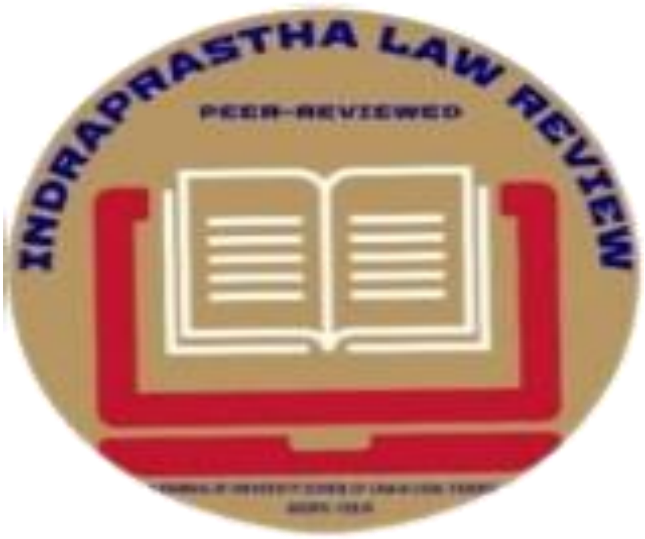
INDRAPRASTHA LAW REVIEW:

E-JOURNAL OF UNIVERSITY SCHOOL OF LAW AND LEGAL STUDIES

GURU GOBIND SINGH INDRAPRASTHA UNIVERSITY

SPECIAL EDITION - WINTER 2022: VOLUME 3: ISSUE 2



SPECIAL EDITION - *Winter 2022*: Volume 3: Issue 2

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IMPACT OF COMMODITY TRADING ON HUMAN RIGHTS TO NATURAL RESOURCES: A COMPARATIVE STUDY OF INDIA VIS-A-VIS EUROPE

By Dr. Sarvesh Kumar Shahi[1] and Prof. (Dr.) Bhavani Prasad Panda[2]

ABSTRACT

The rights of individuals to secure their livelihoods, enjoy healthy and productive surroundings, and live with dignity are all directly tied to actions to protect nature and natural resources. Realizing sustainable development goals is made possible in large part by the commodities industry, particularly in poor nations that depend heavily on it. The commodities industry may help drive global economic expansion via sustainable management. In recent years, the discussion has been started about the impact of commodity trading actions on human rights to natural resources. The debate is that a human rights-based approach should be adopted by commodity traders for the proper management, use and protection of natural resources. The Sustainable Development Goals (SDGs) may be challenging to attain because of environmental degradation, population shifts, growing economic and social inequalities, etc., if current commodities sector management practises are not improved. The theoretical aspects of natural resource commodity trade are examined in this paper, along with its effects on human rights, by emphasising a number of contemporary problems. Further, the paper investigates commodity trading groups harming natural resources in those places where there is a scarcity of productivity. It discusses the situation of big businesses in India compared with Europe. Also, the paper inquires about the international and national guidelines, laws, policies to find out the possible solutions to issues pertaining to human rights violations.

KEYWORDS: Commodity-Trading, Businesses, Natural Resources, Human Rights, Law

[1] Assistant Professor of Law, KIIT School of Law
[2] Director, School of Law, KIIT University

I. INTRODUCTION

Natural Resources are those materials that help human beings to live a better life by providing food, water, air, land, forest, and sun. Other resources like coal, oil, metals and minerals are scattered beneath the surface of the earth and is used for the production of electricity, natural gases, petroleum products, and so on.[3] These energy resources have been classified as renewable and non-renewable sources. The non-renewable sources like coal, petroleum, metal, etc are scarce in nature and are required to be used efficiently to avoid any wastage so that these resources could be available to be used in the future which will fulfill the sustainable development goals. These resources have been scattered unevenly around the globe; therefore, human settlement depends on the area in which the resources are available. In the situation of renewable resources, there is no such complication that this may be lost but that does not mean that it can be used abruptly; every resource should be utilised to meet the needs of the present as well as ascertaining the future use of these resources.[4]

Because natural resources are necessary to human life, human beings have a fundamental right to use them. As a result, both the right of humans to use natural resources to satisfy their basic requirements and the protection of these resources are of utmost importance. Now, these resources are collected as raw materials and converted into finished products, and sold to the consumer and earn profit. This brings us to commodity trading of natural resources to sustain the economic aims of the individual as well as the economic aims of the government by using their rights to use these resources.[5] Though resources are abundant in nature, human civilization has started extracting more and more resources, leading to the exploitation of natural resources at the cost of which they are growing economically, but this method would be short-lived as the resources are scarce in nature and once these resources are depleted there will be no resources left for the human civilization to exploit.[6] Therefore, the activities of humans need to be kept in check when it comes to the utilisation of resources for personal as well as commercial purposes. The article discusses the claim that people have ownership

[3] Allan Kanner, "Natural Resource Restoration" 28(2) *Tulane Environmental Law Journal* 355 (2015).
[4] Jonathan L. Entin; Jennifer R. Jackson, "Environmental and Natural Resource Regulation" 2002 *Developments in Administrative Law and Regulatory Practice* 311-344 (2002-2003).
[5] Jack M. Morgan, Jr., " Environmental and Natural Resource Law" 1 *Utah Law Review 327-342 (1993).*
[6] Delbert W. William, "Valuation of Natural Resource Properties" 2 *Tulane Tax Institute* 218-229 (1952).

of natural resources, how these resources are produced for trade, and how these acts affect the environment and other natural resources. The paper deals with the trade relations of India in comparison with Europe and on the international front.

II. MEANING OF COMMODITY/COMMODITY MARKET

Commodity refers to the products which are traded in the approved commodity exchange market. But the products must be movable from one place to another and must be able to trade i.e. buying and selling. It is divided into two main categories i.e. hard commodities (non-agricultural like natural resources) and soft commodities (agricultural like coffee, corn, wheat, sugar).

A physical or online market place designed specifically for the buying, selling, and trading of unprocessed or basic goods is known as a commodities market. The term "commodity market" describes markets that deal in raw materials rather than produced goods. The commodities market is divided into three categories based on the transaction i.e Spot Market, Future Market, and Derivatives.[7]

i. Meaning of Commodity Trading

The process of exchange of commodities between the buyer and the seller for a price through a medium at a particular point in time or in the future.[8] The medium of exchange is a marketplace that is either physically located at a particular place through commodities exchanges or virtually through online trading portals or by any other means which ensures the purpose of trade. There is a constant change in demand and supply of the commodities sold or purchased in the market due to which the prices of the commodities may vary in every transaction. These trades aim to meet the needs of the buyers and earn valuable profits for the sellers.

ii. In India, there are three major commodities exchanges, namely,

- Multi Commodity Exchange of India Ltd. (MCX) in Mumbai.

[7] Chiu-Lan Chang, "The Connectedness between Natural Resource Commodities and Stock Market Indices: Evidence from the Chinese Economy" 78 *Data Resources Policy* 102841 (2022).
[8] Lakshay Narang, "How does the commodities market work?" *The Economic Times,* Jul. 18, 2017, *available at* https://economictimes.indiatimes.com/markets/stocks/news/how-does-the-commodities-market-work/articleshow/59647231.cms (Visited on March 26, 2022)

- National Commodity and Derivative Exchange of India Ltd. (NCDEX) in Mumbai.
- National Multi Commodity Exchange of India Ltd. (NMCEIL) in Ahmedabad.

These are specialized organized markets that provide a place for the members to buy and sell commodities for future trade under established norms.

III. EVOLUTION OF THE CONCEPT

'Commodity Trading' is an ancient old practice that has existed for generations. Utilizing the well-known silk road, which connects Europe and the far east, the empires of Greece and Rome developed a sophisticated trade system that enabled the exchange of the commodity across vast distances. Evidence indicates that China had a 6000-year history of commodity trading, including futures trading, then, in the 17th century, traces of future trading were also found in Osaka, Japan, next in the year 1848, the Chicago board of trade was set up. In Chicago, the traders dealt with agriculture products as it was closely located to farms and also it was the main route to access from east to west and had good railroad connectivity, therefore, it was the most crucial location for conducting trade.[9]

The earlier traces of ancient commodity trading can be found in Kautilya's Arthashastra and then in modern times, the first commodity trading was initiated in the year 1875 by instituting the Bombay Cotton Trade Association for cotton products that in line with the Bombay Cotton Exchange Limited in the year 1893 started by the cotton millers and the traders who were affected by the Bombay Trade Association (Masood and Chary 2016). Later in 1900, future trading began for products like groundnuts, cotton, and castor seeds by The Gujarati Vyapari Mandli.[10] In 1919, jute products, oil seeds and bullion became a part of future trading by the Calcutta Hessian Exchange then in 1927, another association known as East India Jute Association was formed for trading jute produced later these two organisations were merged to form the Indian Jute Hessian LTD in the year 1945. Even in 1920 , commodities like gold and silver were traded in Bombay and then it was extended to Kanpur, Jaipur.

[9] Hans W. Gerhard, "Commodity Trade Stabilization through International Agreements" 28(2) *Law and Contemporary Problems* 276 (1963).
[10] Shaik Masood and T Satyanarayana Chary, "Performance of Commodity Derivatives Market in India", 1(1) *Amity Journal of Finance* 131-148 (2016) .

After liberalization was implemented in India in 1991, the government established a committee for the forwarding market, which was headed by Prof. K.N. Kabra. In 1994, the committee recommended commodity trading for future trading, expanded operations in the agricultural sectors, and also reduced market price fluctuations.[11] In early 2002, commodities exchanges were set up in India and 52 commodities were started in India and also internationally, there was an upsurge of volume to Rs. 100,000 Crore from Rs.34,500 Crore in 2001-2002 (Shah 2003).

IV. NATURAL RESOURCES AS A COMMODITY

Through different taxation methods, the trade in commodities made from natural resources has the potential to bring in large sums of money for developing nations. The commodities that have proven to be the primary sources of export earnings are crude oil, natural gas, metals, and minerals. Natural resources are the means that are used to help human beings satisfy their wants and help them to attain their social objectives like economic development or a better standard of living basically, natural resources are those commodities in the market that justify their significance and importance by the ends they serve for the human being.[12]

The change of raw materials that are extracted beneath the earth's surface and converted into finished products for sale depends on multiple factors which include the purpose for which the product is extracted, the labour and skills required for processing the raw materials and technical innovation required to finalise the raw materials into the finished product then the product as a commodity is sold for a price. These factors demonstrate how a natural resource may be coupled with human activity to create a good for trade and consumption. Since natural resources sustain the nation's economy, it is important to preserve and effectively use such resources.[13]

As opposed to using natural resources as a commodity to achieve a goal, one should also pay attention to their conservation because they not only meet human needs but also those of animals, plants, and other living things that depend on nature for survival. It is also said

[11] "Commodity Market", Karvy Stock Broking *available at* https://www.karvyonline.com/knowledge-center/beginner/what-is-commodity-market (Visited on March 26, 2022)
[12] William S. Dockins, "Limitations on State Power to Tax Natural Resource Development on Indian Reservations" 43(2) *Montana Law Review* 217 (1982).
[13] Simon H. Ginsberg, "Economic and Environmental Challenges to Natural Resource Trade" 10(1) *Emory International Law Review* 297 (1996).

that the goal of conservation is to achieve the greatest good for the greatest number of people over the longest possible period of time. Therefore, sustainability and conservation of resources will make natural commodities sustain for a longer period.[14]

V. RIGHT TO NATURAL RESOURCES

As it provides the fundamental amenities from the resources that are accessible for consumption by people to live their livelihoods and meet their daily requirements, the utilisation of natural resources has been related to the fundamental rights of people.[15] Various International Organisations have made a key focus on the equal distribution of natural resources and to provide justice to every individual to get access to these resources as stated '*Natural resource justice, therefore, refers to the equitable distribution of which are available from the natural world, rather than those materials produced by humans. For example, freshwater, trees, or animals'*

The International Covenant on Economic, Social, and Cultural Rights in its Article 1 has given all individuals the right to self-determination as individuals are free to exercise their rights for their development, economically, to lead a better life, socially, to attain a good status and their cultural development. Under Article 25 it is stated that "*nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources*." The ability to employ resources to achieve the goals outlined in Article 1 has therefore been granted to every person on the globe.

It is also mentioned in Article 1 that *"All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of their own means of subsistence."*

As the most precious privilege granted to every person, the right to utilise natural resources. Besides being made up of both established and developing nations, the individuals

[14] Irene McConnell, "North American Free Trade Agreement: Trading Natural Resource Goods and Protecting the Environment" 12(1) *Journal of Energy & Natural Resources Law* 151 (1994).
[15] Margaret Moore, "Natural Resources, Territorial Right, and Global Distributive Justice", 40(1) *Political Theory* 84-107 (2012)

also include the sovereign, who is in charge of managing the nation and has the authority to use these resources. As a result, Article 1 of the old customary international law codifies the notion of perpetual sovereignty over natural resources. According to Article 1, the right of peoples and countries to exercise perpetual sovereignty over their natural resources and riches must be done so in the benefit of their national development and the welfare of the people of the State in question.

Nothing in the present Covenant shall be understood as restricting any people's inherent right to enjoy and make full and unrestricted use of their natural resources, according to Article 47 of the Covenant on Civil and Political Rights. The above article empowers the individual to exercise their rights and to secure them from any exploitation that the foreign countries and sovereign powers truly utilise the resources for their own and not let the common individuals enjoy these benefits the purpose is also to secure the natural resources for the future needs rather the present scenario where the extraction of these resources had grown to many folds which endangers these resources from exhaustion.

VI. LAWS REGULATING COMMODITY TRADING

i. International laws

Commodity trading has been the focal point of all the nations to procure more raw materials, convert them into finished goods and sell them to earn profit. This exchange of goods is performed also by exports and imports. Therefore, all the member states can exercise their wishes to use natural resources like extraction, conversion and final products, which would lead to economical and environmental imbalances. Therefore, international regulation is in place to monitor the processes involving commodity trading, including the natural resources, to meet the future demand and supply and reduce exploitation and malpractices which can be done by the countries. These regulations were set up by international organisations like GATT. The GATT stands for General Agreement of Tariffs and Trades and is instituted for the purpose of free and liberal trade practices among the nations and removing obstacles in trading like tariffs and extra charges, maintaining the use of natural resources by controlling the extraction also making trade equally favourable. The Most Favoured Nation (‘MFN’) under its mandate provided in Article I(1) along with

UNCTAD for specific products, the actual purpose of trades under this agreement is to get favourable gains to both the parties from the agreement.

