note 4.
[57] Brazil. Decree No. 6.481 of 2008: List of Worst Forms of Child Labor. Diario Oficial da Uniao (D.O.U.), 12 June 2008 (Braz.).
[58] Supra note 4.

several times during each tobacco season to remind farmers that child labour was prohibited.[59]

Recognizing that bans are not enough to eliminate child labour, Brazil has also put in place social programs for poor families to help alleviate the financial desperation that drives parents to send their children to work. Though not a perfect system, Brazil's approach to child labour provides an example of how governments can address child labour in supply chains. Brazil's example could inform policy decisions in other tobacco-producing countries, where such steps have not been taken.[60]

The role of the ILO in setting binding standards in global supply chains

The ILO is well-placed to initiate the process for a new international legally binding standard on human rights due diligence in supply chains. The ILO's tripartite structure brings together workers, employers, and governments. ILO Conventions have helped advance the protection of workers' rights globally. In recent years, the ILO has also taken up the issue of supply chain due diligence. Together with the International Finance Cooperation, the ILO has set up the Better Work program, a mechanism to monitor working conditions in the apparel sector. The 2014 ILO Forced Labour Protocol[61] also requires parties to "support due diligence" to prevent forced labour. The protocol establishes obligations to: Prevent forced labour, protect victims, provide victims with access to remedies, and emphasize the link between forced labour and trafficking in persons. The ILO therefore takes the lead in bringing about an international, binding standard on human rights in global supply chains.[62]

[59] Supra note 4.
[60] Margaret Wurth, How we can fight child labour in the tobacco industry, The Guardian, June 27, 2018, https://www.hrw.org/news/2018/06/27/how-we-can-fight-child-labour-tobacco-industry
[61] The Protocol of 2014 to the Forced Labour Convention, 1930 (Protocol 29) (09 Nov 2016)
[62] International Labour Organization, What is forced labour?, https://www.ilo.org/topics/forced-labour-modern-slavery-and-human-trafficking/what-forced-labour (last visited May 15, 2024)

A voluntary standard on human rights due diligence: The United Nations Guiding Principles on Business and Human Rights

The human rights responsibilities of businesses are spelled out in a number of non-binding international standards, including the UN Guiding Principles on Business and Human Rights, the Organisation for Economic Co-operation and Development ('OECD') Guidelines for Multinational Enterprises, and several sector-specific OECD guidance documents.[63] A new international legally binding standard on human rights due diligence in global supply chains should draw on these widely accepted standards, building on the concept of human rights due diligence put forward in the UN Guiding Principles (as well as the OECD standards).[64]

Under the UN Guiding Principles, businesses should ensure that they respect human rights in their own activities as well as through their business relationships in supply chains.[65]

The UN Guiding Principles define safeguards—including so-called human rights due diligence measures—that companies should have in place to identify, mitigate, and respond to human rights risks throughout their supply chains.[66]

Specifically, the UN Guiding Principles urge companies to:

- Implement a clear policy commitment to respect human rights, embedded in all relevant business functions.
- Develop a human rights due diligence process that should:
    1. Identify and assess actual and potential adverse human rights impacts;
    2. Prevent and mitigate adverse human rights impacts;

[63] https://www.oecd.org/daf/inv/mne/due-diligence-guidance-for-responsible-business-conduct.htm (last visited May 15, 2024)
[64] Ibid.
[65] International Organization of Employers, Guiding Principles on Business and Human rights: An Employers Guide, https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=110485&token=75b134739893e24b4a12c1e620ff106dc01f0d52 (last visited May 14,2024)
[66] Ibid.

3. Verify whether adverse human rights impacts are addressed; and
4. Communicate externally how adverse human rights impacts are being addressed.

Ensure adversely affected people are able to secure remediation of any adverse human rights impacts a business has caused or contributed to.

While some businesses have made progress in putting the UN Guiding Principles into practice, the standard's voluntary nature leaves companies free to shirk their responsibilities without consequence. Even companies that have made good faith efforts to live up to their human rights responsibilities have often failed to do so, partly because they lack the sound guidance they need in the form of strong government regulation. Far more needs to be done. Below are examples of poor implementation of the UN Guiding Principles, in particular weak company policy commitments, human rights due diligence, and remediation efforts.

Companies Lack of Adequate Human Rights Safeguards in Supply Chains

Weak human rights policy commitments and action

Under the UN Guiding Principles, businesses should have a clear human rights policy that spells out how the company will seek to respect human rights. But many company policies either fail to do this or are not adequately implemented.[67]

For example, many of the world's construction, engineering, and project management firms have operations in the lucrative construction sector of the Gulf Cooperation Council states. Despite pervasive risks of serious human rights abuses in these operations, including the use of forced labour, few construction firms have adopted specific policies to address these risks and ensure the basic rights of all the workers in their labour supply chain.[68] Human Rights Watch has also found that companies sometimes lack specific child

[67] UN Guiding Principles on Business and Human Rights, G.A. Res. 66/281, preamble, U.N. Doc. A/RES/66/281 (June 16, 2011).
[68] Supra note 4.

labour policies, even though child labour occurs in the countries they source from. For example, at the time of Human Rights Watch's documentation of child labour in tobacco farming in the US in 2013, some tobacco companies did not have any child labour policies at all and defaulted to weak protections in US labour law.[69]

Insufficient assessment and monitoring of risks of human rights abuses

Companies should take steps to ensure that they know what the risks of human rights violations in their supply chain are, and should monitor and address those risks on an ongoing basis. In order to correctly assess risks in their supply chain, companies need to be familiar with every link in their supply chain.[70]

In practice, businesses often fail to get a clear picture of the human rights risks contained in their supply chain. Some companies do not even map out all actors involved in their supply chain.[71]

For example, several international gold refineries have bought from Ghanaian gold export companies that had not traced the origin of the gold they were selling and did not have sufficient child labour due diligence in place. One of the Ghanaian export companies acknowledged to Human Rights Watch that "*we have no way of knowing… whether the gold is from child labour*."[72]

Failure to adequately assess human rights risks can also contribute to violations of international humanitarian law or the laws of war.[73]

