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With Best Compliments From

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CONTENTS

Judicial Activism in India-An Evaluation

Shahnaz Noor*
Towkirul Nisa**

Abstract

Although the Executive, Legislature, and Judiciary exercise and perform their respective powers and responsibilities, but at times the judiciary is needed to play a wider role to preserve the constitutional and legal mechanism of the country. However there is a growing criticism that the judiciary is violating the principle of separation of powers.The article tries to make an evaluation of judicial Activism in India by exploring its historical background and various Supreme Court pronouncements. The paper further argueshow far the judicial activism facilitated the goals of equality, freedom and justice?

Key Words: Judicial Activism, Separation of Powers, Legislature, Executive, Judiciary

I. Introduction

Arthur Schlesinger Jr. historian and social critic introduced the word judicial activism for the first time in a January 1947 in fortune magazine article[1]. Black's law dictionary defines the word judicial activism as: "*a philosophy of judicial decision-making whereby judges allow their personal ideas about public policy, among other things, to shape their decisions*[2]." Followers of this thought are prone to finding constitutional violations and are inclined to disregard precedent[3].

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[1] Arthur Schlesinger, Jr. The supreme court, *Fortune, Jan.1947 at 202, 208*
[2] *Black's Law Dictionary* (9th edition, Thomson West 2004) 922
[3] Ayesha Dias, "Judicial Activism in the Development and Enforcement of Environmental Law: Some Comparative Insights from the Indian Experience," 6, *Oxford journals Oxford University Press*, 243-262 (1994).

However the mechanism of judicial review continues to remain the main foundation for judicial activism. Without this rule, the courts do not have the jurisdiction to review and annul acts of the legislature. This does not however mean that power of judicial review in itself will necessarily foster judicial activists. Indeed, the scholars have established that more factors need to be present for courts increased activity in this regard. The Judicial Activism in India is manifested mainly with reference to the review power under Article 13 which provides for the judicial review of alllegislations in India, past as well as future, as well as Article 32 and Article 226/227 of the Constitution of India[4]**.** Judicial activism acquired a humane face in India with the liberalizing of access to justice and granting of relief to disadvantaged groups through public interest litigation (PIL). A postal letter or even a postcard addressed to the court has been acknowledged for the purpose of commencing prerogative writs. The Supreme Court of India relaxed the traditional concept of locus standi by allowing public- spirited citizens to bring public the causes to the notice of court[5].

In recent years, the judiciary has pronounced many landmark judgments relating to unlawful imprisonment, environmental matters, health related problems, rights of children and women, minority affairs and other issues of human rights by interpretingthe procedural rules and various statutes. Judiciary has been not only taken dynamic part on the issue of civic rights, but also controlled the violation of the constitution. As custodian of the constitution, the judiciary acts in the interest of justice to perform its constitutional obligations. In doing so, the judiciary not only

[4] Pritam Ghosh, "Judicial Activism and Public Interest Litigation in India," 01, *Galgotias Journal of Legal Studies* 77-78 (2013).
[5] Parmanad Singh, "Promises and Perils of Public Interest Litigation in India," 52, 2, *Journal of the Indian Law Institute*, 172-188 (2010).

prevents the contravention of the provisions of constitution, but also provides necessary guidance to ensure its proper operation[6].

Part II of the article focuses on the evolution of judicial activism and its justification. Part III discusses various methods of judicial activism. Part IV deals with the recent developments in the area of judicial activism. Part V offers a conclusion and ends up with a couple of suggestions to maintain constitutional equilibrium.

II. Need for Judicial Activism and its Evolving Dimensions

The idea of judicial activism in the form of power of judicialreview had its operational genesis in the famous *William Marbury vs. James Madison*[7] case in 1803 where Justice Marshall proclaimed that "it is emphatically the province and duty of the judicial department to say what the law is". Gradually this concept has been crystallized through various judicial decisions[8]. Instead ofconfining itself to the traditional role of interpreter of the Constitution and scrutinizer of the policy making, the court itself has turned to Constitutional policy-making. In short, the courts have assumed an active role in shaping the society. Activist court serves an indispensable function in our democracy[9].The role of judiciary is diverse in nature. It has a massive duty to protect the constitutional rights of the citizens. The judiciary must not limit its activity to the traditional role of deciding disputes between the two parties, but must also contribute to the progress of the nation and creation of a social order where all citizens are provided with the basic necessities of a civilized life, viz. employment, housing,

[6] Ramesh Kumar and Narendra joon, "Origin of Judicial Review against Administrative Action and Legislative Action," 04, *International Research Journal of Commerce , Arts and Science*, 812-846 (2013).
[7] 5 U.S. 137 1803
[8] William E Nelson, ""The Province of the Judiciary," 37, *John Marshall law Review* 325(2003)
[9] Kenneth M Holland, *Judicial Activism in Comparative Perspective 12-17(St. Martin's Press,New York,1991*).

medical care, education etc. as this alone will win for it the respect of the people of the country.

Judicial activism is the product of failure or inaction of the executive and legislative branch of government. It is believed that the inaction of the executive forced the judiciary to step even in those areas, which are not conventionally assigned to the judiciary. The executive is there to implement the laws in order to ensure the good governance in the society[10]. However, the performance of the executive has been hopeless as far as implementation process is concerned. . It is also impossible for the legislature to foresee all the eventualities and future contingencies and enact any law, so judiciary steps in to scrutinize and fill up the gaps. When any of the three organs of the government becomes inactive, the whole system of administration collapses and the objective of general welfare lose its relevance. It is worth mentioning that the judiciary had to step in those areas which do not fall under its jurisdiction[11]. Judicial activism is also the result of socio-economic changes that have occurred in the country after independence. In light of socio-economic changes, the judiciary's activist role is critical in addressing the concerns of poverty and exploitation that the courts encounter on a daily basis. The governing system must evolve in response to changing societal needs[12]. The judiciary must also comprehend, redefine, and adapt its duty in light of the socioeconomic objective realities that exist in society. Thejudiciary is regarded as a social transformation agency, it must

[10] B Nagarathnam Reddy, "Judicial Activism Vs Judicial Overreach in India"07 *Global Journal for Research Analysis* 82-84(2018).
[11] Mamta Kachwaha, *"The Judiciary in India: Determinants of Its Independence and Impartiality"133-135 Centre for the Independence of Judges and Lawyers, Switzerland (1998)*: Centre for the Independence of Judges and Lawyers).
[12] Vasant Shamrao Deshpande, "Judicial Review-Expansion and Self-Restraint," 15, 4, *Journal of the Indian Law Institute*, 531-552 (1973).

handle new challenges and issues produced by the changing socio-economic backdrop[13].

The evolution of the theory of judicial activism in India can be traced back to the late 1960s or early 1970s. In 1967, in I.C Golaknath and Ors vs. State of Punjab[14] the Supreme Court in a thin six against five majority held that the Parliament could not "take away or abridge" the fundamental rights by amending the Constitution. To overcome the effect of this judgment, the Parliament passed 24th amendment, 1971. This amendment was challenged in the Kesavananda Bharati and Ors vs. State of Kerala[15] case. The apex Court held that Parliament could amend every constitutional provision without damaging the basic structureof the Constitution. In 1975, in Indira Nehru Gandhi vs. Shri Raj Narain[16]the Supreme Court struck down the 39th constitutionalamendment on the ground that it was complete refusal of right to equality preserved in the Article 14 of the Constitution. It was held that free and fair election being the essential feature of democracy could not be violated. This decision endorsed the basic structure concept. During this time when Mrs Indira Gandhi was the Prime Minister of India, she attempted to introduce progressive socialisticmeasures in order to implement her favorite slogan "garibi hatao"(remove poverty) by abolishing Privy Purses and privileges given to the erstwhile Rajas and princes of the princely states ofpre -independent India, and nationalizing the 14 major banks so as to serve the cause of the poorer sections of the society in a more meaningful manner[17]. Rustom Cavasjee Cooper v. Union of India[18]

[13] Arup Ghosh, "Indian Judiciary as a Catalystic Agent of Social Change," 02, *Journal of Humanities and Social Sciences Studies*, 80-85 (2020).
[14] AIR 1967 SC 1643
[15] AIR 1973 SC 1461
[16] AIR 1975 SC 2299
[17] Vijay Prashad, "Emergency Assessments," 24, *Social Scientist*, 36-68 (1996).
[18] AIR 1970 SC 564

was a landmark judgment where the Constitutional Validity of bank nationalization by was challenged. While declaring the nationalization to be invalid, Supreme Court by a majority of 10:1 observed that the nationalization of banks impaired the right to compensation under Article 31(2) of the Constitution of India. In Madhav Jivaji Rao Scindia v Union of India[19],the court invalidated government's efforts to abolish the titles, privileges, and privypurses of the former rulers of the princely states[20].The gradual movement towards judicial activism can be discerned from 1970's in different constitutional decisions delivered by the Supreme Court, one of the most important among them being the Kesavananda Bharati and Ors vs. State of Kerala[21] the Court approved its interpretative method on the extent of parliament's amending power under Article 368 of the constitution of India[22]. Extension of judicial authority was witnessed in the post emergency phase, which saw the growth of Public Interest Litigations (PIL), wherein, the court reinterpreted different provisions relating to fundamental rights liberally, in order to expand the rights of the people, notably those of the disadvantaged sections of the society. The access to courts was smoothened by relaxing the technical rules of locus standi, along with other procedural and institutional innovations[23]. The Court has been pro-active in a plenty of cases, thereby, adequately ensuring dynamism of the Constitution. When one looks at post emergency activism, the Supreme Court took advantage of several opportunities to enlarge the rights of the people through liberal interpretation of

[19] AIR 1971 SC 530
[20] Bhagwan D Dua, "A Study in Executive-Judicial Conflict: The Indian Case," 23, *Asian Survey*, 463-483 (1983).
[21] AIR 1973 SC 1461
[22] Meera Mathew, "Evolving Dimensions of Judiciary in India" 04 Christ University Law Journal 39-54(2015).
[23] Sarbani Sen, "Public Interest Litigation in India: Implications for Law and Development" 08 Mahanirban Calcutta Research Group 7-8(2012)).

different constitutional provisions. The Supreme Court departed from its earlier strategy and gave expansive meanings to the words life, liberty and procedure established by law as contained in Article 21 of the Constitution of India to protect the rights ofmillions[24]. The end of the seventies has been a critical point in the history of judicial activism in India when the Supreme Court started granting vibrant growth to Article 21. The broad and liberal interpretation of Article 21 has even received a legislative approval. The right to education, right to go abroad, right to privacy, the right to legal aid, right to speedy justice, right against custodial violence, safe working conditions and medical aid to the workers, pollution free water and air, right of the citizens to food, clothing and shelter, right of every child to full development, the access to roads etc are the landmark decisions of the Supreme Court in the process of interpretation of Article 21. It was anexpansion of the rights, which didn't find a specific mention under Part III of the Constitution of India[25]. A good number of directive principles of the state policy which were considered to be non justifiable have been made enforceable by the courts through the liberal interpretation of the Article 21[26].

- The theory of judicial activism initially acquired momentum in the case where the Apex Court interpreted 'the due process clause' in Article 21 in place of 'procedure established by law 'in order to bypass the absolutism of the Executive and its interference with individual freedom. *MANEKA GANDHI VS. UNION OF*

[24] Dr.Gyanendra Kumar Sahu, "An Overview of Article 21 of the Indian Constitution" 03 *International Journal of Law* 98-99(2017).
[25] Kavita Sinha, "Expanding Horizon of Article 21 Vis-a-Vis Judicial Activism," 04, *International Journal of Law Management & Humanities*, 106-120 (2021).
[26] Paul P Craig and SL Deshpande, "Rights, Autonomy and Process: Public Interest Litigation in India," 9, *Oxford Journal of Legal Studies.*, 356 (1989).

INDIA[27] was a land mark example of amplifying the law to strengthen the fundamental rights. In this case, the legislation governing grant of passport was interpreted in a manner so as to enhance the rights of personal freedom and personal liberty. In course of time, the PILs carried on with the task of unearthing many scams, providing justice to the citizens and also to enhance their rights[28]**.**The aim of PIL is to provide the common people an access to the courts to obtain legal redress. It has become an important instrument of social change and for maintainingthe Rule of law and accelerating the balance between law and justice. The original purpose of PILs has been to make justice accessible to the poor and the marginalized.

- In *MINERVA MILLS LTD. & ORS VS. UNION OF INDIA*[29], the Supreme Court highlighted the position ofPart IV of the Constitution and it was held that Part-III of the Constitution incorporated fundamental rights and Part IV the directive principle of the State policy. The court observed that the Constitution is founded on the bed rock ofthe balance between Part-III and Part IV of the Constitution. To give absolute primacy to one over other is to disturb the harmony of the Constitution. This harmony and balance between fundamental right and directive principle is an essential feature of the basic structure of the Constitution[30].

[27] AIR 1978 SC 597

[28] Prabhash dale Pravesh dalei, *"Judicial Activism in India: Its Beneficial Effects and Consequences"01 Journal of Internationa Lacademic Research for Multidisciplinary 67(2013*).

[29] AIR 1980 SC 1789

[30] Berihun Adugna Gebeye, "The Potential of Directive Principles of State Policy for the Judicial Enforcement of Socio-Economic Rights: A Comparative Study of Ethiopia and India," 10, 5, *Vienna Journal on International Constitutional Law*, 63 (2016).

- In *BANDHUA MUKTI MORCHA VS UNION OF INDIA*[31], the court focused on the problem of bonded labour .In that case, the Supreme Court made an order giving various directions for identifying, releasing, and rehabilitating bonded labourers, ensuring payment of the minimum wage, the observance of labor laws, provision of wholesome drinking water and the setting up of dust sucking machines in the stone quarries. The Supreme Court also set up a monitoring agency to continuously monitor implementation of those directions[32].

- In *SHYAM NARAYAN CHOUKSEY V. UNION OF INDIA*[33] supreme court with a three- judge bench comprising ofchief justice Deepak Mishra, justice khanwilkar and justice DY Chandrachud has overruled its previous judgment[34] which made it mandatory in movie halls to play the nationalanthem before the start of every feature film and for everyone inside to stand in honor of the national anthem in order to instill a sense of dedicated patriotism andnationalism. Even though the Supreme Court has made it voluntary to play the national anthem in the present ruling, but still it has made it essential to stand in honor of it.

- In *ARJUN GOPAL V. UNION OF INDIA*[35] the court while banning certain categories of firecrackers and directing regulation of the remaining, it was inter-alia directed that on Diwali days or other festivals, fire crackers will be used

[31] AIR 1984 SC 802
[32] Clark D Cunningham, ""Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience"29 Journal of the Indian Law Institute 494-523 (1987,"
[33] AIR 2018 SC 357
[34] 2017 1 SCC 421
[35] 2019 13 SCC 523

strictly between 8 p.m. to 10 p.m. only with different timings for some other festivals.

- In *BOARD OF CONTROL FOR CRICKET* V. *CRICKET ASSOCIATION OF BIHAR*[36], a committee was setup by the apex court after allegations of corruption and maladministration in the board. The committee, headed by a retired Supreme Court judge, Justice R.M. Lodha, recommended certain reforms including a change in the structure of the board. This direction of the court was flawed as the board is a private body which functions through its own by-laws. These recommendations were treated as Judicial overreach as BCCI is an independent body not controlled by any state or central govt, so the Lodha committee has no authority to declare such recommendations.

III. Methods of Judicial Activism and the Constitution

The judiciary performs a crucial role under the norms of constitutionalism, as it has been given the function to interpret the laws framed by the legislature and direct the executive in cases of failure of execution of laws. Thereby, there is no doubt that the judiciary deviates from its traditional way to an activist form for participating actively with the changing crises of the society. Judicial activism is exercised mainly through the following methods[37].

1. Judicial Review

Unlike the US Constitution, the Constitution of India expressly provides for judicial review under Article 13, clause (1), which

[36] 2016 8 SCC 353

[37] J Clifford Wallace, "Globalization of Judicial Education," 28, *Yale Journal of International Law*, 355 (2003).

says that all laws that were in force in the territory of India immediately before the adoption of the Constitution, in so far as they are inconsistent with the provisions containing the fundamental rights, shall, to the extent of such inconsistency, be void. Clause (2) of that article further says that the states shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void. The Constitution also divides the legislative power between the centre and the states and forbids either of them to encroach upon the power of the other. The courts decide whether a legislature or an executive has acted in excess of its powers or in contradiction to any of the constitutional restrictions on its power[38]. According to Dr. Ambedkar, the provisions for judicial review, in particular the writ jurisdiction that gave quick relief against the abridgment of fundamental rights, constituted the heart of the Constitution; the very soul of it[39].

2. Public Interest Litigation

Judicial activism made its way in India through the initiation of public interest litigation. Generally, before the court takes up a matter for adjudication, it must be satisfied that the person who approaches it has sufficient interest in the matter. This is intended to avoid unnecessary litigation, implying that no one except the affected person can approach a court for a legal remedy. Public Interest Litigation has introduced a new dimension regarding judiciary's involvement in public administration. The sanctity of locus standi and the procedural complexities are totally side-

[38] V Nageswara Rao and GB Reddy, "Doctrine of Judicial Review and Tribunals: Speed Breakers Ahead," 39, 2/4, *Journal of the Indian Law Institute*, 411-423 (1997).
[39] Shyam Prakash Pandey, "Constitutional Provision of Judicial Review in India: An Evaluation " 04, *Asian Journal of Advances in Research*, 1-11 (2020).

tracked in the causes brought before the courts through PlL[40]. In the beginning, the application of PIL was confined only to improving the lot of the disadvantaged sections of the society who by reason of their poverty and ignorance were not in a position to seek justice from the courts and, therefore, any member of the public was permitted to maintain an application on their behalf. In fact, in India, Public Interest Litigants has largely assisted thecourts in playing a proactive role and have enabled the courts to go into various issues of exploitation of the poor and the needy, child education, environmental pollution, mass injuries, factory pollution, drinking water scarcity and the right to food and other basic needs, preservation of forests, health of women and children, workers' safety in factories, consumer justice, etc[41].

Public Interest Litigation is working as an imperative instrument of social change. It is working for the welfare of each segment of society. PIL has been utilized as a procedure to battle the atrocities prevailing in society. It's an institutional activity towards the welfare of the needy class of the general public.

Access to justice is a fundamental aspect of rule of law. If the justice is not accessible to all, establishment of the rule of law isnot possible. The individuals fail to reach justice system due to various reasons including lack of basic necessities, illiteracy, poverty, discrimination, privacy, poor infrastructure of the justice system, etc. The Supreme Court of India has recognized in many landmark judgments that access to justice is a fundamental right. Indian Judiciary has played an active role in ensuring access to justice for the indigent persons, members belonging to socially and

[40] Thelton Henderson, "Social Change, Judicial Activism, and the Public Interest Lawyer," 12, *Washington. University Journal of Law & Policy*, 33 (2003).
[41] M. Prakriti, "Role of Judiciary in Strenthening Public Interest Litigation," 3, 4, *International Journal of Advance Research and Innovative Ideas in Education*, 34 (2017).

educationally backward classes, victims of human trafficking or victims of beggar, transgender, etc[42]. Since Independence, the Courts in India have been adopting innovative ways for redressing the grievances of the disadvantaged persons. In many cases, the Supreme Court exercised its epistolary jurisdiction and took suo motto actions on mere postal letters disclosing the human rights violations in society. Human rights violations, which published in the newspapers, were taken into judicial consideration. The court entertains the petitions which are being filed by the public spirited persons in the public interest. By doing so, the superior courts have liberated themselves from the shackles of the principle of locus standi and given the birth to the Public interest litigation in India[43].

In Hussainara Khatoon & Ors vs. Home Secretary, State of Bihar[44], the PIL was filed by an advocate on the basis of the news item published in the Indian Express, highlighting the plight of thousands of under trial prisoners languishing in various jails in Bihar. These proceeding led to the release of more than 40,000 under trial prisoners. Right to speedy justice emerged as a basic fundamental right which had been denied to these prisoners. The same set pattern was adopted in subsequent cases[45].

Article 13, 32 and 226 of the Indian Constitution give the power of judicial review to the higher judiciary to declare, any legislative, executive or administrative action, void if it is in contravention

[42] Santosh Kumar Pandey, "Judicial Activism and Its Relevancy in India," 03, *International Journal of Advanced Research and Development*, 788-789 (2018).
[43] PN Bhagwati and CJ Dias, "The Judiciary in India: A Hunger and Thirst for Justice," 5, *National University of Juridical Sciences* 171 (2012).
[44] AIR 1979 SC 1369
[45] Arvind Verma, "Taking Justice Outside the Courts: Judicial Activism in India," 40, 2, *The Howard Journal of Criminal Justice*, 148-165 (2001).

with the Constitution. The power of judicial review is a basic structure of the Constitution of india[46]**.**

Article 13: The justifiability of fundamental rights and the source of "Judicial Review" can be found under Art. 13 which are regarded as a key provision as it gives teeth to the fundamental rights cannot be infringed by the state either by enacting a law to that effect or through an administrative action. It declares that all pre-constitution laws shall be void to the extent of their inconsistency with the fundamental rights and expressly provides that the State shall not make any law which takes away or abridges the fundamental rights and a law contravening a fundamental right is, to the extent of such contravention is void[47]. Essentially, it is crucial provision dealing with the post-constitution laws and if any such law violates any fundamental right, it becomes void-ab-initio. In effect, it makes the constitutional courts of India, the sole guardian, protector, and the interpreter of the fundamental rights. Itis the function of these courts to access individual laws against the fundamental rights to ensure that no such law infringes these rights[48].

Article 32: Article 32 of the Constitution of India gives right to every individual to move directly the Supreme Court of India for the enforcement of his or her fundamental right. Article 32 confers power on the Supreme Court to issue any order or writ for the enforcement of any of the fundamental rights. The Supreme Court held that the power of the Supreme Court under Article 32 is an integral part of the basic structure of the Indian Constitution "because it is meaningless to confer fundamental rights without

[46] Shyam Prakash Pandey, "Constitutional Provision of Judicial Review in India: An Evaluation," 04, *Asian Journal of Advances in Research*, 1-11 (2020).
[47] P Sharan, "Constitution of India and Judicial Review," 39, 4, *The Indian Journal of Political Science*, 526-537 (1978).
[48] MP Jain, "Judicial Review of Legislation," 16, *Journal of the Indian Law Institute*, 731-738 (1974).

providing an effective remedy for their enforcement, if and when they are violated." It cannot be suspended even during emergency[49]. Article 32 is called as the right to constitutional remedies and confers express powers on the Supreme Court tocarry out the obligations declared under Article 13, that is, to act asa protector of fundamental rights. It constitutes one of the major constitutional safeguards against the state tyranny and can be said to confer ample scope for judicial activism on Supreme Courtwhich is evident from a catena of pronouncements made by it while giving a contemporary meaning to the fundamental rights and thereby creating new rights and obligations from time to time[50].

Article 226: The article is an essential aspect of Constitution of India since it confers a writ jurisdiction on High courts as well, with a much wider scope as compared to what is exercised by the Supreme Court under Articles 32. It provides the judiciary with enormous power to act in an activist manner[51].

Article 131: Article 131 takes care of settling intergovernmental disputes at the highest judicial level. Under this provision, the Supreme Court has exclusive original jurisdiction in any dispute between the center and the state, or the center and state on one side and a state on the other side, or between two or more States. A dispute to be justifiable under this article should involve a question of law or fact on which the existence or extent of legal rightdepends. That is to say that the dispute must involve assertion or vindication of a legal right of Government of India or a state.

[49] R Shunmugasundaram, "Judicial Activism and Overreach in India," 2007, *Amicus Curiae*, 22-28 (2007).

[50] Parmar Dr.Amitkumar Ishwarhai, "Jurisdiction and Power of the Supreme Court of India under Indian Constitution," 3, *Journal of international academic research for multidisciplinary*, 213-214 (2015).

[51] Corey Rayburn Yung, "Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts," 105, *Northwestern University Law Review.*, 1 (2011).

Questions of political nature not involving any legal aspect are excluded from the Court‘s view. Supreme Court‘s jurisdiction under this provision is limited by two fold fetters, that is, as to the parties and as to the subject matter[52].

Article 132: Under this provision, an appeal lies to the Supreme Court from any judgment, decree or final order, whether civil, criminal or other proceeding, if a high court of it certifies that the case involves a substantial question of law as to the interpretation of the Constitution. On obtaining such a certificate any party in the case may appeal to the Supreme Court on the ground that any such question has been wrongly decided. However, only those questions can be agitated for which the high court has granted leave unless permitted by the Supreme Court. A very broad power is thus conferred on the Supreme Court to hear appeals in constitutional matters[53].

Article 133: Civil Appellate Jurisdiction. Under this provision, an appeal lies to the Supreme Court from any judgment, decree or final orders in a civil proceeding of a high court if it certifies that the case involves a substantial question of law of general importance and that in the opinion of the high court, the saidquestion needs to be decided by the Supreme Court.

Article 134: Criminal Appellate Jurisdiction. This provision regulates the criminal appeals to the Supreme Court and is so designed as to permit only important criminal cases to come before it. It confers a limited criminal jurisdiction on the Supreme Court as the court hears appeals only in exceptional criminal cases where justice demands the intervention of the apex court.

[52] Autar Krishan Koul and Autar Krishan Kaul, "Article 131 of the Indian Constitution: Some Observations," 13, 1, *Journal of the Indian Law Institute.*, 121-126 (1971).
[53] KP Singh, "The Jurisdiction of the Supreme Court of India (Evolution of Provisions Relating to It in the Constituent Assembly of India)," 25, 3/4, *The Indian Journal of Political Science*, 192-199 (1964).