In western countries, like the USA, Canada and Mexico are part of an agreement known as The North American Trade Agreement (NAFTA), and GATT both these instruments focus on key environmental issues and making favourable approaches to protect, conserve and preserve the environment as well as conducting their trade on these approaches. The trade agreement between the countries where there are no specific or special provisions while contracting between the parties, the points have to make up in the agreement and it has to comply with NAFTA also when one party is a signatory to NAFTA and GATT and another party is the signatory to GATT the obligations have to be performed keeping in view with the decision of GATT and if not then the obligation has to be determined under the Vienna Convention on the law of treaties also in situation when there is inconsistency with environment norms and there is no other alternative to perform the obligation then the least inconsistent method has to be adopted and adjudged within the GATT and the Convention tough NAFA is very limited in its scope.

After the World Trade Organization is established, according to Article 11(1), the WTO will provide the common institutional framework for the management of trade relations among its members in matters on the agreements and related legal instruments included in the Annexes to this Agreement. The GATT and the World Trade Organisation are one of the institutions that have focused on the new method of market openness by availing varieties of raw materials and natural products from developing countries . Therefore, it also becomes a concern for the WTO members that most of the world trade depends on exports from the developing countries and also the barriers like price fluctuations, supply instability, other problems related to the processing of resources are key concerns.

ii. European Laws

There was a need for the European Council to establish healthy relations with other European countries and a purpose to promote free trade among the European nations . Therefore, in December 1989, the council decided to form an association among the countries in the European region . The basic pillars for establishing the link between the countries were to abolish custom trade in goods, promote free trade, free movement,

diplomatic communications, provisions in supporting cultural, financial and economic goals among the European countries in the year 1991, Hungary, Poland and former Czechoslovakia (CSFR) signed the agreement.[16] Also, the association focused on making safeguards for the workers and their families of the member countries to provide mutual transfer of payments, along with social security, insurance, and pension.[17] There are provisions for the gradual adjustment of state monopolies of a commercial nature, as well as the protection of intellectual, industrial, and commercial property rights.[18]

The Doha Development Agenda, also known as the World Trade Negotiations, was founded in Doha, Qatar, in November 2001 by the European Union to assist trade liberalization and developing nations' entry into the World Trade Organization. Subsidies for agricultural products are being reformed to make liberalization policies consistent with the creation of sustainable goals. [19]

The trade practice among nations also gives a few people some chance to act maliciously in a trade agreement for the purpose of protection and security of the trade transaction and protecting the stakeholder The EU Market Abuse Regulation was enforced in 2016 which covers all the security measures when it comes to do trade along with written instruments it enforced on regulating the market and ask the trade facilities including commodity derivative trading in spot markets under Article 12 it defines the market manipulation as false and misleading signals in demand and supply and the price concerned and finalising the price abnormally or on the artificial level, the regulation is useful in detecting the manipulation rather than proving fraud notifying the European Securities and Markets Authority (ESMA) it also provides an exception in cases where there are legitimate reasons formulated in article 13 as accepted market practices.[20]

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[16] Randall J. Solomon, "Eastern Europe: Trade Relations with the European Community" 2(3) *Journal of International Law and Practice* 575-584 (1993).

[17] *Ibid.*

[18] *Ibid.*

[19] "Doha Development Agenda," *European Commission, available at* https://ec.europa.eu/trade/policy/eu-and-wto/doha-development-agenda/ (Visited on March 26, 2022).

[20] Ivan Klepitskil, "Market Manipulation in Russia and in Europe: The Criminal Law Dimension," 4(3) *Russian Law Journal* 120-135 (2016).

The Europen Union [EU] with the help of the World Trade Organization [WTO] focuses on addressing the challenges that are being faced by economic and health-related due to the COVID-19 pandemic, to ensure social sustainability as well as boosting environmental stands, focuses on updating the trade rules in digital trade and tackling the unfair trade practices that disturb the fair competition.[21]

In the case of *Friends of the Irish Environment v. Ireland*, Supreme Court (2020)[22] it was discussed about the government's plan to meet the lowest carbon emissions in the year 2050, and the action of the government was given prime importance for achieving the objective that the European Union has considered for reaching lowest emissions in 2050 as it is evident from the case that a healthy environment is an ultimate objective as emission could cause a lot of health issues, degradation of atmosphere, irregular rainfalls, and serious other climatic changes dangerous for the life living on earth.

iii. Indian Laws

The Forward Market Regulation Act of 1952 once governed the Indian commodities futures market. Under Section 3 of the Act, this Act establishes the Future Market Body (FMC), a commission made up of up to four members selected by the central government, one of whom will be designated as chairman and a minimum of two members. The FMC had a few objectives in regulating the market to ensure and create healthy competitive market conditions, avoid price manipulation, ensure the risk management system, fairness, and transparency, clearance, and settlement, and finally promote stakeholders in the market.[23]

The commodity futures trading was suspended for some time later, in 2002-2003, the government of India initiated commodity trading for forwarding markets . The government gave a mandate to the four entities to set up a national commodity exchange dealing with multiple commodities. Second, the government proposed modifying the list of commodities under the 1952 Act.[24] The government abolished the 11 day restriction on completing the

[21] "The Multilateral Trading System – Boosting Trade", Reducing Poverty, *An Open, Sustainable And Assertive Trade Policy: Factsheet On WTO Reform, available at* https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159430.pdf (Visited on March 26, 2022)
[22] *Friends of the Irish Environment v. Ireland* [2019] IEHC 747.
[23] Himadri Bhattacharya, "Commodity Derivatives Market in India" 42(13) *Economic and Political Weekly* 1151-1162 (2007).

[24] The Forward Contracts [Regulation] Act, 1952 (Act 74 of 1952).

transaction in the spot market, also known as the Ready Delivery contract and abolished non-transferable specific delivery.[25]

Later, the regulation failed in its purpose and the gap in regulation lead to various crises that the stakeholder had to face fraudulent activities like opening demats accounts with fake PAN cards or using benami companies, circular trading which attracts small investors with false belief that there is a demand in a particular future commodity contract, activities such as tax evasion, price manipulation, Dabba trading (unregulated trading handled by brokers), wash trading means repetitive purchase and sale of the same security to increase its price, client code modification and so on.[26] the scandals like Guar Scandal (Cyamopsis Tertragonlob) a drought-resistant crop had an irregular increase in its price in the months of October 2011 till march 2012 later, the commission was notified regarding the scandal but they failed to take any measures then the NSEL Scandal (National Spot Exchange Limited) for approximately Rs 5500 fraud in July 2013.[27]

There have been serious lapses by the regulatory body in regulating the trade and the FMC was not competent enough due to less number of staff as well as its inability to prevent fraud beforehand it also allowed future trading through online exchanges, which resulted in manipulation of products like Mentha Oil, Guar and Urad futures witnessed extreme volatility during the last quarter of 2005.[28] In the 2015-2016 budget, the ministry of finance has suggested combining SEBI and FMC. Ever since futures trading began in 2003–2004, the discussion about the merger has lasted for more than ten years. Since the merger is anticipated to address the issues of insufficient staff, research, and monitoring skills, the notion of placing regulation of the derivatives market under one regulator seems practical. [29]

The Forward Market Regulation Act of 1952 was repealed and the Securities Contracts (Regulation) Act, 1956 (SCRA), Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012 (SECC Regulations), and SEBI (Stock Broker and

[25] Neal Smith, "Commodity Futures Trading" 25(1) *Drake Law Review* 1 (1975).
[26] Neeraj Mahajan and Kavaljit Singh, ***A Beginner's Guide to Indian Commodity Futures Markets*** **New Delhi: Madhyam (Madhyam, New Delhi, India, 2015).**
[27] *Ibid.*
[28] Tulsi Lingareddy "Commodity Futures Trading at the Crossroads" 50(24) *Economic and Political Weekly* 113-116 (2015) .
[29] *Ibid.*

Sub-Broker) Regulations, 1992 and SEBI (Stock Broker and Sub-Broker) Regulations, 1992 and SEBI (Stock Broker and Sub-Broker) Regulations, 1992 were all amended (Regulatory Fee on Stock Exchanges). The Commodity Derivative Market Regulation Department was established to carry out SEBI-mandated tasks including managing exchanges, creating marketing strategies, addressing complaints, and conducting inspections. [30]

In the 2012 case of *Center for Public Interest Litigation & Ors. v. Union of India*[31], the honourable court, ruled that since natural resources belong to the public, the government should distribute them to the public under the principles of equality and the public interest while also making sure that the distribution reflects the constitutionalism of the nation. It was also said that the notion of sovereignty and interest for the general public in international law as well as common law has been widely defined and studied, and that this includes the ownership of natural resources.

The government of India passed the New Exploration and Licensing Policy of 1999, allowing private entities to perform the extraction and production of petroleum products and natural gas. As a result, in the case of *Reliance Industries Limited* [32], the court held that the state is the trust of natural resources acting as trustee for the citizens of India, meaning that the natural resources belong to the citizens of India and the government has sole responsibility to manage them. The New Exploration and Licensing Policy of 1999 gave private entities authority, but it also required that their operations be in accordance with Indian law because the entire idea of protecting and allocating natural resources has been vested in Article 14, Article 29(b), Article 297, and the public trust doctrine. [33]

In another case[34], the court held that there is a need to strike a balance between the two interests, one of which is the economic interest and the other is the ecological interest. As it is undeniable that development is impossible without having some negative effects on the ecology, as well as the environment, and projects for the public interest, cannot be abandoned,

[30] "Finance Minister unveils merger of FMC with SEBI", *Securities and Exchange Board of India, available at* https://www.sebi.gov.in/media/press-releases/sep-2015/finance-minister-unveils-merger-of-fmc-with-sebi_30729.html (Visited on March 26, 2022)
[31] *Center for Public Interest Litigation & Ors. v. Union of India* (2012) 3SCC 1.
[32] *Reliance Natural Resources Ltd v. Reliance Industries Ltd* (2010) 7 SCC 1.
[33] *Ibid.*
[34] *K.M. Chinnappa,T.N. Godavarman v. Union Of India 2002* (10) SCC 606

working for the interests of the public is necessary as well as beneficial. The conclusion is that sustainable development goals can only be achieved with a balance between the two interests.

VII. IMPACT ON HUMAN RIGHTS TO NATURAL RESOURCES

The right to natural resources for every individual has been mandated under international regulations. In the exercise of these rights, the sovereign, as well as the individual, has exerted natural resources and become so dependent on natural resources, which has led to over-extraction and overproduction of natural commodities . The resultant problems are resource depletion, high prices, pollution, emissions, several impacts on land and human health are major problems.[35] Since the market is growing at a gigantic rate, the need for commodities and resources are increasing, which also increases the competition and the prices now the situation has raised to faster depletion of the resources.[36] Natural resources are unevenly distributed across the globe due to which there is a concern about the supply of commodities, rare and limited raw materials such as lithium and other materials are parts of seeking information and technology is secure.[37] Examples include the UN Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons, which prohibits the development, production, stockpiling, and use of chemical weapons, and the UN Treaty on the Non-Proliferation of Nuclear Weapons, which stems from the Hiroshima and Nagasaki bombings, which had a significant impact on the ecological balance of the region. As a result of human activities such as resource extraction and careless usage, different ecological imbalances have been created, leading to their destruction as well as the heavy exports of endangered species of flora and wildlife. [38]

The exploitation of developing nations for their natural resources so that a select few industrialised nations may use them is one of the principal effects of the human right to use natural resources. The result is the pollution in air and water affecting the ecological balance

[35] United Nations Environment Programme, "International Trade in Resources: A Biophysical Assessment", (2015) *available at* https://wedocs.unep.org/handle/20.500.11822/7427 (Visited on March 26, 2022).
[36] *Ibid.*
[37] Stormy-Annika Mildner; Gitta Lauster, "Settling Trade Disputes over Natural Resources: Limitations of International Trade Law to Tackle Export Restrictions", 3(1) *Goettingen Journal of International Law* 251-282 (2011) .

[38] *Ibid.*

of plants and animals, and global warming. this underdevelopment of the developing countries for resources brings more destruction to the environment.[39]

The activities had resulted in the ecological environment's damage in the guise of exercising the country's right to utilise its natural resources. The government has failed to assess the loss of exercising the right to natural resources, ultimately leading to the exploitation of all the natural habitats and resources. In 1962, after the India-China conflict, various roads were built in that location for the purpose of defense which gave way to the exploitation the natural resources in the region such as the use of timbers, limestone, magnesite, potassium, and other rare materials were used for infrastructural developments, blasting of mountains leading to the destruction of the ecological balance of mountain regions and making it difficult for villagers who depend on the forest for their destroying valleys and their natural resources in the area of Kosi, Gandak and Tungabhadra deforestation had lead to water logging salinization and desertification of the land are near the dams.[40]

India is one of the second-largest consumers of coal, and it has been observed that direct extraction and consumption are equal to the nation's economic growth. As a result, the loss of natural resources has a direct correlation to the growth of the country's economy; consequently, the nation's economy cannot expand due to the nation's limited coal reserves.[41]

The European countries are also facing the adverse impact of the exploitation of natural resources, though they have progressed in developing the standard of living . This economic development is the reason that resources are being depleted at a faster rate, the terrestrial and marine environment is deeply altered.[42] Europe has increased its imports, due to which it is dependent more on the natural resources being developed in other underdeveloped nations . Therefore, Europe is by far degrades the environment much more than the other world

[39] H. E. Luis Echeverria Alvarez, "Development and the Conservation of Natural Resources", 4(4) *Environmental Policy and Law* 159-163 (1978).
[40] P. P. Karan, "Environmental Movements in India" 84(1) *Taylor & Francis Ltd.* 32-41 (1994).

[41] Jinke Li and Zhongxue Li, "A Causality Analysis of Coal Consumption and Economic Growth for China and India", 2 *Natural Resources*, 54-60 (2011) *available at* https://www.scirp.org/pdf/nr20110100005_91343189.pdf (Visited on March 26, 2022).