"For example, an American retail chain sourced linens from a manufacturer, which was located in an Israeli settlement industrial zone in the occupied West Bank before relocating to Israel in October 2015. Until then, the retail chain imported the settlement-produced goods, thereby contributing to and

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[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Human Rights Watch, Precious Metal, Cheap Labor: Child Labor and Corporate Responsibility in Ghana's Artisanal Gold Mines, https://www.hrw.org/report/2015/06/10/precious-metal-cheap-labor/child-labor-and-corporate-responsibility-ghanas (last visited May 14,20024)
[73] Office of the United Nations High Commissioner for Human Rights, International Legal Protection of Human Rights in Armed Conflicts, https://www.ohchr.org/sites/default/files/Documents/Publications/HR_in_armed_conflict.pdf (last visited May 15, 2024)

benefitting from Israeli settlement activity in occupied Palestinian territory, which violates international humanitarian law. The company also contributed to and benefited from human rights abuses associated with the occupation. The manufacturer promoted itself on its website as an exporter with a 'home-base in Israel' and labelled the linens as made in Israel, but the retailer, which appears to have known the true origin of the goods, failed in its duty to conduct due diligence to ascertain the true origin of the goods and to ensure that it did not contribute to violations of the international humanitarian laws applicable to occupation and human rights abuse."[74]

One method to assess and monitor risks is to conduct inspections at production sites. However, businesses do not always conduct such visits. Companies who visit production sites may also conduct very superficial inspections and give the local employer advance notice. As a result, abuses may not be detected or may be concealed.[75]

Weaknesses in preventing and mitigating human rights abuse

Once companies have identified risks to human rights, they should take steps to prevent or mitigate those risks. Depending on the context these may include putting in place regular surprise inspections, contractual obligations for suppliers, whistle blower protection, and other measures. Many companies fail to write specific human rights requirements into contracts with their suppliers.[76]

For example, most workers in the construction sector in the Gulf States are not covered by meaningful labour protections under domestic law, and most construction firms do not address this gap by insisting their contractors provide adequate rights protections.[77]

In some high profile projects in the Gulf States, such as construction associated with the 2022 Qatar World Cup or on Saadiyat Island in Abu Dhabi, contractual

[74] Supra 4.
[75] Ibid.
[76] Ibid.
[77] Ibid.

codes of labour protection are in place to regulate the conduct of contractors and subcontractors, but these are exceptions rather than the norm.[78]

Insufficient third-party auditing for human rights issues

Companies across many sectors engage third-party auditors to verify compliance with laws, regulations, and voluntary standards, including on responsible sourcing and respect for human rights. They sometimes also outsource the assessment of human rights risks. However, Human Rights Watch has found that these audits frequently do not focus strongly enough on human rights, are not conducted by human rights experts, or are too limited in scope.[79]

For example, in the precious minerals industry, voluntary standards for responsible sourcing seek to ensure respect for human rights alongside other goals, but third-party verification of company compliance with these standards has sometimes neglected human rights issues.[80]

In one case, Human Rights Watch found that the summary report of an audit against Dubai's responsible sourcing standard for a gold refinery in the United Arab Emirates did not mention human rights at all, and did not include any site visits to gold mines the refinery was sourcing from.[81]

In the tobacco industry, Human Rights Watch found that in some cases auditors inspected tobacco farms in the US, but the inspections were deeply flawed. Auditors sometimes did not speak the language of the workers, did not interview workers during site visits, visited at times of the day or year when children were not likely to be working, or announced visits ahead of time.[82]

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[78] Peter Millward, World Cup 2022 and Qatar's Construction Projects: Relational Power in Networks and Relational Responsibilities to Migrant Workers, 65 Current Sociology (2016). https://www.researchgate.net/publication/303029977_World_Cup_2022_and_Qatars_construction_projects_Relational_power_in_networks_and_relational_responsibilities_to_migrant_workers (last visited May 15, 2024)
[79] Supra note 4.
[80] Ibid.
[81] Ibid.
[82] Margaret Wurth and Jane Buchanan, Teens of the Tobacco Fields: Child Labor in United States Tobacco Farming, Human Rights Watch (December 9 2015), https://www.hrw.org/report/2015/12/09/teens-tobacco-fields/child-labor-united-states-tobacco-farming (last visited May15, 2024)

In Bangladesh, weak third-party social audits have been identified as one of the factors that contributed to the Rana Plaza collapse.[83] According to trade unions, such audits often addressed worker's rights issues superficially or not at all. Since the Rana Plaza disaster, inspection of fire and building safety has improved in the garment and footwear sector, particularly in Bangladesh.[84]

A large auditing company, Ernst and Young, has criticized a 'checklist approach' in auditing that is "*skewed towards the detection of clerical errors and health and safety questions with yes/no answers*" in current social compliance auditing across a variety of sectors and countries.

Lack of adequate external communication and public reporting

All too often, businesses keep the results of their internal and third-party inspections secret or publish only summary audit reports. While some information could legitimately be kept internal, companies should report publicly on the steps they have taken to conduct human rights due diligence. The lack of adequate public reporting poses a serious problem of accountability. If companies do not disclose the steps they have taken to identify, prevent, mitigate, or remediate human rights risks in their supply chain, abuses would be covered up, companies would evade public scrutiny, and it would be far harder to remedy problems.