Article 136: Power to grant special leave to appeal. Over and above all the constitutional provisions expressly declaring and regulating the power of the Supreme Court in various capacities, this provision empowers the Supreme Court to grant, in its discretion, special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.It however, excludes from its scope any judgment or order passed by a tribunal functioning under a law relating to the Armed Forces. An outstanding feature of this provision is that it empowers the Supreme Court to hear the appeals not only from courts but also from tribunals in any cause ormatter[54].

Article 141: The law declared by the Supreme Court shall be binding on all courts within the territory of India. The main object of doctrine of precedent is that the law of the land should be clear, certain and consistent so that the Courts shall follow it without any hesitation.

In Union of India v. Raghubir Singh[55], the Supreme Court held that "*the doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of daily affairs and, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a Court."*

Article 142: Power to do complete justice. The Supreme Court, in exercise of the power conferred under this provision, is entitled to

[54] Oscar Vilhena And Frans Viljoen Upendra Baxi *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Afarica*, 123-128: Pretoria university law press plup, (2013).
[55] AIR 1989 SC 1933

pass any decree, or make any orders, as is necessary for doing complete justice in any cause or matter pending before it[56].

The Bhopal Gas Tragedy case was one of the chief instances where the Supreme Court had exercised the powers mentioned under Article 142. In *Union Carbide Corporation v. Union of India*[57], a gas leak took place in Bhopal at the Union Carbide India due to poor maintenance of gas chambers, leading to death of nearly thousands of people. The harmful effect was from methylisocyanate gas.
The court ordered to award compensation to the victims and placed itself in a position above to the Parliamentary laws seeking that such prohibitions and limitations, ipso facto, act as provisions highlighted under Article 142. There was no specific rule which explained the usage of Article 142 by the Supreme Court to achieve complete justice[58].

IV. Recent Milestones Achieved by the Process of Judicial Activism in India

- Right to Privacy-Aadhar Judgment

In Justice *K.S. puttuswamy V. Union of India and others,* [59]

The Supreme Court has declared that the Right to Privacy is protected as a fundamental right under Articles 14, 19 and 21 ofthe Constitution of India.

[56] Virendra Kumar, "Judicial Legislation under Article 142 of the Constitution: A Pragmatic Prompt for Proper Legislation by Parliament," 54, *Journal of the Indian Law Institute*, 364-381 (2012).
[57] AIR 1992 SC 248
[58] Manoj Kumar Sinha, "The Bhopal Gas Leak Disaster Case: Union Carbide Corporation Etc V Union of India Etc," 1, 1, *Asia Pacific Law Review*, 118-125 (1992).
[59] AIR 2017 SC 4161

The nine-bench comprising of J.S Kheher, J.Chelameswar, S.A.Bobde, R.K. Agarwal, R.F.Nariman, A.M Sapre, Dr.D.Y.Chandrachud,S.K.Kaul and S.A.Nazeer uanimously held that "*the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by part iii of the constitution".* It explicitly overruled previous judgments of the supreme court in *Kharak Singh vs State of UP*[60] *And M.P Sharma vs* Satish Chandra[61] which had held that there is no fundamental right to privacy under the constitution of India[62].

- Passive Euthanasia – Making of Living Wills

In *Common Cause VS. Union of India,*[63] the 5 judge constitution bench while recognizing passive euthanasia, has allowed "advance directive or living will", by which patients can spell out whether treatment can be withdrawn if they fall terminally ill or are incompetent to express their opinion.

"An individual's right to refuse medical treatment is unconditional. "Neither the law nor the constitution can compel a competent and capable individual to divulge grounds for refusing medicaltreatment, nor can such a rejection be subject to the supervision of an outside institution," declared Justice D.Y. Chandrachud. Right to life includes right to die with dignity. A person cannot be forced to live on support of ventilator. Keeping a patient alive by artificial

[60] AIR 1963 SC 1295
[61] AIR 1954 SC 300
[62] Aswathy Elsa Varghese and Mr Kuljit Singh, "Judicial Law Making in India: Development since Post-Emergency Period" 12 Journal of Xi'an University of Architecture & Technology 726-727(2020).
[63] AIR 2014 SC 1556

means against his/her wishes is an assault on his/her body," the petition said[64].

- Right to Marriage – Fundamental Right

In *Shakti Vahini V. Union of India and others*,[65] the Supreme Court held that the consent of the family or community is not necessary once the two adult individuals agree to enter into wedlock. It is their fundamental right to marry of their own choice.

The Supreme Court further opined that *it has to be sublimely borne in mind that when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution*[66].

- NCMEI has jurisdiction to grant minority status to institutions

In *sisters of St. Joseph of Cluny V. State of West Bengal*,[67] the Supreme Court declared that National Commission for Minority Educational institutions (NCMEI) has original jurisdiction to determine which institution should be granted minority status[68].

- Women's Entry to Sabarimala Temple

In *Indian Young Lawyers Association V. State of Kerala*,[69] the court propounded by a majority of 4:1 that the exclusion of women from the Sabarimala shrine is unconstitutional and the section 3(b)

[64] Tejas Motwani, "The Debate on Euthanasia in India-in a Nutshell"08 *International Journal for Research in Applied Science & Engineering Technology* 733 (2020).
[65] AIR 2018 SC 1601
[66] Arjun george, "Activist Judiciary and Transformative Constitution," 2, *international journal of law and management and humanities.*, 3-14 (2019).
[67] 2018 6 SCC 772
[68] Surbhi Singhania, *"Judicial Activism in India"04 International Journal of Law 238-242(2018*).
[69] AIR 2018 SC 1690

of the Kerala Hindu Places of Worship (Authorization of Entry) Act 1965 is unconstitutional. The above-mentioned section statesas follows:

a) *"The classes of persons mentioned here under shall not beentitled to offer worship in any place of public worship or bath in or use of water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situated withinor outside precincts thereof, or any sacred place including a hill orhill lock, or a road, street or pathways which is requisite of obtaining access to place of public worship*

(b) Women at such time during which they are not by custom and usage allowed to enter place of public worship"This rule is hit by Article 15(1) and Article 25(1) of Constitution of India as it discriminates against women on the basis of their sex only. This kind of discrimination on the basis of sex violates the fundamentalsof Constitution[70].

- Decriminalization of Homosexuality

In Navtej Johar V. Union of India[71]the Supreme Court of India unanimously held that Section 377 of the Indian Penal Code, 1860, which criminalized 'carnal intercourse against the order of nature', was unconstitutional in so far as it criminalized consensual sexual conduct between adults of the same sex. The petition, filed by dancer Navtej Singh Johar, challenged Section 377 of the Penal Code on the ground that it violated the constitutional rights to privacy, freedom of expression, equality, human dignity and protection from discrimination. The Court reasoned thatdiscrimination on the basis of sexual orientation was violative of

[70] Soumalya Ghosh, "Supreme Court on Women's Right to Religious Freedom in India: From Shirur Mutt to Sabarimala" 10 Indian Journal of Law and Justice 162(2019).
[71] AIR 2018 SC 4321

the right to equality, that criminalizing consensual sex between adults in private was violative of the right to privacy, that sexual orientation forms an inherent part of self-identity and denying the same would be violative of the right to life, and that fundamental rights cannot be denied on the ground that they only affect a minuscule section of the population[72].

- Decriminalization of Adultery

Joseph Shine VS. Union of India[73], In December 2017, Joseph Shine filed a petition challenging the validity of Section 497. A three-judge bench, headed by the then-Chief Justice of India, Dipak Misra, had referred the petition to a five-judge Constitution Bench, admitting that the law does seem to be archaic. While hearing the matter previously, the court had observed that the law seemed to be based on certain "societal presumptions".

The court ruled that:-

1. *Section 497 is Archaic and is Constitutionally Invalid*

In Joseph shine vs. union of India[74] it was held that Section 497 deprives a woman of her autonomy, dignity and privacy. It compounds the encroachment on her right to life and personal liberty by adopting a notion of marriage which subverts true equality. Equality is subverted by lending the sanctions of thepenal code to a gender-based approach to the relationship of a man and a woman. Sexual autonomy is a value which is an integral part and falls within the ambit of personal liberty under Article 21 of the Indian Constitution. Along with other things, it is it is very

[72] Pawan Renu, "Homosexuality with Special Refrence Case: Navtej Singh Johar V. Union of India," 3, *International Journal of Trend in Scientific Research and Development (IJTSRD)*, 16-19 (2019).
[73] AIR 2018 SC 1676
[74] AIR 2018 SC 1676

important to recognize the expectations one has from a relationship and to acknowledge them. One of these expectations is that each will provide the same element of companionship and respect of choices. Respect for sexual autonomy is established only when both the spouses treat each other with equality and dignity.

This section is a denial of substantive equality in that it reinforces the notion that women are unequal participants in a marriage; incapable of freely consenting to a sexual act in a legal order which regards them as the sexual property of their spouse.

In this way, it is violative of Article 14. It is based on gender stereotypes and violates the non-discrimination clause of Article15.

2. SECTION 497 TO BE NO LONGER A CRIMINAL OFFENCE.

A crime is something which is committed on the society as a whole, while adultery is more of a personal issue .Treating adulteryas a crime would tantamount to the State entering into a real private realm. Adultery doesn't fit into the concept of the crime as that would otherwise invade the extreme privacy sphere of a marriage. However, it continues to stand as a civil wrong and a ground for divorce. What happens after adultery is committed should be left to the husband and wife to decide as it is something which should only involve their personal discretion. It is difficult for the court to construe the different circumstances which have lead them to this stage. Hence, declaring adultery as a crime would somehow creep injustice into the system.

3. A Husband is not the Master of His Wife

The judgment places reliance on the fact that women should not be considered as the property of their husbands or fathers, for that matter, anymore. They have an equal status in society and should be given every opportunity to put their stance forward.

4. Section 497 is Arbitrary

Throughout the judgment, it was pointed out that the nature of Section 497 is arbitrary. For one, it doesn't preserve the ''sanctity of marriage', for a husband can give consent to let his wife have an affair with someone else. Rather, the judgment points out, it serves to preserve the 'proprietary rights' a husband has over his wife. Moreover, the wife cannot file a complaint against her husband or his lover. There are no provisions to deal with a married man having an affair with an unmarried woman or a widow[75].

V. Conclusion and Suggestions

The role of the judiciary, as was previously assumed, has been to interpret and declare the law as it used to be and not to make it. However, in a rapidly changing and ever-growing society, it is up to the court to shape the law to ensure its relevance in a changing environment because the amending process is highly time consuming and generates political controversies too. Consequently the judiciary plays a significant role in the progress of a nation. While deciding the matter, the judges have to infuse new life into the law whenever the occasion demands. In this sense, the judiciary can actively transform things in a new direction without changing the letter of the law and this active participation is known as

[75] Shyam Prakash Pandey, "Changing Dimensions of Institutions of Marriage in India: A Socio-Legal Evaluation," 04, *International journal of law management & humanities*, 58-72 (2021).

judicial activism, which has arisen mostly as a result of the failures on the part of executive and legislature. The failure on the part of these two branches of the government have mainly paved the way for an activist role of judiciary to achieve the ends of justice. Judicial activism has also gained momentum in the process ofprotection of human rights.

Whatever may be the factors warranting an activist part on the part of the judiciary, it needed to be ensured that the power is exercised with due restraint so that it is not labeled as judicial adventurism or judicial overreach. To maintain the true spirit of the idea of judicial activism and to keep it beyond the pale of controversy, it is suggested that in the area of public interest litigations which has emerged as an important tool in its expansion, definite guidelines need to be spelled out by the Supreme Court itself. Besides, it should be resorted to sparingly in areas like violation of human rights, protection of environment, issues of corruption and other pressing problems facing the society.

The role of judiciary has always been very important in providing protection to the citizens against the Human rights violations. In Vishaka & Ors. vs. State of Rajasthan & Ors[76] Supreme Court said that "gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized as a basic human right

The Supreme Court in *People's Union for Democratic Rights vs.Union of India*[77] held that public Interest litigation is different from the traditional adversarial justice system. The court said that

[76] AIR 1997 SC 3011
[77] AIR 1982 SC 1473

Public interest litigation is intended to promote public interest. Public interest litigation has been invented to bring justice to poor and socially or economically disadvantaged sections of the society.

In another case of *Sheela Barse vs. State of Maharashtra*[78] a letter alleging custodial violence of women prisoners in jail was addressed to the Supreme Court. The letter was written by a journalist who had interviewed some women prisoners in jail. Treating the letter as a writ petition, the Supreme Court took cognizance and issued directions to the concerned authority..

[78] AIR 1983 SC 378

Impact of COVID-19 on Legal Practice: A Critical Evaluation with a special reference to India

Mir Farhatul Aen*

Abstract

Law is universally described as a profession par excellence. Its excellence lies not in the monetary benefits it brings but in the ethics which governs those who belong to this profession. The value of conformity to the ethical standards is not judged only in terms of money but other considerations are no less important. Recently the profession of law has suffered a serious setback due to the outbreak of Covid-19 pandemic despite the judicial response to it. The primary response has been to ensure continuity of essential judicial services while safeguarding the health and safety of those responsible for providing the services and other stakeholders like lawyers and the litigants. The sudden and unexpected onslaught of the Covid-19 has put the world into turmoil. It has caused lockdowns in all states around the world and has caused disruption in all facets of life for an indefinite period. The Indian legal landscape has also been disturbed and severely impacted by this pandemic. With the social distancing norms and the entire nation under lockdown, law firms in India and the Indianjudicial system had to close their doors to the general public. Nevertheless, considering that a complete shutdown of the Indian justice system is unfavorable, the law firms have adopted work from home policies, whereas, the judicial administrators have embraced technology by conducting hearings through video conferencing. The impact of Corona pandemic has been unprecedented and unimaginable, and on many counts, it has been the biggest human tragedy in recent history. Everyone stands affected by it. The advocates are no exemption to Corona phenomenon. The impact of Covid-19 has been felt by one and all and the advocates are not an exception to it. Several of them found it difficult to articulate and share their helplessness and susceptibility. The article focuses on the regulatory framework governing the profession of Law in India and impact of global legal regulations in Indian scenario. The article further seeks to study and analyze the impact of Covid-19 on the practice of junior lawyers in India.

Key Words: Covid-19, Ethics, Legal education, Lawyer

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I Introduction

Everything in the contemporary world is dynamic, be it be the advancement in technology or the social condition. All the factors are constantly changing and evolving. It is, therefore, impossible that the way people work would remain static. Every profession in the world is diversifying and new professions are cropping up. Today new opportunities are opening up for the new generation. The Legal Profession is one of the oldest professions known to the mankind. Legal Profession is an acclaimed profession which emerged to build fairness and impartiality in the system of administration of justice. While the Legal Profession may have been articulated with innate characteristics and influences of respective societies they have been developed in, it is believed with no skepticism that the Legal Profession of each society follows some universally adhered principles. These principles are regarded as "commandments" for Legal Professionals in all societies irrespective of their cultural diversity and differences of standards regarding socio-economic development. The violation of any such universally adhered principle renders the work of a Lawyer unethical and thus unacceptable. The major role of professionalism is related to defend rights and protect liberty of persons and thereby preserve the peace and order in the society[1].

In 19th century, Lawyers in UK and USA were treated as icons or role models for the emerging democratic societies. Lawyers because of their positive and elitist image have been able to register their strong presence in politics and state affairs. The Western model of Legal Profession entered in South Asia with Colonial rule. With it came the system of Legal Education[2].

[1] Dr. Yubaraj Sangroula, "Legal Ethics: A Critical Analysis of the Understanding of Legal Education and Professionalism in Developing Countries with Special Reference to South Asian Scenario" available at https:www.researchgate.net
[2] ibid

II An Overview of Legal Education in India

In India, Legal Education began as an ancillary to English Legal System introduced by British Government.[3] Formal Legal Education was introduced through universities in the year 1857.[4] There were lack of standards and qualifications to get admission to law courses run by universities, generally those with command in English language got admission and studied law. Thus, the primaryaim and object of legal education at that time was to bring about the lower armature of professional lawyers who were acquainted with the English law and English language. The minimum qualification required was anyone who knew English well could study Law and be qualified to study law. After independence, there has been a mushroom growth of law colleges throughout the country without any quality legal education.[5] The Radhakrishnan Commission on University Education[6] in its report lamented that "Our colleges of Law do not hold a place of high esteem either at home or abroad nor has law become an area of profound scholarship and enlightened research."

The Law Commission of India stated that "the main purpose of University Legal education seems hitherto to have been not the teaching of Law as a science or as a branch of learning, but merely imparting to students a knowledge of certain principles and

[3] J.K.Bhavnani, "Legal Education in India'', *Journal of Indian Law Institute* 167(1962).
[4] For almost a century from 1857 to 1957 a stereotyped system of teaching compulsory subjects under a straight lecture method and the two year course continued. The need for upgrading legal education has been felt for long. Numerous committees were set up periodically to consider and propose reforms in legal education. The University Education Commission was set up in 1948-49, in the year 1949 the Bombay Legal Education was set up to promote Legal Education. The All India Bar Committee made certain recommendations in 1951. In 1954, XIV Report of Law Commission (Setalvard Commission) of India discussed the status of Legal Education and recognized the need for reforms in the system of Legal education. It was only from 1958 that many Universities switched over to three year Law degree courses.
[5] Speech by N. N. Ghatate, "Seminar on Legal Education at Cross roads: Problems and Perspectives" Indian Bar Review
[6] University Education Commission 1948-49.

provisions of Law to enable them to enter the Legal profession…"[7] Thereafter, committees were constituted to assess the standards of Legal Education. Based on the recommendations, reforms in Legal education were also enacted and Bar Council of India was constituted as a regulatory body to maintain the standards of legal education as well as to regulate the Bar.[8]

III Regulation of Legal Profession in India

Felix Frankfurter has observed and rightly so, "The law is what the lawyers are and the law and the lawyers are what the law schools make them."[9] The Law is not a homeless, wandering ghost. It is a phase of human life located in time and space.[10] The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one. There must be rules. This may be stated as the requirement of generality. In recent history perhaps the notable failure to achieve general rules has been that ofcertain of our regulatory agencies, particularly those charged with allocative functions.[11]

Bar Council of India has a special apportionment of regulation of Legal profession. It is a statutory body created by the Advocates Act, 1961(25 of 1961) which makes a special emphasis regarding adherence to ethical standards by Advocates. For this the Bar Council of India has enacted the Rules under Chapter II, Part VI of The Bar Council of India Rules, 1975. These Rules are framed under Section 49(1) (c) of the Advocates Act, 1961(25 of 1961). The preamble to these Rules provide:

An Advocate shall, at all times, comport himself in a manner

[7] The 14th Law Commission of India Report on Reform of Judicial Administration (1958).
[8] Susmitha P. Mallaya, "Contouring Legal Education in India: An analysis of challenges posed by Covid-19, *ILI law Review*, Special Issue147 (2020).
[9] https://thedailyguardian.com/legal-education-in-india-will-covid-19-act-as-a-catalyst-for-reforms/, Retrieved on 3rd December, 2021.
[10] Morris Raphael Cohen, "Reason and Law, The Free Press, Glencoe, Illinois, p.4
[11] Lon L. Fuller(Revised Edition) ,The Morality of Law, Yale University Press, 46(1995)

befitting his status as an officer of the court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity may still be improper for an Advocate. Without prejudice to the generality of the forgoing obligation, an Advocate shall fearlessly uphold the interests of his client and in his conduct conform to the rules hereinafter mentioned contain canons of conduct and etiquette adopted as general guides; yet the specific mention thereof shall not be construed as a denial of the existence of others equally imperative though not specifically mentioned. Section I to Section IV of the aforementioned Part contain the duties of Advocates towards the court, towards the client, towards the opponent and towards the colleagues. The BCI amends these Rules from time to time to improve standards of professional conduct and etiquette for Advocates.

These ethical standards of Legal profession have a crucial role to play in upholding and keeping intact the tradition of hoary past, associated with this profession. An Advocate's duty is as important as that of a Judge. The Bar Council embraces within itself the function of upholding the Rule of Law. India ranks 68th out of 126 countries in 2020 in "Rule of Law Index."[12] This index measures how the Rule of Law is experienced and perceived by the general public. The Indian Legal profession has a direct bearing on the subsistence of Rule of Law. As a result of this, regulation of the profession is of utmost necessity.[13]

IV Concerns about Trends of Legal Profession

Today, the concerns about increasing trend of legal professionbeing transformed into a business are mounting. The emergence of

[12] Economic Survey 2020-2021, Vol.1, p.194 (World Justice Project, 2020).
[13] Bar Council of India Rules, 1975, Chapter II, Part VI.

the corporate law firms is phenomenal all across the world. The corporate law firms take law practice as a business and opine that anything acceptable in the business is acceptable in the law practice too. This trend is making the Legal Profession most lucrative in terms of earning and it in turn makes the legal education most expensive as joining Law schools is considered an investment in the business career itself.

Decline in "professional courtesy", the lack of commitment to one's professional duties and the way "lawyers" manipulate the legal system without any concern for right and wrong are also serious concerns facing the legal profession. The human side of the profession is worse affected by the growth of business notion. It means that the virtue aspect of the profession has become vulnerable. The mounting trend that practice of law is a business and thus accepts all those practices accepted by the fair business is seemingly destroying the traditionally associated notions of benevolence and human side duty of the profession.[14] As already stated that there are domestic regulations as framed by the Bar Council of India to uphold the virtues of Legal Profession but these domestic regulations have to adhere to changes in International Legal Regulations such as the canons of conduct by American Bar Association and Resolutions of the General Council of Bar in England and Wales which form the basis of Rules framed by the Bar Council of India for governing the standards and ethics of Legal Profession in India.

V Impact of International Developments on Domestic Regulations

Another concern is the international developments which affect the domestic regulators of legal profession like Bar Council of India and Bar Association. These developments at international level

[14] Supra note 1

also have contributed to, and likely will sustain, the use of comparative and global legal ethics perspectives.[15]

Similar to academics and practicing Lawyers, regulators and Bar Associations have been affected by regulatory developments such as the EU Directives, Trade Agreements (including GATS and NAFTA), money laundering initiatives and interest in Lawyer regulation by anti-trust authorities. Domestic regulators and Bar Associations, like practicing lawyers and academics, now operate in a world in which these international developments may affect their own domestic rules regarding Lawyers. And even if these developments do not directly displace their own regulation of lawyers, they increasingly face situations in which rules from a foreign jurisdiction are cited in policy debates about their own rules.[16] An additional factor contributing to the greater sensitivity on the part of regulators and Bar Associations is their increasing awareness that lawyers and law firms are subject to multiple sets of ethics rules, which are likely to have spillover effects on a jurisdiction's own rules. Regulators are aware that the spillover may occur in a de- facto fashion, in which lawyers, subject to multiple rules, use the other jurisdiction's rule.[17]

VI Covid-19: A setback to Legal Profession

The eminent jurist V.R. Krishna Iyer remarked, "A study of law becomes an imperative if societies with their members, high and low, are to be civilized, stable and humanist. The profound significance of jurisprudence, which is but the science of law, finds its foundation in the excellence of legal education".[18] This

[15] Laurel Terry, U.S. Legal Ethics: The Coming of Age of Global and comparative Perspectives, 4 *Wash.U.Global Studies Law Review* 463,528 (2005).
[16] Thomas D. Morgan, The Evolving Concept of Professional Responsibility, 90 *Harv. L. Rev.*, 702 (1977).
[17] Ted Schneyer, From Self-Regulation to Bar Corporatism: What the S & L Crisis Means for the Regulation of Lawyers, 35 S, *Tex.L.Rev.*,639 (1994).
[18] G. Mohan Gopal (ed), Professor N.R. Madhava Menon's Reflections on Legal and

statement becomes imperative today when we revisit the contouring of legal education, when the nation unexpectedly is facing the pandemic which brought all the sectors to standstillincluding the legal education and legal sector. After the virus surge, the Central Government announced a nationwide lockdown at a very short notice without adequate plans of implementation, adversely affecting the livelihood of junior advocates. Noting the seriousness of the Covid-19, lock down was ordered in India under the provisions of the Epidemics Diseases Act, 1897 and the Disaster Management Act, 2005.

The privileged class of society and institutions within a few days of national lockdown suddenly responded to the calamity positively by organizing "webinars" on various legal topics, various workshops on legal education, and even the online internship programmes were offered by law firms. The practicing lawyers, especially in the lower courts started facing problems to deal with the emergent lockdown forcing the judiciary to introspect its technical infrastructure and recommendation of the scheme of digitization of courts which largely remained on paper. On the other side, it is also felt that there is a need for law teachers and legal professionals to make an introspection of the existing legal education in our country.[19]

VII COVID-19: A Great Disparity in the Legal Profession

Covid-19 pandemic is an unprecedented situation whose impact continues to grow each day. The pandemic has forced the Indian judiciary to adopt digital processes at an unprecedented speed and scale. With a countrywide first lockdown being imposed in March, 2020 and the enforcing of physical distancing courts across India started using video conferencing to hear cases. The COVID-19

Judicial Education (Universal La Publishing Co. Pvt. Ltd. 2009).