[42] "The European Enviornment State and Outlook 2020" *European Environment Agency available at* https://www.eea.europa.eu//publications/soer-2020 (Visited on March 26, 2022).

countries . Also, Europe, along with other nations, are losing biodiversity. Also, climate changes due to greenhouse effects also tend to intensify as the exploitation of resources is not stopped. These climate changes will increase the heat waves, forest fires and hotter temperatures in the region, also the use of chemicals and factories brings more health hazards to humans and wildlife, therefore, despite Europeans have made various environmental policies, they are still facing the consequences of resource exploitation.[43]

VIII. POSSIBLE SOLUTIONS

The possible solutions can be used to avoid the degradation of natural resources:

1. The need to stop or lower the extraction of iron ores, oil, and other metals. The major drawback of the extraction process is that it involves sulfides, which are the main source of air pollution. Apart from that, the process of releasing a large amount of metallic as well as toxic and acidic compounds results in harm to the environment.
2. Adopting efficient techniques to reduce the waste of resources while producing a commodity. Specific framework conditions, institutional and technical set-ups and incentive systems for waste management are required. Technical infrastructural systems should be explored and the best models of the world should be adopted.
3. Use viable renewable energy sources rather than non-renewable sources. The reason being that renewable energy has a much lower carbon footprint than coal and other fossil fuels. Switching to renewable energy sources can positively impact the environment by slowing climate change. This positive environmental impact is where the terms green energy and clean energy come from.
4. Preserve the ecological balance by not cutting the flora and fauna for development purposes, as the process of afforestation will take a few years for the sapling to become a tree.
5. method of consumption should be altered as per the requirements and needs of the natural environment. Changing consumption patterns will require a multi-pronged strategy focusing on demand, meeting the basic needs of the poor, and reducing wastage and the use of finite resources in the production process.

IX. CONCLUSION

[43] *Ibid.*

The primary component of the commodities market in today's economy depends on the extraction, transformation, and manufacture of raw materials into finished goods. The WTO, GATT, and NAFTA all established rules for the extraction, use, and sale of natural resources. However, because extraction is still occurring, the international organization has not been able to satisfy the need of preservation and protection of natural resources. Even in India, the use of coal mines, gold mines, and other extraction methods has a continuous impact on the environment as more extraction is leading to faster depletion of natural resources. The future will be in the dark if necessary steps aren't taken to stop the exploitation. The responsibility lies on every individual as no regulation will be efficient if the individuals, as well as the sovereign, take it as responsibility for the preservation of the natural resources.

A Critical Study on Use of Mediation in Resolving Matrimonial Dispute in the form of Cruelty

-By Dr. Deepali Vashisht[44]

Abstract

Conflict is a part and parcel of human life in all human races. It arises because of some disagreement, difference of opinion or view point and because of clashes of interest. It is a natural phenomenon as everyone has unique personality so have different outlook to see things. Therefore, difference of opinion is so obvious.

Marriage is considered as a sacred institution especially among Hindus. It is a union of two persons who decided to spend their life together. It has been said that this union has been made united in heaven. However, in this amalgamation also dispute is common. Disputes relating to marriage are referred as Matrimonial Disputes. They can happen because of various disagreement in spouses. However, one specific kind of matrimonial dispute is cruelty. Section 498A of the Indian Penal Code talking about cruelty, done by a husband or his relative on a woman. It is a cognizable offence where the police officer has the power to investigate and arrest without the permission of court. In-fact, the offence cruelty is not specified in the list specified in section 320 of The code of criminal Procedure. However, for safeguarding the marriage institution, the court has permitted settlement through mediation.

Question

To find out the implication of using meditation in resolving matrimonial disputes in the pretext of Cruelty specified in section 498A of the IPC.

Objective

The object of this paper is to assess the use and misuse of mediation in resolving cases related to cruelty.

Keywords

[44] Associate Professor of Law, VIPS

Cruelty, Disputes, models of mediation, conflict and marriage.

Introduction

Disputes and conflicts are a part and parcel of human life. They are often used as interchangeable. However, many scholars and jurists have been distinguished them. According to them, conflict, is a serious disagreement or argument which depicts an ongoing state of disharmony unless and until handled by stringent sort of resolving mechanism like litigation. John Burton has defined the conflict as a prolonged disagreement which turns into a problem that is so deep and its issues are broadly non-negotiable"[45]

Whereas, dispute is short-term disagreement between the two different entities that can be resolved by some alternative mechanism that may be communication and, they are negotiable. Hence, dispute arises on account of some disagreement or difference of opinion or view point. It might arise because of clashes of interests in individuals. All humans are generally acquisitive in nature. Therefore, escalation of differences take place due to their acquisitive tendencies. Another reason for the occurrence of differences is that every individual has his own unique personality and they must have different family backgrounds; therefore, each person has different way to see, appreciate and analyse the things/situations and events. Therefore, difference of opinion is obvious as even blood related persons will have different outlook. Marriage is also not an exception to this. However, the issues arise when such small differences convert into a conflict or dispute.

Marriage

In ancient times, Marriage was considered as a union of two persons who were united in heaven or made by God. As per Hindu Mythology, marriage is considered as a sacrament. It is always considered as an important social institution by society as well as BY law. The legislature and society both try to protect marriage institution. It has subsisted in one form or the other in every culture, caste and religion, as the most important institution of society. In the Hindu mythology,

[45]Difference between command and conflict, available at: https://www.differencebetween.com/difference-between-conflict-and-vs-dispute/ (visited on 18-08-2022).

marriage has been considered as an indispensable *sanskars* of life.[46] The Hindu Marriage Act, 1955 also considers marriage as a sacred Union between two individuals. Though, presently it is often considered as a covenant between a man and women formed to live together on the basis of compatibility. It works as a base for building family which is a vital unit for overall well being of individuals. It is often said that the foundation of a happy married union is in some inherent vitals like tolerance, trust, adjustment and respecting one another.[47] The marriage has been governed by The Hindu Marriage Act, 1955 only when both bride and groom are either Hindus, Buddhist, Sikh or jains. As per The Hindu Marriage Act, 1955, the bride and groom should take seven steps around the fire. However, if the parties to marriage are Sikhs, then The Anand Marriage Act,1909 will apply which allows performance of marriage by undergoing ceremony of Anand Karaj. Whereas, in Muslim marriage norms are quite different i.e., here marriage is in the nature of a contract between the bride and groom. So, an offer/proposal for marriage is given by the groom to bride and this proposal should be accepted and performed in one sitting with some consideration. The contract of marriage should also be signed by the bride, groom, witnesses and Qazi. The signed document is known as *Nikha - nama*.

In Christians, marriage of a couple is regulated by The Indian Christian Marriage Act, 1872, where both or either of them is a Christian. The marriage must be performed before the Minister of Church and, this should also be witnessed in presence of at-least two witnesses. The same way in Parsi, marriage should be completed with Ashirvad ceremony, in the presence of Parsi priest and two Parsi witnesses. The Parsi Priest issues a certificate of marriage on the completion of marriage.

Matrimonial Disputes

Disputes relating to marriage are often regarded as Matrimonial Disputes. They arise because of difference of opinion or have clash regarding anything. It might be arisen because of some misunderstanding which may further lead the parties to a wrong conclusion. It, amongst others, also includes disputes pertaining to divorce, restitution of conjugal rights, maintenance,

[46]Indira Sharma, Balram Pandit, Abhishek Pathak and Reet Sharma, *Hinduism, Marriage and Mental Illness* (Indian J Psychaitry, 2013 jan 55(suppl2) 243-249, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3705690/(visited on August 17, 2022).
[47]N Bhagya Lakshmi, *Mediation: Marital Conflict Resolution Therapy*, BLR (Oct-Dec, 2016).

custody of child etc. The matrimonial disputes can also arise due to various disagreements/differences between the spouses. In primitive days, they majorly arose because of the strained relations with in-laws. However, now there are many reasons apart from strained relationship with in-laws like money, which basically relates to dominance. In primitive days, females were financially dependent on their father, husband and son therefore, they easily trusted their words and followed them but now the situation has changed. Now, the females have gained financial independence to a great extent and they take their own decision, they have their own outlook to see and manage the things. Earlier they were bound to follow the command of their father, brother, husband and son but now they can take inform decisions in their life without trusting blindly to anybody.

Apart from this in present era, the Conflict in marriage can also arise due to pressure of professional commitments, long working hours of spouses, work related travelling and one the spouses bearing all the responsibility of kids . Hence, Apart from all these reasons mentioned above, if either of the spouses is not able to earn enough, then it will bring a complexity and give rise to differences/clashes. Thus, it can be said that persistent disagreement results into dispute and, in case, if this disagreement is not resolved and continues for a long time, then it would turn into a dispute, often referred to as 'Matrimonial dispute'. However, one specific kind of matrimonial dispute is "Cruelty". It is defined as an offence under section 498A of Indian Penal Code(IPC), 1860. The offence of cruelty as stipulated U/s 498A of IPC may be committed against the wife either by her husband or relative of the husband.

Mediation as a Mode of ADR

Alternative Dispute Resolution often referred to as ADR. 'A' connotes "Alternative" which means an alternative manner/ mode to resolve the dispute. Hence, it is actually a supplement or an additional mode for resolving dispute and not a replacement/substitution to litigation. So, ADR is not an alternative of conventional litigation process, it is an additional mode or mechanism for resolving 'disputes which are mainly of civil nature'. So, in acronym, ADR 'D' Stands for dispute whereas 'R' refers to resolution. Therefore, in 'ADR' focus is on the 'resolution' of disputes and not on the 'settlement'. Settlement would take place only after the resolution of dispute and, it will subsist only after the resolution of dispute.

The object behind promotion of ADR is to give speedy and effective justice as pendency of cases in Indian courts has become a hurdle in dispensation of justice, resulting in delay and denial of justice. Needless to mention here that, according to legal maxim, "justice delayed is justice denied". Hence, ADR might be a more viable option for disputant parties to seek justice. In ADR, parties have the autonomy in terms of venue, mode, manner, time and same is also economical. Apart from mediation, there are other forms of ADR like Negotiation, Conciliation and Arbitration. However, mediation and negotiation are the two most informal mode of ADR where parties enjoy a lot of freedom and confidentiality in comparison to other modes like arbitration and conciliation.

The eminent philosophers like Buddha, Mahatma Gandhi and AbhramLincon, had promoted the practice of ADR for settling their civil disputes out of Court. [48]Albert Einsten said-

"Peace cannot be kept by force it can only be achieved by understanding."[49]

Mediation is one of the well-recognized forms of ADR. It is a mystical art.[50] In Mediation, two or more persons come to a common platform to bring out some solution to their problem, and for resolving the conflict subsisting between them, peacefully, with the assistance of a neutral third person known as mediator. The mediator works as a facilitator whose main role is to facilitate the parties in evaluating their goals or options and, to find their own mutually satisfactory solution. Mediation can be defined as "an assisted negotiation where a third person assist the disputant to carry out the negotiation process". It can be of two types i.e., Private Mediation and Court Annexed Mediation. In Private Mediation, the mediator is appointed by the disputants whereas in Court Annexed mediation, court appoints a mediator who can be an advocate or a judge.

There are different models of mediation i.e., Facilitative, Evaluative and Transformative Mediation.[51]In facilitative mediation, the mediator has no decision-making authority. His main job is limited to facilitate/ help parties in mediation process. He offers a structured process to

[48]Mediation Training Manual for Refresher Course by Mediation and Conciliation Project Committee Supreme Court ofIndia, Delhi https://main.sci.gov.in/pdf/mediation/Mediation%20Training%20Manual%20for%20Refresher%20Course.pdf
[49]Id. at p. 16.
[50]Laurence Boulle and Nadja Alexander, Mediation A how to Guide 3 (LexisNexis 2015).
[51]https://www.stevehindmarsh.co.uk/help-and-advice/models-of-mediation/ (visited on 22-05-2022)

disputants to make use of, in finding mutually satisfactory solutions. This model is based on win-win theory, so it is most suitable in matrimonial and relationship situations.[52]

In Evaluative mediation, the mediators are the legal expert of the particular field of dispute. They will evaluate the strength and weakness of the case and advise their clients about the possible outcome /decision given by the court. This model of mediation is more apt in business disputes. The third model of mediation is transformative mediation. It is a more flexible approach which focuses on two elements i.e., empowerment and recognition. In this model mediator job is to empower the parties to take their own decision and their own action plan. This kind of mediation is highly responsive to party's need.

Resolution of Matrimonial Disputes

For protecting marriage institution, it is inevitable to use some alternative mechanism contrary to conventional litigation for resolving issues. Alternative Dispute Resolution is an amicable mode for resolving disputes. It is more friendly for the disputing parties in comparison to adjudication vis-à-vis litigation.

Mediation has been recognised in Indian legal system as a successful mode for resolving matrimonial disputes. The pre litigation mediation based on "opt-out clause" has been promoted in Mediation Bill, 2021 also. The main object behind this bill is to bring uniformity in the application of rules of mediation through-out the Country. This bill is based on UN Convention on International Settlement Agreement Resulting from Mediation known as Singapore Convention.

There are many instances where the apex court stressed upon the use of mediation in resolving matrimonial disputes. In-fact, there are many statutes in India which per se promote use of mediation in resolving matrimonial disputes which are of civil nature namely Civil Procedure Code, 1908; family Court Act, 1984; Hindu Marriage Act, 1955; Special Marriage Act, 1954; Arbitration and Conciliation Act, 1996.

Section 89 of the Code of Civil Procedure, 1908 provides that court has the power to refer the matter to ADR including Arbitration, Conciliation, Judicial settlement through Lok Adalat,

[52]Zena Zumeta, *styles of mediation: Facilitative, Evaluative and Transformative*, mediate.com https://www.mediate.com/articles/zumeta.cfm (visited on 22-05-2022).

Negotiation and Mediation if the court finds that there exists an element of settlement. The intent of the legislature is to introduce an effective additional mechanism for resolving civil disputes. In-fact this provision was inserted on the recommendation of Arrear of Committee Report, 1990 headed by Chief Justice V.S. Malimath. In 1989, the Government of India appointed this committee for finding out the solution of pendency of cases in all the Courts of India from lower courts to Supreme Court. So, section 89 was inserted in the Code of Civil Procedure (Amendment Act) 1999.