One example of weak public external communication is the poor reporting on audits conducted among gold refineries on responsible mineral supply chains. Gold refiners have published summary compliance reports and summary reports of audits against several responsible sourcing standards, but not the full findings.[85] One refinery has not even published the summary report of its audit against the 'Responsible Gold Guidance' of the London Bullion Market Association.[86]

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[83] Supra note 4.
[84] Ibid.
[85] Human Rights Watch, Sparkling Jewels, Opaque Supply Chains, https://www.hrw.org/report/2020/11/24/sparkling-jewels-opaque-supply-chains/jewelry-companies-changing-sourcing (last visited on May 14,2024)
[86] Human Rights Watch, EU's Flawed Reliance on Audits, Certifications for Raw Materials Rules, https://www.hrw.org/news/2023/05/24/eus-flawed-reliance-audits-certifications-raw-materials-rules (last visited on May 14, 2024)

Step in the right direction: public disclosure of suppliers enables better risk assessments

Public disclosure of suppliers in the Garment and Footwear Sector

Some leading brands including Adidas, Disney, H&M, Levis, New Balance, Nike, Patagonia, and Puma regularly publish lists of the factories producing their clothes and shoes on their websites.[87] By publishing the names and locations of factories producing for the company, companies bolster their ability to prevent and take timely measures to mitigate and remediate labour rights violations in their supply chains.[88]

The disclosure of information by some brands in the garment and footwear section is a powerful first step towards greater transparency.[89]

Insufficient remediation

Where business enterprises have caused, contributed, or been directly linked to rights abuses, they should provide for or cooperate in the remediation of these abuses. But in practice, Human Rights Watch has found a number of instances where businesses have failed to take any effective steps to ensure remedy for human rights abuses that have occurred in their supply chains.[90]

Step in the right direction: prevention, mitigation, and remediation

The legally binding Bangladesh Accord on Fire and Building Safety

In May 2013, in the immediate aftermath of the Rana Plaza collapse, more than 200 apparel and footwear companies signed a five-year legally binding agreement with trade unions to work towards factory building and fire safety in Bangladesh's garment industry.[91] This agreement paid attention to the serious flaws in the Bangladesh labour inspectorate regarding building safety, created an independent inspection system, and publicly disclosed all factories covered by the agreement, inspection reports, and corrective action plans. The

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[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Md Zillur Rahman, Accord on "Fire and Building Safety in Bangladesh": A Breakthrough Agreement?, 4 njwls,73 (2014)

Accord, even though limited to fire and building safety issues, has been a promising collaborative effort to improve due diligence.[92]

India's supply chains ready for the movement towards human rights due diligence?

The movement towards corporate human rights due diligence (HRDD) is picking up pace globally. As we attempt to address the converging effects of the Covid-19 pandemic, the climate crisis, and vulnerabilities in our increasingly interconnected and interdependent global economies (reliant on global value chains), vulnerable stakeholders, whose categorisation varies from region to region, often bear the brunt of the worst impacts of crises.[93]

Adoption of the globally-acknowledged UNGPs, and with them a commitment to corporate human rights due diligence, is increasingly on the agenda, more countries are announcing National Action Plans on Business and Human Rights (based on the UNGPs) and mandatory human rights due diligence laws and requirements.[94] Japan is the latest to join the growing list of countries taking steps towards mandatory due diligence (including the UK and Australia Modern Slavery Acts[95], Dutch Child Labour Due Diligence Act[96], French Duty of Vigilance law[97], and Indian Business Responsibility Reporting Requirement) with its draft guidelines on respect for human rights in responsible supply chains.[98]

It is becoming increasingly important that companies' actions to protect and respect human rights extend beyond their home country, to all regions where it manufactures, sources, and sells its products and services. Protection of human

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[92] Ibid.
[93] Swati Tewari, Are India's supply chains ready for the movement towards human rights due diligence?, Business & Human Rights Resource Centre (Aug 30, 2022) https://www.business-humanrights.org/en/blog/are-indias-supply-chains-ready-for-the-movement-towards-human-rights-due-diligence/ last visited on May 15, 2024
[94] Ibid.
[95] The Modern Slavery Act 2018, Act No. 153, The Parliament of Australia, 2018 (Austl.).
[96] Dutch Child Labour Due Diligence Act 2019, Act No. 170-96, The Dutch Senate, 2019 (Dutch.)
[97] French Duty of Vigilance law 2017, Act No. 2017-399, The French Parliament, 2017 (French.)
[98] Supra note 84.

rights across supply chains is also one of the key principles in UNGPs.[99] Global companies that either operate in India or are linked to India through their manufacturing and supply chains must follow both the laws of both their home countries and laws and regulations applicable in India. India has several local laws and regulations that aim to ensure the protection of and respect for human rights. Central and state-level remedy mechanisms are available in the country for those affected by human rights violations.[100]

India's National Guidelines on Responsible Business Conduct ('NGRBC') is based on nine principles, including corporate actions on human rights.[101] The guidelines advise a holistic approach for companies, starting with the adoption and implementation of a human rights policy, human rights awareness and training of employees and supply chain partners, grievance channels, and remedy mechanisms.[102] The guidelines also focus on monitoring human rights concerns and incidents both in operations and supply chains, as well as HRDD.[103] The country's top 1,000 listed companies are subject to mandatory sustainability disclosure as part of the Business Responsibility Sustainability Reporting ('BRSR') framework[104], based on the nine principles of the NGRBC[105].

"Japanese companies with supply chains in India may be required to fulfil the requirement of BRSR if they fall within the mandated top 1,000 listed companies. Even if they are not part of the mandate, it is advised that the BRSR framework and NGRBC are followed as good practice. Japan's draft guidelines on responsible supply chains can help companies take necessary steps to protect and respect human rights. Indian suppliers to Japanese companies can also look to these guidelines to inform their actions. Since these guidelines are also based on the UNGPs, there is a common ground between Japan's guidelines on

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[99] Ibid.
[100] Ibid.
[101] Ministry of Corporate Affairs, India's National Guidelines on Responsible Business Conduct, (Issued on March 15, 2019) (India).
[102] Supra note 84.
[103] Ibid.
[104] Securities and Exchange Board of India, Business Responsibility and Sustainability Reporting, (Issued on May 10, 2021) (India).
[105] Supra note 101.

responsible supply chains and India's NGRBC. Some of the common areas include:

- Both are guidelines and are voluntary in nature.
- Both take a value chain approach to respect for human rights, guiding companies to go beyond their manufacturing setup and examine their supply chains, both upstream and downstream, to ensure respect for human rights.
- Both advise companies on Human Rights Policy, HRDD, and Remedy mechanisms."[106]

Although due diligence is gaining traction, companies still have a long way to go to respect human rights. While some have started to establish human rights policies, they are struggling with the next steps. India's NGRBC serves as a model for companies to take action beyond human rights policies.[107] It takes a broad approach, extending its scope beyond human rights to responsible business conduct on issues including the environment, ethics, transparency, economics, and communities. Japan's guidelines on responsible supply chains, which focus exclusively on human rights, can provide deep insights to companies, including companies in Indian supply chains, to take specific actions to respect human rights.[108]

Japan's supply chains in India can take advantage of both the NGRBC and Japan's draft guidelines to take steps in designing and deploying systems and processes to respect human rights.[109]

Key considerations going forward

The trend towards mandatory human rights due diligence will not be reversed and a coordinated business response is necessary in the face of these legislative developments. Key considerations for business to consider in the debates on legislation include:

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[106] Supra note 84.
[107] Ibid.
[108] Ibid.
[109] Ibid.