[19] Susmitha P. Mallaya, Contouring Legal Education in India: An Analysis of Challenges Posed by COVID-19, ILI Law Review, Special Issue 2020.

pandemic has had a profound impact on work at all levels, and the legal profession is no exception. The near-universal transition to remote work was unprecedented. It created daunting technological and logistical challenges for legal employers. Lawyers, staff and employers devised new ways to keep teams connected, engaged, and productive. Covid-19 has affected the Indian Legal System likenever before. It has casted a harsh light on the outdated way justice is dispensed, law is taught, and legal services are delivered.[20] Coronavirus has harnessed the potential of under-utilized tools and alternative work models long resisted by the Indian legal fraternity.[21] Traditional ways of working have been altered and accepted at an astounding speed and with ease. The impact of the pandemic has been majorly seen in the Indian courtrooms. In order to adhere to social distancing norms and to curb the spread of second wave of this infectious virus, the Indian Courts have again resorted to Virtual Court Rooms to ensure that administration of justice remains uninterrupted.[22] It must be noted that, the concept of Virtual Courts is not a novel concept in India. In 2003, the Supreme Court of India in *State of Maharashtra v. Prafulla Desai*[23] held that recording of evidence by a Court through video conferencing shall be considered to be "as per the procedure established by law".[24] Since then, several subordinate Courts in India have already framed guidelines in this respect and have held judicial proceedings through video conferencing.

The nationwide lockdown has brought to the fore the great disparity in the Legal profession and lockdown has serious

[20] Mark A. Cohen,'Covid-19 and the Reformation of Legal Culture' (Forbes, 14 April, 2020).
[21] Ibid.

[22] In Re: Guidelines for Court Functioning through Video Conferencing during COVID-19 Pandemic, 2020 SCC Online SC 355
[23] (2003) 4 SCC 601
[24] Ibid

financial implications for lawyers. Lawyers in India have been one of the most neglected and overlooked lot during Covid-19 in comparison to other professionals. 70% Lawyers are almost daily wage workers who earn on case to case basis per appearance hearing. Covid-19 has impacted deep and triggered many social, mental and psychological issues as well.

Among Lawyers, there exists a stark contrast between the paltry remuneration of the juniors with no steady flow of income and the huge amount of professional fees charged by well-established senior counsel. The earnings of a lawyer wholly and solely depend on their practice in court of law but due to virtual mode of hearing in courts the virtual appearance is confined only to a particular class of lawyers. However, this section of rich lawyers is a small fraction and majority of Lawyers, especially in the lower courts who function on a case-to-case basis and when the courts do not function, their economic condition, becomes precarious. The Covid-19 pandemic has opened a Pandora's Box for legal professionals with reference to earning of their livelihood.

VIII Minimum Subsistence Allowance for Advocates during COVID-19 Pandemic

Many State Bar Councils came up with circulars for conditional financial assistance to advocates.[25] The Bar Council of India appealed to Prime Minister of India to provide rupees 20000 as minimum subsistence allowance per month to lawyers who are not financially well off so that they can support their families following the lockdown due to Covid-19 pandemic. In a letter to the Prime Minister and the Chief Ministers of all the States, BCI Chairman requested them to make a provision for providing the allowance from the Centre and State Government funds, either

[25] *The Hindu*, Subsistence Allowance for Junior Advocates Sought by V. Raghavendra, 30 March 2020.

directly or through Advocate Welfare Fund of the State Bar Councils. The Apex Bar body said in the above mentioned letter that all professions except those providing essential services have virtually gone into lockdown mode as the only way to stop further outbreak and spread of the virus. The letter said that lawyers have no social security and only a handful of 10% can be stated to be in a position to survive and subsist without any earning during this time of crisis when the work and earning opportunities have ceased.

IX Financial Assistance in favour of Advocates in Jammu and Kashmir

In *M. Abubakar Pandit v. Union Territory of JK & Ors.,*[26] the Jammu and Kashmir High Court took notice of the adverse effects on the legal profession due to restriction in functioning of thecourts. In this regard the Lieutenant Governor of Jammu and Kashmir announced financial assistance of Rs. 1 crore in favour of advocates who work in different courts of Jammu and Kashmir. The amount was kept at the disposal of High Court of Jammu & Kashmir and Ladakh. An amount of Rs.3000 was given to each eligible lawyer in Union Territory of Jammu and Kashmir from the government. The development came because of the prolonged closure of the Courts due to the Covid-19 lockdown. The J&K Bar Association also collected contribution from various senior Lawyers and the amount was paid to the some Lawyers.[27]

X Conclusion

A robust system of legal education is a prerequisite for the "noble" legal profession. According to the Law Commission of India legal

[26] *M. Abubakar Pandit v. Union Territory of JK & Ors.,* WP(C) No. 941/2021 CM No. 3018/2021 Dated. 26.06.2021.
[27] *Outlook*, 16 May 2020, https://www.outlookindia.com/website/story/india-news-lawyers-in-jk-to-get-rs-3000- covid-19-assistance-from-govt/352938, Accessed on 03.12.2021.

education in India should be structured in a manner where the BCI, along with legal academics may endeavor to innovate, experiment and compete globally. A balance should be maintained in order to change the entire fabric of legal education system in India, keeping in mind the necessity of globalization." Sometimes, odd problems pose greater challenges before the Regulatory body like BCI which have a great bearing on the ethics of the legal profession. Presently it seems that employment opportunities are as bleak as they can get. There is no office that is ready to take new recruits because most are already downsizing. Some magnanimous offices do offer an opportunity but it is in the form of an unpaid internship rather than actual employment. This is due to the fact that there has been no mobility in the legal market.

Juvenile Justice System in Jammu and Kashmir: A Status Report

Arvind Jasrotia*
Ms Sunandini**

Abstract

The concept of child rights and child protection policies emerged after adverse experiences in children's everyday life. The 18th century witnessed the rise of concept of child rights during the period of industrialization in Great Britain. The concept evolved steadily in different parts of the world, but garnered global attention during the First World War. The Juvenile Justice System in India also developed at its own pace. Post-independence, the aim of the nation-states to securejustice for its children was reflected through the law of the land. The development of the Juvenile Justice System in the erstwhile State of Jammu and Kashmir happened at a different pace. The state government always had a lackadaisical approach as far as the adoption and implementation of the laws relating to juvenile justice was concerned. The abrogation of Article 370 in August 2019 by the Parliament of India changed the status of the erstwhile State of J&K into Union Territories of Jammu & Kashmir and Ladakh. This paradigm shift brought a major change and with the J&K Reorganisation Act, 2019, as a consequence of which 113 Central laws were extended to the Union Territory of J&K, Juvenile Justice (Care and Protection) Act, 2015 happened to be one amongst them.

I. Child Rights -- A Panoramic View

'Childhood' is a universal 'term' and its experiences differ based on various factors like geographical location, social status,economic condition, culture, religion, gender, amongst others. But whether it serves a universal character is debatable. The adverse experiences that some children go through in their everyday life ledto the birth of the concept of child rights and child protection

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policies. The idea of childhood was not popular in the historic times. Once the child moved from biological dependency of 'infancy' towards adulthood it 'belonged to adult society'.[1] The 18th century witnessed the rise of the concept of child rights during the period of industrialization in Great Britain.[2] Child labour was prevalent during this period, and it led to various social movementscondemning its ill effects on their overall health and well-being. America witnessed the movement in the 19th century when the orphans or children in extremely poor conditions were forced to work for survival.[3] The western world recognized the need to protect their children and this led to the emergence of various child care institutions like orphanages guided by several legislations. Separate facilities for children in dispute with the law were also established during this time.

Post industrial revolution, the concept around rights of the child gained momentum and increased literacy played a significant role in fortifying this idea. Though the concept was steadily emerging in different parts of the world, it garnered global attention during the First World War. A committee was set up by the newly formed League of Nations in the year 1919 on Child Welfare to examine various issues around welfare of children in their member states.[4] The committee reported in 1928 on the impact of cinema on the overall health of children, both who were employed in the cinema industry as child artists and those who watched it.[5] In light of this, attempts to protect children's' rights continued, and in 1924, the

1. Philippe Ariès, *Centuries of childhood: A social history of family life* (1965)
2. Carolyn Tuttle, *Child Labour during the British Industrial Revolution*, EH.Net *available at:* https://eh.net/encyclopedia/child-labor-during-the-british-industrial-revolution/ (last visited 02 February 2022)
3. *Id.*
4. Modern Records Centre, University of Warwick, *Report of the League of Nations Child Welfare Committee, 1928, available at:* https://warwick.ac.uk/services/library/mrc/archives_online/exhibitions/film/child_welfare/ (last visited 04 February 2022))
5. *Id.*

League of Nations adopted the Geneva Declaration on the Rights of the Child. The declaration was drafted by Eglantyne Jebb, the founder of the 'Save the Children' Fund, after she realised theterror imprints on several children following World War I and the necessity for particular protection.[6] This was a historic document that acknowledged the rights of the children and the responsibility of the adults towards fulfilling the same.[7]

The recognition of child rights and actions to promote it were galvanised through the League of Nations. In 1945, the League of Nations was replaced by the United Nations (UN), and in 1946 a specialized agency was established under the name United Nations International Children's Emergency Fund (UNICEF) which aimed at providing care for children worldwide.[8] The UN took over the Geneva Declaration in 1946 and later adopted the Universal Declaration of Human Rights (UDHR) in 1948.[9] It declared all humans to be free with dignity and the same rights.[10] This was the base that strengthened the child rights arena and nation-states were under the moral obligation to uphold the basic human rights for persons of all genders, communities, ages, religions and ethnicity. It was felt that the Geneva Declaration was not at par with the Universal Declaration of Human Rights (UDHR) and expansion was needed.[11]

6. Humanium, *The Geneva Declaration of the Rights of the Child, available at:* https://www.humanium.org/en/geneva-declaration/ (last visited 05 February 2022)
7. *Id.*
8. UNICEF, *History of Child Rights, available at:* https://www.unicef.org/child-rights-convention/history-child-rights (last visited 06 February 2022)
9. https://www.humanium.org/en/declaration-rights-child-2/
10. UDHR, art 1: '*All human beings are born free and equal in dignity and rights.',* art. 25(2): '*Motherhood and Childhood are entitiled to special care and assistance.'*
11. Humanium, *Declaration of the rights of the child, 1959, available at :* https://www.humanium.org/en/declaration-rights-child-2/ (last visited 08 February 2022)

Subsequently, seventy-eight member states of UN adopted the Declaration of the Rights of the Child on 20 November 1959 vide General Assembly Resolution No. 1386 (XIV). This Declaration gave a universal recognition to the child as a human and bestowed the responsibility on the adults, governments, voluntary organisations, amongst others, to recognise their rights and take necessary measures for upholding the same.[12] With the signing of the International Covenants on Civil and Political Rights, 1966[13] and Covenant on Economic, Social and Cultural Rights, 1966[14], member states agreed to take measures for safeguarding the rights of their children. On 29th November 1985, the United Nations General Assembly passed the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (also known as the Beijing Rules) considering the need to protect the human rights of juveniles in conflict with the law.[15] The commitment of the member states to safeguard the rights of the children strengthened in 1989 when world leaders decided to adopt an international legal framework for the protection and upholding of the rights of the

12. UN General Assembly, *Declaration of the Rights of the Child***,** GA Res. 1386 (XIV), 14 GAOR Supp. (No. 16) at 19,UN Doc A/4354(November 20, 1959). *Available at:* http://www.cirp.org/library/ethics/UN-declaration/ (last visited 08 February 2022)
13. UN General Assembly, *International Covenant on Civil and Political Rights* Adopted and opened for signature, ratification and accession by GA Res 2200A (XXI) (December 16th, 1966) entry into force (March 23rd, 1976), art 49, *Available at:* https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last Visited 11th, February 2022)
14. UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, `Adopted and opened for signature, ratification and accession by GA Res 2200A (XXI) (December 16th, 1966) entry into force (January 3rd, 1976), art 27, *Available at:* https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx (last visited 14th February 2022)
15. UN General Assembly, *Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33 (November 29th, 1985), *available at :* https://www.ojp.gov/pdffiles1/Digitization/145271NCJRS.pdf (last visited 16th February 2022)

children.[16] The United Nations Convention on Rights of the Child (UNCRC) came into existence in 1989 and acknowledged the need for children to have special safeguards because of their physical and mental immaturity. It separated childhood from adulthood and stated that anyone below 18 years of age will be considered as a child.[17] It also emphasised the questionable circumstances or conditions in which children are living across the world and urged for international co-operation for improvement in their lives and overall well-being.[18] It became the most ratified human rights convention in history. In the year 2000, the UN General Assembly added two optional protocols to the agreement, protecting children in armed conflict and preventing the sale and sexual exploitation ofchildren.[19] In 2006, the United Nations adopted the Convention on the Rights of Persons with Disabilities, which aims to '*promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities (including children), as well as to promote respect for their inherent dignity.'* Article 7 of this Convention laid down specific provisions for children with disabilities and asserted that all States should make necessary provisions so that every child with a disability can enjoy all human rights like any other child would.

Over the years, UN instruments and treaties became the overarching framework guiding different states to formulate

16. UNICEF, *Convention on the rights of the child, available at:* https://www.unicef.org/child-rights-convention/what-is-the-convention (last visited 20th February 2022)
17. *Id.*
18. UN General Assembly. *Convention on the Rights of the Child*, Pub L No. UN Res. A/RES/44/25 (November 20th, 1989). Retrieved from https://www.un.org/documents/ga/res/44/a44r025.htm (last visited 22nd February 2022)
19. UNICEF, *Strengthening the Convention on the Rights of the Child: Optional Protocols, available at:* https://www.unicef.org/child-rights-convention/strengthening-convention-optional-protocols (last visited 24th February)

several laws, rules and, regulations to provide affirmative provisions to uphold the rights of children. Together they were influential in shaping the overall policy on child protection ofmany countries and envisaged to institutionalise the child protection mechanism.

India ratified the UN 'Convention on the Rights of the Child' in 1992 , and UN 'Convention on the Rights of Persons with Disabilities' in 2007. In addition, in 2005, two important optional protocols concerning the sale of children, child prostitution, child pornography, and child engagement in armed conflict were ratified. In 2011, India ratified the UN 'Protocol to Prevent, Suppress, and Punish Human Trafficking, Especially of Women and Children.' Also, several other UN Guidelines, Protocols, and Rules about Juvenile Justice, organised crime, trafficking, and alternative care for children have been endorsed.

II. Juvenile Justice System in India: A Snapshot

The Juvenile Justice System in India may be split in the pre and post-Independence period. The very first legislation dealing with children in conflict with the law was the Apprentice Act, 1850. Under the Act, the Court was mandated to treat children under the age of fifteen years, accused of petty offences, as apprentices and not send them to prison, if proven guilty.[20] In 1837, First Law Commission was appointed which came up with the Indian Penal Code, 1860. Section 82[21] and 83[22] of the Code dealt with the legal incapacity of infants to form criminal liability. Similarly, the Code of Criminal Procedure, 1898 (Cr.PC) had provisions to deal with the children in conflict with the law. Section 562 of the Cr.PC has

20. Nutakki Sateesh, "Who is a child: An analysis on recent trends" *2(5) International Journal of Academic Research* (2015), *available at:* http://www.ijar.org.in/stuff/issues/v2-i2(5)/v2-i2(5)-a008.pdf
21. Indian Penal Code 1860 (Act 45 of 1860), s.82
22. *Id*. at s.83.

provisions for the release of an offender under the age of 21 years on probation based on good conduct. The specific law to deal with the children in conflict with the law was the Reformatory School Act, 1876 later amended in 1897, under which the delinquents below the age of fifteen years who were sentenced for imprisonment could be sent to reformatory schools for three to seven years.[23] There was a rise in the consciousness to deal with juvenile justice. The Presidency State of Madras through the Madras Children Act, 1920 established a separate Juvenile Court and residential building.[24] The state of Bengal and Bombay followed the footsteps and enacted the Bengal Children Act, 1922 and the Bombay Children Act, 1924 respectively with the avowed objective of the protection of the child whether delinquent or neglected.[25]

Post-independence, the aim of the nation-state to secure justice for its children was reflected through the law of the land. Under the Constitution of India, provisions were laid to secure the rights of the children through the Fundamental Rights, Directive Principles of State Policies and Fundamental Duties. The Fundamental Rights under the Part III of the Constitution secures the rights of the children. Article 15(3) empowers the State to make special provisions for women and children. Article 21A which was added through the 86th Constitutional Amendment in 2002, provides for free and compulsory education for children between 6 to 14 years of age. Article 23 and 24 secures them from exploitation and lays conditions on the employment of children. The Directive Principles of the State Policies under Article 39(e) and (f) directs the State to protect the children from being abused and give them opportunities

23. S.K Bhattacharyya,"Juvenile Justice System in India". 23(4) *Journal of the Indian Law Institute*, 606-612 (1981), *available at:* http://www.jstor.org/stable/43950781 (last visited 2nd March 2022)
24. *Id.*
25. *Supra* note 23

to be healthy and enjoy their freedom and dignity. The Directive Principles under Articles 45 and 47 enjoin upon State to provide early childhood care up to the age of 6 years and raise the level of nutrition. Further, Fundamental Duties which were added in the Constitution after the 42nd amendment, under Article 51-A(k) provide that the parent or guardian must provide opportunities for education to his child between the age of six and fourteen years.

Thus, a well-founded framework was laid in the post-independence period. But the increase in urbanization and industrialisation enhanced the vulnerability exponentially, and there arose a need for new legislation. The Children Act, 1960 facilitated the care and protection of vulnerable children and delinquent children through separate institutions.[26] It was applicable in the Union Territories but States were not under the obligation to adopt the same. This was the first Act to segregate between the two bodies dealing with neglected children and delinquent children as 'child welfare boards' and 'children's courts'.[27] These legislations were not uniform in the country and different states adopted different juvenile justice regimes. The Supreme Court in *Sheela Barse v. Union of India*[28] suggested that each state should not follow separate procedures in cases related to children. The Central government should form uniform legislation with provisions for investigations of cases for children below 16 years of age with mandatory provisions for their rehabilitation of accused orneglected children.

In 1986, the Juvenile Justice Act came into existence and repealed every other legislation on Juvenile Justice in the country to bring

26. Satyarthi, *Summary of Child Protection Laws in India*, *available at*: http://satyarthi.org.in/wp-content/uploads/ChildLabor/English/Handbook%20on%20Child%20Protection%20Laws%20in%20India_English.pdf (last visited 4th March 2022)
27. The Children Act, 1960
28. (1986) 3 SCC 632

uniformity in the law.[29] This Act did not sync with the international guidelines that emerged later and it became mandatory for the Indian legislatures to amend the laws by incorporating the tenets of UNCRC, ratified by India in 1992.[30] In the year 2000, the Juvenile Justice (Care and Protection) Act, 2000 (JJ Act) was passed overruling the previous legislations. As perthis Act, those below the age of 18 years were considered children and two categories were created viz, 'children in need of care and protection' and 'juveniles in conflict with the law'. As per a noted expert, '*this Act is not penal legislation. It does not look to the punishment for the misdeeds of the juvenile but is inclined towards 'care and protection of children through institutionalization.*" However, she noted that these institutions which were meant to be protective, violated the rights of children and argued that the fundamental nature of these institutions inevitably curtailed the freedom of every child and denied them the right to live in a familyenvironment.[31] The Act was further amended in the years 2006 and2011 to bring in more clarity and fill in the gaps. It was only in 2012 after the infamous *Nirbhaya rape and murder case* in the capital of the country where one of the accused was a minor thatthe debate about the age of the minor accused involved in heinous crime erupted. Justice Verma Committee formulated to give suggestions for the changes in the criminal law noted that theJuvenile Justice Act has failed to protect the children in the country.[32] The Committee also stated that the children cannot be held responsible for committing a crime if the basic rights given in

29. Asha Bajpai, *Child rights in India: Law, policy, and practice*. (Oxford University Press, USA, 2018)
30. *Supra* note 18
31. Ved Kumari, *The juvenile justice system in India: From welfare to rights*. (Oxford University Press, USA, 2004)
32. Bindu Shajan Perapaddan, "Juvenile Justice Act has failed miserably", *The Hindu*, January 24th 2013, *available at:* https://www.thehindu.com/news/national/juvenile-justice-act-has-failed-miserably/article4337040.ece (last visited 15th March 2022)

the Constitution are not provided. It was not in favour of reducing the age of the minors to be tried as adults in the case of heinous crimes.

In the Nirbhaya case, when one of the accused, allegedly minor was punished with three years' imprisonment under the juvenile law, there was an uproar. The outrage led to debates and discussions and ultimately the Juvenile Justice (Care and Protection) Act, 2015 came into existence with one of the prominent provisions of the discretionary age bracket of 16 to 18 years. The juvenile offenders between this age bracket could be tried as adults if alleged to commit a heinous crime, based on the assessment done by the Juvenile Justice Boards.[33] There were several other provisions like segregating the children and change interminology as 'children in need of care and protection' and 'children in conflict with the law', with mention of various child care agencies to implement its affirmative provisions. The Actgranted powers under Section 110 to the States to make rules for the implementation of the Act and if the same is not done, then the central model rules may apply. At present, the Parliament of India has passed the Juvenile Justice (Care and Protection of Children) Amendment Bill, 2021 that is in the process of becoming the new legislation.[34]

33. Pravin, "Juvenile Justice Bill 2014, What you should know", *one India* August 7th 2014, *available at:* https://www.oneindia.com/feature/juvenile-justice-bill-2014-what-you-should-know-1497925.html?story=1 (last visited 17th March 2022)
34. PIB, Juvenile Justice (Care and Protection of Children) Amendment Bill 2021, *available at:* https://pib.gov.in/PressReleasePage.aspx?PRID=1740011#:~:text=The%20Juvenile%20Justice%20(Care%20and,in%20Lok%20Sabha%20on%2024.03. (last visited 19th March 2022)

III. Juvenile Justice System in Jammu & Kashmir

The development of the Juvenile Justice System in the erstwhile State of Jammu and Kashmir happened at a different pace. Any law passed by the Parliament had to be passed by the State legislature for its implementation in the State of J&K. This Special Status was withdrawn after the abrogation of Article 370 of the Constitution of India in August 2019. The operational aspect of theJuvenile Justice System in the erstwhile State of J&K before the abrogation of Article 370 deeply hampered the rights of the children.

The Government of J&K realized the need for a separate law governing the Juvenile Justice regime in the erstwhile State of J&K in 1997. The delinquent children in the State were dealt with the Jammu and Kashmir Juvenile Justice Act, 1997. This Act of 1997 corresponded to the Juvenile Justice Act, 1986. Like all other laws, the State was slow to catch up with the reforms carried out at the national level which affected the rights of the child residents in J&K. In a similar vein, even after India changed its Juvenile law in the year 2000, it took the erstwhile State around thirteen years to enact a law in consonance with the revised Central legislation. In 2013, the Jammu and Kashmir Juvenile Justice (Care andProtection) Act, 2013 was enacted which was the replica of the Juvenile Justice (Care and Protection) Act, 2000. The delay wasnot limited to the formal proclamation of the laws but also in its implementation. The first 'Juvenile Home' was set up in the State as late as 2011.[35] It was notified under the Act that the rules shallbe framed and notified by the State Government at the earliest but strangely rules were notified in 2014 after the State Government was directed by the High Court of J&K in a Public Interest

35. Press Trust of India. "First juvenile home set up in J&K.", September 8th 2011, *available at:* http://zeenews.india.com/news/jammu-and-kashmir/firstjuvenile-home-set-up-in-jandamp-k_730467.html (last visited 20th March 2022)

Litigation filed by an NGO, 'Voice of Rights'.[36] The petition titled *Tanvi Ahuja v. State of J&K* demanded the proper implementation of the J&K Juvenile Justice (Care and Protection) Act, 2013 and the Rules of 2014. The PIL mentioned that till 2013 there was no Child Welfare Committee (CWC) and Juvenile Justice Board (JJB) set up in the State. In the conflict-ridden State, majority of the cases of 'children in conflict with the law' were tried by Chief Judicial Magistrates and lodged in different jails, violating theprovisions of JJ Act. The PIL was filed after the fact-finding report of Human Rights Law Network (HRLN), Amnesty International and Human Rights Watch. It also had first-hand experience of the juveniles narrating the torture and atrocities in the erstwhile Stateof J&K. The petitioner prayed before the Court for the implementation of the JJ Act, beginning with the constitution ofthe CWCs and JJBs throughout the State, setting up of Juvenile Homes and providing rehabilitation packages to the juveniles for their rehabilitation. The Court directed the respondent, the erstwhile State of J&K to constitute the CWCs and JJBs across the State. The respondent state came up with a plea of lack of fundsand an amount of Rs 28 crores was released by the Central Government under the 'Integrated Child Protection Scheme' for the implementation of the said order. The State's share in the said scheme amounted to Rs 3 crores and a with a total grant of Rs 31 crores it was the mandate of the erstwhile State government to implement the Juvenile Justice system in the State. But the Juvenile Justice System of J&K is yet to mark the journey from rhetoric to reality.