However, the validity of section 89 was challenged in Salem Advocate Bar Association, Tamil Naadu *v.* Union of India[53].The main issue involved in this case was whether the amendments made in the Code of Civil Procedure 1908 via the Amendment Act of 1999 and 2000 were constitutionally valid or not?[54]The Court held that if the parties agree for arbitration, then the arbitration proceeding will go according to Arbitration and Conciliation Act, 1996. To remove all dilemma regarding reference of a case for ADR, the court also stressed upon the need for appointing a committee.

> "…Para 11 provides for the constitution of a committee to ensure that the amendment made in the code become effective and result in quicker dispension of justice which is the object of amendment".[55]

In 2003, Government of India appointed a committee under the chairmanship of Justice M. Jagannadha Rao to prepare a draft for case management. The commiittee has drafted a 'Model Case Management Formula'. This Model formula lay down certain rules and regulation which should be followed by all courts while referring a case for the ADR.[56]

In Afcon Infrastructure Limited and Another *v.* Cherian Varkey Construction Company Private Limited and Others[57] the Supreme court held that for Arbitration and Conciliation 'Consent' of the parties is required to be taken before forwarding parties whereas for Mediation and Judicial

[53]AIR2003SC 189

[56]Bibek Debroy, *Managing Case FlowsDraft rules in subordinate courts have either not been adopted or are not implemented in the right context, indiaexpress.com*(November 16,2017)https://indianexpress.com/article/opinion/columns/indian-legal-system-supreme-court-pending-court-cases-law-commission-managing-case-flows-4939176/(visited on 19-05-2022).
[57](2010) 8 SCC 24

Settlement in form of Lok- Adalat settlement if the court is satisfied that there is a scope of settlement of dispute then the court can refer the parties even without settlement. The court has also clarified the stage of case for reference of ADR that is when pleadings are complete and before the framing of issues, the court shall fix a date for preliminary hearing for appearance of parties so that the court will understand the nature of dispute and proximity of its settlement through ADR.

Section 9 of the Family Court Act, 1984 puts a mandate on the family court to make efforts for bringing out settlement in relation to family dispute like matrimonial dispute, maintenance, child-custody and divorce etc.[58] This provision also empowers the court to refer the parties to the Counsellor/ Mediation Centre based on opt- out model of mediation where parties have no option but to go for mandatory mediation. The counsellor specified in section 9 of the Family Court Act work as a facilitator and take sessions with the disputant parties and show them the real picture or likelihood of drawbacks which they will have to face in case if settlement is not done through counsellor. So, here job of a Counsellor is based on transformative model of mediation. The Counsellor has to complete counselling session with in the given time limit for timely resolution of dispute to avoid unnecessary delay.[59]The counsellor will not disclose the details of discussion in counselling session and send the report depicting the possible term of settlement.[60]

Sub-section (2) and (3) of Hindu Marriage Act, 1955 also provides for mediation i.e., section 23(2) says that it is peremptory for the court to make every possible attempt to reconcile the dispute i.e., when the parties approach the court for seeking some relief regarding matrimonial

[58]Family Court Act, 1984 Sec. 9(1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fithttps://www.indiacode.nic.in/show-data?actid=AC_CEN_3_3_00019_198466_1517807326692&sectionId=9550&sectionno=9&orderno=9 (visited on 23-05-2022).

[59]Sakshi Jain, ***Need for Mediation before Divorce Proceedings in India,*** **mediate.com*(March 2019)***https://www.mediate.com/articles/jain-use-of-mediation.cfm#:~:text=Section%209%20of%20the%20Family%20Court%20Act%2C%20makes%20is%20it,mediation%20center%20with%20their%20consent**. (visited on 23-05-2022).**

[60]KishanDuttKalaskar,*Procedure Involved In A Family Court Case*, legalservicesindia.com, https://www.legalserviceindia.com/legal/article-5394-procedures-involved-in-a-family-court-case.html (visited on 23-05-2022).

dispute, at the first instance, the court should try to reconcile the dispute before further proceeding in the case. For bringing effectual reconciliation between the disputants, the court has the power to adjourn court proceeding for a limited time which should not exceeds fifteen days and refer the matter for mediation for the same.[61] In case, if the mediation fails then the court will resume the proceeding again and will continue.

Section 34 (2) of Special Marriage Act, 1954 put a mandate on the court for not to grant any relief under this Statute at the first instance in all cases where there is a scope of reconciliation between the parties. Section 30 of Arbitration and Conciliation Act, 1996 empowers the arbitrator or tribunal to use mediation to bring out a settlement on the consent of parties.

Mediation in 498A of IPC

Section 498A of the IPC says cruelty by husband or his relatives on a women. The object behind the formulation of section 498 A is to protect women from marital torture including violence and abuse. The term cruelty includes both physical or mental harm to the woman done by a husband or his relatives. It is a non-compoundable offence under section 320 of the Code of Criminal Procedure,1973 (hereinafter refer as Cr.P.C). Apart from this it is a cognizable and non bailable offence. Cognizable offences are those offences in which a police officer has the power to initiate investigation without the permission of the court. So, in case if an information is given to a police officer regarding commission of an offence of cruelty, the police officer can start investigation even without permission of the court and, if necessary, police officer can also do arrest even without the permission of court. However, in Arneshkumar case the court has directed police for not to arrest immediately.

An offence of cruelty is a non-bailable offence which means that the accused cannot claim bail as a matter of rights so, granting of bail is discretion of court. Therefore, the question arises here is-

How the court can refer the cases of section 498A of IPC for Mediation? And, can the court quash FIR of 498A by exercising its inherent power?

Some concerns which have arisen-

[61]Hindu Marriage Act, 1955, No 25 Act of Parliament, 1955§. 23(3).

- Can the courts refer the cases of section 498A of IPC for Mediation? what is the stage at which the court can refer the parties? Is it valid to quash FIR in 498A by High court?
- Can an accused misused the application of mediation in section 498A or easily escape from punishment by using mediation as a backdoor ?
- The object of the Panel law is to convict offender for committing an offence. The punishment works as deterrent for other like minded people and helps in decreasing the rate of crime. So, Doesn't the mediation remove that deterrence in the mind of wrongdoers?

Provisions Governing Cruelty in Marriage other than 498 A of The Indian Penal Code

Section 498 A of the Indian Penal Code (IPC) deals with cruelty. However, the aggravated form of cruelty resulting into death has been covered under Section 304 B of the IPC which provides that if a women has died within seven years of her marriage and there is any burn marks or bodily injury and, it is shown that soon before her death she was subjected to cruelty or harassment by her husband or relative in connection with demand of dowry, such death shall be termed as "Dowary Death". It will be presumed as a dowry death. Hence, demand for any valuable items including property or valuable security come under the preview of dowry if it is in connection of marriage irrespective of the fact that it is direct or indirect. However, if this demand has been made out just to meet out some financial emergency and for meeting some financial expenses for the time being then it would not fall in the domain of dowry demand rather it will be considered as a mutual help.

Cruelty in the form of Domestic Violence

The Protection of Women from Domestic Violence Act, 2005 was enacted to protect the women from the acts of domestic violence. The term 'Domestic Violence' as violence has been defined as a violence within the four walls of the house between the persons who are in domestic relationship living in a shared household. However, it is easy to establish physical torture than to mental torture.

The term 'domestic relationship' is defined in section 2 (f) of PWDV Act. It means a relationship through marriage or in the nature of marriage i.e., live-in-relationship, such as wife, daughter-in-law, sister-in-law, widows; blood relationship such as mothers, sisters or daughters and other domestic relationship in the form of adoption.

Section 14(2) empower a Magistrate to issue direction to respondent or aggrieved person either jointly or individually to undergo for counselling. However, the direction can be issued only if the issue is of civil nature.

Recently in case titled as, Dr. Jaya Sagade*v*. State of Maharshtra[62]the court very categorically said that 'no women should be compelled to go forcounselling or to settle or reside with a violent husband. In this case a petition was filed against the circular passed by the state government for mediating in domestic violence cases without court order. So, no agency can do counselling without the directions from the court. Hence, the court has the power to refer the parties for mediation but, simultaneously the court has the duty to use this power cautiously. Thus, the agencies can only inform the aggrieved women about her right to medical and shelter home services and besides informing her to file a case in the court either herself or through a protection officer. The court also emphasised that if there is a risk of recurrence of domestic violence then domestic incident report (DIR) of the violence should be made by the counsellor under section 10 (2) of the PWDV Act before starting counselling session. The court also made it clear that counselling session can only commence under section 14 of PWDV Act only after getting voluntary and informed consent of victim (aggrieved women) for settling maintenance claim of a women in case if she left her shared residence.[63]

Judicial Pronouncements

In Ram Gopal *v*. State of Madhya Pradesh[64] the court requested the Law commission and Government of India to examine whether the offence prescribed under section 498 A of IPC can be made compoundable? However, it was not permitted and still it is not compoundable in section 320 of the Cr.P.C. Similarly in Rajeev Verma *v*. State of Uttar Pradesh[65] the court again asked for compounding of 498 A with the permission of Court.[66] It has been clarified by the apex court that courts can refer the cases of section 498A of IPC for Mediation on the instance of parties and if the court is itself satisfied that there is a scope of settlement.

[62]Sandeep Bhalotia, *Mediation in Domestic Violence Case Whether to Use or not to Use? - AN Indian Perspective* posted on September 21, 2019 available at: https://www.mediate.com/mediation-in-domestic-violence-case-whether-to-use-or-not-to-use-an-indian-perspective/ (visited on 18-08-2022)
[63]https://www.casemine.com/judgement/in/581180a52713e179479bcfb4 (visited on 18-08-2022).
[64](2010) 13 SCC 540
[65]2004 Cri L.J.2956
[66]N. Bhagya, *supra n*ote 1, at 8.

In 2012 case titled as Manas Acharya *v.* state &Anr.[67] The Delhi High Court, while hearing a petition for quashing of FIR filed under section 498 A of IPC held that the settlement agreement of a court annexed mediation i.e., mediation done by a trained mediator of a mediation centre and, report submitted is a comprehensive legally valid and binding document.

In the year 2013, the Supreme Court has sanctioned all Family Courts under section 9 of Family Court Act, 1984 and, to criminal courts to refer the 498A matters for mediation at first instance in a landmark case titled as K. Srinivas Rao *v*. D.A. Deepa[68] with two core objectives i.e., first, to safeguard the marriage institution and secondly, it is a private matter so if the parties are willing for settlement and if the court finds that there is a possibility of settlement, the court can send the parties for mediation. The intent of judiciary is not to dilute the strictness and effectiveness of the provision but to give justice to the parties in the form of reconciliation.

In case titled as *Jitendra Raghuvanshi v. Babita Raghuvanshi*[69]the court said that-

> *"If the offence is a matrimonial offence in section 498 A of IPC and the court is satisfied that the parties are willing to settle the same amicably and without any pressure, the court should permit them and also said that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings."*[70]

Thereafter, in case titled asMohd. Mushtaq Ahmad *v*. State[71], the wife had filed a divorce petition along with a criminal complaint/FIR of section 498 A of IPC against the husband. After hearing both the parties, the court sent them for mediation. Thereafter, in mediation they both agreed to give another chance to their marriage. So, after settlement, the wife requested the court to quash FIR. The High Court on the urge of wife, quashed the FIR under section 482 of Cr.P.C.[72]

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[67]Supra note 18.
[68](2013) 5 SCC 226.
[69](2013) 4 SCC 58
[70]*Ibid*
[71](2015) 3 AIR Kant R 363.
[72]Code of Criminal Procedure, 1973 (No.2, Act of Parliament 1974) §. 482saving of inherent power of High Court-Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

Considering the sensibility of relation, the Supreme Court in Arneshkumar v. State of Bihar[73] … in Para 12 has directed the police officers not to make arrest per se in a case where a complaint is filed for committing cruelty in section 498A. [74]

Recently in case titled as Prakash Chand *v.* State of HP [75]

The Court held *that*

> *"Present is a fit case to exercise jurisdiction vested in this Court, under Section 482 of the Code and, therefore, the present petition is allowed and F.I.R No. 105, dated 01.06.2013, under Sections 498A, 406, 120B and 506 of IPC, registered at Police Station Dehra, District Kangra, H.P., is ordered to be quashed."*[76]

In the year 2022, in case titled Ram Pravesh and 3 Other *v.* State of U.P. and Another The Allahabad High Court quashed the criminal Proceedings initiated on the FIR lodged by the wife against her husband and her in-laws under section 498A and 323 of IPC and, section 3 and 4 of Dowry Prohibition Act, 1961.

The Court also observed that the FIR pertaining to matrimonial disputes especially relating to 498A should be quashed when the disputant parties have resolved their entire issues through a compromise deed duly filed and verified by the court. In this case a compromise deed was executed between the disputants in March 2021and was duly verified and sent to the High Court along with a verification report by the lower court. The court also said that if the parties agreed to live together happily, then there is no use/purpose to drag the proceedings. The court relied on the judgment of Apex court in the case titled as Gian Singh *v.* state of Punjab and anothers[77], Narinder Singh and Others

[73](2014) 8 SCC 273.
[74]Pranav Kaushal, *Arnesh Kumar V State of Bihar(2014) 8Scc 273: Landmark Ruling On Misuse of Section 498-A of the Indian Penal Code*, legalserviceindia.com https://www.legalserviceindia.com/legal/article-6196-arnesh-kumar-v-state-of-bihar-2014-8-scc-273-landmark-ruling-on-misuse-of-section-498-a-of-the-indian-penal-code.html (visited on 24-05-2022).
[75]2021 SCC Online HP 7918.
[76]Arnima Bose, *Can FIR/ complaint in non-compoundable offences pertaining to matrimonial disputes be quashed?HP HC lays down under what circumstance*s?, scconline.com, https://www.scconline.com/blog/post/2021/12/29/can-fir-complaint-in-non-compoundable-offences-pertaining-to-matrimonial-disputes-be-quashed-hp-hc-lays-down-under-what-circumstances/*(visited on 23-05-2022).*
[77](2012) 10 SCC 303.

v. State of Punjab and other [78] and, State of Madhya Pradesh *v.* Laxmi Narayan and others.[79]

The Punjab High court again reiterated in case titled as Kawabir Singh *v.* State of Punjab[80] that if a matrimonial dispute has been resolved between the complainant and respondent and a petition has been made by the counsel appearing for complainant before the court that the complainant has no objection if impugned FIR is quashed, then this is sufficient ground initiating proceeding under section 482 of Cr.P.C for quashing of FIR in by the High court. [81]

Conclusion & Suggestion

Hence, for safeguarding the marriage institution, the court has permitted settlement through mediation. The use of mediation in a criminal offence related to marriage specified in section 498A of Indian Penal Code is permitted on the sanction of the Supreme Court. However, the duty to the judge should not be limited to refer case for mediation as a routine. Mediation should not be applied as one size fit to all the matrimonial disputes. Thus, before referring any case of cruelty for mediation, the court has to apply his judicial prudence and be very cautious. Hence, the approach and process of mediation can't be same, it needs to be tailored as per the nature of the case, culture of the disputant parties involved and, need of the time for ensuring interest of justice especially in cases where settlement is to taken place between the disputant parties. Mediator has to check the neutrality of settlement as well. It has been observed that when the dispute is matrimonial related, it gets dreadful in litigation process while in mediation, the parties can sit together, discuss the issues and try to find a solution with a positive mind setup. Mediation also saves family relationship especially where the parents have to be in touch even after their divorce due to their children. But Court has to be very cautious while referring disputant parties for mediation so that a wrong doer would not get out of clutches of the law.[82]

[78](2014) 6 SCC 466.
[79](2019) 5 SCC 688.
[80]https://www.livelaw.in/news-updates/ph-high-court-matrimonial-dispute-quashing-of-fir-mutual-settlement-203264
[81]Ibid.