- Liability vs. sanctions: Will the legislation, such as the French due vigilance law, create liabilities for adverse impacts in the supply chain, or will it impose sanctions for non-compliance, such as the Dutch and German law? If liabilities are created, for which tiers of companies, and in which circumstances? Creating liabilities for adverse human rights impacts in supply chains will create huge legal uncertainties for companies. In the case of sanctions, what will those be?
- Safe Harbour Clause: A key question will be whether any legislation includes a 'safe harbour' for companies that conduct due diligence, but still find themselves in situations where there are adverse human rights impacts. An erosion of a safe harbour defence may fail to reward good faith efforts by companies to conduct due diligence, and therefore eliminate an important incentive for companies to conduct due diligence. The approach of many jurisdictions to corporate due diligence includes safe harbour clauses. For example, courts have found that the CA Transparency in Supply Chains Act creates a safe harbour against consumer protection claims against companies that make disclosures under that law[110]. As another example, in a slightly different context, in the UK, if a company has "adequate procedures" in place to prevent bribery, it will have a complete defence against a claim under the UK Bribery Act.[111]
- Liability of natural and legal persons: where liability is extended to natural persons, this would open the door for States to hold responsible multinational companies' directors.
- Reversal of burden of proof: The reversal of the burden of proof such as was initially considered in the Swiss supply chain legislation proposal, contravenes a fundamental and well-established legal principle of "innocent until proven guilty" and the notion that "he who asserts must prove." Indeed, requiring that the accused party prove its innocence violates due process principles and fundamental notions of fairness in most jurisdictions.

[110] Hodsdon v. Mars, Inc., -- F.3d --, No. 16-15444, 2018 WL 2473486 (9th Cir. June 4, 2018)
[111] Bribery Act 2010, c. 23, Act of UK Parliament, 2010 (United Kingdom)

- Extraterritorial Jurisdiction: Does the legislation include provisions on extraterritorial jurisdiction? Which laws apply in cases of extraterritorial jurisdiction? In addition to the fact that extraterritorial jurisdiction creates grave uncertainties as to where the accused may be taken into court, and to which laws they may be subject. There are other shortcomings that are too often overlooked including the tremendously higher costs of pursuing remedies in foreign courts and sustaining such cases over several years, the challenges presented to foreign courts when they must rule according to foreign legal principles, the difficulties in obtaining evidence and testimony abroad, as well as the question of which court is the right forum for the case to be heard. Independent of all the arguments for the need to ensure access to remedy and the limited responsibility of business partners, because of the inherent challenges, extraterritorial jurisdiction is not a suitable tool to address gaps in access to remedy in a vast majority of cases."[112]

Conclusion

The implementation of human rights due diligence in the supply chain is crucial for ensuring ethical practices, protecting human rights, and fostering sustainable business operations. Through this paper, we have explored the significance of integrating human rights considerations into supply chain management, the challenges faced in implementing due diligence processes, and the potential benefits for businesses, workers, and communities.

By conducting thorough risk assessments, engaging with stakeholders, and establishing transparent monitoring mechanisms, companies can mitigate risks of human rights violations, enhance their reputation, and contribute to positive social impact. Embracing a proactive approach to human rights due diligence not only aligns with international standards and regulations but also demonstrates a commitment to corporate social responsibility and ethical business conduct.

[112] International Organization of Employers, OECD Due Diligence Guidance for Responsible Business Conduct: IOE Commentary (2023) (last visited May 15, 2024).

As evidenced by various international frameworks and legislative initiatives, including the UN Guiding Principles on Business and Human Rights and modern slavery acts, there is a growing recognition of the imperative to integrate human rights considerations into business operations. By embracing this responsibility, companies can not only mitigate legal and reputational risks but also foster sustainable business practices that prioritize human dignity and well-being.

As organizations navigate complex global supply chains, it is imperative to prioritize human rights, empower workers, and address systemic issues to create a more equitable and sustainable future. By embedding human rights due diligence practices into their operations, companies can drive positive change, build trust with stakeholders, and uphold the fundamental rights of all individuals impacted by their supply chain activities. Together, through collaborative efforts and a shared commitment to human rights, we can create a more just and responsible global business environment.

Nevertheless, challenges persist, including the complexities of global supply chains, limited resources for monitoring and enforcement, and varying levels of commitment among stakeholders. Overcoming these challenges requires collaborative efforts involving governments, businesses, civil society organizations, and other relevant actors. By working together to promote transparency, accountability, and respect for human rights, we can strive towards a future where every individual, regardless of their position in the supply chain, is treated with dignity, fairness, and respect for their inherent rights. In this pursuit, human rights due diligence stands as a crucial tool, guiding businesses towards a fair, just, equitable and sustainable global economy.

TEACHERS' AND RESEARCH SCHOLARS' SECTION

Economic Inequality by Gender: The Motherhood Penalty

Parul Raghuwanshi & Bhumika Rathod***

Introduction

Motherhood is a multifaceted journey which has various spectrums of roles, responsibilities and transformative experiences. Motherhood goes far beyond the mere act of giving birth, caregiving, and nurturing. It is celebrated across cultures and throughout the world. Apart from being celebrated, it is also scrutinized and critiqued, even then it remains a force for creating and shaping the fabric of society.

According to Jean Jacques Rousseau, Family is considered as the first model of political society.[1] Where family as a social institution is considered as a backbone of a society. Once people start living as a commune, family is considered as a foundation of the community and women have a major role to play. Every civilization has recognized the power of motherhood and in certain civilization mother is figuratively projected as Goddess.[2]

The normative perspective of being a mother has been 'nurturing and self-sacrificing' and it has been deep rooted in almost all the cultures all over the world.