The State government always had a lackadaisical approach as far as the adoption and implementation of the laws relating to juvenile justice was concerned. The Central legislation of Juvenile Justice (Care and Protection of Children) Act, 2015 which replaced the

36. *Tanvi Ahuja v State of J&K*, PIL 09/15, J&K High Court

Juvenile Justice (Care and Protection of Children) Act, 2000, did not see the light of day in the State of Jammu and Kashmir. The thinkers, writers, critics while condemning the lack of implementation of the law focused more on 'children in conflict with the law'. The conflict-ridden state had severity in the criminalization and thus the debates rambled about the 'children in conflict with the law' as a consequence of which the 'children in need of care and protection' were side-lined. The ongoing Kashmirconflict and terrorism has impacted thousands of children in the State. A study conducted by NGO 'Save the Children: India in Kashmir' claimed that there are approximately 2,00,000 plus children who have lost their parents and 37% of them are orphans as a result of armed conflict.[37] Kashmir Foundation for Organization Research and Development (KFORD) conducted the survey in 2016 and reported the total number of orphanages functional in J&K are 201 in which 12,716 children are enrolled.[38] The report also mentions that majority of these orphanages run through charity money and government supports only 14 of them.[39]The delay in the enforcement of Central laws in the State led to the tardy implementation. The 'children in need of care and protection'were either paid no attention and few got the support through NGOrun homes which did not follow the laid rules as per the mandate ofthe Juvenile Justice Act. Similarly, the conflict-ridden State has many children who come in conflict with the law. The Jammu and Kashmir High Court in the Public Interest Litigation filed by a

37. Altaf Ahmad Dar, "Impact of Kashmir Conflict on Children", *South Asia Journal* (2020), *available at:* http://southasiajournal.net/impact-of-kashmir-conflict-on-children/ (last visited 25th March 2022)
38. Kashmir Foundation for Organization Research and Development, "Drafting Policy Framework to Secure Rights of Orphan Children And Govern Orphanges In Jammu & Kashmir", Department Of Justice Ministry of Law and Justice, Government of India, (2016), *available at: https://img1.wsimg.com/blobby/go/93c5f9ec-ec09-41c1-a2d2-5c4b3bc7eb70/DoJ-Study-KFORD.pdf* (last visited 27th March 2022)
39. *Id.*

reputed police officer directed the State to consider amending the provisions of the J&K Juvenile Justice (Care & Protection of Children) Act, 2013 to reduce the age of juvenility from 18 years to 16 years.[40] This provision was added in the Central legislation of 2015 where if a child between the age group of 16 to 18 years is involved in a heinous crime, can be tried as an adult. This aspect was also side lined through the law implemented in J&K before the abrogation of Article 370. Majority of the children in conflict with the law particularly in armed conflict cases were lodged in the jails and the procedure laid under the JJ Act of being kept in the Observation Home was overlooked.

There were several other aspects related to basic rights of the children which were neglected in J&K. For instance, the laws on children did not cover the aspect of the adoption of the orphan, abandoned and surrendered children from within and outside of the State. Thousands of children who were in need of care and protection because of being orphaned in the State due to militancy, natural disasters or abandonment etc. were barred from being adopted even as many interested couples evinced their interest time and again. The Jammu and Kashmir Hindu (Adoptions and Maintenance) Act, 1960 was silent about the adoption of an abandoned child and where the parentage of a child was not known. This stood in contrast to the provisions of the Hindu (Adoptions and Maintenance) Act (amended in 1962) enacted by the Parliament which permitted the adoption of abandoned childrenas well as the Juvenile Justice Act of 2015. Perhaps, the roots of this discrimination laid in the political conflict of the State and the false narrative perpetuated from time to time that any changes inthe adoption law would lead to demographic changes. The implications were severe and had led to grave violation of the

40. *Farooq Khan v. State and anr*. PIL No 42/2013, J&K High Court

rights of the children. Few case studies which witnessed gross violations are mentioned below.

A. Story of exploitation at Rotary Inner Wheel Home for Mentally Retarded Children.

A residential home was set up for the mentally retarded children in 1979 in Jammu. It was hosting both mentally deranged boys and girls. The home came to limelight in 2013 when a nursing home owner was alleged for causing abortion of mentally retarded girl who was an inmate of the Rotary Inner Wheel Home for Mentally Retarded Children. The case unfolded and unveiled the horrors of the home when it was reported that the female children were allegedly sexually exploited inside the home and thatled to the impregnation of one of them. The FIR was lodged against the doctor of the nursing home on the alleged charges of undertaking the process of abortion on minor girl who was mentally deranged and then further inquiry led to the lodging of FIR against the staff of the home who were alleged to have been involved in thesexual exploitation of these girls. The inquiry was immediately taken over by the District Development Commissioner, Jammu who constituted a committee to look into the matter which made startling revelations. First and foremost, the home was following no rules and was running without any authorisation by the authorities. The laid rules were violated as there was no record of thevisitors, no proper training of the staff, no sensitization, no rules and regulations as to the conduct of the home, no criteria for donations, accounts management, no meal schedule or maintenance of hygiene etc. The home was running on the whims and the fancies of the staff and there was no check by the government authorities about

the same. The enquiry unveiled the fear psychosis amongst the inmates who stated continuous abuse by the staff as well as the outsiders. The government took immediate action with this regard and took the administration of the home under their command and filedcases against the accused and the staff who were allegedly involved in the malpractices.

The repercussions of not having the legislations which ruled the rest of the country like the JJ Act and the Protection of Children from Sexual Offences (POCSO)led to trial of cases under the Ranbir Penal Code. The assumption of charge by the administration also did not follow the set procedures and guidelines as laid under the JJ Act for the child care institutions. The District Social Welfare Officer was given the responsibility to have regular inspection of the area but the criteria which is clearly laid as per the JJ Act remained missing. This case study clearly depicts the violation of the rights of the children under the state custody.

B. Asifa Bano Rape and Murder Case (Infamous Kathua Rape Case of Minor)

In the year 2018 a horrific incident that jolted the entire nation was the alleged rape and murder of a minor girl Asifa Bano in Kathua district of Jammu commonly known as *Kathua Rape Case*. This infamous case got highlighted across the country and people demanded justice for the victim and her family. The incident took a political turn and politics was played around by leaders from different political parties putting forward their agendas and promising justice. This incident also brought the Criminal Law (Amendment) Act, 2018 with major changes in the IPC, Indian Evidence Act, Cr. PC and POCSO Act, 2012. The irony of the matter remained that even the POCSO

Act 2012 was not applicable in the State of J&K even in 2018. The State Legislature did not feel the need to implement such important legislation for the protection of children and till the time this incident shocked the entire nation, they were in their deep slumber. It was only after the hue and cry that the J&KPOCSO was brought in 2018. But as criminal law cannot have a retrospective effect, sadly this law was not applicable on the Asifa Bano Case. The accused were booked under the Ranbir Penal Code (RPC) under Section 363/343/376-D/302/201 read with Sec 120-B RPC. This lackadaisical attitude and the failure of the J&K legislature was nothing but the abuse of powerthat might have caused blunders in the cases related to sexual offences against the children.

C. Illegal orphanage running in District Kathua in Jammu

This is another case study which highlighted the plight of the children with lack of proper protection by the State. In the month of August 2018, few locals complained to the authorities about an orphanage running in their area by a Pastor from Kerala and his wife, housing both minor boys and girls. The locals suspected that there were issues of exploitation in the orphanage and thus lodged a complaint. The police conducted the raid and the pastor failed to produce any evidence of authorisation to run the orphanage and was arrested. A total of 20 children including 8 girls were rescued from the facility and the children alleged sexual exploitation. The pastor was later booked under JKPOCSO 2018 ordinance and sent to 7 days custody. As per the newspaper reports few children went back to their homes in Punjab and Himachal Pradesh and few were shifted to State run Bal Ashrams and Nari Niketans (Shelter Home for Women).

This case study clearly depicts the loose end of the administration as they were not even aware of such facility running. As per the JJ Act, the Child Welfare Committees (CWCs) have the list of all the Child Care Institutions (CCIs) running in their jurisdictions and there are regular monitoring and evaluations. But looking at the curious case of J&K, it was only in the year 2018 the CWCs came into picture and prior to that there were no checks and balances.

These few case studies highlight the plight of child rights in the erstwhile State of J&K. The half-hearted approach of the state legislature for the implementation of the laws governing the rights of the children remained inadequate and thus violated their basic rights. Following the similar approach empirical data was collected from the field to have a deeper analysis of the ground reality which is discussed as follows.

IV. From Rhetoric to Reality: An Impact Study in J&K

The Constitution of J&K, 1957 directed the State to secure its children the right to a happy childhood and protection from exploitation and material abandonment.[41] However, without any proper laws in place, this became impossible. Several other aspects undermined the necessary rights of the child in the State of J&K. One of the major aspects was the establishment of the Child Care Institutions. An empirical study was got conducted at the instance of 'Childline Foundation' (J&K Chapter) under the supervision of the author of this paper for Mapping & Reviewing of Child Care Institutions (CCI) under the J&K Juvenile Justice (Care and Protection of Children) Act of 2013 from February 2017 to July 2017 in the 10 districts belonging to the Jammu Province. The

41. The Constitution of J&K 1956, Section 21.

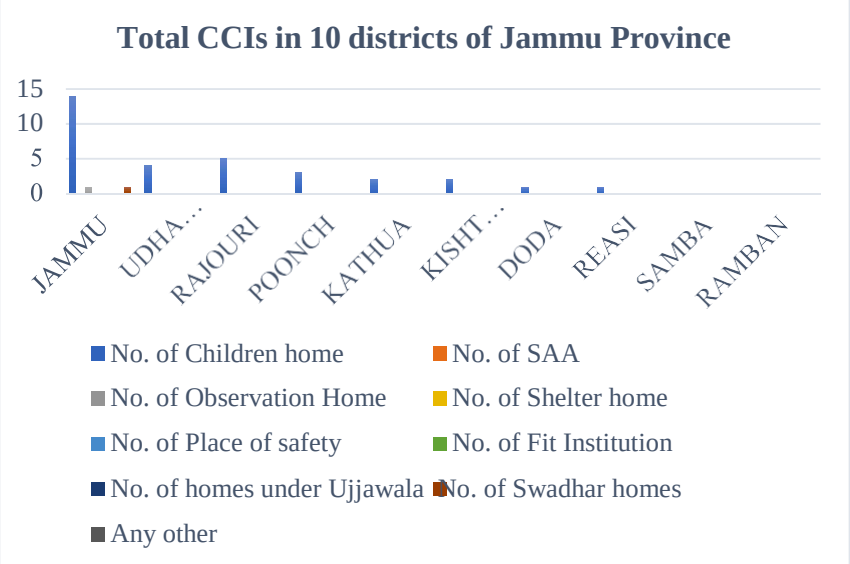
objective of the research was to review and map all the Child Care Institutions functioning in the province and assess the implementation of the J&K Juvenile Justice (Care and Protection of Children) Act, 2013 and draw comparisons with the Central laws.

The methodology used in the research was mixed methodology which followed the stratified purposive sampling wheerre sampled population was defined into different strata of the homogenous population of various CCIs and then data was collected. The quantitative data was collected using survey as a tool and the qualitative data was collected through semi-structured interviews. The field surveys comprised of day long visits to the CCIs and Focused Group Discussions (FGDs) were resorted to understandthe ground realities. NGO's were also taken into consideration that work for the welfare of the Children. The participative observation behaviour was adopted by the researchers and the interviews of the participants were recorded for the narrative analysis.

The ground research revealed that the implementation of the J&K Juvenile Justice (Care and Protection of Children) Act, 2013 was extremely poor. None of the Child Care Institutions reviewed was registered under the Act. Barring a few private/NGO-run homes, most of the homes lacked the basic infrastructure and facilities that were required under the Act. At the time of the research, till 2017, there were no Juvenile Justice Boards or Child Welfare Committees which were functional. It was only later that theybecame functional. Also as noted above, there was no adoption policy in the State and the statutory authorities like the State Adoption Resource Agency (SARA) did not exist. Another issue that came to the fore during the field survey was the non- applicability of the Protection of Children from Sexual Offences (POCSO) Act 2012 which was not then extended to the erstwhile State of J&K. The cases of sexual offenses against children were

dealt under the Ranbir Penal Code by criminal courts and not by any special courts with little regard to the privacy of the victim. This was a serious lacuna in the administration of justice and needed immediate attention. The peculiar issue that came up was the curious case of Nari Niketan. The state-run institutions Nari Niketan tripled up as shelter homes for destitute women, children home for orphans, abandoned and surrendered children, and also observation homes for female children in conflict with the law. This exposed children of impressionable ages to delinquents and a clear violation of provisions laid under the central laws. The staffin most of the homes was inadequate and untrained and inspectionswere infrequent. The details gathered in these institutions is reflected in a tabular form below.

Total Number of CCIs in Ten Districts of Jammu Province



S. NO	Name of district	No. of Children Homes	No. of SAA	No. of Observation Homes	No. of Special Homes	No. of Shelter home	No. of Place of safety	No. of Fit Institution	No. of homes under Ujjawala	No. of Swadhar homes	Any other

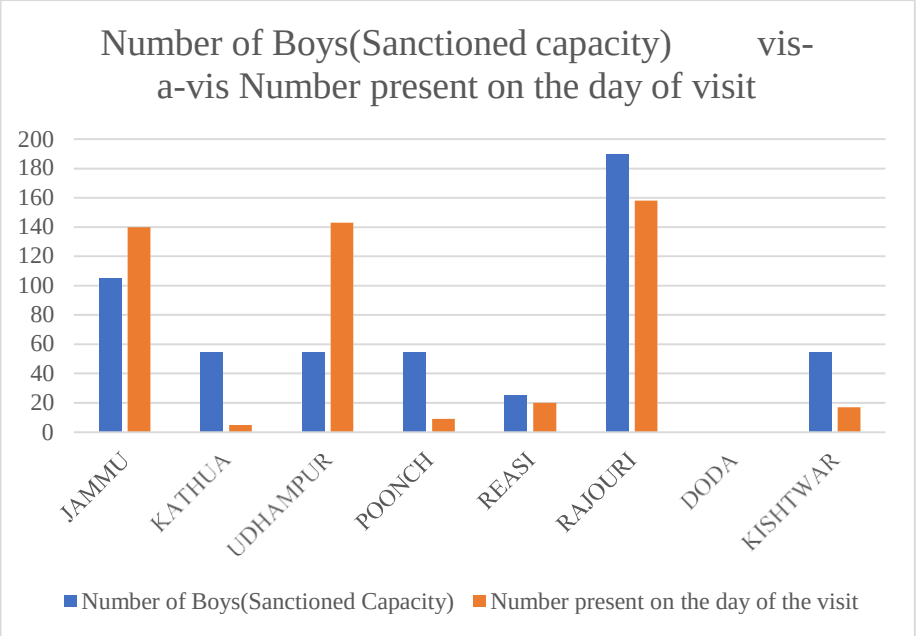
1	Jammu	14	0	1	0	0	0	0	0	1	0
2	Udhampur	4	0	0	0	0	0	0	0	0	0
3	Rajouri	5	0	0	0	0	0	0	0	0	0
4	Poonch	3	0	0	0	0	0	0	0	0	0
5	Kathua	2	0	0	0	0	0	0	0	0	0
6	Kishtwar	2	0	0	0	0	0	0	0	0	0
7	Doda	1	0	0	0	0	0	0	0	0	0
8	Reasi	1	0	0	0	0	0	0	0	0	0
9	Samba	0	0	0	0	0	0	0	0	0	0
10	Ramban	0	0	0	0	0	0	0	0	0	0
Total		33									

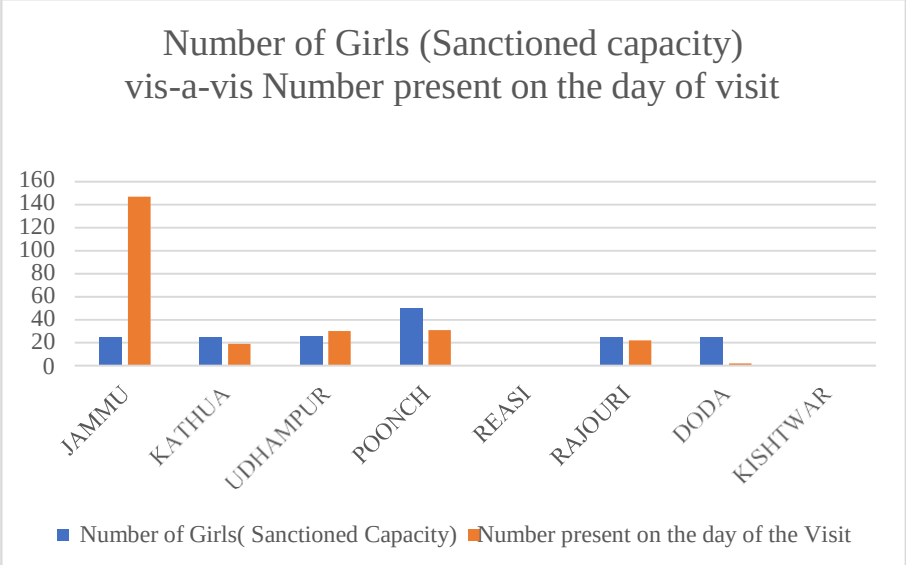
A. Details about the registration of the CCIs

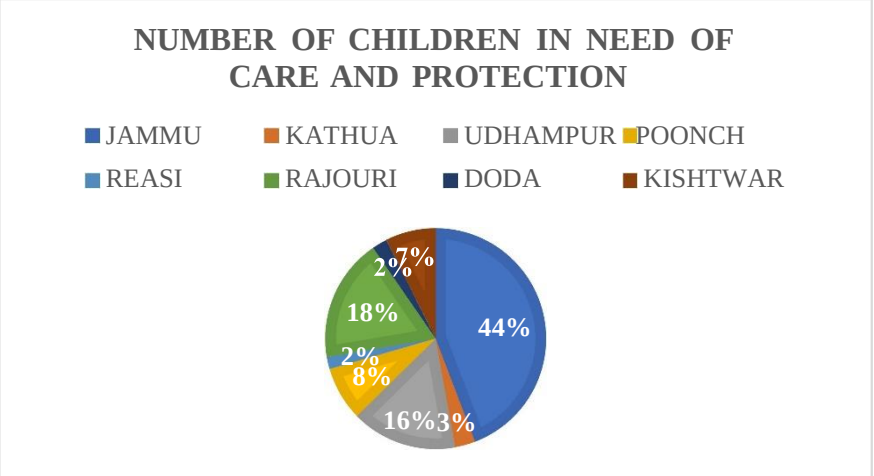
The Child Care Institutions running in the ten districts of the state were not registered. None of them was authorised and registered with the relevant authorities as per the mandate of the Juvenile Justice Act. None of the institutions could produce any papers for registration. It was fairly evident that the entire registration process was bypassed.

B. Details about the children in the CCIs

S. No.	Name of district	Total Number of Children (sanctioned capacity)			Total Number of Children Present on day of visit			Total number of children fit for adoption			Total number of children in need of care and protection	Total number of orphaned childrn	Total number of children in conflict with law		
		Girls	Boys	Transgender	Girls	Boys	Transgender	Girls	Boys	Trans gender			Below 16 years	16 -18 years	Above 18 years
1	Jammu	25	105		147	140	1	63	75		503	68	8	2	
2	Kathua	25	55		19	5		11	3		34	14			
3	Udhampur	26	55		30	143		5	3		176	7			
4	Poonch	50	55		31	9		21	31		90	52			
5	Reasi		25			20			2		20	2			
6	Rajouri	25	190		22	158		1	15		206	16			
7	Doda	25			2			21			25	21			
8	Kishtwar		55			17			64		84	64			
Total		176	540		251	492	1	122	193		1138	244	8	2	


Number of Boys(Sanctioned capacity) vis-a-vis Number present on the day of visit
200
180
160
140
120
100
80
60
40
20
0
JAMMU
KATHUA
UDHAMPUR
POONCH
REASI
RAJOURI
DODA
KISHTWAR
Number of Boys(Sanctioned Capacity)
Number present on the day of the visit


Number of Girls (Sanctioned capacity) vis-a-vis Number present on the day of visit
160
140
120
100
80
60
40
20
0
JAMMU
KATHUA
UDHAMPUR
POONCH
REASI
RAJOURI
DODA
KISHTWAR
Number of Girls(Sanctioned Capacity)
Number present on the day of the Visit



The tabulated data mirrors the ground reality. None of the CCIs functional in the above-mentioned districts were registered as per the mandate. They also did not follow the sanctioned rule of number of inmates. At the time of the data collection no CWC or Juvenile Justice Board (JJB) was constituted in the 10 surveyed districts. The tabulated data collected was either located by the researcher through the records or the narrative of thesuperintendents. The number of children as mentioned in eachdistrict who were fit for adoption or in need of care and protection are as per the records of the said CCIs. The data depicts eight districts out of the ten surveyed as the researchers could not find any tangible record for the remaining two districts. The erstwhile State of J&K was the only State which lacked the implementation of the 'Integrated Child Protection Scheme' which led to the tardy implementation of the Juvenile Justice System. It is also interesting to note that there is no separate department for women and child development in the State and the area comes under the administration of Department of Social Welfare. The major roadblock in the implementation of Integrated Child ProtectionScheme (ICPS) and constitution of CWCs and JJBs was crossed by

setting of Selection cum Oversight Committee as an apex body.[42] The Government order was passed in March 2017 with former J&K High Court Justice as the Chairman.[43] The implementation of the Act under the constituted committee began and slowly the constitution of the CWCs and JJBs began. The Juvenile Justice Committee of Supreme Court in collaboration with Juvenile Justice Committee of High Court of J&K, Government of J&K and UNICEF started to organise an yearly affair of Round Table Conference on the Implementation of Juvenile Justice Act in J&K. The first conference was organised in 2017 with Justice Madan B Lokur as the Chief Guest.[44] All the stakeholders were brought together to discuss the lacunas for implementation of the Act. In the 2nd Round Table conference, held in August 2018, Advisor to the Governor informed that all the CWCs and JJBs in 22 districts were put in place.[45] He also informed in the conference that two 'Observation Homes' were set up, one in Jammu and another in Srinagar and similarly efforts were done to revamp the Children Homes.

V. Concluding Observations

The abrogation of Article 370 in August 2019 by the Parliament of India changed the status of the erstwhile State of J&K into Union Territories of Jammu & Kashmir and Ladakh. This paradigm shift

42. KNS, "Govt constitutes selection-cum -oversight Committee", *Kashmir News Service* (March 01, 2017) *available at,* http://www.knskashmir.com/govt-constitutes-selection-cum--oversight-committee-14782 (last visited on April 05, 2022)
43. *Id.*
44. KNS, "2 Day Round Table Conference on Juvenile Justice Concludes", *Kashmir News Service* (Sep 10, 2017), *available at: http://www.knskashmir.com/2-day-roundtable-conference-on-juvenile-justice-concludes-19550* (last visited on April 07, 2022)
45. Press Trust of India, "All 22 districts of J-K have CWCs, JJBs", *Business Standard* (August 25, 2018), *available at*: *https://www.business-standard.com/article/pti-stories/all-22-districts-of-j-k-have-cwcs-jjbs-118082500529_1.html* (last visited on April 07, 2022)

has brought a major change and with the J&K Reorganisation Act, 2019, as a consequence of which 113 Central laws were extended to the Union Territory of J&K, Juvenile Justice (Care and Protection) Act, 2015 happened to be one amongst them. The third-round table conference on 'Implementation of Juvenile Justice System in UT of J&K' was organised in November 2019 with a prime focus on the implementation of the JJ Act, 2015 in the UT of J&K.[46] The UT of J&K was struggling to adjust to the change when a petition was filed by child rights activist in the Supreme Court for seeking judicial intervention following the media reports of 'illegal detention of children in Kashmir'.[47] The Supreme Court directed the Juvenile Justice Committee of J&K High Court to intervene and file a status report within a week. A team of four High Court Judges visited the jails of J&K and submitted the reportthat no child was detained in any of the jails. The Supreme Court was satisfied with the report filed in December 2019. Prior to this, the DGP of J&K filed a report on September 2019 stating that priorto the abrogation of Article 370, 144 juveniles were detained but post the abrogation 142 were released and 2 were sent to juvenile homes. The Court then directed the High Court to undertake this exercise and completely abided by the submitted report.

The Fourth Round Table conference organised in October 2021 highlighted that the Juvenile Justice Boards in all the 22 districts were yet to be made functional and few of the media reports

46. Cross Town News, "3rd Round Table Conference on Implementation of Juvenile Justice System in UTs of J&K, Ladakh, (November 24, 2019), *available at: https://www.crosstownnews.in/post/45108/3rd-roundtable-conference-on-implementation-of-juvenile-justice-system-in-uts-of-jak-ladakh-.html* (last visited on April 09, 2022)
47. Staff, " Kashmir: SC seeks Probe into Alleged Illegal Detention of Children", *The Wire* (September 21, 2019), *available at: https://thewire.in/rights/kashmir-sc-seeks-probe-into-alleged-illegal-detention-of-children* (last visited on April 09, 2022)

backed the same.[48] The appointment of the CWC and JJB members in the erstwhile State was done in 2018 and fresh appointments were supposed to happen post the abrogation. But the delay in the appointment of the Selection cum Oversight committee has hindered the process. In a recent media report, it was mentioned that the previously appointed CWC and JJB members were grantedanother extension. The present scenario depicts the entire ordeal of the juvenile justice system in the UT of J&K. Where post reorganization of J&K, a ray of new hope has emerged with the implementation of the Central laws in the UT of J&K, the operational aspect remains slow. The violations faced by the children of J&K due to the absence of the child protection laws have long undermined their rights. Thus, it is of utmost importance that the present administration ensures a robust Juvenile Justice System in the UT of Jammu and Kashmir through proper training and coordination of relevant key players and stakeholders and achieve the objective of well-being, welfare and reintegration of children.