ROLE OF GENDER SENSITIZATION OF POLICE FORCE IN MAKING POLICING ACCESSIBLE FOR WOMEN IN INDIA

By Prof. (Dr.) Amar Pal Singh[83] *and Ms. Kanika Garg*[84]

Abstract

The present transition in the Indian society with greater women asserting their rights and taking up jobs has made them prone to becoming targets of attack. Towards this end, the police have a huge role to play in providing security to the women of the country. However, the stereotypes prevailing in police force regarding sexual offences and offences relating to marriage deter them from reporting crime committed against them. Adding to this, there is a dearth of women in policing to cater to the existing crime scenario. The percentage of women police force in the country is only 10.30percent of the total strength of police, accounting for one woman police personnel per 3,026.89 women in the country.[85] Adequate representation of women in police is seen as an important aspect of gender sensitization of the police force. The paper examines the need and importance of sensitizing police towards crime against women by training the police in dealing with such cases, the present mechanisms of provision of the training and the measures by which such training can be provided to police at a large scale to make policing accessible for the women of India. The paper shall also study the reasons for such low representation of women in police along with making a slew of suggestions for improving the same.

Keywords: *Gender sensitization of police, crime against women, gender sensitization training, women representation in police.*

I. Introduction

II. Role of police

III. Sensitization of police: A facet of gender equality

[83] Former Dean & Professor of Law, *USLLS, GGSIP UNIVERSITY*
[84] Research Scholar, *USLLS, GGSIP UNIVERSITY*
[85] Bureau of Police Research and Development, "Data on Police Organizations (as on January 01, 2020)" 40 (October, 2020).

IV. Women representation in Indian police: A gap to be filled

V. Conclusion and Suggestions

I. Introduction

The society is experiencing a transition with a greater number of women than ever before obtaining education both at the school level and at the level of higher education. And, with an increasing participation of women in employment in almost all the sectors, their security has become even more important. This is for the reason that the socially constructed roles for men and women, their behaviour and social position create gender-specific vulnerabilities for them. Their behaviours and actions may seem inappropriate to some and may propel them to commit an offence against the person non-conforming with the prevalent gender stereotype. Thus, women in India have become more prone to attack, and are in need of greater protection from the State machinery.

Crime against women (hereinafter, CAW) comprises of a total of 11.69percent of the total cognizable crimes registered under the Indian Penal Code, 1860 in the year 2021[86]and is on a constant rise in the country. The total number of registered cases of CAW during the year 2021 stood at 4,28,278.[87] This is amounts to an increase of 15% over the previous year.[88]It is to be understood that these are the official statistics; and if take into account the cases which remained unreported because of various social factors, lack of easy access to the police and illiteracy, the true picture would be even more serious.

In spite of these gruesome figures, police response to CAW has been marred by gender stereotyping. Their response is generally observed to be poor and inadequate. Besides this, work overload, pressure to keep crime rate low to appease political bosses, lack of resources and prevalent malpractices in the organisation also contribute towards inappropriate response

[86] National Crime Records Bureau, "Crime in India: 2021 Statistics, Volume I" XI & XII (August, 2022).
Calculated as percentage of registered crime against women (4,28,278) out of the total cognizable crime registered under the Indian Penal Code (60,96,310) in 2021.
(Calculated as percentage of registered crime against women (4,28,278) out of the total cognizable crime registered under the Indian Penal Code (60,96,310) in 2021).
[87] *Supra* note 1 at xii.
[88] *Ibid.*

from the police.[89] These stereotypes include false perceptions related to a woman's dress; her being away from home, or her being with a male friend as factors perpetrating rape; stereotype that women enjoy sexual harassment at workplace; husbands have a marital right to discipline wives; etc. On many occasions, a woman victim is discouraged from reporting crime and her complaint is not registered; at others, she is faced with insensitive interrogation involving sexist questions being asked from her; there is trivialization of the offence; she is not informed of her legal rights and is dissuaded from pursuing her complaint further. Such behavioural approach of the police further results in greater reluctance of women in reporting incidents of crime committed against them.

It is understood that in order to make policing more accessible to women, there is a need to sensitize the police force towards crimes related to women through the mechanism of provision of gender sensitization training, and also to mainstream women in the police force by raising their representation in policing. These means shall aid in reshaping the attitude of police towards women victims in dealing with matters related to CAW.

[89]National Commission for Women, "Course Curriculum on Gender Sensitization of Police Officers", 1, available at: http://ncw.nic.in/sites/default/files/Gender%20Sensitization%20of%20Police%20Officers.pdf (Visited on November 20, 2022).

II.Role of police

The social contract theory explains the relationship between a State and its citizens as being governed by an agreement wherein the rights and duties of both the parties have been defined. The individuals agree to be bound by the laws made by the State, and the State in turn is under a duty to protect the interests of its citizens. In the modern world, the duties of the State include protection of its sovereignty, providing security to its citizens in matters of defence, law and order enforcement, upholding rule of law, protection of the vulnerable sections of people through various welfare schemes etc. Policing is one of the major functions performed by the State which directly influences the day-to-day lives of its citizens. The primary role of the police is to uphold and enforce laws, investigate crime and secure the safety of people. The role of police in a society is ubiquitous, with the police personnel being the most visible representatives of the government.[90] In situations of danger and crisis where people do not know where to go and how to handle it, they turn to the police.

Policing in India

Police is a state subject in the Indian Constitution.[91]At the same time, the Union also has power to maintain police forces for assisting the states in securing law and order.[92] All the twenty eight states control and manage the recruitment, promotion and functioning of their local police and the union government is in charge of the police in the union territories of the country. The state police are regulated by the Police Act, 1861; or by the state-specific laws modelled after the 1861 Act. Policing is a division of the Ministry of Home Affairs with the Indian Police Service being managed and controlled by the government centrally. Thus, the union co-ordinates the functioning of police across states and at the same time also manages central police forces including the BSF and the ITBP; and the police organizations including the IB and the CBI.

[90]Bureau of Police Research and Development, 1, available at: https://bprd.nic.in/WriteReadData/userfiles/file/6798203243-Volume%202.pdf (Visited on November 15, 2022).
[91]The Constitution of India, sch. 7, list II, entry 2..
[92]*Id.*, sch. 7, list I, entry 2 & entry 2A.

'Law and order' is also a subject governed by the states in India.[93]The twin roles of 'maintenance of law' and 'maintenance of order' land them in a variety of circumstances on a daily basis where their response directly affects the lives of the citizens. The role and functions of police in India are multifarious. The Model Police Act, 2006 describes these as ranging from upholding and enforcing the rule of law, protecting life, liberty, property, human rights, and dignity of the citizens to registering the complaints of crime, preventing crime, aiding people in distress conditions, facilitating ordinary movement of people and vehicles, and creating a feeling of trust among people.[94] Along with these duties, they have many social responsibilities including acting with due courtesy and decorum with the members of the public, assisting them; preventing harassment of women and children etc.[95] The Act has not yet been uniformly enforced in all states, but its provisions guide us in understanding the role of police in our daily lives.

The job of policing is a highly sensitive one as it involves continuous public dealing. Different sections of people have to be dealt with in a manner suitable to their needs and appropriate to the circumstances being encountered by them. It is to be understood that the need for sensitization of police force in dealing with certain matters related to women and children thus becomes important.

III.Sensitization of police: A facet of gender equality

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is a comprehensive document which encompasses within itself all the human rights of women and aims to create substantive equality for them. 189 States are party to this convention. And, every State party is obliged to ensure that the rights enshrined in the convention are upheld through suitable legislation. India had ratified the convention in 1993 with certain reservations. The convention says that "*violence against women is a form of discrimination against them*".[96]It is at the same time understood that no equality can be achieved in real terms if

[93]*Supra* note 7, sch. 7, list II, entry 1.
[94] Police Act Drafting Committee, "Proposed Model Police Act, 2006", s.5740&41, available at: https://www.mha.gov.in/sites/default/files/ModelAct06_30_Oct_0.pdf (Visited on January 23rd, 2023).
[95]*Id.* at S.58.
[96] Art.1.

women do not feel physically secure. To ensure effective participation of women in society, the foremost duty of the State is to secure their safety. And, this can be attained though good law and order situation in a country which in turn can be achieved only through the mechanism of a well drafted legislation, a supportive framework and an efficient administration of justice through its agencies of police and judiciary.

It is understood that the State has a duty to provide security to its citizens through its institutions including the police force. The Indian Constitution provides 'equal protection of laws'[97] to its citizens. Therefore, the police are bound to perform this duty and uphold the rule of law without prejudice towards any member of the society.

Equality for women has been given due importance in the Indian Constitution. Articles 14, 19, 21 of the Constitution guarantee to every citizen equality and protection, along with Article 51A(e) which includes a duty on the part of State to make special provisions for women under Article 15(3). An obligation is imposed on the State under Article 15(3) and also on all individuals under Article 51A(e) to renounce practices which are derogatory to the dignity of women and the guaranteed articles under the Constitution.

International perspective

CEDAW obliges the State parties to provide training for gender sensitizing law enforcement officers and other public personnel engaged with the responsibility of implementing laws and policies for the prevention, investigation and punishment of CAW.[98] One of its general recommendations calls on State parties to send its periodic reports to its Committee including information on the laws and other means adopted by them to eradicate CAW, the support systems available to such victims and the statistical reports relating to CAW and these victims.[99]

In the fourth world conference on women by the UN, a Platform for Action was drafted which laid an obligation on the State Governments to develop training and fund programmes for police personnel to sensitize them with respect to the nature of gender-based activities and the

[97] *Supra* note 7, art.14.
[98] The Convention on the Elimination of All Forms of Discrimination against Women, 1979, art. 4(i).
[99] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 12: Violence against women*, 1989.

peril of CAW to ensure fair treatment of female victims.[100] The need for sensitizing police to effectively respond to acts of CAW has been similarly emphasized in many other international documents including the UN General Assembly Resolution 52/86 on Crime Prevention and Criminal Justice Measures to Eliminate Violence against Women (1998) and the UNSC Resolution 1820 (2008).

Importance of gender sensitization training for police

It has been observed by the Ministry of Women and Child Development in one of its reports that women related legislation is in place in India, yet the implementation of the these laws is a challenge largely due to the lack of gender sensitivity on part of State functionaries like police, law enforcement agencies, medical practitioners, judiciary etc.[101] The need to educate the representatives of these functionaries about the legal nuances and to inculcate gender sensitivity in the system was observed in the report.[102]

The appropriate response of police personnel in matters related to CAW involves a balance of the three components of knowledge, skill and attitude.[103] 'Knowledge' of the laws related to the offences committed, of the procedure to be followed and of the sensitivity of the treatment of victims of crime; 'skill' of the investigation and collection of evidence, and compensation and victim rehabilitation; and 'attitude' which refers to the behavioural approach to be adopted in dealing with women victims of crime.[104]

Gender sensitization involves building the capacity of police in developing the right kind of attitude with respect to the manner in which the police should patiently interact with the victim and make her comfortable, including the gender-sensitive practices to be adopted while investigating such cases.

The need for sensitizing police personnel in matters relating to CAW arises as women are placed differently than men in the society because of various socio-economic factors and

[100] Beijing Plan for Action, 1995, D.124(n).
[101] Ministry of Women and Child Development, Government of India, "Report of the Working Group on Empowerment of Women for the XI Plan" 16.
[102] *Ibid.*
[103] Bureau of Police Research and Development, "Women's Safety & Security A Handbook for First Responders and Investigators in the Police"1 (March, 2021).
[104] *Ibid.*

require to be treated in a gender sensitive manner. When police are receptive to the different security requirements of men and women, there is a lower threat of gender-based violence against them.[105] They need to be trained to develop the attitude and skills to handle such cases in a manner where the victim feels safe and comfortable in expressing her ordeal. Such trainings aid in bringing behavioural changes in the police personnel and in building trust of the public in policing.

Gender sensitization training for Indian police: An emergent need

It is observed that even after six years of insertion of the provision for compulsory registration of first information report in relation to certain cognizable offences committed against women[106], and eleven years of the landmark judgment of the honourable Supreme Court wherein the constitutional bench held that registration of the first information report is mandatory if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation[107]; the Ministry of Home Affairs in its May 2019 advisory to the states and UTs accepts that there have been instances of failure of police in adhering to these provisions, and is advising them to issue instructions to the police personnel of the respective states and UTs to comply with these provisions[108]. The notification is a reflection of the miserable state of policing in India, and of the reason for the low trust of Indian women in policing. Thus, emphasizing the emergent need to sensitize the police personnel in dealing with CAW.