When a child is born in a family, the child is meant to see the world firstly through the eyes of the mother as it is the mother who has the primary childcare responsibility in a family and meets the needs of the child. If we talk about agrarian society, the roles and responsibilities of mothers were limited to

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[1] Rousseau, J.J. The Social Contract (1762) Retrieved November 24, 2023 from, https://www.marxists.org/reference/subject/economics/rousseau/social-contract/ch01.htm
[2] Bagchi, J. (2017). *Interrogating Motherhood* SAGE Publications

childcare, household work and fulfilling the needs of the family. With the change in time and with societies evolving, the notion of motherhood has undergone serious transformation.[3] This change occurred with industrialization and urbanization, resulting in change is the legal concept of a society. In the economic frontier, motherhood became a debatable issue, as the legal notion of cultural and social justice evolved such as 'gender equity'.[4] Motherhood exhibits economic inequality by affecting women's career trajectories and earning potential. The economic impact contributes to broader gender based economic disparity. The theory of motherhood penalty refers to the loss of pay and career opportunities to a woman after becoming a mother. It is a concept which shows the economic and career setback which mothers experience due to gender stereotypes, societal expectations, gender biases which disproportionately affect working mothers. In the intersection of professional career and motherhood responsibilities, a mother often finds herself navigating a place with disparities and systemic hurdles. Some surveys have shown the result that mothers suffer a substantial amount of wage penalty.[5] In a study of economic research by Crittenden,[6] it was found that the pay gap between mothers and non-mothers is larger than between men and women under the age of 35 years.

The paper examines the factors that lead to the motherhood penalty. It analyzes the multifaceted factors of motherhood, the challenges faced by mothers and the sacred roles defined by society. Mothers face multifold challenges based on ethnicity, class, caste, status etc. The refer also explores the existing laws for the protection of mothers in India and its positive and negative impact on women's professional career.

Heterogeneity of Motherhood Penalty

Motherhood penalty has a varied impact on women based on their socio-economic conditions. It refers to the variety of experiences and challenges that

[3] Bagchi (2017)
[4] K. T. Mini v. Life Insurance Corporation of India, W.P.(C)No. 22007 of 2012
[5] Correll S.J., Benard, S. & Paik I. (2007) Getting a Job: Is There a Motherhood Penalty?, *American Journal of Sociology,* 112(5), The University of Chicago Press, doi:10.1086/511799
[6] Crittenden, A. (2001) The Price of Motherhood: Why the Most Important Job in the World Is Still the Least Valued. New York: Metropolitan Books

a woman faces in her role as mother. Social, economic, cultural, legal factors contribute significantly to the heterogeneity of motherhood. Heterogeneity of motherhood[7] is often described based on parameters like mother's age at the time of childbirth, number of children, level of education, types of households, income level, length of break from paid employment, nature of employment i.e., part time or full-time work, types of workplace i.e., organized or unorganized. To develop supportive policies, services and legislation, there is a need to acknowledge heterogeneity of motherhood.

Motherhood is a universal phenomenon. There are many societal norms, expectations and biases associated with motherhood which reflect women's career and personal lives. There are some aspects that contribute to the spectrum of challenges[8] to the motherhood penalty: motherhood hindered career progression, mother experienced employment discrimination, limited job opportunities. It takes a huge effort on the part of a mother to have work-life balance. Maternal Wall Bias and Stigmatization of Part-Time Work, has psychological impact.

Socio-economic Factors for Motherhood penalty

Gender Norms: Gender norms refer to the societal expectations, attitudes, and behaviors that are considered appropriate or typical for individuals based on their perceived gender. These norms are culturally defined and vary across societies. Gender norms often prescribe that women should take on the primary caregiver role for children. It describes the role of men as breadwinners and women as centric to household chores. Labour market often perpetuates the traditional stereotype and creates a work culture which puts motherhood at a disadvantaged position. When women become mothers, these traditional expectations can lead to assumptions that they will prioritize family over their careers. There is a potential link between gender norms, culture and actual labor market participation.[9] Gender Norms have an effect on the overall work culture

[7] Grimshaw, D & Rubey, J. (2015) *The Motherhood Pay Gap: A review of the issues, theory and international evidence*, University of Manchester, International Labour Office, Geneva (Conditions of Work and Employment Series No. 57)
[8] Grimshaw & Rubey (2015)
[9] Bedi, A., Majilla, M. & Rieger M. (2018) Gender Norms and the Motherhood Penalty: Experimental Evidence from India, *International Institute of Social Studies; IZA Institute of Labor Economics* Retrieved November 25, 2023 from http://dx.doi.org/10.2139/ssrn.3137490

in terms of hiring preference, leadership role, promotions etc. One such fine example is the Patriarchal norms of the Indian Society which shape the image of the "ideal" mother and puts the overall responsibility of childcare on the woman. Even government policies and legislations re-enforce the gender and occupational stereotype with respect to reproductive and child care rights.

Biological clock hits career clock: Both personal and professional aspirations of women often intersect with their biological and career clock. It describes the conflict which women feel between their desire to have children and the biological realities of fertility and pursuit of career goals. There is an interplay between fertility of women, female labor supply, and childcare.[10] Biological clocks and fertility choices can influence a woman's decision to participate in the labor force. Decision over having the first child is shaped by the fertile age of women, career structure, childcare opportunities.[11]

Labour Market Arrangement: -Labour market arrangements are not compatible for those who are a mother. There is a negative relationship between motherhood and labour market arrangement.[12] The culture of Labour market and workplace in general contributes to long working hours which in turn makes motherhood less compatible within workforce participation. The emergence of organizational culture demands for a high devotion and dedication puting motherhood at a disadvantaged position. Labour market does not consider motherhood as potential human capital for the organization. It determines accumulating work experience in terms of years and expertise which costs the women from experiencing motherhood.