48. GK News Network, "Implementation of Juvenile Justice System in J&K, Ladakh | Justice Bhat inaugurates 4th RTC", *Greater Kashmir, (October 10th, 2021), available at: https://www.greaterkashmir.com/kashmir/implementation-of-juvenile-justice-system-in-jk-ladakh-justice-bhat-inaugurates-4th-rtc* (last visited on April 09, 2022)

Intellectual Honesty and Research Integrity in Law: An Overview

Syed Asima Refayi*
Athar Yousuf*

Abstract

Honesty and Integrity are the hallmarks of research ethics. A researcher should always be honest in the pursuit of truth, as the research findings impact society at large. There seems a consensus that the trustworthiness of research is highly important and unethical research is of no value. The standards of judging the trustworthiness of any research are based on how honestly the research work has been executed. Any research that is done with attributes of honesty and integrity will allow others to have confidence in the methods used and the findings of that research. Intellectual honesty and research integrity play a vital role in promoting the aims and objectives of the research and maintaining research ethics, such as fairness in conducting the research, treating the research participants respectfully and never compromising on true findings, even if they don't fall in line with the researchers already stated hypothesis. The present paper is aimed to examine and discuss the importance and relevance of intellectual honesty and research integrity in the realm of contemporary research trends in law.

Keywords: Intellectual Honesty; Research Integrity; Research Ethics; Rationale; Competence; Objectivity.

I INTRODUCTION

Intellectual honesty can be described as honesty in the acquisition, analysis and communication of ideas that can inform or persuade others; that is, a researcher knowing the truth, states the truth" [1]. It is a combination of good faith and true belief of a researcher in sharing the information. Research integrity means that a researcher

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[1] *Rational Wiki entry on Intellectual Honesty (accessed on 16 September 2021).*

communicates his data and knowledge about the outcome of the research to the best of his ability to understand a phenomenon. In the context of contemporary research trends, the ethics ofintellectualism are of humongous importance. Indeed, intellectual honesty is based on the philosophy that, whether a researcher agrees or disagrees with someone's philosophy, he will not allow those beliefs to be a hindrance in the ultimate pursuit of facts and the truth. A researcher can be said to be intellectually honest if he pursues the truth even if that goes against his/her hypothesis or previously held narratives. The core of intellectual honesty and research integrity is to uphold ethical principles over politics; that is, to have an unbiased attitude in the conduct of research. When there is an incentive for deception, intellectual honesty is a virtuous propensity to avoid it [2]. It is attempting to defend one's opinions if one is confident that the facts support them. It also entails acknowledging and being open to one's biases rather thanattempting to conceal them in the guise of non-partisan writing, as nobody can be essentially unbiased. A researcher is guilty of being intellectually dishonest only when he attempts to keep the facts at bay, only to uphold a narrative. This relies upon how one looksinto views and beliefs when making a choice between reason and rashness. While describing the significance of intellectual honesty, Nathan Cain, *says* "we *need to make it a commonplace for everyone to think freely and seek the truth whenever it leads them. Only with* that *mindset, we can begin to heal from this infection of intellectual dishonesty. After all, if a writer, politician, or researcher believes what they are saying, why not encourage readers to look at all sides of a discussion. If they are correct,*

[2] *Louis M. Guenin, "Intellectual Honesty," Synthese (2005) Vol. 145 p. 177-232.*

people will agree because of knowledge of their own and not as mindless drones" [3].

On the flip side, research integrity is also one of the cornerstones of a healthy and trustworthy process. Explicitly, research integrity refers to research in such a way that others can have faith in the methodology employed and the outcomes of the study4[4]. It covers both the aspects of scientific integrity of conducted research andthe professional integrity of researchers. According to *Snezana Krstic,* research integrity refers to undertaking research activities with diligence and professionalism and maintaining research morals in the proposal and experimentation phases, while upholding publication ethics in the evaluation and communication phases[5]. Furthermore, the notion of research integrity is also focused to prevent the exploitation of the research subjects, by assuring the participants' safety and well-being. Indeed, it is alsothe ethical responsibility of the researcher to carry out and then honestly report research, to uphold the integrity of research. The ethical responsibility can be lucidly described in the followingwords of *Resnik* [6]:

> "The *most precise way of defining ethics is norms of conduct that distinguish between acceptable and unacceptable behaviour. Ethical norms are so appearing that one might be enticed to regard them as common sense. But if ethics and morality were nothing more than common sense, then why are there so many ethical disputes and issues in our society? One*

[3] *Nathan Cain, The Importance of Intellectual Honesty, 19 June 2017 (Assessed on 16 September 2021).*
[4] *Available at https: //www.ed.ac.uk>research office (Assessed on 16 September 2021).*
[5] *Snezana Krstic, Research Integrity and Ethics- Concepts, Practices and Challenges, 2016 (Assessed on 16 September 2021).*
[6] *Resnik D.B, What is ethics in research and why it is important? National Institutes of Health (1 December 2015). Available at* https://www.niehs.nih.gov/research/resources/bioethics *(Assessed on 16 September2021).*

explanation of these disagreements is that all people recognise some common ethical norms but interpret, applyand balance them in different ways in light of their values and life experiences because they have different understandings ofwhat it means to be a human being."

The article comprises of two major sections, viz; Section I and Section III. Section II, would discuss the legal perspective of intellectual honesty and integrity in conducting research activities. Section III, would extract a conclusion based on the analysiscarried out in the preceding section.

II LEGAL PERSPECTIVE OF INTELLECTUAL HONESTY AND RESEARCH INTEGRITY

The section forms the core of this article and is completely devoted to uncovering the legal perspective of intellectual honesty and integrity in different research activities. Keeping in mind the relevance of ethics in the research process, various organisations and institutes have embraced certain guidelines with regard to the authenticity of research processes in the form of the following components:

(i) Honesty: Indeed, honesty is the prime ethical entity in the course of conducting the research. A research fellow ought to aspire for honesty in all the research activities like data reporting, techniques used and methodology. It is the moral duty of the researcher not to falsify, fabricate or misreport data and also, not to mislead research sponsors, co-workers, or the general public

(ii)Integrity: Integrity in research is of utmost importance, which can be described as researching with utmost sincerity while upholding promises and agreements.

(iii) **Objectivity:** Objectivity in research means that the researcher should always be rational and not biased throughout the whole research process. It is better for the outcome of the research that the researcherdiscloses the personal or financial interests that aregoing to affect the research in any way.

(iv) **Carefulness and Openness:** The researcher has to be careful in examining his work and the work of others relating to the research. In fact, during the course of action, the researcher is ought to keep a healthy record of all the research activities like data collection, analysis, research design and so on. Nevertheless, careless errors and negligence should be kept at bay, as such an erring can create discrepancies in the literature. Therefore, the researcher should always be open to sharing ideas, data, resources, and results with others. Moreover, the researcher should also be open to criticism of the work done for the betterment and excellence of the research work.

(v) **Confidentiality and Responsible Publication:** In order to maintain the ethical standards whileconducting research, the researcher is expected to keep high levels of confidentiality in protecting classified communications such as personal records, papers, grants for publications and secrets if any. The researcher should publish the research not just to advance his career, but to advance the research and scholarship in that particular area of study. Duplicate and deceptive publications should always be avoided.

(vi) **Respect for Intellectual Property Rights:** The researcher is obliged to pay due respect to the legal guidelines by making sure that he does not violate the Intellectual Property Rights like Copyright, Trademark,

Patents etc. The researcher should always acknowledge and credit all contributions to the research work and should avoid falsification, fabrication and plagiarism.

(vii) Social Responsibility: The researcher should always respect the integrity of the respondents and should strive to promote social good through his research work. Discrimination and societal harms like the breach of privacy should be avoided while conducting research.

With the aforementioned codes of conduct in hindsight, a survey shall be taken to explore the legal perspective of intellectual honesty and research integrity.

Law and Ethics govern the very foundations of a civilized society. Intellectual honesty and ethics are fundamental in undertaking legal research, as it is the research done on a particular issue that goes a long way in the making of laws by the Legislature and their proper implementation by the Executive. Indeed, good legal research requires the integration of a range of skills such as problem-solving, analysis, reasoning, honesty, competence, rationality etc. Provisions relating to competence and diligence, honesty and courtesy have direct implications on legal research, as they embody a sense of professionalism in the legal system. Nevertheless, sound legal research also includes awareness of any formal written work like Court rulings, judgements delivered and so on[7]. In all of their dealings over the course of their investigation,legal researchers must be honest and respectful. The researchers have a responsibility to guarantee that they do not deceive, deliberately or recklessly mislead the respondents and that they take all necessary efforts to amend any inaccurate data. The requirements of civility and courtesy must be adhered to by the

[7] *Legal Writing as an Ethical Practice, Oxford University Press Available at https://www.oup.com.au (Assessed on 26 September 2021).*

legal researchers in all communications. Effective and appropriate communications with respondents, colleagues and others are pivotal for sound legal research. Self-awareness and reflection on oneself and others are the prime instincts for conducting effective legal research abreast of the professional expectations as represented in the appropriate norms of conduct and the community of practise[8]. A legal researcher should be aware of the principals, aims and issues of law relating to the research problem, and all this is possible only when the researcher follows a dynamic approach by doing a thorough and in-depth analysis of the relevant research problem and then shares the information with clarity in mind and an unbiased manner[9].

Different countries have put in place different statutory frameworks for promoting intellectual honesty and researchintegrity. The United States was the first such country, whoselegislators were centred on the responsibility to investigate complaints of research misconduct[10]. The Office of Research Integrity (ORI)[11] was founded in 1992 with the goal of promoting research integrity by investigating research misconduct. With the assistance of the United States Public Health Service, the ORI declares misconduct findings and related sanctions publicly. The science and technology policymakers in the White House developed a Federal Research Misconduct Policy in the year 2000, requiring the implementation through regulations and policies by the federal agencies and departments sponsoring research, but the

[8] *Ibid.*

[9] *Swati Ruhela, Importance and Benefits of Legal Research in the Legal Industry Available at vaidhalegal.com (Assessed on 26 September 2021).*

[10] *Bratislav Stankovic, "Pulp Fiction: Reflections on Scientific Misconduct," Wisconsin Law Review 3(2004): P.989 (Assessed on 26 September 2021).*

I. [11] *ORI website: https://ori.hhs.gov (Assessed on 26 September 2021).*

US landscape is still marked by a lack of consensus on research misconduct[12].

International discussions on intellectual honesty and research integrity in the 2000s saw a split in the United States and the European approaches. The latter, on the other hand, was less legalised and relied primarily on researcher self-regulation[13]. Generally speaking, it is preferable to distinguish between nations where the legislature has approved special legislative rules on research misconduct and those where the general law governs several concerns connected to research integrity.

Scandinavian countries (Denmark, Norway, and Sweden) were among the first in Europe to pursue specific legislations, sometimes in conjunction with the establishment of "quasi- judicial" national structures for determining how legally and non- legally binding obligations are nonetheless frequently intertwined.[14],[15].

In Denmark, The Danish Code of Conduct for Research Integrity specifies that institutions and researchers should endorse all the measures aimed for addressing transgressions in the conduct of research in a responsible manner, which are described as violations of contemporary standards on sincere research conduct, including those of the Danish Code of Conduct and other relevant institutional, national and international research integrity

[12] *Editorial Policy Committee of the Council of Science Editors (CSE), "White Paper on Promoting Integrity in Scientific Journal Publications, 2012 Update." P.57. (Assessed on 26 September 2021).*

[13] *Krista Varantola, "What Does the Global Scene Look Like in Research Integrity in the Nordic Countries" – National Systems and Procedures, Nord Forsk Expert Seminar, Oslo 9 April 2014 (Nord Forsk, 2015), P.8 (Assessed on 26 September 2021).*

[14] *Hiney, "Research Integrity: What it means, Why it is Important and How we might Protect it." P.19 (Assessed on 26 September 2021).*

[15] *Ben. R. Martin, "Whither Research Integrity? Plagiarism, Self-Plagiarism, and Coercive citation in an Age of Research Assessment," Research Policy 42 (2013): P. 11 (Assessed on 26 September 2021).*

procedures and principles[16]. Among such violations, the research misconduct or intellectual dishonesty is gruesome and is described by the Danish Committee on Scientific dishonesty as *" falsification, fabrication, plagiarism and other serious violations of good scientific practice committed intentionally or due to gross negligence during the planning, implementation or reporting of research results"*[17],[18].

During the culminating decennium of the twentieth century, Norway established a centralised management system of national research ethics committees[19]. A few years later, in the year 2006, legislation on research ethics and integrity was enacted, which led to the constitution of the National Commission for the purpose of looking into scientific wrongdoing[20]. The object of this law is "*to ensure that research carried out by public and private institutionsis conducted in accordance with recognised ethical standards"*[21]. As a consequence of this law, a couple of committees were established (*National Research Ethics committee and Regional Committees),* for the ethical conduct of medical and health research, having expertise not just in the appropriate discipline and ethics, but also in the law[22]. The said national commission is set with the role to investigate scientific misconduct, in the guise of falsification, fabrication, plagiarism or any sort of breaching in the

[16] *Ministry of Higher Education and Science, "Danish Code of Conduct for Research Integrity," November 2014 (Assessed on 26 September 2021).*

[17] *Ibid.*

[18] *Act on the Research Advisory System etc. [Consolidated Act no. 1064 of 6 September 2010], Section 2(3) (Assessed on 26 September 2021).*

[19] *European Science Foundation, "Stewards of Integrity: Institutional Approaches to Promote and Safeguard Good Research Practice in Europe" [Strasbourg, 2008], P.33 (Assessed on 26 September 2021).*

[20] *Law on Ethics and Integrity in Research, (Act of 30 June 2006, which entered into force in July 2007) (accessed on 26 September 2021).*

[21] *Section 1.*

[22] *Section 3 and Section 4.*

good scientific practise that has been committed intentionally or negligently while planning, conducting, or reporting research[23]. A person with judicial experience leads the National Commission, and any decision given by the commission is appealable before the *Ministry of Research*, which is responsible for appointing a special commission for this reason[24].

Different institutions in the United Kingdom have their own policies and procedures for dealing with intellectual honesty and related practices. They rely on separate terminologies and definitions such as "*research fraud"* and *"scientific misconduct"*[25].In the year 2006, the UK Research Integrity Office (UKRIO) provided general guidelines in the detection of misconduct in research or in intellectual dishonesty. In 2012, an agreement for supporting the initiatives of Research Integrity was signed by a number of institutions in the UK[26]. The agreement acknowledges that the research process is governed by a plethora of statutory and regulatory requirements, but it does not override or replace them. This agreement commits the parties involved to doing research in accordance with relevant ethical, legal, and professionalframeworks, obligations, and standards. These are thus considered important for ensuring research integrity, despite the fact that they are presented as distinct from and supplementary to the key concepts that underpin integrity. The signatories to the agreement also pledge for using methods that are transparent, resilient, and

[23] *Section 5.*

[24] Judicial expertise is also integrated in similar structures in Sweden.

[25] *In this sense: Konin Klijke Nederlandse Akademie Van Watenschappen, Vereniging Van Samenwarkende Nerderlandse Universiteiten, and Netherlands Organisation forScientific Research "Standard Evaluation Protocol 2015-2021: Protocol for Research Assessments in the Netherlands". July 2015, P.8 (accessed on 26 September 2021).*

[26] *The Department for Employment and Learning, Higher Education Funding Council for England, Higher Education Funding Council for Wales, National Institute for Health Research, Research Councils UK, Scottish Funding Council, Universities UK, Welcome Trust.*

equitable in dealing with claims of research misconduct. According to the concordat, research misconduct refers to "*behaviour or actions that fall short of standards of ethics, research and scholarship required to ensure that the integrity of research is upheld"* and is characterized by "*failure to meet ethical, legal and professional obligations: for example failure to declare competing interests, misrepresentation of involvement or authorship, misrepresentation of interests, breach of confidentiality, lack of informed consent, misuse of personal data, and abuse of research subjects or materials"*[27].

In India, certain major policy declarations and rules issued byIndian apex organisations for higher education and scientific research between 2016 and 2018 deal with concerns such as research integrity, research evaluation, and research misconduct.

(i) The Indian National Science Academy (New Delhi) issued a policy statement on "Dissemination and Evaluation of Research Output in India" (May 2018). The Indian National Science Academy (INSA) fellows Praveen Chaddah and S.C. Lakhotia produced a policy statement on research output dissemination and assessment in India, according to the minutes of the INSA's general body meeting on July 27, 2017. The draft report was forwarded to INSA Council members for their feedback, and after incorporating the council members' final comments, it was published in INSA's flagship journal *"The Proceedings of the Indian National Science Academy," (PINSA),* in the month of May in 2018.

(ii) The University Grants Commission (UGC) formed an expert panel on the theme "**Promotion of AcademicIntegrity and Prevention of Plagiarism in Higher**

[27] *Ibid.*

Educational Institutions" in July 2018. The major objectives of the panel were[28]:

(a) To create awareness about the responsible conductof research, thesis, dissertation, promotion of academic integrity and prevention of misconduct including plagiarism in academic writing among students, faculty, researchers and staff.

(b) To establish an institutional mechanism through education and training to facilitate responsible conduct of research, thesis, dissertation, promotion of academic integrity and deterrence from plagiarism.

(c) To develop systems to detect plagiarism and to set up mechanisms to prevent plagiarism and punish a student-faculty, researcher or staff of HEI committing the act of plagiarism.

The committee released a series of proposed regulations on the topic, which were published in the Indian Gazette in 2018. Many Universities in India, have adopted these UGC regulations and it has helped in achieving the goal of intellectual honesty and research integrity.

(iii) The statement of the Department of Biotechnology (DBT) issued in 2016 is of crucial significance in dealing with the allegations of research misconduct circumscribingthe research in Biomedical Sciences in India. It wascreated in partnership with the DBT India Alliance and the Welcome Trust, with the purpose of enabling biomedical research in the country through funding and involvement, and the vision of building an internationally competitive research environment in

[28] *The Gazette of India: Extraordinary Part iii-Sec 4, p. 9, 2018. (Assessed on 26 September 2021).*

India. Besides, the Department of Biotechnology is the institutional signatories from India to the San Francisco Deceleration on Research Assessment (DORA), which recognizes the need to enhance the way researchers and scholarly research outputs are evaluated.

The INSA Policy Statement (2018), the UGC Regulations (2018), and the DBT Statement (2016) are all by and large complementary, but more synergy in implementing strategies at the institutional and funder levels is required so that India can play a leadership role in creating sustainable knowledge societies in South Asia through responsible research and innovation practises[29].

III CONCLUSION

It may be concluded that earning a learner's trust in one's research is totally dependent on, how truthfully and fairly the research has been conducted. It is the moral obligation of the researchers and the research institutions to always maintain high standards of intellectual honesty and research integrity, by avoiding unethical conduct and policy of deceit. The research findings should always be original and genuine so that public confidence is not breached with the research. The test results should not be fabricated and the respondents should never be misled. The researcher, while discussing his/her work with others, should always be open- minded and should welcome constructive criticism of the research work, as that will be beneficial not only to his/her research workbut to the society at large.

One of the important aspects of intellectual honesty and research integrity is to respect the secrets of one's organization and to make sure that unpublished data belonging to others is not disclosed and

[29] *Anup Kumar Das, "Research Integrity in the context of Responsible Research and Innovation Framework" DESIDOC Journal of Library and Information Technology, Vol.39, No.2, March 2019, P. 82-86 (Assessed on 26 September 2021).*

every researcher should be mindful of that. It becomes even more important in Social Science research, as the researcher may have to gather data on diverse aspects of people, and even it is also possible that the researcher will have access to personal and private information. The privacy of the respondents has to be protected, and the purpose of the research study has to be told well in advanceby the researcher to every respondent. Nevertheless, In order for the researcher's research work to be published, the respondents' consent must be obtained first.

Research ethics demands that bias and wishful thinking should be avoided by the researcher. The researcher must not infringe on any copyright, patent, or other types of intellectual property. He/she should always give credit while using material from others, and should never do anything, that damages the credibility of the research work.

Another important aspect of research integrity and ethics is that the researcher should not publish the same work in multiple journals. Here the role of the supervisor is important and the supervisor should provide genuine guidance to the concerned researcher as regards safeguarding his/her interests. Both the researcher and the supervisor should know that honesty is the best policy in researchas well.

Towards the culmination, one of the important suggestions which we would like to put forth is that it should be compulsory for every research scholar to attend at least one workshop on "Intellectual Honesty and Research Integrity" during his/her Course Work component so that he/she knows and understands the relevance and need of basic research ethics, and abstains from plagiarism and other ill practices in research.

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Critical Analysis of Domestic Violence Act, 2005: An Impact on the Institution of Marriage

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Abstract

Violence against women is an appalling human rights violation transcending boundaries of race, religion, class, and sex. Currently the violence perpetrated against women has advanced beyond expectations and is not confined to physical threats or abuse only. In India, domestic violence is a reality with almost one out of four women being victims of such abuse. The Domestic Violence Act, 2005 came to the rescueof victims of domestic violence by providing a fourfold support system ranging from orders concerning residence, custody, protection, to monetary relief from the respondent. The Act in theory contributes greatly in the protection of women within domestic setup. However, under the garb of protecting women, the Act indeed challenges the foundations of marriage by prompting intolerance, unnecessary litigation, and placing marriages on the verge of extinction. With no legal repercussions for false litigations, instances do exist, whereby; the protective provisions of the Act are being usedas a weapon to wreak petty revenge and to settle scores. The paper attempts to examine the inadequacies of the legislation and its impact on the institution of marriage which require immediate action and redressal.

Key words: *Domestic violence, Human rights, Marriage, Protection, Redress, Victim, Violence.*

I. Introduction

Domestic violence can be referred to as the extension of attempts in a relationship to gain and maintain power over the other side through violence and other forms of abuses- physical, sexual, psychological, economic etc. Such violence is seen as a typical

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manifestation of gender inequality in a society, no matter whether the perpetrator is, a family member, current or past spouse, or any relative or a friend. Violence against women is in itself a crime against humanity and a critical human rights issue. The offence of domestic violence being a 'continuing offence' is classified among most repugnant crimes against women[1]. When such violence occurs within a family setup, it reflects a serious human rights violation. The notion of domestic violence carries with it, the demolition of the assumption that home is a secured place for the protection of women, as the persons in whom women put absolute confidence, those who are expected to give her warmth of relations and a feeling of security in her own family, are generally theperpetrators of such violence.

Presently the, violence against women appears a universal reality. In recent years, there is a growing consensus amongst nationsabout the alarming rise in the incidences of violence perpetrated against women. The Vienna Declaration1994 and the Beijing Declaration and Platform for Action (1995) have acknowledged domestic violence as a human rights issue.[2] UN Committee on

[1]Supreme Court of India in *Krishna Bhattacharjee v. Sarathi Choudhury*, (2016) 2 SCC 705

[2] Vienna Declaration and Programme Action (A/CONF.157/23), of 1994 is a human rights declaration adopted at the World Conference on Human Rights on 25th June 1993, in Vienna, Austria. The Declaration states that:

> "In particular the World Conference on Human Rights stresses the importance of working towards the elimination of violence against women in public and private life…the elimination of gender bias in the administrationof justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices."

Violence against women, including domestic violence, was a major focus at the 1995 Fourth World Conference on Women in Beijing, China (A/CONF. 177/20 (1995) and A/CONF. 177/20/Add. 1 (1995)). The Conference document, the Beijing Platform for Action, identifies domestic violence as human rights violation. The Platform states: *"violence against women both violates and impairs or nullifies the enjoyment by women of their human right and fundamental freedoms"*. It addresses violence against women as a separate "Critical Area of Concern" and includes it under the "Human Rights" section, SVAW - Domestic Violence: Law and Policy (umn.edu).

Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in its general recommendations has also urged the member countries to take measures to protect women against any form of violence, particularly violence taking place within the family, a phenomenon highly frequent in India.[3]

In India's patriarchal setup, domestic violence against women i.e., violence within the safest walls of her abode, is sadly a reality and is prevalent among women regardless of their age, educationalstatus, socio-economic dependence, and family living arrangement.In the year 2018, domestic violence against women figured as the top category of violence against women in India.[4] Although, the reasons for the occurrence of such violent acts may vary, yet an unlawful demand of dowry seems a predominant factor for enforcing such violence. This may be the reason that in Indiadomestic violence is commonly referred to as violence againstwomen in matrimonial homes. Through the Criminal Law (Second Amendment) Act 1983, Section 498-A was inserted under Chapter XX-A in Indian Penal Code and domestic violence was recognized as a specific criminal offence. The section reflects the criminal dimensions of physical and mental cruelty inflicted by the husband or his relatives for reasons that may extend beyond unlawful demands and makes it a punishable offence.[5]

However, the Civil Law did not address this phenomenon in its entirety. Although, Section 498-A[6] which states, *"Whoever, being*

[3] CEDAW is an international treaty adopted in 1979 by the UN General Assembly through G.A. res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993). Described as an International Bill of Rights for Women, it was instituted on 3 September 1981 and had been ratified by 189 States. The Committee on Convention on Elimination of Discrimination Against Women is a UN treaty body that oversees the CEDAW.

[4] National Crime Records Bureau (NCRB), *Crimes in India – 2018*, 1, (2019),https://ncrb.gov.in/en/crime-india-2018.

[5] Indian Penal Code 1860§ 498-A.

[6]The Indian Penal Code, 1191, *Ratanlal and Dhirajlal* (35th edn., 2017)

the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine" dealt with dowry-related cruelty to married women but did not explicitly define 'domestic violence'. Consequently, theParliament of India, in order to provide more effective protection of rights of women guaranteed in the Constitution under Articles 14, 15, and 21, and to rescue women from any kind of violence occurring within the family, enacted The Protection of Women from Domestic Violence Act, 2005 hereinafter referred as DV Act.