The Women and Child Development Ministry has in its report recommended the facilitation education and sensitization of police by making it a mandatory part of the in-house training and curriculum; and the training and capacity building of the existing police, judicial, medical personnel etc.[109]Subsequently, the eleventh five year plan laid emphasis on these programmes using CEDAW as framework.[110]

[105]UN Women, "Gender-Sensitive Police Reform in Post-Conflict Societies" 4 (October, 2012).
[106] The Criminal Law (Amendment) Act, 2013 (Act 13 of 2013), s. 3.
[107]*Lalita Kumari* v. *Government of Uttar Pradesh*, (2014) 2 SCC 1.
[108] Advisory by the Ministry of Home Affairs, D.O. No. 15011/75/2019 – SC/ST – W dated 16th May, 2019, available at https://www.mha.gov.in/sites/default/files/WSdiv_CrimeAgainstWomen_advisory_17052019.pdf.
[109]Ministry of Women and Child Development, *supra* note 17, at 72 (Visited on 16th December, 2022).
[110] National Alliance of Women, "Engendering, The Eleventh Five-Year Plan 2007-12, Removing Obstacles, Creating Opportunities" 9 (March, 2008).

The necessity of the training has also been recognised through various reports and advisories of government bodies. The Second Administrative Reforms Commission suggested the requirement of certain police reforms in the country. These included increasing the representation of women to 33percent of the total strength of the police force in India and to provide training in gender sensitization to police at all levels along with the other functionaries of the criminal justice system through well structured training programmes.[111]

The Justice Verma Committee in its report observed, "Proper policing can ensure a safer community which is accessible to all for enjoyment; especially women and children without fear of sexual harassment or violence."[112]The need for increasing gender sensitivity in police personnel has also been observed by the Ministry of Home Affairs in its advisory dated 12th May, 2015 on the comprehensive approach to be adopted by the police in CAW.[113]Therein, eleven affirmative measures have been recommended by the ministry to be adopted by the respective states and UTs.[114]Increasing gender sensitivity in the police force is one of them which to be achieved through the six modes mentioned therein.[115] These include: conduction of training programmes for all levels of police personnel, consideration of their conduct for posting, promotions and in their Annual Performance Appraisal Report, the development of a gender-sensitivity index to take decisions of their transfer, making observations regarding women related measures a part of inspection notes of police stations and taking strict action against police personnel who exhibit bias or discourtesy against women or ignore their responsibilities in this regard.[116]

Provision of training in India: Current mechanisms

[111] Second Administrative Reforms Commission, "5th Report on Public Order"125 (June. 2007).
[112] Justice J.S. Verma, Justice (Smt.) Leila Seth, & Gopal Subramaniam, "Report of the Committee on Amendments to Criminal Law" 313 (January, 2013).
[113] Advisory by the Ministry of Home Affairs, D.O. No. 15011/22/2015 – SC/ST – W dated 12th May, 2015, available at: https://www.mha.gov.in/sites/default/files/2022-12/12-05-2015%5B1%5D.pdf (Visited on 12th November, 2022).
[114]*Ibid.*
[115]*Ibid.*
[116]*Ibid.*

Police being a state subject, different states have been adopting various methods to provide training in gender sensitivity to its police personnel to build their capacities in dealing with CAW. For example, Puducherry in 2017 conducted a two-day training programme for the capacity building of the police officials in the rank of inspectors and sub-inspectors in the state.[117] In Delhi, training is being provided to inspectors and sub-inspectors in collaboration with the Gender Training Institute, New Delhi. A ten day CTDS course is also offered to the police officials on investigation of cases on CAW and gender sensitization with its syllabus based on case study and experience sharing method of imparting training.[118] A handbook for police personnel has been prepared by the Bureau of Police Research and Development (hereinafter, BPR&D) for first response and investigation in CAW with a focus on the attitudinal change expected from police personnel in dealing with women victims of crime.[119]

The National Commission for Women (hereinafter, NCW) has proposed that a basic course of training in gender sensitization should be provided to the candidates newly inducted into the police force[120]; and the training for the in-service police personnel should be conducted for different groups of officials at regular intervals. At the national level, the NCW has in 2021 signed an MoU with the BPR&D for conducting this training of police personnel across the country spread over a period of three to five days.[121]The commission has also been regularly providing the training to police personnel at various locations in the country. However, it is observed that the reach of these trainings is still low, and a lot of times restricted to only the inspectors and sub-inspectors leaving the larger section of the police force out of its coverage.

IV. Women representation in the Indian police: A gap to be filled

Representation of women in police is another important characteristic determining the attitude of police towards victims of CAW. In its 2015 advisory on comprehensive approach to be

[117]Special Correspondent, "Police get training in gender sensitivity", *The Hindu*, Sept. 9, 2017, available at https://www.thehindu.com/news/cities/puducherry/police-get-training-in-gender-sensitivity/article19646953.ece (Visited on 16th November, 2022).
[118] Investigation of cases on Crime against Women & Gender Sensitization (10 Days), Bureau of Police Research & Development, available at https://bprd.nic.in/WriteReadData/userfiles/file/5466985369-Crime%20Against%20and%20Women%2010%20days.pdf. (Visited on 16th November, 2022).
[119]*Supra* note 19.
[120]*Supra* note 5 at 14.
[121]Press Information Bureau, "NCW signs MoU with BPR&D for Nation-Wide Gender Sensitization Training Programme for Police Personnel",16th Jul., 2021, available at: https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1736188 (Visited on

adopted by police in response to CAW, the MHA has included increased representation of women in police in the list of the eleven measures to be taken in such cases.[122]When women exist in the roles of both victims and perpetrators of crime, we need them in the role of protection, prevention and investigation too. The Indian Constitution mandates equality of opportunity between all individuals in matters related to employment in the public sector.[123] The country commits to secure gender equality in all matters including the economic empowerment of women. Presence of women in positions of authority is an indicator of equality of women in various spheres of life. Police represents the investigative arm of the justice delivery system in a particular society. However, the percentage of women in police in India is dismal. There is an urgent need to increase the representation of women in the police force both at the horizontal and at the vertical level. This is primarily for the reason that policing is generally considered as the job of a man, and not a woman. The working conditions of the job are such that women don't find it conducive considering their future prospects of marriage, fear of posting at a place other than the home district, dearth of facilities for childcare for children of police, etc.

Women in police: Need of the hour

There are a total of 16,955 sanctioned police stations in India.[124] And, out of this only 518 are women police stations.[125] The total strength of women police in the country stood at 2,15,504 on 1st January, 2020.[126] There was one woman police personnel for every 3,026.89 women in the country.[127] This includes the Civil, the District Armed Reserve, the Special Armed and the India Reserve Battalion. Of these, the total strength of women in Civil police stood at 1,74,716.[128] The Government of India had in its 2013 advisory to the states and UTs targeted to have at least three women sub-inspectors and ten women constables in every police station to ensure that the woman help desk at the station is manned round the clock which was to be

[122] Advisory by the Ministry of Home Affairs, *supra* note 24.st November, 2022).
[123]*Supra* note 7, art.16.
[124]*Supra* note 1 at 45.
[125]Press Information Bureau, "Women Police Stations as on 01.01.2014",3rd March, 2015, available at: https://pib.gov.in/newsite/PrintRelease.aspx?relid=116309 (Visited on 16th November, 2022).
[126]*Supra* note 1 at 40.
[127]*Id.* at 107.
[128]*Id.* at at 96.

subsequently increased to thirty percent of the total strength of the police force.[129] A similar observation was made by the Minister of state for home affairs, Mr. Nityanand Rai in Lok Sabha in 2022.[130]In order to achieve this target, there is a requirement of at least 2,20,415[131] women police personnel on duty at any given time in the country. To secure this figure, there should be around 3 lakh women police personnel in service in the country taking into account the contingencies of maternity leave, ill-health etc. of these personnel.

There is a need for more women in the police force as not only the women victims would feel more comfortable in interacting with women police personnel, but it would create a sense of confidence, respect and trust among the people. The Prime Minister of India, Mr. Narendra Modi in his address in the 82nd episode of Mann Ki Baat has emphasized the importance of women in police saying that,

> "The most positive effect of this is on the morale of our police force as well as society. Their presence naturally instils a sense of confidence among the people, especially women. They naturally feel connected to women security personnel. Because of the sensitivity in women, people tend to trust them more. These policewomen of ours are also becoming role models for lakhs of other daughters of the country."[132]

Dr. Sandhya in her one of papers shares an experience of Kerala police wherein critical information regarding a gang of youngsters involved in several cases of house-breaking and theft was provided to one of the Woman Beat Officer of the Kerala police by a housewife on one of her visits to her home.[133] This happened when the Community Policing Project named Janamaithri Suraksha Project was being implemented in the state wherein women constables

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[129] Letter from Home Secretary, Government of India to all Chief Secretaries, dated 22nd April, 2013, D.O. No. 15011/21/2013, available at: https://www.mha.gov.in/sites/default/files/AdvisoriesonincreaseofWomeninpolice_30062021.pdf (Visited on 16th November, 2022).

[130]Isha Sahai Bhatnagar, *"*India has 10.3% women in police force: Govt in Lok Sabha*",* Hindustan Times, (15thMar., 2022, available at: https://www.hindustantimes.com/india-news/india-has-10-3-women-in-police-force-govt-in-lok-sabha-101647339406984.html (Visited on 16th November, 2022).

[131] This figure is achieved after multiplying 16955(number of police stations in the country) with 13 (minimum number of women police personnel required at the women help desk).

[132]PM's address in the 82nd Episode of 'Mann Ki Baat', 24th Oct., 2021, available at: https://www.pmindia.gov.in/en/news_updates/pms-address-in-the-82nd-episode-of-mann-ki-baat/ (Visited on 20th January, 2023).

[133] Dr. B. Sandhya IPS, "Women in Police- Professionalism and Capacity Building" 14, available at https://fire.kerala.gov.in/wp-content/uploads/2022/07/women-in-police-study.pdf (Visited on 20th January, 2023).

were appointed as Beat Officers.[134] The author states that there have been several such instances where women and children have passed on information regarding criminal activities to women police personnel.[135]It has been observed through the Maharashtra experience that mainstreaming gender in police has reaped a positive impact on policing making it more accessible to women and child victims of crime.[136]At the same time, representation of women in the police force makes the forces sensitive to the needs of women.

Recruitment and retention of women in police force

As has been already mentioned, women in police force account only around 10percent of the total police force. This low representation has been recognised with the efforts of the union government to increase this limit to 33percent. Advisories have been issued by the Ministry of Home Affairs requesting the states/UTs in this regard.[137] In 2015, the Central Government has towards this end reserved 33percent of the non-gazetted posts from Constable to Sub-inspector in the police forces of UTs for women horizontally in all categories. Some states have followed suit, though the majority have not made similar enabling provisions.

The other important aspect in increasing female representation is giving importance to the retention of women by implementation of certain policies to make policing a desirable career choice. CHRI has analyzed this issue in detail and has drafted a model policy for women police personnel in the country. To encourage participation of women in police force, the suggestions in the model policy include provisions for childcare for children of women police personnel'; giving her choice to be posted, preferably in the district of residence[138]; improving the working conditions of police stations by creating rest rooms for women; making provisions making them eligible for maternity leaves of 180 days and for childcare leaves of 730 days[139].

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[134] *Ibid.*
[135] *Ibid.*
[136] S. Chakravarty, "Mainstreaming Gender in the Police: The Maharashtra Experience", 8(4) *DIP*430 (1998).
[137] Advisory by the Ministry of Home Affairs, D.O. No. 15011/21/2013 – SC/ST – W dated 22nd April, 2013, https://www.mha.gov.in/sites/default/files/AdvisoryWomenPolice-290513_1.pdf; D.O. No. 15011/22/2015 – SC/ST – W dated 12th May, 2015, available at: https://www.mha.gov.in/sites/default/files/AdvisoryCompAppCrimeAgainstWomen_130515_0.pdf (Visited on 20th January, 2023).
[138] CHRI, "Model Policy for Women in the Police in India" 12 (2018), available at: https://www.humanrightsinitiative.org/download/1570171115Model%20Policy%20for%20Women%20in%20India.pdf (Visited on 20th January, 2023).
[139] *Ibid.*

Capacity building of women police personnel

As per the BPR&D data, Indian police comprised of only 5 women DGP/Spcl. DGP, 25 Addtl. DGP, 38 IGP, 45 DIG in the Civil Police.[140]The situation is worse for the District Armed Reserve, the Special Armed and the India Reserve Battalion with no woman personnel above the rank of AIGP/SSP/SP/ Commandant in the India Reserve Battalion.[141] Mizoram is the only state with women officers above the rank of ASP/ Dy.SP/Asstt. Commandant in the Commando Battalions in States/UTs.[142] Only nine states *viz*., Bihar, Himachal Pradesh, Jharkhand, Kerala, Manipur, Nagaland, Rajathan, Uttarakhand and Jammu and Kashmir had one or more all-woman battalion in police force.[143] The data reflects the miserable state of affairs in the police as few women are able to climb the ladder and secure positions of authority. The situation though is now being recognised with the Delhi Police taking the lead and appointing women DCPs in six out of the fifteen police districts in the territory of Delhi in 2021.[144]

It has been observed that with the increase in tasks of women police including the demand of women police to patrol night clubs and of women commandos in Special Task Forces to ensure the safety of women, the need for women in the police force has increased.[145]Equal opportunities should be given to women to build their capacities in handling diverse categories of work, and not make them restricted to handling cases related only to women and children.

V. Conclusion and Suggestions

It is understood that women in the country need greater than ever sense of security and protection. However, many members of the police force themselves hold stereotypical notions in regard to certain offences committed against them. Their attitude sometimes makes it non-conducive for woman victims to approach the police.

It is observed that there is a need to sensitize the police personnel in handling victims of crime, making the working procedures sensitive to the needs of women. The biggest hurdle the police

[140]*Supra* note 1, at 95.
[141]*Id.* at 101.
[142]*Id.* at 103.
[143]*Id.* at 105.
[144]Tanseem Haider, *"In a first, women DCPs to head 6 out of 15 police districts in Delhi",* India Today, Sept.26, 2021, available at: https://www.indiatoday.in/cities/delhi/story/women-dcps-delhi-police-1857248-2021-09-25 (Visited on 20th January, 2023).
[145]*Supra* note 37.

force encounters in this respect is the paucity of funds. Providing regular training to every police personnel demands huge resources both in terms of money out of the states funds, and also in terms of time commitments from an overworked police force. It is suggested that the training should be made part of the state or organisational budget as a constituent of gender budgeting. Further, the new recruits should be provided a basic training during their initial course curriculum during the training period as recommended by the NCW. Also, successful completion of these trainings should be accounted for the purpose of posting, promotions and annual performance appraisal of the police personnel.