Motherhood as a status characteristic: - Evaluation of workplace competence and performance expectation are based on status characteristic theory. A status characteristic is a categorical distinction among people based on personal parameters like (race, gender) or role (mother, manager), that has widely held beliefs in culture that associate greater status worthiness and competence with one category of distinction than with others.[13] The concept of "motherhood as a status characteristic" influence individuals' social

[10] Bedi et. al. (2018)
[11] Grimshaw & Rubey (2015)
[12] Grimshaw & Rubey (2015)
[13] Correll et. al. (2007)

perceptions and interactions and implicitly guides their behavior and interactions. At the same time, fatherhood is also considered as a status characteristic but with different implications. Assign status based on certain characteristic may affect the opportunities and interactions at workplace.

Intersectionality: Motherhood penalty also links to current debates on Intersectionality, and in particular the intersection of gender with class, race, age, ethnicity, caste. The concept of Intersectionality has developed an understanding as to how the mothers are being put at a disadvantage due to multiple social categorizations, such as race, gender, class, ethnicity etc.[14] When applied to the context of the motherhood penalty, intersectionality emphasizes how various aspects of identity intersect and contribute to the unique experiences of different groups of mothers. The intersectionality of motherhood with other social categories (e.g., race, socioeconomic status) further complicates the status characteristic. As societal expectations and stereotypes intersect with multiple dimensions of identity, women from different backgrounds may experience unique challenges and biases related to motherhood.

Deficiency of Welfare Support: - The role of a welfare State is important in increasing women's participation in the labor force and treating women as primarily economically independent.[15] State policies and schemes provide general support for care and work. It generally includes child care, provisions of maternity leave, flexible working hours, creche facility, medical and insurance facility. The role of government is thus crucial to provide supportive environment in a work organization.

Analysis and Discussion:

The magnitude of motherhood penalty has penetrated in all the social institutions like family, marriage, legal institution and most importantly labor market organization. This phenomenon has been widely studied to shed light on the challenges that women face in the workplace while experiencing

[14] Mantovania N. & Thomasb H. (2013) Stigma, intersectionality and motherhood: Exploring the relations of stigma in the accounts of black teenage mothers 'looked after' by the State, *Social Theory & Health.* doi:10.1057/sth.2013.19
[15] Grimshaw & Rubey (2015)

motherhood. A variety of factors have been proposed as an explanation for motherhood penalty such as primary caregiver, depreciated human capital, categorizing few occupations as mother centric mainly Pink Job or a less devoted employee. The issue of motherhood penalty is primarily seen in terms of men and women. Both motherhood and fatherhood are celebrated across the societies, but the economic reality of these phenomena are distinct. Research on the "marriage premium" for men's wages, one of the most robust empirical findings in labour economics, suggests that fathers might experience advantages in labour market outcomes. Labour economists frequently report that married men earn higher wages than unmarried men[16] One of the studies of gender inequality among Wall Street financial companies also found discriminatory views. Despite the fact that both mothers and fathers reduced their average weekly hours following parenthood; mothers worked 8% fewer hours than fathers but earned only half their pay, while fathers worked 10% fewer hours than non-fathers but earned 22% more pay.[17]

The concept of motherhood penalty goes beyond the comparison of mother and father. Heterogeneity of motherhood has varied impact on mother and non-mother. A competing picture of longer-lasting cumulative wage penalty for mothers. In fact, while Zhang's assessment of unadjusted annual earnings' patterns suggests a one-off penalty, the facts identify a significant cumulative wage penalty of 8% two years after childbirth, 6% four years later and 3% seven years later.[18] Motherhood is not a homogeneous phenomena. Based on the type of family, a woman belongs to, the effect of motherhood differs. A study shows that women from northeast India are less vulnerable to motherhood penalty as they belong to matrilineal society.[19]Therefore the impact of motherhood penalty on women varies with respect to age, number of children, ethnicity, level of education. Descriptive stereotypes are widely experienced by mothers in terms of status-based discrimination. Mothers are considered less competent and less committed than otherwise identical women coworkers who are non-mothers.

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[16] Correll et. al. (2007)
[17] Grimshaw & Rubey (2015)
[18] Grimshaw & Rubey (2015)
[19] Bedi et. al. (2018)

Lack of conducive environment or welfare support by State and labor force organizations highlight implementation gaps in addressing motherhood penalty. Social Benefits and welfare policies are often unclear. Established rules and regulations should be compatible with family and work organization.

Legal Aspect

ILO Maternity Protection Convention, 2000 has established standards for the protection of women in the workforce. This includes provisions for maternity leaves, cash benefits for maintenance of the woman and her child for the proper health and suitable condition of living, employment protection etc.[20] Way before this Convention, India had enacted the Maternity Benefit Act in the year 1961 (herein referred as 'the Act').

The Maternity Benefit Act is not the only legislation in India for the protection of mothers. Apart from this Act, India has beneficial provisions for mothers in 'The Employee's State Insurance Act 1948' and 'Central Civil Services Rule, 1972'. Now, let's examine the laws relating to motherhood in India.

The Maternity Benefit Act, 1961

The Act has been enacted with the aim to provide maternity benefits to women before and after childbirth and to bring uniformity in the existing laws in India. It brought uniformity in laws by repealing the Bombay Maternity Benefit Act 1929, The Mines Maternity Benefit Act, 1941 and certain provisions mentioned under the Plantations Labour Act 1951.

Applicability: The Act is applicable on Government establishments and every Government establishment being factory, mine or plantation. Apart from such establishments, it is also applicable on shops or establishments which have ten or more employees.

However, this Act is not applicable to women working in factories or any other establishments on which the Employee State Insurance Act, 1948 applies. This exception is made so as to avoid any conflict arising due to double benefits.

Maternity Leaves: Any woman who has worked in the establishment for a period of not less than 80 days in the duration of 12 months is entitled to

[20] ILO Maternity Protection Convention 2000 (No. 183)

maternity leave of upto 26 weeks.[21] The provision does not discriminate on the basis of the nature of employment. The Act is applicable to women having permanent or contractual employment. The only eligibility is to fulfill the mandatory period of 80 days employment in 12 months.

A woman who legally adopts a child below the age of three months or commissioning mother is entitled to 12 weeks of maternity leave from the day the child is handed over or from her becoming a commissioned mother.