II. Significance of the Domestic Violence Act, 2005

September 13 of the year 2005 was no doubt a defining moment for women rights in India. On that day, the Protection of Women from Domestic Violence Act came into force. For the first time the Act considered 'invisible violence' at home, physical and verbal abuse, withholding of financial rights, and sexual cruelty. The provisions of the Act are intended to achieve the Constitutional Principles laid down in Article 15(3)[7], reinforced vide Article 39 ofthe Constitution of India, in addition to providing an effectiveremedy in Civil Law for protection of women from being victimsof domestic violence and to prevent women from violence of any kind occurring within the family.

To address judicial subjectivity in and trivialization of determining what constitutes violence; the Domestic Violence Act has enlarged the expression of domestic violence to encompass physical, emotional, mental, verbal, sexual, and economic abuse.[8]

Chapter IV of the DV Act is regarded as its heart and soul, for providing diverse reliefs to a woman who is or has been in a

[7] (3) Nothing in this article shall prevent the State from making any special provision for women and children.
[8]*See* Protection of Women against Domestic Violence Act, 2005 § 3.

domestic relationship with the respondent and seeks one or more reliefs provided under the Act. The Magistrate, while entertaining an application from an aggrieved person under Section 12 of the DV Act, may grant varied reliefs to victims ranging from protection orders,[9] residence orders,[10] custodial orders,[11] and monetary relief[12]from the respondent. Further, the Magistrate may order payment of compensation or damages without prejudice tothe right of the applicant to institute a suit for compensation or damages for injuries caused by the acts of domestic violence committed by the respondent, with a prayer for set off against the amount payable under a decree obtained in Court. The Act was thus conceived as a solution for the battered woman who first needed to secure herself against a violent situation.

III. Some Substantive and Procedural Lacunae in the Domestic Violence Legislation

Although the Domestic Violence Act, 2005 is a commendable effort to safeguard women from the perpetrators of domestic violence, yet there exist numerous lacunae in the Act and in its execution that prevent it from securing its unfrequented fruition.

1) ***A Weak piece of legislation:*** A law in order to be delivery-oriented has to be organic and has to take cognizance of socio-economic realities. Although the DV Act was welcomed by the majority, yet the haste in making the Act without gauging the ground realities makes it a weak piece of legislation and a matter of public mockery. Theacceptance to a statute must come within itself and should avoid the impression of being inflicted by some external agency for the effective realization in a democracy, which

[9]*Id.* § 18.
[10]*Id.*§ 19.
[11]*Id.*§ 21.
[12]*Id.*§ 20.

did not happen in the present case, as the advent of this Act was less an outcome of *vox populi* and more the reaction by Government to the mounting pressures from the global community after ratifying the CEDAW.[13] Besides, larger sections of women who have used the DV Act constitute married women. This is an indication of its wider non-acceptance yet or non-recognition of the DV Act in the non-matrimonial plane.[14]Thus the Act has predominantly remained a matrimonial law.

2) ***A gender-specific legislation:*** The DV Act singles out only men as the perpetrators of domestic violence and assumes that only women are the victims. In other words, the law is totally gender specific and rules out the possibility of domestic violence against men. Under this Act, a woman alone can file a complaint against her male partner. A male who is a victim of domestic violence has no rights under this law as the pendulum of presumption under the said law is against men, thus fails to redress incidents of violence against men in a domestic relationship. Conveying such extensive legal protection to women, while retaining protection for male victims commensurate with systematic legal victimization of men.

3) ***No pre-litigation counseling:*** Women need pre-litigation counseling. Besides pre-litigation advice under Section 5[15]of the Act, pre-litigation counseling has completely

[13] India signed the Convention on Elimination of All Forms of Discrimination Against Women, 1979 on 30th of July 1980 and ratified it on 9 July 1993 with two declarations and one reservation.

[14] Rachna Kaushal, *Protection of Women from Domestic Violence Act, 2005-An Appraisal*, MAINSTREAM (DEC. 10, 2020, 10:4 A.M), https://www.mainstreamweekly.net/article1936.html.

[15]Section 5 in The Protection of Women from Domestic Violence Act, 2005

5. Duties of police officers, service providers and Magistrate.—A police officer, Protection Officer, service provider or Magistrate who has received a complaint of domestic violence or is otherwise present at the place of an incident of domestic violence

different objectives and requirements. At the pre-litigation stage, counseling may provide a chance to the aggrieved party to restore her self-esteem, provide emotional support and assist her in making an informed decision as to whether she wants to initiate legal proceedings. As regards the respondent, such counseling may help them to acknowledge their past acts of violence and counsel them to stop further violence. However, in DV Act, it is difficult to gauge who is providing counseling services at pre-litigation stage. Section 14 of the Act only provides for Court directed counseling at the litigation stage, with the objective to prevent violence or where the women so desires, attempt settlement. In cases where the Magistrate may direct joint counseling sessions to be held for the victim and the perpetrator if the latter is however not permitted to plead any counter justification for violent behavior, such exclusion of equal chance of reconciliation virtually negates the possibility of reaching a mutually agreeablesettlement.

The settled position in law is that a non-compoundable offence cannot be compounded by a Magistrate, if the aggrieved person acting on the Protection Officer's

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or when the incident of domestic violence is reported to him, shall inform the aggrieved person—

(a) of her right to make an application for obtaining a relief by way of a protection order, an order for monetary relief, a custody order, a residence order, a compensation order or more than one such order under this Act;

(b) of the availability of services of service providers;

(c) of the availability of services of the Protection Officers;

(d) of her right to free legal services under the Legal Services Authorities Act, 1987 (39 of 1987);

(e) of her right to file a complaint under section 498A of the Indian Penal Code (45 of 1860), wherever relevant: Provided that nothing in this Act shall be construed in any manner as to relieve a police officer from his duty to proceed in accordance with law upon receipt of information as to the commission of a cognizable offence.*Available at:https://indiankanoon.org/doc/1655530/*(Last Modified on 22nd Feb, 2022)

advice,[16] files a penal complaint under Section 498 A of IPC, the Magistrate shall have no power to recall process even if the parties later on desire, rendering amicable settlement under Sections 14 and 15 of DV Act impossible.[17]

4) ***Uncertainty regarding the Right to reside:*** Under Section 17 of the Act, a woman's right to protection co-exists with her right to reside in the shared household and not on whether or not she had marked her physical presence in the shared household. This Right to reside remains an area of major concern for women. There is much confusion amongst the implementing agencies as to the scope of the definition of 'Right to reside in the shared household'. Many Protection Officers and Police Officers were unable to distinguish between the right to reside and the right to share in the property. Many felt that the Act gives aggrieved parties a right to ownership over the property, which it does not. The right to reside is most affected by Supreme Court's decision in *Batra v. Batra.*[18] The analysis of the orders shows that this judgment has been used todeny Residence Orders to the women and widows by providing the reasoning that since the premises belongs to the mother-in-law and father-in-law and not the husband, the home is thus not a shared household.[19]Under Clause(2) of Section 17, the aggrieved person shall not be evicted or

[16]*Supra note 5*§ 5(e): A police officer, Protection Officer, service provider or Magistrate who has received a complaint of domestic violence or is otherwise present at the place of an incident of domestic violence or when the incident of domestic violence is reported to him, shall inform the aggrieved person of her right to file a complaint under section 498A of the Indian Penal Code (45 of 1860), wherever relevant.

[17] Artrika Choudhuri, *Protection of Women from Domestic Violence Act: A Critical Exegesis,* LEXQUEST FOUNDATION (Dec. 10 2020, 10:15 A.M), https://lexquest.in/protectio-of-women-from-domestic-violence-act-a-critical-exegesis/ .

[18] S.R. Batra and Anr. v. Smt. Taruna Batra, AIR (2007) 3 SCC 169 (India).

[19]*Supra* note 11.

excluded from the shared household or any part of it by the respondent except in accordance with the procedure established by law. However, the DV, Act does not specify 'the procedure established by law' to evict a woman or exclude this right.[20]

5) ***Violation of the due process of law:*** By permitting the passing of 'ex-parte' orders, in granting the power to the magistrate to pass orders without laying down any rule of evidence or procedure and in granting power to the magistrate to conclude that an offence under Section 31 has been committed, upon the sole testimony of the aggrieved person, the provisions of the Act is found violative of the "due process of law".[21]Section 19 of the Act empowers the Magistrate to pass residence order in favor of women by placing some restraints upon the respondents. However, some of the restraining orders directing the male respondent to abstain from visiting places, frequented by the aggrieved person, including respondent's home or other public places, unjustly check his fundamental right to freedom of movement guaranteed under Article 19(1)(d) of the Constitution. Further by restraining the respondent from alienating or disposing off the shared household or from renouncing his rights in the shared household, the law impedes the rights of even those who may not have any contribution to the dispute. Such restraints result in harassment of respondents particularly, when the complainant filed a case with 'malafide' intentions, thus no safety values in the Act to prevent its misuse.

[20]*Supra* note 13.

[21] The *'Due process of law'* is a legal requirement that the State must respect all legal rights that are owed to a person. Due process balances the power of law of the land and protects the individual person from it. When government harms a person without following the exact course of the law, this constitutes a due process violation, which offends the rule of law, https://en.m.wikipedia.org.

Section 23 of the Act empowers the Magistrate to grant an interim and ex-parte Protection Order under Section 18 only upon prima facie satisfaction that 'there is a likelihood' of domestic violence being committed by the respondent.[22] A combined reading of these Sections reflects a considerable danger of their abuse and may ensure some alarming repercussions. If an unscrupulous woman, for example, obtains an ex-parte injunction order merely by introducing doubts that the respondent 'may subject her to emotional abuse', it may effectively restrain the respondent from entering his own home or operating his own bank account and thereby wrongfully subject him to physical and economic constraints by curtailing his basic freedoms. Further, Section 23 when applied in conjunction with Section 31 of the Act, the breach of such interim order attracts substantive sentence, rendering the respondent totally at the applicant's mercy.[23]

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[22] *Supra* note 5 Section 23: Power to grant interim and ex parte orders.-

(1) In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.

(2) If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent.

[23] *Id.* § 31: Penalty for breach of protection order by respondent.-

(1) A breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

(2) The offence under sub-section (1) shall as far as practicable be tried by the Magistrate who had passed the order, the breach of which has been alleged to have been caused by the accused.

(3) While framing charges under sub-section (1), the Magistrate may also frame charges under section 498A of the Indian Penal Code (45 of 1860) or any other provision of that Code or the Dowry Prohibition Act, 1961

On the one hand, filing complaints for breach under Section 31of the DV Act, 2005 remains the predominant method of enforcement of orders. Among the ambiguous aspects requiring prompt cognizance from the higher judiciary including policy makers is that, in a majority of cases, no direction for enforcement/compliance of orders is included in the orders themselves. It amounts to an obstruction for the women who shall approach the court separately for such a direction.[24] One the other hand, there has been a constant demand to strike down Section 31of the Act, as it makes breaching of Protection Order a criminal offence and thus a cognizable and non-bailable offence.

Section 32 of the DV Act empowers the Court to conclude that there has been a breach of Protection Order underSection 31 of the DV Act, upon the 'sole testimony of the aggrieved person' without any prior investigation. This is considered as a highly dangerous position as the action like arresting and putting a person in jail, even before trial amounts to prejudging and punishing the accused without due process. Besides, the fact that a complaint by a woman will be treated, prima facie, as 'true and genuine' offers the possibility where innocent men will be accused and implicated in sham cases.

6) ***Danger of abuse:*** There is a rising possibility of the misuse of the DV Act, as has been seen with Section 498-Aof IPC where all the mechanisms and guidelines to prevent the misuse of the provision have proved ineffective and has acquired the reputation of being 'most absurd law in the

(28 of 1961), as the case may be, if the facts disclose the commission of an offence under those provisions.

[24] NNLRJ India, *Recommendations of Third Monitoring and Evaluation Report 2009 on PWDA*, NATIONAL MEDIA COALITION INDIA (Dec. 11, 2020 10:45 A.M), https://mediacoalition.wordpress.com/2009/11/15/recommendations-third-monitoring-evaluation-report-2009-on-the-protection-of-women-from-domestic-violence-act-2005/.

history of jurisprudence'. Many organizations like 'Save the Indian Family' hold the view that under the garb of providing protection to women, the Act indeed attacks the very foundation of the marriage by promoting intolerance and encouraging inessential litigation even for petty family abuses.[25]

Alarmed by the abuse of dowry prohibition laws, in 2005 a bench of Supreme Court while upholding the Constitutional validity of Section 498-A of IPC stated that "by misuse of provisions of 498A IPC, a new 'legal terrorism' can be unleashed. The provision is expected to be employed as a shield and not as an assassin's weapon".[26] According to Justice CK Prasad and PC Ghose, the fact that Section498A is a cognizable and non-bailable offence which has ushered in it a questionable precedence amongst the provisions invoked by disgruntled wives as weapons instead of shield.[27] According to Khurshid Ahmed Dar,[28]the law is based on the wrong assumptions that the women will complain only against the injustice. Domestic Violence Act has become a tool to harass innocent family members. The Act instead of being used in a productive manner is often misused bytaking undue advantage to torture husbands and in-laws.[29] The Courts are lacking the mechanism to check the ground situations and often the genuine cases of domestic violence are not reported either because they are not aware of the

[25] Save Indian Family Foundation (SIFF) is a men's rights group in India. Founded in 2007, SIFF is an advocacy group against misuse of Indian laws related to dowry harassment.
[26] Sushil Kumar Sharma v Union of India and Ors., AIR (2005) SCC 141 (India).
[27] Arnesh Kumar v. State of Bihar And Anr., AIR (2014) SCC 1277 (India).
[28] Advocate J&K High Court, Srinagar, India.
[29]Assumption is based on Advocate's expertise and experience in matrimonial dispute litigation.

law or they hesitate to approach the court. He further added that in some cases, without any regard to the principles of natural justice and without corroborating the testimony of women, the respondent's are being pulled out of their property and sometimes their families, including their women, are made to face arrest on false charges of taking dowry all under the grab of implementation of Section 498-A of IPC. It has exploited several innocent women affiliated with the husband's family. Much of such complaints are filed in the heat of the moment over trivial issues or under unreasonable expectations of alimony, which is unfortunately often overlooked by the judiciary. Women often don't visualize the far-reaching outcomes of registering false criminal complaints against their husbands and in-laws, because if uncalled for arrest, it may presumably ruin the chances of any possible settlement, thereby planting seeds for matrimonial discord.

The Act has become a key tool with the women to get divorce and maintenance, even though she may not suffer any such kind of domestic violence, while the matter is sub-judice, the men are obliged to pay maintenance to women, this means that punishment for men starts once the false complaint is lodged. It totally contradicts with the principles of natural justice which work on the presumptionof innocence rather than guilt.

IV. Impact of Domestic Violence Act on the Institution of Marriage

Marriage as an institution has great socio-legal significance and various legal consequences flow out of this relationship. According to O'Regan, J:

> *"Marriage and the family are social institutions of vital importance. Entering into and sustaining a*

> *marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage, therefore, is to enter into a relationship that has public significance as well".*[30]

For decades, the laws in India have abstained from entering the privacy of marital life. The judicial interpretation of Constitution initially refrained to interfere in the matters within the exclusive domain of marital wedlock. But now, the legal reforms are rushing inside the bedrooms of individuals thereby, encroaching into the private space of individuals. The DV Act, 2005 too followed a radical departure from the established rule and caused intrusion of law within the bedroom affairs of the individuals. The institution of marriage is now under sharp scrutiny. A reassessment of marital rights could prove both beneficial or if misused, an invitation to a marital crisis.[31] Nowadays, family courts in India have become a hub of slinging matches between husbands and wives, once united in a holy matrimonial relationship. With the growth of new

[30] Dawood and Another v Minister of Home Affairs and Others, 3, SA 936, CC (2000) (India).

[31]Damayanti Datta, *New matrimony laws in India and their impact*, INDIA TODAY (Dec. 11, 2020 12:10 P.M), https://www.indiatoday.in/magazine/cover-story/story/20061204-reason-for-the-breakdown-of-the-marriage-and-relationship-and-marriage-laws-in-india-781975-2006-12-04.

concepts like live-in-relationship, it is much easier for people today to break their wedlock, and prefer new concepts thereby rapidly increasing divorce rates posing challenge to the validity and sanctity of marriage institution.

According to legal experts, although the Act was devised to protect the interests of the 'victim', instead it causes untold pain and misery to the 'accused' and his elderly family members due to its misuse, misapplication, and misinterpretation. Today, women especially wives, aided by unscrupulous lawyers are taking undue advantage of the inherent flaws in the legal system and thereby making law, a potent weapon against their husbands to make them "fall into their hives". The life of the poor, wrongly accused personis devastated so badly that in numerous cases, unable to bear harassment and ignominy of being labeled as wife abuser, he decides to even commit suicide.[32]

No matter what may be the consequences of the prosecution, the social stigma remains, thus affecting the future prospectus of the accused. While some are losing jobs mostly due to frivolous cases lodged by their wives and arbitrary arrests, others are losing the custody of their children. No matter how innocent he is, the laws seem stacked against him and it takes him years and years to prove his innocence despite the evidence. Besides, the accused is tormented by the society even if the accusation is proven wrong. In India, where the creative legal genius can transform a BMW into a truck, we don't require much imagination to figure out what would happen if husbands who are being accused of domestic violence by their wives are offered an opportunity to reciprocate. A clear

[32] Swagata Sen and Arvind Chabbra, *Unhappily harried: Harassed husbands come together in Shimla on Independence Day to protest against cruel treatment by their wives*, INDIA TODAY ("55,200 married men committed suicide every year as compared to married women according to NCRB"), (Dec. 11 2020 1:30 P.M), https://www.indiatoday.in/society%20&%20the%20arts/story/Unhappily-harried-740583-2009-08-19.

situation that might occur would be that men, often the breadwinners in a household and with deeper pockets than their wives, would utilize their available means to out-litigate their wives.[33]

The foundation of a sound marriage is tolerance, adjustments, and respect for each other. Petty quibbles, trifling differences are mundane matters that should not be exaggerated and blown out of proportion to destroy what is said to have been made in the heaven.[34] However, even minute differences in matrimonial ties could invoke the provisions of the DV Act, women with wrong intentions are ready to jump at the smallest opportunity and file a case by making a mountain out of a mole. Such misuse and misapplication of the law are some of the main causes for the destruction of many families. These massive changes in the institution of marriage have often far-reaching consequences. This is evident from the increasing rate of divorces mostly among younger age groups. Instead of salvaging the situation and making all possible endeavors to save a marriage, their action either due to ignorance or on account of sheer hatred towards the husband and his family brings about complete destruction of marriage on trivial issues. No sooner a family matter reaches outside the family, than even a fair chance of reconciliation between spouses gets vanished.

It seems that the DV Act strikes at the very foundation of marriage by prompting intolerance and litigation for petty domestic disputes. It is universally recognized since long that differences do arise in a marriage and sometimes people both men and women, behave in unfavourable ways towards each other. In most of the situations

[33] Sanjoy Ghose, *A Gender-Neutral Domestic Violence Law harms rather than protects women*, THE WIRE (DEC. 12 2020 7:04 P.M), https://thewire.in/law/a-gender-neutral-domestic-violence-law-harms-rather-than-protects-women.
[34] Justice Pardiwala of Gujarat High Court in Gunjan v. State of Gujarat, AIR (2005) (India).

people are able to work them out and lead a more or less happy life with their loved ones. However, the present law makes it very easy to escalate the domestic problems in daily life to such a level that it eventually leads to a breakdown in marriage. Once a person is accused of domestic violence, he will perpetually feel threatened by his partner and that is the beginning of the end where wedlock turns into deadlocks. This law is likely to lead to more divorces, declining faith in the institution of marriage, resulting in broken homes where the children ultimately have to bear the consequences by being deprived of a pleasant childhood.

The DV Act, like Section 498A of IPC, was enacted with very noble intentions to ensure the safety and security of women within domestic setups such as marriage and cohabitation but the misuse of the Act has emerged as a great challenge, raising grave apprehension that the Act will meet the same fate as Section 498-A of IPC. The police, civil society, politicians and even judges of the High Courts and Supreme Court have offered these arguments of the ‘misuse' of laws vehemently. The allegation of misuse is made particularly against Sec 498A of the IPC and against the offence of dowry death in Sec 304B. One such view was expressed by former Justice K T Thomas in his article titled 'Women and the Law'.

V. Conclusion

There are different levels of aggressive behavior and all conflicts in a relationship cannot be termed as domestic violence. The DV Act understates the problem of domestic violence by bringing negligible differences within its domain and thereby explicitly repudiating protection to half of the population. The main aim and object of the Act was to guard the victims of domestic violence from further incidents of violence and anguish and thus to alleviate their miseries and not to serve the selfish desires of people who won’t bother in accusing their own family of committing atrocities

in order to acquire monetary benefits. Thus, there is a need to identify the genuine victims of domestic violence. Rest frivolous, concocted and fake complainants must be halted from ruining families.

The present law in its current form is grossly inadequate to tackle the problem of domestic violence, and imposes a lot of responsibility on men only. Above all, it should be made gender- neutral, by offering protection to both the genders. The, provisions for stringent punishments need to be incorporated into the law to prevent its misuse. Moreover, the law needs to be more practical by differentiating various degrees of conflicts and by unambiguously defining what constitutes domestic violence?

The problem of domestic violence is a serious issue and a gender-neutral law is needed to protect the genuine victims of domestic violence. The perpetrators of domestic violence should be appropriately punished and dealt with. Meanwhile, protection cannot be denied to the real victims irrespective of their gender. When a person who has not committed any crimes, begins to fear punishment under the provisions of law, it is not a law anymore –it is state-sponsored terrorism.

The law has to be shaped in a way where the women motivated by vengeance and self-interest can no longer make spurious allegations. A message should go from the judicial corridors to the entire society that if there exist laws for the protection of women there also exist provisions in the Law that ensures safety and equal treatment without discrimination to all.

Evolving Jurisprudence on Reproductive Rights: An Indian Perspective

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Abstract

Gender Equality connotes equal participation of both men and women in all walks of life. Although it aims to provide equal basic right and freedom to men and women, yet the struggle for establishing women's rights in the form of human rights remains a distant dream. The guarantee for women's rights remains an important means of eradicating gender discrimination and to protect women from gender violence. Women's human rights domain incorporates the rights to fairness, dignity, self-sufficiency, information and bodily integrity and regard for their private life including reproductive wellbeing. This paper aims at tracing the development of reproductive rights and analyzes how far the Indian legal system has given the recognition to these rights. The paper aims at highlighting the role of Indian judiciary in safeguarding and upholding these rights.

Key words:

Introduction

Ability of a woman to access and exercise their rights, and their ability to shape and control their own lives and destiny, rely to a crucial extent on their reproductive rights and wellbeing. These rights encompass both freedoms and entitlements that must be ensured by states to guarantee women's autonomy, bodily integrity, and dignity. Recognition of women's reproductive rights in law is insufficient without adequate state and social structures for providing women the material ability to access these rights and exercise this freedom. There is no clear explanation as to what these rights pertain to but the International Conference on Population and Development Programme of Action 1994[3], recognized reproductive rights as the human right to decide freely and responsibly the number, spacing and timing of one's children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right to make decisions concerning reproduction free of discrimination, coercion and violence.

Evolution of Reproductive Rights as a Human Right

The idea of protection of international human rights depends on the possibility that all individuals are born free and equal. The advancement of human rights was recognized as the fundamental motivation behind the United Nations (U.N.) in 1945. It is explicitly mentioned in the United Nations Charter that one of the primary principle of the United Nations is to promote and encourage respect for Human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.[4] After three years, the UN adopted the Universal

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[3] See Programme of Action of the International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, U.N. Doc. A/CONF.171/13/Rev.1 (1995) [para. 7.3]

[4] Article 1(1) of UN Charter.

Declaration of Human Rights (UDHR), which outline common liberties and its preamble upholds the basic freedoms and dignity to human life.[5]

The International Bill of Human Rights, consisting of the Universal Declaration of Human Rights (adopted in 1948), the International Covenant on Civil and Political Rights (ICCPR, 1966) with its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), set out an extensive arrangement of rights to all individuals, including women.[6] However, the methods for ensuring the basic liberties of women were given by 'Convention on Elimination of All Forms of Discrimination against Women' (CEDAW)[7] which is

[5] Preamble to UDHR provides:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,
> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,
> Whereas it is essential to promote the development of friendly relations between nations,
> Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,
> Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,
> Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,
> Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

[6] International convention of Civil and Political Rights, 1968 provides fundamental liberties for example the right to life, freedom from torture, freedom from slavery, the right to liberty and security of the person, equality before the law, rights relating to family life and children. International Covenant on Economic, Social and Political Rights guarantees among other rights, rights relating to marriage, maternity and child protection, the right to an adequate standard of living, the right to health.

[7] The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. India signed CEDAW on July 39, 1980 and ratified it on July 9, 1993, with certain reservations.

ratified by India also. It is the first human rights treaty that asserts the reproductive rights of women.[8]

The primary detailing of Reproductive rights as basic freedoms is found in the International Conference on Human Rights, which was held in Tehran in 1968 to promote the standards and points of the Universal Declaration of Human Rights (UDHR). The result of the meeting was the Proclamation of Tehran; Final Act of the International Conference on Human Rights, 1968.[9] Section 16 of the Final Act perceives the basic liberties of couples to choose freely and responsibly on the number and spacing of their kids and to approach the data and training to do as such. Principle 12 of the Declaration of Mexico on the Equality of Women and their Contribution to Development and Peace[10] emphasizes this privilege of couples and people to choose openly and freely whether to have children and when to do as such, and to approach data and instruction that would empower them to settle on these choices. The Vienna Declaration and Program of Action, embraced by the World Conference on Human Rights in 1993, underscored the privilege of ladies, based on balance with men, to get to the most stretched out scope of family arranging administrations and to have sufficient medical care.[11]

Reproductive rights are comprehensively defined in the 1994 International Conference on Population and Development's (ICPD) Programme of Action in Cairo. As per paragraph 7.1 in Programme of Action,

> Reproductive rights are defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.