Improving the representation of women in the police force is another important aspect of making policing accessible to women. Systematic efforts should be made by individual states to increase this over a period of time and make working in the police force conducive to women by provision of facilities that support work-family balance of these women.

DRAWING INTO THE VORTEX OF A CONSTITUTIONAL CRISIS

By Kaustubh Tiwari[146]

Abstract

This article sketches out the burgeoning constitutional crisis that awaits Kerala. Recently, the High Court of Kerala has dismissed a Public Interest Litigation challenging the indefinite withholding of legislative Bills by the Governor. This effectively indicates that the Governor can exercise his power of pocket veto, and stifle the policies and programme that require transition into law. Resultantly, stalling the business of the State Government. In the light of these emergent circumstance, this article delves into three main questions- first, whether the President/Governor can exercise their discretion in assenting to a Bill passed by the legislature; second, whether the President/Governor can indefinitely withhold a Bill passed by the legislature, and third, whether the High Court of Kerala erred in its decision? In the process of discussion, this article draws out the legal position of the situation, decisions of the Supreme Court of India, previous instances of impasses, and the dichotomy that looms and pervades the Constitutional landscape. In conclusion, this article endeavour to adumbrate on the lacunas that are manifest in the Constitution and suggests corrective change that time necessitates.

Keywords: *Constitution of India, Government of Kerala, President's Assent, Governor's Assent, Withholding of Assent, High Court of Kerala.*

[146] Advocate, *Madhya Pradesh High Court*

The Prologue

The mere adoption of a constitution, observes the Supreme Court, does not behoves the citizens to follow a constitutional culture rather it is the maturity in the political sphere that enables the people to meaningfully engage and embrace such a culture.[147] However, the political crisis that was brewing in Kerala does not seems to suggest to have taken any leaf out this book and appears to be a constitutional crisis in the making. Evidently, the friction in the working the constitutional machinery in the State is attributable to the impasse between the Governor and the Cabinet on vital issues of governance. The rancour among the constitutional functionaries became rife when the Governor opted to publicly express his different outlook on the Citizenship Amendment Act from his Cabinet during the annual address to the State Assembly.[148] The traces of such tug of war has followed the recent appointments of university vice chancellors where the Governor outright rejected the proposed name by the government placing reliance on a Supreme Court verdict.

Until now, skirmishes like these remained within the political fold. However, recently the decision of the Kerala High Court in P.V Jeevesh v. Union of India[149] (*Jeevesh*) dismissing the petition challenging the indefinite withholding of Bills sent by the State Legislature to the Governor has added a hum to the political cacophony. In my opinion, this case is set to become a perfect simulacrum of how the silences of the Constitution can be judicially exploited to satisfy the whims and caprice of a committed court. No blind eye could be turned to the fact that the State Assembly of Kerala is occupied by a different ideological force than the Union Parliament and an identical constitutional milieu of obstructionism is also detectable in States where people have returned to office representatives that espouse different political philosophy.

The role of the President and the Governor (analogous to the President at the State Level) has been made conspicuous by the Constitution of India, and interpretation offered by

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[147] *R.C. Poudyal v. Union of India*, AIR 1993 SC 1804.

[148] Abantika Ghosh, 'From 'nepotism' standoff to Rs 85 lakh Mercedes — inside Kerala's governor vs govt tangle', The Print, November 19, 2022, *available at:* https://theprint.in/politics/from-nepotism-standoff-to-rs-85-lakh-mercedes-inside-keralas-governor-vs-govt-tangle/1223176/ (last visited on December 19, 2022).

[149] 2022 LiveLaw (Ker) 624, *available at:* https://www.livelaw.in/news-updates/kerala-hc-dismisses-plea-filed-lawyer-challenging-action-governor-arif-mohammed-khan-withholding-bills-passed-state-legislature-indefinitely-215404 (last visited on December 19, 2022); *PV Jeevesh v. Union of India*, WP(C) NO. 38724 OF 2022, High Court of Kerala, *available at:* https://hckinfo.kerala.gov.in/digicourt/Casedetailssearch/fileview?token=MjE1NzAwMzg3MjQyMDIyXzEucGRm&lookups=b3JkZXJzLzIwMjI= (last visited on December 19, 2022).

the Supreme Court in numerous cases. Despite such clear and precise language of the law, the High Court in *Jeevesh* has culled an opportunity to defeat the fundamental framework underpinning the Constitution, and has upend the constitutional relationships between constitutional functionaries. The rippling effects of this judicial misinterpretation will have a transcendental impact on Centre- State relations as it mirrors an ominous precedent inimical to the robustness of the Indian federalism.

By dismissing the PIL in *Jeevesh* that brought forth a settled constitutional issue, the High Court effectively eschewed from upholding the Constitution. It has been made abundantly clear by the Supreme Court that the President of India and the Governors in the State disposes the duty of his office according to the constitutionally binding advice of the Cabinet and, therefore, by no constitutional construction can the President or the Governor relegate a government chosen by the people to the margins.[150] The President/Governor cannot not act as an autocrat or an obstructionist, for he is a mere nominal, indirectly elected figure- head with no real power.[151] Trite to say, in a democracy the power solely resides with the people that is exercised through the Constitution.

Without a shred of doubt, the present situation makes it all the more necessary to have a proper understanding of the issues at hand. There are basically three essential questions to be answered at this moment- *first*, whether the President/Governor can exercise their discretion in assenting to a legislative Bill; *second*, whether the President and the Governor can indefinitely withhold a legislative Bill, and *third*, whether the High Court of Kerala erred in *Jeevesh*?

What the Constitution Says and What the Courts Mean

Articles 52 and 153 of the Constitution that create the posts of the President of the Union of India and the Governor in a State were modelled on the influence that the Constituent Assembly drew from the Westminster style of Parliamentary system, and the report by the Sapru Committee that suggested a constitutional head of State.[152] Under the structure of government in the Constitution, the Assembly entrusted with the object to produce a constitutional document intended to create a position for the President that had 'great authority

[150] *Govt. of NCT, Delhi v. Union of India*, (2018) 8 SCC 501.
[151] *Ibid.*
[152] T.K. Tope, *The President and The Council of Ministers*, Seminar on Constitutional Development Since Independence (Bombay, 1975).

and dignity' but was devoid of any *real authority* which in actuality meant to be obsequious to the Ministers.[153] This point is laconically dissected by Justice Mukherjee. Mukherjee state that words real authority and great authority did not hold any significant difference….."in plain English and etymology, authority means power."[154] On a literal examination of the provision related to the President, the present dichotomy is obvious. Article 53 of the Constitution stipulates that President is to exercise the authority of the executive, not through anyone but, directly. The word 'directly' here indicates a sort of higher level of autonomy granted by the Constitution to the President to carry the work of the Union. If this the correct position under the Constitution, argues Mukherjee J., then it will unconstitutional to consider that the President can only act as per the to the opinion rendered to him by the Cabinet.[155]

Mukherjee' J. apprehension are not completely meretricious. An identical problem pervaded the minds of the constitution- makers as well. Dr. Rajendra Prasad, then President of the Assembly, enjoined Dr. Ambedkar to shed light on the true essence and character of advice offered by the Cabinet to the President. In his compendious response, Dr. Ambedkar iterated that "*The President of the Indian Union will be generally bound by the advice of his Ministers. He can do nothing contrary to their advice nor can he do anything without their advice"* [further pointing out he stated] the impact of such question is confined only to a small segment of constitutional law given a comparative glance on the general principles entailing the Constitution. Constitutions around the world do not explicitly provide for different organs to pay obeisance or are bounded by each other, this principle is followed impliedly. [156]

Dr. Ambedkar's reply outlined the basic tenets of the Constitution in a generalised form. It is correct that bindingness among state organ will translate into creating a hierarchical system that will hinder in the cultivation of harmonious relation among State organs. But, the absence of any binding provision raised eyebrows. It is noteworthy that Article 74 as then in the Constitution was infirmly fashioned. Still unsatisfied by the explanation, K.M Munshi, a far-

[153] *Infra* note 14; *Rai Sahib Ram Jawaya Kapur v. State of Punjab*, 1955 SC 549.
[154] P.B. Mukharji, *The Critical Problems of the Indian Constitution*, Chimanlal Setalvad Lectures 12 (Bombay, 1966) *available at:* https://www.indianculture.gov.in/ebooks/critical-problems-indian-constitution (last visited on December 19, 2022)
[155] *Id.* at 21.
[156] Constitutional Assembly Debates on November 4, 1948 *available at:* https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-04 (last visited on December 19, 2022).

sighted constitutional scholar, incisively captured his thoughts by stating that 'though Dr. Ambedkar's opinion is of crucial importance, however, there are instance that dispel the argument that the position of President under the India Constitution is not similar to the English Monarch. If Constitution accords certain reserved power on the President of India, it becomes problematic to constraint the exercise of such power by him.' [157]

However, the Supreme Court of India has, on this issue, cleared the dust of contestation in *Samsher Singh,*[158] but rather by endorsing an obscure viewpoint. The Court commenced by elucidating that the Presidential authority in India is a mirror- image and the Constitution has only mimeographed the English Monarch. Thus, by doing so, the Supreme Court ratiocinated that the personal opinion or satisfaction of the President of India or the Governor (except where the Governor is warranted to exercise discretion within the confines of the Constitution) holds no primacy or influence over the opinion of his Ministers, it is the decision based on the profundity of the Ministers that is constitutionally compatible.[159] Simply put, the President of India is not in the constitutional position to behave contrary to the binding advice of the Cabinet irrespective of his personal dissatisfaction. Nevertheless, the opinion of the Court turned haywire by falling under the wheels of caution. The Court turned the rationale of the decision ostensibly into a moot proposition by accentuating the office of the President as carrying a 'pervasive and persuasive role' in the constitutional structure which is sometime attended to in a 'narrow territory which is sometimes slippery'.[160]

The eccentricity of the situation lay in the fact that the Court did not adequately supply the term 'slippery territory' with a proper meaning and context. The loose usage of the phrases can be put to a plethora of circumstance under the Constitution that tends to harbour the notions of an 'Obdurate President'. For instance, assenting/withholding of legislative bills[161] (discussed in detail below), convening or prorogation of Parliament,[162] dismissing Ministers,[163] refusing the promulgation of ordinance[164] or the proclamation of emergency,[165] among other things. In

[157] K.M. Munshi, The President Under the Indian Constitution, 284 (Bharatiya Vidya Bhawan, Mumbai, 1963).
[158] *Supra* note 7.
[159] *Infra* note 14; PU Myllai Hlychho v State of Mizoram, (2005) 2 SCC 92.
[160] *Samsher Singh v. State of Punjab*, (1974) 2 SCC 831.
[161] Constitution of India, art. 111.
[162] *Id.*, art. 85.
[163] *Id.*, art. 75 (2).
[164] *Id.*, art. 123.
[165] *Id.*, art. 352.

all these situations, the President can evade Ministerial advice. This ambiguous and vexed position of law acts as a catalyst that deepens a constitutional chasm by letting the instrument of political misuse (more often, and obvious at the State level) slip through the cracks of constitutionalism.

The other part of our problem is neatly couched in the sparse language of Articles 111 and 200 of the Constitution that can be countenanced from the expression "*as soon as possible*". Articles 111 and 200 are abundantly clear to stipulate that a bill passed by a legislature can be withheld by the President and Governor, respectively, for an indefinite period of time relying on the constructed language of the law that indicates vagueness ("*as soon as possible*"). The members of the Constituent Assembly were found have floundered on the prospects of inserting the expression. Initially, the Assembly composed the said provision as "*not later than six weeks*",[166] but later acquiesced to the words "*as soon as possible*" on an amendment pushed by Dr. Ambedkar.[167] This error in judgement, quite astute and presciently, has been vehemently voiced by H.V Kamath, Member of the Assembly, arguing that the term 'as soon as possible' does not connotes any specific time frame- it can be as long as six month or even beyond- the phrase, he declared, is amorphously vague. [168]

With the Assembly building a castle of Parliamentary democracy in air, the President, when presented with a Bill can either convey his assent to it, return it to the Parliament for reconsideration or withhold his expression of intent indefinitely. In other words, the Bill may lie on the desk of the President or the Governor for an unspecified time awaiting its approval or denial. The contrivance of such a stalemate has been keenly dubbed as a 'Pocket Veto' which earns the President the sobriquet of an 'Obdurate President'.

Political Impasses and Constitutional Crisis

Interestingly, the historical legal landscape of India has often been shaped by a separate panoply of cases that entirely are the outcome of frivolous conducts. Take for example, the Keshav Singh case that triggered a major constitutional crisis as the Uttar Pradesh State

[166] Constitutional Assembly Debates on May 20, 1949 *available at:* https://www.constitutionofindia.net/constitution_of_india/the_union/articles/Article%20111 (last visited on December 19, 2022).
[167] *Ibid.*
[168] *Id.* at 195.

Assembly locked horn with the High Court because Keshav Singh, who published defamatory pamphlets against one of the MLAs was granted bail by it.[169] The bail order irked the Assembly to the extent that it resolved to reprimand High Court judges who signed the order, thereby, orchestrating a spate of confrontation between the Executive and the Judiciary.[170] Ultimately, a Presidential Reference was sort from the Supreme Court that conclusively determined the issues. The Supreme Court held that the Assembly was right to hold Keshav Singh for breach of privilege, at the same, it opined that the High Court didn't err in entertain the plea of Keshav Singh. On the fundamental rights issue, the court effectively held that Article 21 would trump Parliamentary privileges. In this case, the distribution of pamphlets triggered a constitutional crisis epitomising the paradoxes of a modern and liberal constitutional democracy.

One of the important issues germane to our present discussion highlighted in the Keshav Singh case was the application of British convention in Parliamentary Privileges in the absence of a codified law, despite codification of the particular law being a constitutional requisite. The question here that crops up is that how far can the British conventions be applied to Indian laws that draw sanctity from the Constitution. The primary impetus to cite the aforementioned example was the conscious effort to adumbrate on the force of triviality that can sometimes translate into serious constitutional crisis and the gaps in law that accelerate it.

Though, gridlocks, argues Antonin Scalia (Former Associate Judge, US Supreme Court), are the sublime beauty of a constitution as it precludes any sole repository of authority in a democracy and reassures the believe in building a common consensus. Thus, I, as this section sheds light on the gridlocks that have occurred in the past at the Central level, propose look it from the lenses of abusing a constitutional process.