It is important to note that maternity benefits increased from 12 weeks to 26 weeks by the 2017 Amendment of the Act since WHO has recommended that a child shall be breastfed by mother for the initial 24 weeks. Thus, an increase in maternity leave helps in improving the survival rates of children as well as the healthy development of both mother and child.[22] This Amendment also aligns with the best standards given under the Maternity Protection Convention, 2000.

Right to receive payment: The employer has the responsibility to make payment at the rate of daily wages as maternity benefit during her absence.[23] Moreover, the employer is expected to make the payment in advance for the duration preceding the date of delivery.[24]

Nursing Breaks: A woman is entitled to have two nursing breaks in the course of her daily work, for a specified duration until her child attains the age of 15 months. These breaks shall be given when she resumes work after her delivery.[25]

Duties of Employer: The employer shall not knowingly employ a woman within or during 6 weeks immediately after giving birth to the child i.e., delivery, miscarriage or medical termination of pregnancy.[26] After the

[21] Section 5 of Maternity Benefit Act, 1963
[22] Gethe, R. K. & Pandey, A. (2023). Impact of Maternity Benefits Act, 1961 [Amendment 2017] on job employment of working mothers in India, *International Journal of Law and Management* 65(5), 373-404.
[23] S. 5 *Maternity Benefit Act, 1961*
[24] S. 6(5) *Maternity Benefit Act, 1961*
[25] S. 11 *Maternity Benefit Act, 1961*
[26] S. 4 *Maternity Benefit Act, 1961*

amendment in 2017, employers having 50 or more employees are bound to provide crèche facilities.[27]

The Employee State Insurance Act, 1948

Apart from the Maternity Benefit Act, the Employee State Insurance Act, 1948 also provides certain maternity benefits to insured women. This Act is applicable to all Government factories and other seasonal factories.[28] According to this Act, any insured woman is entitled to receive periodic payment at a prescribed rate in case of 'confinement, miscarriage, sickness due to pregnancy or premature childbirth'.[29]

Duration and Quantum of Benefit: The benefits are to be given to an insured woman depending upon her prevailing conditions, such as, in case of confinement, the insured woman is entitled to 12 weeks of maternity benefits. However, in case of miscarriage, 6 weeks maternity benefits are given to the insured woman, provided she submits a certificate of her miscarriage. Insured women are entitled to one-month additional benefit in case of illness due to pregnancy, miscarriage, delivery or premature birth of the child, provided she submits a certificate for the same from the prescribed medical officer.[30]

An insured woman is entitled to receive benefits subject to the condition that she shall not work for any remuneration on those days for which maternity benefit is paid. In case an insured woman dies, then maternity benefits will be paid to her nominee or her legal representative for the duration if the child survives, and if the child also passes away then until the death of that child.[31]

This Act is a protective shield for the career of mothers as it protects insured women who receive maternity benefits from any dismissal, discharge, reduction in rank or any other type of punishment.[32]

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[27] S. 11A *Maternity Benefit Act, 1961*
[28] S. 1(4) *Employee State Insurance Act, 1948*
[29] S. 46 *Employee State Insurance Act, 1948*
[30] S. 46 *Employee State Insurance Act, 1948*
[31] S. 71 *Employee State Insurance Act, 1948*
[32] S. 73 *Employee State Insurance Act, 1948*

Impact of these Acts on Motherhood

These laws have both positive and negative impact on motherhood in India. The aim of these laws is to reduce the amount of labour from their employment for the woman. It provides well-being to mothers with extra rest periods, which helps to improve recovery of mothers and in child development, and also improves job security for women. These laws have economic benefits as well. In today's time, women empowerment and their participation in the market is very important. These laws act as a support system for women to become more independent and less dependent upon their husbands/spouses.[33]

However, there are negatives, that is less demand for women, as it is considered as a financial burden on the employer, which leads to discrimination while hiring mothers. Now let's discuss these impact in detail.

Increase in cost of woman labour and decrease in their demand in workforce: Team Lease Survey Services has conducted a survey and generated a report in the year 2020 which analyzed the impact of Maternity Benefit (Amendment) Act 2017. This report shows that in the year 2018-2019 around 12 million women lost their jobs, belonging to all the sectors. The reason turns out to be the Maternity Act 2017, as it increased the maternity benefit from 12 weeks to 26 weeks.[34]

After the amendment in the Act in 2017, employers need to bear more costs due to increased maternity leaves and benefits, such as providing crèche facilities. According to the employer's point of view, if a man and a woman have similar qualifications and experience, then a man is more likely to be hired as an employer does not have to bear additional costs apart from salary and statutory benefits.[35] But if the employer decides to hire a woman, then the employer has to bear additional cost of maternity leaves and other facilities.

Start-up companies and Small and Medium Size Enterprises (SMEs), avoid to hiring women workers and if hired are prohibited from availing maternity

[33] Team Lease (2020) *Maternity Benefit Amendment Act, 2017: Revisiting the Impact* Retrieved November 27, 2023 from file:///C:/Users/Library/Downloads/maternity2020-v06-20201103.original.pdf
[34] Team Lease (2020)
[35] Team Lease (2020)

leaves/benefits. There are findings which show that such employers harass pregnant women to leave their jobs because the employer has to bear the entire cost of maternity benefit.[36] The contention raised by employers is that they cannot afford to provide maternity benefits for a period of 26 weeks. Moreover, there is always a possibility that mothers do not join the office after the maternity leaves end. As per the survey report of Team Lease, around 56 percent of mothers do not join their services post their maternity leave.[37]

This Act has been implemented with the aim to protect mothers and in providing support to them but it is negatively affecting the job opportunities of women in general. The ultimate consequence of this Act is a decrease in job opportunities for women. Various studies show that women get discriminated against on the basis of gender. However, they are discriminated on the basis of being mothers. Being a mother is a double-edged sword.