This was again reiterated in the Beijing Declaration and Platform for Action,[12] adopted at the Fourth World Conference on Women in 1995. It states:

> The basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.

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[8] Article 5 of the CEDAW

[9] Final Act of the International Conference on Human Rights. Teheran. U.N. Doc. A/CONF 32/41.1968.

[10] Adopted at the World Conference of the International Women's Year, Mexico City, Mexico, on 2 July 1975.

[11] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Part 3 available at https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx,(last visited 7/03/2022).

[12] Beijing Declaration and Platform for Action." Proceedings of the Fourth World Conference on Women, China, Beijing. 1995. Paras 17 and 30.

Following the Millennium Summit in 2000 in New York, the General Assembly of the United Nations embraced the Millennium Declaration[13] with the vision of eradicating destitution and introducing improvement for all. The Eight Millennium Advancement Goals (MDGs) were built up to understand this vision by 2015 and to control the execution of the Declaration. A few objectives of the MDGs identify with reproductive health and rights.[14]

As of now no country has given recognition to the reproductive rights explicitly but few have relaxed the laws related to some aspects of these rights. New Zealand is one of such examples wherein recent law reform decriminalized the abortion. Until the enactment of the Abortion Legislation Act, 2020, abortion was a crime in New Zealand.[15]

Reproductive Justice

Conceptualization of reproductive rights have been regarded as Reproductive Justice which propounds that the capacity of any woman to decide her own conceptive fate is straightforwardly connected to the conditions in her locale and these conditions are not simply an issue of her choice and access. Reproductive Justice is a deliberate motivation to shape the contending goals of uniformity and the social truth of disparity. Instead of focusing on the means- a debate on abortion and birth control that neglects the real-life experiences of women- the reproductive justice focuses on the ends: better lives for women, healthier families and sustainable communities.[16] The framework of reproductive justice is much broader. The reproductive justice movement influenced activism, training, and policy in a number of domains, while pressing for a broad redefinition of the constituent elements of reproductive dignity and safety.[17] The term reproductive justice combines *reproductive rights* and *social justice.*

Indian Perspective

Gender discrimination with respect to women is a global reality. World over women have suffered and are still suffering oppression and subordination in almost every field.[18] Such

[13] UN. General Assembly Resolution. Res. A/55/L.2. 2000.

[14] The Eight MDGs are: 1. To eradicate extreme poverty and hunger, 2.To achieve universal primary education 3. To promote gender equality 4. To reduce child mortality 5.To improve maternal health 6. To combat HIV/AIDS, malaria, and other diseases 7. To ensure environmental sustainability 8. To develop a global partnership for development.

[15] The Crimes Act, 1961 and the Contraception, Sterilization and Abortion Act 1977 were amended.

[16] Loretta Ross "Understanding Reproductive Justice: Transforming the Pro-Choice Movement", 36 *Off our Backs*, 14-19 (2006).

[17] Loretta J. Ross and Rickie Solinger, *Reproductive Justice-An Introduction*, 55 (University of California Press 2017).

[18] Women make up more than two-thirds of the world's 796 million illiterate people. According to global statistics, just 39 percent of rural girls attend secondary school. This is far fewer than rural boys (45 percent), urban girls (59 percent) and urban boys (60 percent). Women make up fewer elected representatives in most rural councils. In Asia, this ranges between 1.6 percent in Sri Lanka and 31 percent in Pakistan. Women's participation as chairs or heads in rural councils is also much lower than men's, as seen in Bangladesh (0.2 percent) and Cambodia (7 percent). See more at: https://www.unwomen.org/en/news/in-focus/commission-on-the-status-of-women-2012/facts-and-figures (last visited February 01, 2021).

inequality of women is both caused and aggravated by the existence of discrimination in almost every field - social, economic or political. Although causes and consequences may vary from country to country, yet discrimination against women is constant and widespread. So far as the social structure in India is concerned gender inequality is deep rooted, manifesting itself in countless structures and at different levels, in family, society, work environment, legislative practices, and so on and may gain differing degrees going from moderate structures to intense and complex ones. In this way, discrimination of women in India is far reaching.

In India, the women have been subjected to exploitation from times immemorial. Much of the exploitation that the women suffer is on account of discriminatory social practices wherein they are subjected to the worst form of abuse.[19] In post-independence India, a number of social practices, ceremonies, restrictions and gender-based disparities have been differently brought somewhere near reformist social change developments. India has been seeing one such period of astounding perplexity for gender-affectability just as the journey for women's rights, equality and what has now come to be set under the rubric of women's "bodily integrity". With the coming into force of the Constitution, women were recognized as a special class meriting special treatment and protection.[20] The Supreme Court of India has through a series of its dictums created a right based framework for emancipation of the women folk.[21] This Court has been able to accomplish under the paraphernalia of Article 21 of the Constitution. Of late the Supreme Court has recognized women's right to bodily integrity and reproductive autonomy by harnessing the postulates of 'dignity' jurisprudence within the rubric of Article 21.[22]

As per the survey conducted among global experts about the factors that make a country unsafe, found India the most dangerous country for women in 2018, based on rankings. India ranked number one in the culture and religion, sexual violence and human trafficking categories. The country was perceived as most dangerous for women in terms of cultural, tribal and religious traditions or customary practices, in addition to the sexual violence. The latter included rape and forced labor, marriage and/or sexual slavery.[23]

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[19] India ranks Gender Inequality Index Rank at 125 [and] Global Gender Gap Index Rank at 87, *available at:* https://evaw-global-database.unwomen.org/en/countries/asia/india (last visited December 17, 2020).

[20] Article 15(3) of the Constitution of India allows protective discrimination in favour of women. It provides that nothing *in this article shall prevent the State from making any special provision for women and children.* Hence it allows state to make special laws for protection of women and children.

[21] For example: *Vishakha v State of Rajasthan* (1997), *Shayra Bano v Union of India* (2017), *Joseph Shine v Union of India* (2018), *the Secretary, Ministry of Defence v Babita Puniya* & Ors. (2020), *Vineeta Sharma v Rakesh Sharma* (2020).

[22] In 2018, the Supreme Court of India in two judgments on gender equality and autonomy: *Navtej Johar v. Union of India* [(2018) 10 SCC 1] and *Joseph Shine v. Union of India* [(2019) 3 SCC 39]. These judgments affirm the courts' constitutional obligation to strike down laws that reflect discriminatory stereotypes and infringe upon women's sexual autonomy, which encompasses the right to make reproductive choices.

[23]Published by Statista Research Department, Oct 16, 2020, See more at https://www.statista.com/ statistics /9095 96/india-most-dangerous-country-for-women/ (last visited February 03, 2021).

The Constitution of India is a fundamental legal document which guarantees justice-social, economic and political. The makers of the Constitution tried to ensure liberty, equality and dignity to every citizen.[24] Article 14 confers equality before law and equal protection of laws. Article 15[25] prohibits discrimination against any citizen on the grounds of religion, race, caste, sex etc. Article 15(3) makes a special provision which enables the state to make affirmative discriminations in favour of women and children. On the same lines Article 16[26] provides for

[24] Preamble of the Indian Constitution states

> WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens :
>
> JUSTICE, social, economic and political;
>
> LIBERTY of thought, expression, belief, faith and worship;
>
> EQUALITY of status and of opportunity;
>
> and to promote among them all
>
> FRATERNITY assuring the dignity of the individual and the [unity and integrity of the Nation]
>
> IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

[25] Article 15 of the Indian Constitution reads as:

> Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
> (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them
> (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to
> (a) access to shops, public restaurants, hotels and palaces of public entertainment; or
> (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public
> (3) Nothing in this article shall prevent the State from making any special provision for women and children
> (4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes

[26] Article 16 reads as:

> Equality of opportunity in matters of public employment
> (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State
> (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State
> (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment

equality of opportunities in matters of public employment for all citizens. The right to life and personal liberty guaranteed under Article 21[27] of the Constitution is the heart of fundamental rights. The personal liberty guaranteed includes the liberty of a woman conceiving a child and giving birth to it. Therefore, the right to make reproductive choices is also a dimension of personal liberty as understood under Article 21 of the Constitution.

So far as the Directive Principles of State Policy are concerned, the Constitution of India incorporates the ideal of social justice. Article 38[28] sets as a goal for the state to advance welfare of individuals and secure social justice through the institution of the state, and that it should be founded on the way of thinking of equity in its social, monetary and political viewpoints. Consequently, the Directive Principles of State Policy read with Fundamental Rights as given under the Constitution of India plainly reflect the established order to guarantee autonomy of women in reproductive matters.[29] Furthermore, Article 39(a) provides that the state shall direct its policy towards securing all citizens, men and women, equally, the right to means of livelihood, while Article 39(c) ensures equal pay for equal work. Article 42 directs the state to make provision for ensuring just and humane conditions of work and maternity relief. Above all, the Constitution imposes a fundamental duty on every citizen through Article 51A (e) to renounce the practices derogatory to the dignity of women.[30]

In tune with various provisions of the Constitution, the Parliament of India and state legislatures have enacted various women– specific and women-related legislation to protect women against social discrimination, violence and atrocities and also to prevent social evils like child marriage,

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(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State
(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination

[27] Article 21 of the Indian Constitution reads as :

No person shall be deprived of his life or personal liberty except according to procedure established by law.

[28] Article 38 provides: (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

[29] Tarun Arora, "*Twilight of Reproductive Justice in India: A Welfare State*.....?"53(Nayaya Deep 2011).

[30] Article 51A (e) of the Indian Constitution reads as:

to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

dowry, rape etc. Notwithstanding, the enactment of the laws relating to dowry, rape, violence against women, the factual position of women in India is rather distressing.[31]

Legislative Framework

There is no specific legislation which deals with the reproductive rights of women so far as Indian legal system is concerned. However, few provisions of different laws recognize some of these rights.

In the field of criminal law, the Indian Penal Code, 1860 keeping in view the strict, moral and social foundation of the Indian society, has characterized different offences identifying with unnatural birth cycle, injury to the unborn.[32] The code prohibits all kinds of harm to an unborn child, unless the mother's life is in danger.[33] The Code allows the abortion only on therapeutic grounds, primarily to save the life of the mother. That is to say, the unborn child must not be destroyed except for the purpose of preserving the precious life of the mother. The provision by implication recognizes the right to life of a fetus.[34]

Hence, it could be said that the criminal law was severe so far as abortion is concerned and the only safeguard available was the "good faith". The severity concerning the law of early termination of pregnancy brought about the psychological pressure among women and consequently, amplified the chances of women resorting to suicides to dispose of the resultant child. It is a matter of common knowledge that most of the maternal deaths at that time were because of illegal abortions. Notwithstanding this, till 1970 the criminal law was not changed and criminal fetus removals remained uncombative.[35]

Another major legislation which partly deals with such rights is The Medical Termination of Pregnancy Act, 1971 which was drafted in tune with the Abortion Act of 1967[36] of United Kingdom. The legislative intent behind passing of this Law was to provide a qualified 'right to

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[31] Lalita Dhar Parihar, Women and Law: From Impoverishment to Empowerment- A Critique 407-408 (Eastern Book Co., Lucknow, 2011).

[32] Chapter XVI (312-318) of IPC deals with the offences Of the Causing of Miscarriage, of Injuries to Unborn Children, of the Exposure of Infants, And of the Concealment of Births.

[33] Section 312 of the Indian Penal Code provides:

> Whoever voluntarily causes, a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description or term which may extend to three years, or with fine, or with bot; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[34] Bonda, "The Impact of Constitutional Law on the Protection of Urban Human Life: Some Comparative Remarks" *6 Human Rights* 223- 235 (1977).

[35] N.R.M. Menon, "Policy, Law enforcement and the Liberalization of Abortion: A Socio Legal Inquiry into the Implementation for the Abortion Law in India" 16 *Journal of Indian Law Institute* 626 (1974).

[36] The Abortion Act 1967 is an Act of the Parliament of the United Kingdom legalising abortions on certain grounds by registered practitioners, and regulating the tax-paid provision of such medical practices through the National Health Service (NHS).

abortion' and the termination of pregnancy which has never been recognized as a normal recourse for expecting mothers.[37] The object behind enacting the Act of 1971 was set out in its preamble, which provided that:

> To provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto.

The Act clearly enumerates the cases where the termination of pregnancy would be permitted. Section 3 of the MTP Act provides the grounds on which a pregnancy would be terminated. These are:

I. a risk to life of the pregnant woman[38]; or a risk of grave injury to her physical or mental health; or
II. if the pregnancy is caused by rape[39]; or
III. there exists a substantial risk that, if the child were born, it would suffer from some physical or mental abnormalities so as to be seriously handicapped[40]; or
IV. failure of any device or method used by the married couple for the purpose of limiting the number of children[41]; or
V. Risk to the health of the pregnant woman by reason of her actual or reasonably foreseeable environment.[42]

An important characteristic of the Act remains that it does not allow termination of pregnancy after twenty weeks. Sub-Section (2) of Section 3 of the Act which is the pertinent clause on the subject provides certain pre-conditions in this regard:

a) Pregnancy may be terminated by a registered medical practitioner,
b) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is[43], or
c) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are of the opinion formed in good faith that[44]- (a) the continuance of the pregnancy would involve a risk to the life of the pregnant women or may cause grave injury to her physical or mental health; or (b) there is a substantial risk, if the child were born, that it would suffer from such physical or mental abnormalities as to be seriously handicapped.

The Act has an overriding effect on Section 312 of the Indian penal Code. Hence as long as the conditions of section 3 of the Act are met, no liability shall arise under Section 312 of the Indian

[37] Kamaljeet Singh and Bhumika Sharma, "Issue of Legalization of Abortion: With Reference to Changed Social Conditions" 116 *Criminal Law Journal* 202 (2010).
[38] Section (3) sub-section 2(i) of MTP Act 1971.
[39] Explanation I appended to Section 3 of MTP Act, 1971.
[40] Section (3) sub-section 2(ii) of MTP Act 1971.
[41] Explanation II appended to Section 3 of MTP Act, 1971
[42] Section 3 sub-section 3 of MTP Act, 1971.
[43] Section 3 sub-section 2 (a).
[44] Section 3 sub-section 2 (b).

Penal Code. Furthermore, if an abortion is done in contravention of the Act then criminal liability arises under the Act as well as the code, both being separate offences.[45]

Notwithstanding, the conditions under which early termination is legitimate are exceptionally limited. Early termination is legitimate up to the second trimester, yet it is the outright discretion of the medical practitioner. A woman can't essentially terminate an undesirable pregnancy; she needs to ensure that she falls in the classes referenced in the section (3) and furthermore, that it tends to be medicinally manifested that the pregnancy would cause grave harm to her. The two explanations appended to section (3) of this Act provide that pregnancy arising out of sexual assault or failure of contraceptive might be taken as injury to the psychological well-being, in any case, the expressions "heath", "substantial risk", even the expressions, "termination of pregnancy" and "abortion" are not clearly defined in the Act.[46] This represents the extent of legal vagueness of this law.

Furthermore the Act provides that pregnancy cannot be terminated after the 20th week unless there is a health risk to the mother.[47] There may be cases where reason for termination of pregnancy is not sex of the fetus but some fatal or catastrophic abnormalities in the fetus detected in later weeks of pregnancy.[48] Despite major advancements in medical technology, certain fetal impairments cannot be detected and fully evaluated until after the 20th week of pregnancy. These are complicated and expensive tests and take time. Many times, pregnancy crosses 20 weeks by the time a diagnosis is confirmed. If the law imposes an arbitrary limit of time-period of 20 weeks, it can lead to haste on the part of the doctors making a diagnosis as well as on the part of parents. The haste can be disastrous as couples may abort on a mere doubt rather than confirming the tests which may take longer time than 20 weeks. The limited access to health care further leads to delay in diagnosis in India.[49]

To fill these legal gaps, the Medical Termination of Pregnancy (Amendment) Act, 2020 has been passed by the both houses of Parliament. The amendment allows the termination of Pregnancy beyond twenty weeks[50] but still the preference to the will of woman in this regard is lacking and sole authority has been vested in medical practioner whose opinion is determinative under the Act. It has also made abortion legal beyond twenty-four weeks[51] which will be allowed by a Medical Board, constituted by the state government. However, the only reason this could be allowed is the case of fetus abnormality. It could be inferred that termination of pregnancy beyond twenty-four weeks for any other reason, like pregnancy resulting due to rape that have crossed twenty-four week limit, will not be allowed. Moreover, there is no time frame given within which the medical board can decide. It is submitted that this lacunae in the law needs to

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[45] Ishmeet Kaur Taluja and Simran "Reproductive Autonomy and Related Sexual Freedom In India" 4(3) *International Journal of Law and Legal Jurisprudence Studies* 175 (2018).

[46] https://ijlljs.in/wpcontent/uploads/2017/08/REPRODUCTIVE_AUTONOMY_RELATED_SEXUAL_FREEDOM_IN_INDIA.pdf. (Last visited April 22, 2021)

[47] Section 3(2) of MTP Act, 1971.

[48] Sarbjit Kaur, "Need to Amend Abortion Law in India" 1 *JOLT1* 35 (2010).

[49] Shallu, "Debate on Abortion Law: A Controversial Issue in Medico-Legal Jurisprudence" 116 *CriLJ* 178 (2010)

[50] Section 3 of the Medical Termination of Pregnancy (Amendment) Act, 2020.

[51] *Id*., Section 3 sub-section 2B.

be reviewed and an appropriate amendment needs to be incorporated to cater such exceptional circumstances.

Another significant legislation which partially deals with this right is Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex-Selection) (PC and PNDT) Act, 2003. India has a long history of female infanticide.[52] The object of this Act is to prevent the misuse of the technologies used in pre-conception and pre-natal care, which in India are used to determine the sex of a fetus.[53]

The basic spirit of the PC and PNDT Act is to legislate against any discrimination based on sex using any diagnostic technique whether pre, intra or post conception.[54] Thus the sex selective abortions are made illegal through this Act. Pre Birth determination of sex with purpose of female foeticide (abortion of fetus) is an offence and nobody can compel a pregnant woman to undergo such tests.[55] Even no one is allowed to advertise to do pre-birth sex determination or abortion for purpose of female foeticide.[56] Under this Act it is to be presumed that the pregnant woman was compelled to undergo such a test by husband or any other relative and such person shall be liable for the abetment of the offence, unless contrary is proved.[57] Therefore it substantiates the right to have a child even if it would be a female child.

Judicial Approach

While expanding the horizons of Article 21, judiciary has played a major role in upholding the reproductive healthcare as a basic human right. Courts in India have adjudicated upon this right as a subset of Right to Health. In *Laxmi Mandal* v. *Deen Dayal Harinagar Hospital & Ors,*[58] The Delhi High Court held that the right to health (including the right to access and receive a minimum standard of treatment and care in public health facilities), the reproductive rights of women, and the right to food are inalienable survival rights forming part of the right to life. In *Kali Bai* v. *Union of India*[59] the Court held that the right to health incorporates the right to have access to public health facilities. Noticing that such rights to health and the right to have adequate reproductive

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[52] United Nations Population Fund report (2020) showed that 4.6 lakh girls were "missing" at birth each year from 2013 to 2017, as a result of sex selection that prefers a male child to a female child. The report added that 4.6 crore women are "missing" in India over the last 50 years.

[53] Preamble of this Act provides:

> An Act to provide for the prohibition of sex selection, before or after conception, and for regulation of prenatal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide; and, for matters connected therewith or incidental thereto.

[54] Asha Bajpai, *Child Rights in India* 398 (Oxford University Press, New Delhi, 2006).

[55] Section 3A of PC and PNDT Act, 2003.

[56] Section 22 *Ibid.*

[57] Section 24 *Ibid.*

[58] (2010) 172 DLT 9.

[59] 2017 SCC OnLine Chh 1081.

healthcare facilities are basic parts of Article 21, the Court issued directions for the improvement of public health services including reproductive health care.

In case of *Justice K.S.Puttaswamy (Retd)* v *Union of India and Ors.*[60]. It stated:

> Reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a compelling State interest in protecting the life of the prospective child.[61]

The Court while speculating further upon autonomy of an individual stated that:

> Autonomy is the ethical element of human dignity. It is the foundation of the free will of individuals, which entitles them to pursue the ideals of living well and having a good life in their own ways. The central notion is that of self-determination: An autonomous person establishes the rules that will govern his or her life. Here, we are concerned with personal autonomy, which is value neutral and means the free exercise of the will according to one's own values, interests, and desires. Autonomy requires the fulfillment of certain conditions, such as reason (the mental capacity to make informed decisions), independence (the absence of coercion, manipulation and severe want), and choice (the actual existence of alternatives). Autonomy, thus, is the ability to make personal decisions and choices in life based on one's conception of the good, without undue external influences. As for its legal implications, autonomy underlies a set of fundamental rights associated with democratic constitutionalism, including basic freedoms (private autonomy) and the right of political participation (public autonomy).[62]

Conclusion

This paper concludes that legislative policy as well as judicial attitude towards the reproductive rights in India has been mainly utilitarian, seeking to achieve community interests through population policies and suppressing the individual will of a woman in these matters. There is no specific legal framework which deals with the reproductive rights in India; and even those legislations which touch upon some aspects of reproductive rights have a number of lacunas. There is the need to sensitize the legislature and the judiciary to the fact that reproductive choices are personal choices with which the State must not interfere, rather should provide the implementation mechanism for safeguarding these rights. Women and their right to determine their sexuality, fertility and reproductive choices are considerations that have seldom adhere to, if ever, been taken into account in formulation of policies relating to reproductive rights.

[60] (2017) 10 SCC 1.

[61] *Id.,* para 68.

[62] *Id.,* para 116.

Media Coverage of Judiciary: How Do Journalists Assess the Significance of High Court Decisions in Jammu and Kashmir?

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ABSTRACT

The very fundamental idea to understand the connection between media and society in general and media and government in particular is Agenda Setting theory. It has been seen that legislative and executive wings of the government are often characterized by their publicity-seeking conduct, which is not true for judiciary. However, in a conflict ridden zone of Jammu and Kashmir, it becomes imperative for the courts to depend on media for dissemination of information about its decisions. Notwithstanding this important role, little is known about what attracts media to cover Court cases in Jammu and Kashmir. This study explores how case facts and the characteristics of media and the judiciary affect news coverage of the decision of the High Court of Jammu and Kashmir and Ladakh. The study analyses Greater Kashmir and Rising Kashmir daily newspapers to examine the coverage of J&K and Ladakh High Court's decisions of the last two years to invoke the concept of newsworthiness and to identify characteristics of cases appearing in the newspapers. The study reveals that media news values may not always lead to coverage of the most legally prominent cases, but some overlap indicates several parameters used to judge immediate newsworthiness of cases stand the exposition assessment of legal significance. The selected newspapers covered 174 cases decided by the J&K and Ladakh High Court out of randomly selected 1450 cases from the official website of the High Court, thus making the results consistent with the hypotheses that case facts, media characteristics, and judicial characteristics all affect the chances that a case will receive news coverage and not every court decision finds place in media.

INTRODUCTION

Media, which acts as a bridge between Judiciary and public, has an important role in the development of society. Prevalence of an independent judiciary and free press is extremely essential. Over the years, this relationship between judiciary and public has strengthened with an increase in the media audience, which has invariably influenced its impact in the society. Media has gained an unparalleled responsibility in opinion shaping. In a study "Mass Communication: An Introduction; Theory and Practice of Mass Media in Society", Bittner[1] (1977) stated that mass media like magazines, newspaper, TV, radio, and films work to make public aware. It has been seen that legislative and executive wings of the government are often characterized by their publicity-seeking conduct, which is not true for judiciary, thus in such instances the role of media becomes more significant, as it becomes the only viable source for the public to get information about cases, which might not have been taken seriously. Being a bridge, media let the people

[1] Bittner, J. R. (1977). Mass Communication: An Introduction; Theory and Practice of Mass Media in Society. p 23-24.

know about the case. The coverage of judicial proceeding needs to show admiration to the rights of parties and a certain degree of self-control. In a research work "Journalism and the Law", Crier[2] (2005) sated that journalism is to support the judicial system and tell it's lacking too. However, not every proceeding of the J&K and Ladakh Court receives an equal coverage in media, thus this study is an endeavour to seek better understanding of how media determine which High Court cases are newsworthy by exploring whether media look to case characteristics or not. This study shall also try to discover upon which case characteristics the mediarely. Further, we evaluate whether media's use of case characteristics is similar to the effect of case characteristics on the long-term legal salience of decisions. In assessing the effect of case characteristics on media coverage and legal salience, we evaluated the extent to which media's dependence upon case inkling leads to coverage of legally salient cases. Thus we tried to provide insight into media coverage of the High Court and, by extension, public exposure to Court decisions.

To test the effect of case characteristics on newsworthiness, we look at the effect of five categories of case characteristics (case origins, court behavior, issue area, case participants, and case salience) on the front page coverage of the High Court from 2020-2021 in Greater Kashmir and Rising Kashmir, as they are the most read and circulated newspapers of Kashmir.