Post-maternity challenges: According to a survey 30 percent of mothers have reduced salary or have got demoted. This actually amounts to a motherhood penalty. Moreover, even if mothers are able to retain the jobs with no reduction in their salary, around 12 percent of mothers are not provided with challenging work or responsibilities.[38] Reason behind this is the normative perspective of the employers. It is considered that mothers are incapable of taking up challenging work, as they would be less focused and dedicated towards the institutions. A pregnant woman is fully capable of performing her work even in the third trimester period of her pregnancy and even after resuming work shortly after childbirth.[39]

Childcare is the sole responsibility of a woman: Indirectly, the Act puts the responsibility completely on the woman. It seems like the legislature has completely ignored the concept of 'fatherhood'. The entire legislation fails to discuss the rights of fathers who can also have crèche facilities for keeping their

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[36] Team Lease (2020)
[37] Team Lease (2020)
[38] Team Lease (2020)
[39] Pillai, G. Reproductive Rights in India: The Search for a 'New' Constitutional Home, Hertford College, University of Oxford (2022) Retrieved November 28, 2023, from https://ora.ox.ac.uk/objects/uuid:51f1851f-27eb-47a6-897a-44471029e53b/download_file?file_format=application%2Fpdf&safe_filename=Pillai_2022_reproductive_rights_in.pdf&type_of_work=Thesis

child during the day and share the responsibility of childcare along with mothers. According to the Team Lease survey, 44 percent employers responded that giving paternity leaves to men will not reduce or prevent woman attrition caused by maternity.[40] Thus, fatherhood is also not considered as a solution to prevent female attrition caused due to motherhood. Reason being childcare has been considered as a sole responsibility of the mother, not just in India but globally.

Role of Judiciary

Judiciary has an important role to play in curing motherhood penalty. Time and again, Indian Supreme Court has given landmark judgments which reflect its stand against the pre-existing normative perspective of our Indian society that promotes motherhood penalty. In the landmark judgment of *Air India v. Nergesh Meerza*[41] where constitutional validity of Regulation 46 and 47 of Air India Employees Regulations was challenged on the ground that these regulations violate Article 14 and 15 of the Indian Constitution. According to the regulation, the job of any air hostess terminates on her first pregnancy. The Apex Court struck down these regulations as being arbitrary and unreasonable.

In the case of *K.T. Mini v. LIC*, Kerala High Court has recently given the judgment stating that, *"a mother shall not be compelled to choose her career and motherhood. State cannot discriminate against her Right to Dignity as a mother"*.[42] In this case, the mother named Mini claimed special leave so as to provide treatment to her second child who was ill. Her child was diagnosed with autism and for the treatment she has to travel to a different city. As her husband lives in Bahrain and LIC also has a branch there, later she requested for her transfer to the Baharin branch so that her husband can also take care of the child and they both can provide better treatment. LIC proceeded with disciplinary actions to remove her on the ground that the mother remained absent from her job as misconduct and unable to justify her continuation in service. The High Court set aside the action taken by LIC as arbitrary and discriminatory against the family responsibility.

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[40]Pillai (2022)
[41] (1981) 4 SCC 335
[42] K. T. Mini v. Life Insurance Corporation of India, W.P.(C)No. 22007 of 2012

Apart from protecting mothers from discrimination and ensuring the rights of mothers, the Indian judiciary criticized the normative perspective and gender stereotyping of our society. Justice Chandrachud in his concurring opinion in the case of *Navtej Singh Johar v. Union of India*[43] criticized the normative perspective of Courts by placing the burden of childcare and family planning on women, which amounts to reinforcement of stereotypical gender norms. Such an approach amounts to violation of a woman's constitutional right against discrimination on grounds of sex guaranteed under Article 15 of the Constitution.

In the case of *Neetu Bala v. Union of India*[44] Neetu was denied employment solely on the grounds of being pregnant. Neetu applied to the advertisement for Short Service Commission in Army Medical Corps. She cleared the exam and went for the fitness test. Thereupon, at the advanced stage her pregnancy was discovered. Later she was denied the appointment as a doctor in the Army Medical Corps. The High Court declared this practice as arbitrary and discrimination on the grounds of sex, as it violates Article 14 and 16 of the Constitution.

There are cases where mothers have lost their promotion. As in the case of *Bilju A.T. v. Union of India*[45] Delhi High Court examined the issue of loss of seniority. Where the petitioners, officers of CRPF, made a contention that they were not promoted as some of them were pregnant and declared medically unfit for mandatory training on promotion. However, they were not promoted for two consecutive years after that. The Court held that this denial of equal opportunity for promotion resulted in arbitrary and unequal treatment. The denial of their promotion and granting their male counterparts the promotion who are being juniors/subordinates to the petitioner is violative of Article 16 and 21 of the Constitution.[46]

[43] AIR 2018 SC 4231
[44] CWP No. 6414/2014 (P&H High Court, 1 February 2016)
[45] W.P.(C) 8744/2011; [LAWS(DLH)-2013-5-358]
[46] Bilju A.T. v. Union of India W.P.(C) 8744/2011; [LAWS(DLH)-2013-5-358]

Suggestions and Conclusion (with respect to laws):

The existing laws in India are protective, majorly taken by the Government to empower and promote women workforce in India. However, the burden imposed upon the employer is attributed to the motherhood penalty considering its rising negative impact on mothers at the workplace. Government should come up with certain schemes which promote the employer's willingness to implement maternity benefits more effectively. In the Government sector, Maternity Benefit Act is strictly followed and implemented, the implementation issue arises in private sectors. Government should make certain schemes which provide certain subsidy or tax benefits to the employers who are providing maternity benefits to their female employees. When an employer is also getting direct benefits for providing maternity benefits then it will be possible to implement the laws in India more effectively. Currently, the existing laws prompt the employers from not hiring women employees as it amounts to additional financial burden for them.

Existing laws in India put the whole responsibility of childcare on mothers. This indirectly affects her performance at work as for a new mother, responsibility of child, household work and office work lead to mental stress. The lack of support of family and spouse impacts the performance of women at work and her mental health. Being parents, it is the responsibility of both the mother and father to share the responsibility of childcare. The Maternity Benefit Act should incorporate paternity leave. Currently, in the government sector, as a part of leave rules, paternity leaves are applicable but not in the private sector. Incorporating paternity leaves and benefits under a Statue will be more impactful.

Addressing the motherhood penalty is essential for tackling economic inequality and fostering an inclusive work culture. Along with legislation, society and cultural norms needs to reshape and create attitudinal change by discarding stereotypes with respect to gender role and intersectionality.

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