We find media depend on anarray of case characteristics to indicate newsworthiness. Furthermore, we find many of the indications media use are also related to the apparent legal importance of a decision. We conclude while the indications media use may direct them to legally important cases, the indications are not perfect, meaning the public is not always attentive to legally important decisions.

Despite such an important role, little is known about what attracts media to cover Court cases in Jammu and Kashmir. This study fills that void in existing research by considering the interplay between case facts, media characteristics, and judicial characteristics while coverage of Jammu and Kashmir High Court's decisions in the media. The results are consistent with the hypotheses that case facts, media characteristics, and judicial characteristics all affect the probability that a case will receive news coverage.

THEORIES OF MEDIA COVERAGE

Media provides an important function in any political system as the principal connection between government and the public; media guarantee that the government is answerable to the public ([3]Cook, 1998; [4]Paletz & Entman, 1981; [5]Shah et al, 1999). However, media are more than a medium for information; they shape what people think about and how they think about it ([6]Cohen, 1963; [7]Lippmann, 1922; [8]McLeod et al, 2002). In this role, media can set the national agenda through coverage decisions,

[2] Crier, C. (2005). Journalism and the Law. Syracuse L. Rev., 56, 387.

[3] Cook, T. E (1989). "Governing with the news: The news media as a political institution". Chicago: University of Chicago Press. P 134-135.

[4] Paletz, D. E. & Entman, R. M. (1981). "Media power politics". New York: Free Press. P 79-81.

[5] Shah, D. V.; Watts, M. D.; Domke, D.; Fan, D. P. & Fibisor, M. (1999). "News coverage, economic cues and the public's presidential preferences". Journal of Politics, 61(4), 914-43.

[6] Cohen, B. (1963). "The press and foreign policy". Princeton, NJ: Princeton University Press, p 211-213.

[7] Lippmann, W. (1922). "Public opinion". NY: Simon & Schuster. P 37-41.

[8] McLeod, J. M., Kosicki, G. M. & McLeod, D.M. (2002). "Resurveying the boundaries of political communication effects". In J. Bryant & D. Zillman (Eds.), Media effects: Advances in theory and research, (pp. 215-268).

thus influencing public perception of the importance of political issues ([9]Funkhouser, 1973; [10]Iyengar & Kinder, 1987; [11]McCombs, 2004; [12]McCombs & Shaw, 1972). This agenda-setting was first documented in a study linking media coverage of campaign issues with citizens' later ranking of importance of those same issues (McCombs & Shaw, 1972).

Lippmann (1922) earlier hinted at this agenda-setting role when he likened media's function in society to that of a prison patio spotlight – illuminating items brieflyand then moving on. These dynamics influence peoples' attitudes toward information presented, opinions on issues, and even political behavior ([13]Entman, 1993; [14]Gamson, 1992; [15]Gamson & Lasch, 1983; [16]Gitlin, 1980; Iyengar & Kinder, 1987; [17]Reese, 2007). In totality, by filtering the flow of information between the public and government, media influence public opinion. Because of media's established effect on public opinion, political behavior, and subsequent government action, understanding how media choose which issues to cover is important for understanding development of government priorities and policy positions.

[18]Gans (1980) identified multiple factors driving media attention including disrepute of participants in the story and effect of the story on the nation as a whole. The factors guiding journalists to a particular story are known as "news values". News values are, to quote Stuart Hall, *"one of the most opaque structures of meaning in modern society…"* ([19]Hall, 1973, p. 181) and their formal identification is indefinable.

As [20]Greenhouse (1996) notes, the press plays an important role in determining what citizens know about their government. Nowhere is this role more visible or more important than with regard to the judiciary, which conducts most of its work in relative anonymity. Few citizens are able to observe the daily activities of judges and justices, and media coverage of the courts is far more limited than in the legislative or executive branches. Thus, a greater knowledge of the cases that are most likely to receive coverage allows researchers to better understand what citizens know about their judiciary. A number of researchers have

[9]Funkhouser, R. G. (1973). "The issues of the sixties: An exploratory study in the dynamics of policy opinion". Public Opinion Quarterly, 37, 62-65.

[10] Iyengar, S. & Kinder, D. R. (1987). "News that matters". Chicago: University of Chicago Press, p 67-69.

[11] McCombs, M. E. (2004). "Setting the agenda: The mass media and public opinion". New York: Policy, p 331-340.

[12] McCombs, M.E. & Shaw, D. L. (1972). "The agenda-setting function of the mass media". Public Opinion Quarterly, 36, 176-187.

[13] Entman, R. M. (1993). "Framing: Toward clarification of the fractured paradigm". Journal of Communication, 43(4), 51-58.

[14] Gamson, W. A. (1992). "Talking politics". Cambridge: Cambridge University Press 172-178.

[15] Gamson, W. A. & Lasch, K. E. (1983). "The political culture of social welfare policy". In S. Spiro & E. Yuchtman-Yarr (Eds.), Evaluating the welfare state: Social and political perspectives, (pp. 371-415).

[16] Gitlin, T. (1980). "The whole world is watching: Mass media in the making and unmaking of the new left". Los Angeles: University of California Press, p 91-93.

[17] Reese, S. (2007). "The framing project: A Bridging model for media research revisited". Journal of Communication, 57(1), 148-154.

[18] Gans, H. (1980). "Deciding what's news: A study of CBS Evening News, NBC Nightly News, Newsweek and Time". New York: Pantheon Books, p 65-66.

[19] Hall, S. (1973). "The determinations of new photographs. In: Cohen, S. & Young, J. (Eds.). The manufacture of news: Deviance social problems and the mass media". London: Constable. 176-190.

[20] Greenhouse, L. (1996). "Telling the court's story: Justice and journalism at the Supreme Court". Yale Law Review, 6(105), 1537-1561.

studied print and television news coverage of the Court (e.g. [21]Ericson, 1977; [22]Katsh, 1983; [23]Larson, 1985; [24]O'Callaghan and Dukes, 1992; [25]Slotnick and Segal, 1998; [26]Vermeer, 2002; [27]Haider- Markel, Allen, and Johansen, 2006). Taken as a whole, these studies reveal that only a small fraction of Court decisions receive coverage. The issue area of the case, attention from organized interests, and local importance appear to play especially significant roles in differentiating between the High Court cases that receive coverage and those that do not.

NEWS COVERAGE OF THE JUDICIAL DECISIONS

Having power of "neither the purse nor the sword" ([28]Caldeira, 1986), the Court lacks obvious instrument to ensure compliance, so its ability to influence policy depends on general willingness to abide by its decisions and the public's willingness to exert pressure on other actors to comply (Slotnick & Segal, 1998). Applying the preceding logic to the courts, media should be more likely to cover the court proceedings when they are acting as a policy venue. This is more likely to occur in issue areas where the judiciary acts as a veto player. In these cases, the decision of the court is final, and there is little that other political actors can do to topple a judicial decision. The types of issues proscribed by the courts may change over time as a result of history, constitutional arrangements, or cultural norms. Other factors, such as public opinion and divided government, may also play a role. But there are useful heuristic cues, such as frequent litigation or distinctions between case types that aid the media in determining when the court is acting as a policy venue.

One empirical distinction that is particularly useful because of its endurance and relative lucidity is the difference between constitutional and statutory decisions. Although common wisdom on this distinction has been criticized in recent years ([29]Friedman and Harvey, 2003; [30]Martin, 2006), a body of research demonstrates that the dynamics of the judiciary are quite different in these two types of cases.

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[21] Ericson, D. (1977). "Newspaper Coverage of the Supreme Court: A Case Study," Journalism Quarterly, 604-606.
[22] Katsch, E. (1983). "The Supreme Court beat: How television covers the United States Supreme Court". Judicature, 67, 6-12.
[23] Larson, S. (1985). "How the New York Times Covered Discrimination Cases," 62 Journalism Quarterly 894.
[24] O'Callaghan, J. & Dukes, J. O. (1992). "Media coverage of the Supreme Court's caseload". Journalism Quarterly, 69 (1), 195-203.
[25] Slotnick, E. E., and J. A. Segal (1998). "Television News and the Supreme Court: All the News that's Fit to Air?". New York: Cambridge University Press, p 210-213.
[26] Vermeer, J. P. (2002). "The Supreme Court in Local Daily Newspapers." Paper presented at the Annual Meeting of the American Political Science Association, Boston, p 76-78.
[27] Haider-Markel, D. P., M. D. Allen, and M. Johansen (2006). "Understanding Variations in Media Coverage of U.S. Supreme Court Decisions: Comparing Media Outlets in their Coverage of Lawrence v. Texas," Harvard Journal of Press and Politics, 64-66.
[28] Caldeira, G. A. (1986). "Neither the purse nor the sword: Dynamics of public confidence in the Supreme Court". American Political Science Review, 80(4), 1209-1226.
[29] Friedman, B., and A. L. Harvey (2003). "Electing the Supreme Court," Indiana Law Journal, 123-125.
[30] Martin, A. D. (2006). "Statutory Battles and Constitutional Wars: Congress and the Supreme Court." In J. Rogers, R. Flemming, and J. Bond (eds.), Institutional Games and the U.S. Supreme Court, pp. 3-23. Charlottesville: University of Virginia Press.

Institutional restrictions on judicial power, for example, are much lower in constitutional than statutory cases ([31]Epstein and Knight, 1998). When a court decides a case on a constitutional issue, such as free speech or due process, there is little that other political players can easily do to alter its decision. The legislative and executive branches are able to limit the budget of the judiciary and amend the constitution. But using one of these powers as a weapon is a high-cost scheme that may have limited rewards. Perhaps for these reasons, judges appear to make decisions differently in constitutional and statutory cases (e.g., [32]Stock, 1990; [33]Spiller and Gely, 1992; [34]Pacelle et al., 2008). In constitutional cases, for example, the Court pays comparatively little attention to the philosophy of government, their preferences and precedent. In contrast, in statutory cases, these factors have a significant impact on judicial decisions (Pacelle et al., 2008). This is likely because the executive and legislative branches can more easily change judicial decisions on statutory issues. As a result, judicial decisions may have little sustaining power on issues such as torts and tax law.

THE JUSTICE SYSTEM

Media may use a number of additional indicators to help differentiate more important cases from less significant cases. Measures of conflict such as a lower-court decision being overruled were also significant predictors of media attention. Conflict is also likely to be an important determinant of media coverage of the judiciary. Disagreement within or between two courts may suggest a case that will make for a good story. Conflict may suggest to media that inter- and intrabranch battles on an issue will continue to occupy the policy agenda ([35]Brace and Hall, 1993; [36]Brace, Hall, and Langer, 1999).

HYPOTHESES

The previous theory argues that case facts, media characteristics, and judicial characteristics should work together to affect the possibility that High Court decision receives news coverage. The expected effects of each of these broad categories of variables are considered in the paragraphs that follow.

CASE FACTS

Judicial decision on issues, where the courts act as a policy venue should be more likely, than other decisions, to receive news coverage. This practice of giving selective coverage to court proceedings is also based on the idea that media outlets have restricted news space, and they must choose those cases that will affect the greatest number of citizens or cause the greatest change in existing law. As previously discussed, a useful experiential distinction in the policy issues handled by the judiciary is the difference

[31] Epstein, L. & Knight, J. (1998). "The choices justices made". Washington, D.C.: CQ Press, pp 18-21.

[32] Stock, A. (1990). "Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses," 39 Duke Law Journal, pp 160-164.

[33] Spiller, P., and R. Gely (1992). "Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor Decisions, 1949-1988," 23 RAND Journal of Economics, p 463-465.

[34] Pacelle, R., J. Lawrence, B. Curry, and B. Marshall (2008). "Navigating Separation of Powers: The Supreme Court and Civil Rights." Paper presented at the Annual Meeting of the Southern Political Science Association, New Orleans, p 243-251.

[35] Brace, P. R., and M. G. Hall (1993). "Integrated Models of Judicial Dissent," Journal of Politics, 14.

[36] Brace, P. R., M. G. Hall, and L. Langer (1999). "Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts," Albany Law Review, 1265.

between statutory and constitutional decisions. The courts have much broader leeway to make enduring decisions in constitutional cases than in statutory cases. Therefore, constitutional cases should be more likely to receive coverage than their statutory counterparts. In contrast, the courts may have mainly limited power to make decisions on other issues. Torts, for example, are profoundly regulated by the executive and legislative branches. Most tort decisions are also narrow in scope and affect only a small group of citizens. Thus, torts should be less likely than other cases to receive news coverage.

Alternately, in other cases, the judiciary's power may be enhanced by political situation. One of these areas is the practice of law, which includes disbarments, ethical violations, and other legal issues that are of interest to citizens.

MEDIA CHARACTERISTICS

All media coverage is, first, provisional upon the resources of the news outlet. Outlets that have greater resources (more reporters, more space) should be more able to cover judicial decisions. Consider the case of a newspaper, whose resources may be measured using its daily circulation. Higher-circulation papers generally have more staff and news space. Therefore, cases decided in cities with higher-circulation newspapers should be more likely to receive coverage than cases decided in cities with smaller-circulation newspapers.

Newspapers that are more associated to the community and devoted to local news may also give out more resources to covering the judiciary. Previous research has demonstrated that locally owned newspapers have a greater focus on the community than those that are owned by conglomerates. Thus, cases decided in cities with locally owned newspapers should be more likely to receive news coverage than their corporate-owned counterparts.

JUDICIAL CHARACTERISTICS

The characteristics of a court should also affect a case's probability of getting news coverage. Holding caseload and reputation steady, the business of a court should become more salient as that court becomes more accountable to the citizens. This is particularly true in the electoral context; wherein media become proactive during High Court Bar elections as the media have a compulsion to inform citizens about the people running for office and the issues they will consider while on the bench. Therefore, cases decided by courts holding judicial elections in a given year should be more likely to receive news coverage than cases decided by courts that do not have a judicial election in that year.

DATA AND METHODS

The analysis relies on a dependent variable assembled from media coverage in the Greater Kashmir and Rising Kashmir. It also includes a series of independent variables, along with the Probit model used to make predictions about the probability that a case will receive news coverage.

DEPENDENT VARIABLE

The dependent variable indicates whether or not a High Court case received coverage in local newspaper. This variable was created using news stories on high court decisions from calendar year 2020 to 2021. The percentage of criminal and civil cases is moderately consistent. To identify whether or not a case received news coverage, the LexisNexis archives of each newspaper were searched using the over-inclusive term "J&K High Court". All relevant stories were collected and read to confirm that they related to the JK's High Court. Overall, 174 cases decided by the High Court during 2020 to 2021 received coverage in the Greater Kashmir and Rising Kashmir.

INDEPENDENT VARIABLES

The independent variables in this analysis fall into three major categories: case facts, media characteristics, and judicial characteristics, as already discussed above.

FACTORS AFFECTING NEWSWORTHINESS AND LEGAL IMPORTANCE

Geographical Origin

Studies show media outlets are more likely to cover cases affecting their geographical region ([37]Davis, 1994; [38]Gartner, 2004; Haider-Markel et al, 2006; [39]Hoekstra, 2003). This is constant with the news value "proximity". An event is more likely to be considered newsworthy when it happens closer to home ([40]Straubhaar et al, 2008).

Lower Court Disagreement

The handling of a case by lower courts may signal media about the newsworthiness of a case. This is consistent with the news value "conflict" suggesting that events involving disagreement are more likely to attract media attention (Straubhaar et al, 2008). We presume that conflict among lower courts may serve as a signal of newsworthiness.

Multiple Legal Provisions

[37] Davis, R. (1994). "Decisions and images: The Supreme Court and the press". Englewood Cliffs, NJ: Prentice Hall, p 47-54.

[38] Gartner, S. S. (2004). "Making the international local: The terrorist attack on the USS Cole, local casualties, and media coverage". Political Communication, 21(2), 139-59.

[39] Hoekstra, V. J. (2003). "Public reaction to Supreme Court decisions". Cambridge: Cambridge University Press, p 87-89.

[40] Straubhaar, J.; LaRose, R. & Davenport, L. (2008). Media now: Understanding media, culture and technology. Belmont, CA: Wadsworth Publishing, 108-111.

Cases with multiple legal provisions are cases in which the Court decides more than one legal question within a case. We anticipate these types of cases will get more attention because they are likely to have a broader impact ([41]Knobloch et al. 2005).

Issue Area

Issue area is the one case characteristic universally agreed to influence media coverage, according to earlier studies. We theorize that issue area signals journalists about newsworthiness. Certain issue areas are of greater interest to the public and, as a result, media is more inclined to report on those cases. Knobloch et al. (2005) theorize that the higher level of public interest in a topic, the more newsworthy an event relevant to that topic, thus cases decided on issues that are already of interest to the public may be more newsworthy. This is consistent with the "currency" news value (Straubhaar et al, 2008) suggesting that cases dealing with issues whose degree of public attention is influenced by the agenda-setting effect are more likely to attract coverage.

Case Participants

"Prominence" as a news value suggests that journalists are more likely to cover a story when it involves a prominent person ([42]Galtung & Ruge 1965; Knobloch et al. 2005; Straubhaar et al, 2008). The actors in Court cases generally are low profile, however, when prominent entities are involved it leads to increased coverage. Prominent entities can even have press operations responsive to media, thereby increasing the likelihood of coverage.

Government

The government can participate in a case as appellant or respondent. We anticipate that when the government is a participant, the case should be more likely to receive media coverage because the press can focus on a particular actor who has resources dedicated to interact with the media.

METHODOLOGY

The purpose of this study was to determine what attracts media to cover High Court cases in Jammu and Kashmir. This study explores how case facts and the characteristics of media and the judiciary affect news coverage of the decision of Jammu and Kashmir High Court. A qualitative and quantitative content analysis was conducted for this study.

According to [43]Neuendorf (2002) content analysis has been a fast-growing technique in the world of qualitative research. Neuendorf stated that content analysis "may be briefly defined as the systematic, objective, analysis of message characteristics" (Neuendorf, 2002). Content analysis is the statistical semantics of political discourse. Two types of content analysis exist, quantitative and qualitative.

[41] Knobloch, S., Sundar, S.S. & Hastall, M.R. (2005). "Clicking news: Impacts of newsworthiness, source credibility, and timeliness as online news features on news consumption". Paper presented at the 55th annual conference of the International Communication Association, New York NY.

[42] Galtung, J. && Ruge, M. (1965). "The structure of foreign news: The presentation of the Congo, Cuba and Cyprus crises in four Norwegian newspapers". Journal of International Peace Research, 1, 64-91.

[43] Neuendorf, Kimberly A. "The Content Analysis Guidebook". Thousand Oaks, CA: SAGE Publications, Inc, 2017.http://dx.doi.org/10.4135/9781071802878. Retrieved on 3-December 2021.

Quantitative content analysis is described as the process by which the symbols of communication are assigned numeric values. The relationship among these values is analyzed using statistical methods to draw inferences about their meaning ([44]Riffe et. al, 1998). Qualitative content analysis is defined as, drawing of inferences on the basis of appearance and nonappearance of attributes in messages ([45]Holsti, 1969). For the purpose of this research, the researchers focused on the use of quantitative content analysis because, "quantitative methods have proven successful, particularly in analyses of coverage to a particular event" ([46]Krippendorff, 2004).

To study what are the prime factors on which media covers High Court cases in Kashmir, two prominent newspapers namely, Greater Kashmir and Rising Kashmir, were selected for content analysis and the results were compared with the total number of cases adjudicated by theHigh Court Jammu and Kashmirand ladakh during the period of 2020 and 2021. The reasons for choosing these two newspapers are numerous. To mention few, these two newspapers have good reputation in Kashmir. Greater Kashmir is one such newspaper which is easily available (online or offline). It is one of the most trusted newspapers in Kashmir having most expansive readership base with daily net paid circulation of around 3 lakh, (DAVP, 2020) which certainly have an impact on the cognitive development of readers. Likewise, Rising Kashmir is also most read newspapers of Kashmir, which has more than 1 lakh readers' base (DAVP, 2020).

The content analysis of the selected two newspapers was conducted from January 2020 to November, 2021. Both online and offline sources were used to collect the data. A total of 174 news articles related to the decision of Jammu and Kashmir High Court were retrieved from the online and offline versions of Greater Kashmir and Rising Kashmir. All the articles were studied and analyzed.

LexisNexis database and a coding sheet were used as coding instruments. Both the researchers were responsible for coding the material. Trial rounds of newspaper analysis were conducted in order to assure inter-coder reliability. Through these trials of newspaper analysis, a 100% agreement was reached on all variables. This was done in order to guarantee that both researchers understood the variables to be coded. The researchers examined the articles, and more precisely, the patterns and factors in which the unit of analysis was found.

During the course of the study, it was found that both the selected newspapers covered only 174 cases of Jammu and Kashmir High Court, out of randomly selected 1450 cases decided by the court, which makes it clear that not all court cases in totality receive coverage in the media.

FINDINGS

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[45] Holsti, O. RR. Ole (1969). "Content analysis for the social sciences and humanities". Massachusetts: Addison-Wesley Publishing Company, p 312-313.
[46] Krippendorff, Klaus (2004). "Content analysis: An introduction to its methodology". Thousand Oaks: Sage Publications, 115-121.

The findings of the statistical analysis give significant support for the hypotheses that case facts, media characteristics, and judicial characteristics affect the probability that a case receives news coverage.

Consider the effect of issue area on the predicted probability of receiving news coverage. Of all of the independent variables in the model, issue area had the greatest effect on the predicted probability that a case received news coverage. Specifically, constitutional cases were 28 percent more likely to receive coverage than their statutory counterparts.

In other cases more facts also significantly affected the predicted probability that a case received news coverage. Unanimous decisions were nearly 6 percent less likely to receive news coverage. Signed opinions and decisions that altered a lower court's verdict increased a case's predicted probability of news coverage by 9 percent and 3 percent, respectively. It was found that mere 26 percent of the total cases argued in the Jammu and Kashmir High Court during the stated period got coverage in the newspapers.

DISCUSSION

In many ways, the findings of this analysis validate the findings of those of previous researchers who have noted the importance of case facts in determining the likelihood that a judicial decision receives news coverage (O'Callaghan and Dukes, 1992; Slotnick and Segal, 1998). The results also provide additional evidence for the importance of media ownership and resources (Schaffner and Sellers, 2003; Hale, 2006) in determining the quantity of coverage allotted to local events. And in keeping with judicial politics research, this study finds that the proximity of judicial elections affects not only decisions (Hall, 1987; Brace and Hall, 1990) and challengers (Bonneau and Hall, 2003), but also the information that citizens receive about courts.

This study's unique contribution, however, comes from using J&K and Ladakh High Court decisions to demonstrate that each of these factors—case facts, media characteristics, and judicial characteristics—remained significant predictors of news coverage in an integrated model. In other words, it is not just the decision itself, but also the broader political environment in which it is decided, that affects the likelihood that a case receives coverage.

Having recognized this dichotomy, the significance of the additional case facts suggests that other characteristics may act as cues to separate the decisions that are most significant from those that may be resolved or simply procedural. These characteristics include unanimity, whether the case is signed, and whether a lower court's decision was altered in whole or in part.

CONCLUSION

This analysis uses data on Jammu and Kashmir and Ladakh High Court decisions to study how a variety of variables shape media coverage of the judicial decisions. The results are consistent with the hypotheses that case facts, media characteristics, and judicial characteristics exert statistically significant effects upon the probability that a case will receive news coverage.

What makes a High Court decision newsworthy? Previous studies considering this question have been limited by the number of Court terms considered and the time period examined. There has also been a lack of consensus concerning the factors upon which reporters rely to determine the newsworthiness of a case. In this study we examined over 1450 randomly selected cases of different nature decided in Jammu

and Kashmir High Court during the period from 2020 to 2021. We include a number of theoretically relevant case characteristics that we hypothesize should serve not only as indicators of newsworthiness, but also as cues for the legal importance of a case.

Our results indicate that case characteristics influence both newsworthiness and long-term legal impact. Primary overlap occurs when we consider the behavior of the Court itself (e.g. in what direction a case is decided, whether a case alters previous precedent, whether a law is declared unconstitutional, how many justices dissent from the majority opinion) and when the salience of a case is taken into consideration. However, a closer examination of the subsets of case characteristics also reveals some interesting differences. Characteristics related to case origin (e.g. a case originating in Kashmir) only affect the newsworthiness of a case, while the participant's variable only influences whether a case is deemed to have long-term legal impact.

Overall, it was found that case characteristics are significant cues for journalists in recognizing newsworthy Court cases. Further, we note that some cues used to judge immediate newsworthiness stand the retrospective evaluation of long-term legal salience. We find that journalists rely on information enabling them to identify legally significant cases. However, traditional media news values do not lead to absolute coverage of the most legally significant cases; rather, the reliance on cues can result in less legally important cases being brought to the public awareness, while cases with great latent long-term legal importance go uncovered by media.

Though our study provides an insight into how media decide which cases deserve attention, to fully understand the relationship between case characteristics, media attention, and legal importance, future research should expand the scope of our study. For instance, we need to consider other forms of media, sources, and measures of salience. Moreover, additional forms of media should be considered, including television and Internet coverage. Similarly, to better understand the effect of the case salience, future research should explore the use of other measures.

Finally, an analysis that considered the effects of contextual variables such as media and judicial characteristics on coverage of a broader range of courts—from the J&K and Ladakh High Court to lower state courts—would throw greater light on how the political environment affects political knowledge of the readers. Such an analysis would also provide a unique opportunity to study not only the effects of the variables considered here but also the effects of institutional prestige on media coverage.

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