The mirroring of the British Crown and the Indian President has been fraught with scepticism since the incipience of the Republic. This, especially, didn't sit well with Dr. Rajendra Prasad, who now donning the hat of the Indian President, expressly perpetuated his proclivity to act independently of Cabinet advice, as he in 1954, conveyed the same to the Prime Minister.[171] However, the eventuality of this occurrence was staved off. But, inevitably in 1960, President Prasad went on to publicly raise the spectre of an 'Obdurate President'

[169] Chintan Chandeachud, *Cases That India Forgot* 3-23(Juggernaut, New Delhi, 2019).
[170] *Ibid.*
[171] K.M Munshi, *Pilgrimage to Freedom* 568-75 (Bhavans, New Delhi, 1967).

calling for a scholarly scrutiny of the incongruous role of the British Crown in an unwritten constitution vis-a vis the Indian President under a written Constitution.[172] A similar and commensurate, viewpoint was also endorsed by the scholars who contended that the Parliamentary system in India is a myth without adhering to conventions that are beyond the Constitutional text.[173]

To bring the arc of constitutional compatibility under the impression of semblance by tweaking the position of the President, the Government ventured to draw a line in the sand by the introduction of the 42nd and 44th Amendments that negligibly dented the authority of the President and remained impervious to the concerns of obviating the instrument of Pocket Veto. Following which a serious crisis gripped the Rajiv Gandhi Government in 1986, when President Singh opted to Pocket Veto the Postal (Amendment) Bill, 1986 that would have enabled the government to censor personal correspondence in the interest of national security. The reason for the veto was grounded in the apprehension of the President that whether such a Bill was actually required for national security purposes. However, the veto, apparently, rode on the crest of the political slugfest that ensued between the President and the members of the Cabinet owing to the unrest in Punjab.[174]

The constitutional justification for the veto also came from the duty to *preserve, protect and defend the Constitution*".[175] It is noticeably indiscernible as to the effective connotation that can be provide to the oath of Presidency. The real imperilment is vested in attaching the term *Constitution* with a proper explication. As to whether what the term *Constitution* signifies is a contested domain. Whether it mean the Constitution as it is (in the present state) or whether it indicates constitutional morality or whether what the President personal wants it to be. Certainly, these questions remain in the clutches of speculation. Indeed, it remains a paramount dichotomy to detect the transgression of the constitutional provisions by the President if such justification is constitutionally permissible. Considering an alternative route, if the President

[172] *The Hindustan Times*, Nov. 29, 1960.
[173] Charles Henry Alexandrowicz, *Constitutional Developments in India* (Oxford University Press, Bombay, 1957).
[174] Prabhu Chawla, "President Zail Singh questions govt's decisions, much to PM Rajiv Gandhi's embarrassment" *India Today*, Feb. 28, 1987, *available at:* https://www.indiatoday.in/magazine/cover-story/story/19870228-president-zail-singh-questions-govt-decisions-much-to-pm-rajiv-gandhi-embarrassment-798591-1987-02-27 (last visited on December 19, 2022).
[175] *Supra* note 15 at art. 60.

chooses to assent a Bill that is, let suppose, in direct contradistinction to the Directive Principle or 'the basic structure' of the Constitution, will not this tantamount to violating his oath of office? Undoubtedly, ambiguity is an unfeigned anathema to law!

At this juncture, where the President has exercised the Pocket Veto or acted against the Cabinet advice, the only constitutional recourse available to the government is the impeachment of the 'Obdurate President'. The impeachment of the President is a fairly excruciating endeavour and highly depends on the prevalent political climate. In the particular instance enunciated above, President Singh enjoyed the support of the opposition parties as they found in him a ray of hope and an ultimate force that has balanced the scales in the face of political adversity for them drawn by the outcome of the 1984 General Election. According to the Constitution, to impeach an 'Obdurate President', the approval of two- third majority in both the Houses of the Parliament is an essentiality. Concocting such a majority has been a rare phenomenon in the political landscape for considerable stretch of time in India. Even if it is triggered, the President is granted, in compliance of natural justice, by the Constitution a fifteen- day time to counter the charges levelled against him.[176] Prof. Gledhill here argues that the fifteen days is substantial period of time for the President to dismiss the government and dissolve the Lower House of the Parliament.[177] A step that would obviate his impeachment at least for six months and possibly could prolong it even further by dismissing subsequent governments. Although, these examples are marked by surmises, still they are the foundational questions that require logical answers and proper mechanism of check and balances.

Some Reflections on the Kerala Crisis and How It Can Be Avoided

At the very outset of this discussion, three essential questions were framed. In light of the discussion sketched out above, *first*- it would be correct to assert that by the language of Article 111 and 200, the President and Governor have the leeway of exercising their discretion while assenting to a bill which manifestly appears in returning a bill to the Parliament for reconsideration. It is a far stretched imagination to consider that the Executive who piloted the Bill in the Parliament would advise the President against. Here, the President applies his own mind and discretionary wisdom drawing from the Constitution. Therefore, by extension of the

[176] *Supra* note 15 at art. 61.
[177] Alan Gledhill, *The Republic of India: Development of its Laws and Constitution* (Stevens and Sons Ltd., London, 1951).

same logic an Obdurate President can withhold the expression of assent or denial to a legislative Bill indefinitely. *Second,* by the text of Articles 111 and 200, the President/Governor can withhold his assent indefinitely by exercising the power of pocket veto which is axiomatic from the example of President Singh, but is but such an exercise is antithetical incompatible with the spirit of the Constitution that hold the rule of law above the rule of men. Further, in some cases, impeachment that becomes an inevitable consequence of the pressing circumstances is susceptible to defenestration on account of the prevalent political climate. Therefore, the Cabinet his left with no corrective measure.

For answering the *Third* question, examining the High Court's decision is an inescapable endeavour. In *Jeevesh*, the petitioner sort to challenge the indefinite withholding of legislative Bills by the Governor, *inter alia,* seeking that the *ab infinitum* withholding of the legislative Bills goes against the very grain of democratic values and the primacy of the Cabinet form of Government. Further, that the discretionary power of the Governor be confine to the application of mind to a stipulated time period of two months, a logic grounded in the voices that echoed the chambers of the Constituent Assembly. The High Court, relying on the SC decisions in *Kameshwar Singh, Hoechst Pharmaceuticals* and *B.K Pavitra,* in its judicial wisdom erroneously upheld the vaguely contrived language of Article 200 under which the Governor exercises his discretionary power. It is imperative to point out that nowhere in the relied decision does the Supreme Court allude to a circumstance where a legislative Bill is pocket vetoed by the Governor. The Supreme Court in the relied decision is consistent of the view that the Governor has three choices when a Bill is presented to him- to accord his approval (assent); to send it back or retain for future consideration of the President- and one of them shall be exercised. That apart, nowhere does the relied decision reflect that the Governor can indefinitely sit over a legislative Bill and act as an obstructionist in functioning of the legislature. Therefore, it is unerringly clear that the Kerala High Court erred in rejecting the PIL. It should have read into the amorphous text of Article 200 a time- bounded approach that the Governor should follow by the feat of judicial craftmanship like in many cases where the Indian judiciary has effectively enforced the Directive Principles by using Article 21 as a bridge. The High Court should have avoided to set a bad legal precedent giving a free reign to an Obdurate Governor.

After the careful evaluation of the crucial issues, it can be theorized that the present political and constitutional milieu in Kerala is stark. The present tussle that began with the appointment of vice chancellors now has enter into a battle for supremacy and legitimacy. While the Kerala Government has passed a Bill removing the Governor as the chancellor of all the State universities,[178]a serious confrontation is presently knocking the doors which shall be attended to with acuity. Procedurally, for a Bill to become law requires the assent of the Governor. If the Bill does become a law, it possibly will be the first law diminishing the role of the very approver. However, if not, then the Governor and the Cabinet will be at daggers drawn. Centre- State relation will suffer and federalism will be in tatters. This confrontation will surely draw a vortex of constitutional crisis which shall be avoided through dialogue and engaging at every frontier be it political or constitutional.

Suggestively, the problems that have emerged in our discussion are the direct consequences of them being deftly tucked in the constitutional framework which warrant the need for an arduous sprucing. The wrinkles in the Constitution like the entrenched ambiguity in the phrase "*as soon as possible"* and the undefined extension of the British convention to the Constitution of India (a legacy of the Constituent Assembly) is required to be ironed out through amendments. The application of British convention assigned to the Indian Constitution shall be expressly provide so that silences of the Constitution are not manoeuvred to frustrate the intrinsic value that the Constitution nurtures. A pertinent example of this can be traced in the Canadian Constitution that declares itself to be indistinguishable in principle to the conventional constitution of the United Kingdom.[179]

Further, in all pragmatic sense, an Obdurate President/Governor, despite the monumental dictums of the courts, cannot be averted from setting aside the spirit of the Constitution because there is an inherent failure to deal with such fortuity as it has found an embodiment in President Singh's obstinacy. A proper and constitutionally compatible mechanism shall be formulated to fix this shortcoming. In this regard, the US law promulgating

[178] Express New Service, 'Kerala Assembly passes Bill to remove Governor as Chancellor of state's universities'
The Indian Express, December 14, 2022, *available at:*
https://indianexpress.com/article/cities/thiruvananthapuram/kerala-assembly-passes-bill-for-removing-governor-as-the-chancellor-of-universities-8322513/ (last visited on December 19, 2022)
[179] British North American Act, 1867.

system can better cater to the Indian needs. In the US, when the President is present with a Bill approved by the Congress, following outcomes are certain:

A. Gets Presidential approval and therefore, become law.

B. Is returned to the Congress on a Presidential disapproval. The Congress may again approve the Bill by a two-third majority which become a law in effect. Presidential assent irrelevant.

C. President putting the legislative Bill in his Pocket (neither approves or disapproves by retaining it for future consideration), then, with the expiration of ten days since such retention the legislative Bill effectually becomes law irrespective of presidential approval

Thus, the US President can only pocket veto a Bill for only ten days which led some commentators to be of the considerate opinion that the 'Pocket' of the American President is small than the Indian President. Further, evidently in Sweden, its Parliament has adopted a more radical step towards the promulgation of law. Under its law- making process, the authority of the Sweden Crown is completely circumvented. For the transformation of a bill into a law, only the approval of the Parliament is quintessential.[180] Axiomatically, apt to say that the law-making process of Sweden has been tailored in such a way that the Crown possess no pocket at all.

Conclusion

The exception of Pocket Veto, on a dispassionate analysis of the constitutional milieu in Chhattisgarh and Tamil Nadu, has now become a normative practice. Particularly, the Chhattisgarh conundrum can be summarised by paraphrasing the poignant remark offered by Sir Ivor Jennings, that the President is a politician who is promoted, and a politician who is promoted is unable to forget his past, and even if he is capable of doing so, other who promoted him will never.[181] The political antecedents of the Governor in Chhattisgarh, despite being a non- partisan figure head, manifestly appears to be a conspicuous reflection of the

[180] Factsheet, Ministry of Justice, May 2016, *available at:* https://www.government.se/49c837/contentassets/4490fe7afcb040b0822840fa460dd858/the-swedish-law-making-process#:~:text=A%20fundamental%20law%20must%20be,qualified%20majority%20is%20not%20required (last visited on December 19, 2022).

[181] Ivor Jennings, *Cabinet Government* 328 (Cambridge University Press, Cambridge, 3rd edn., 1969).

constitutional stalemate that persists in the governance of the State. The Governor, as reported,[182] has decisively acted to be indecisive on the essential policy Bills that demand transition into law. Neither the Governor has assented to Bill kept on the desk since 2020 nor sent it back to the Assembly for reconsideration or reserved for the perusal of the President, effectively pocket vetoing the will of the legislative majority that mirrors the will of the people of the State. On a similar rationale path, but on a different footing, the Governor of Tamil Nadu has kindled the prospects of a serious interrogation of the constitutional text and waking- up from the reverie of a pragmatic and cooperative federalism in India.[183]

In conclusion, on the factual matrix that this article proceeded was triggered from the erroneous judgment rendered by the Kerala High Court in *Jeevesh.* By dismissing the petition, the High Court has made a mammoth out of a mink by disturbing the constitutionally maintained harmony and equilibrium among the Governor and his Cabinet. The Cabinet which is accountable to the legislature (the people of the state) now has been enervated and pushed to back the burner as the profundity of decision- making of an unelected individual takes precedence over the elected. Interestingly, the event has kindled the resurfacing of a constitutional chasm by broaching a topic into national discourse that has gathered immense political attention and public scrutiny. The idea that has sprung into action from *Jeevesh* is whether the same legal exposition can be extended to other States. In effect, investing in the Union Cabinet the authority to issue diktats to run or stifle the business of the State governments.

Further, this legal proclivity seems to draw sanctity from the sparsely constructed text of the Constitution. By the language of Articles 111 read with 52, and/or 200 read with 163 of the Constitution, it is fairly fatal to assume that there is no leeway for the President and/or the Governors in the State to constitutionally behave without or against the binding advice of the Cabinet. Evidently, this factuality is not based on pure surmises but is the result of reflections and concerns stemming from historical discourses and incidences that have indelibly shaped our constitutional history. Therefore, in the interest of constitutional harmony, and for the

[182] Jayprakash S. Naidu, "Governor in tussle with Govt., Anusuiya Uikey is Ex- Cong Leader with list of Tribal Causes" *The Indian Express*, Jan. 2, 2023.
[183] Editorial, "Tamil Nadu Governor RN Ravi's conduct in assembly is unseemly; ill serves his high office" *The Indian Express*, Jan. 13, 2023.

restoration of equilibrium among constitutional functionaries, it is an imperative that spirit of the Constitution, as expounded by the Supreme Court, be given the shape of words and nested within the fundamental framework of law. Unequivocally, the Kerala situation provides with the perfect opportunity and the correct impetus to vitiate the blemish that have infiltrated the Constitution.

The Indian Constitutional framework requires a paradigmatic transition to firmly harmonise and harness the cardinal values of a democracy by shedding the vestige of a centralised authority belonging to an era long passed, and march towards a system of government in which the sovereignty is vested in, and is exerted through, the free expression of a free citizen dissipating the caprice of individual men.

EMERGENCE OF CORPORATE LIABILITY IN CRIMINAL LAW: COMPARATIVE ANALYSIS BETWEEN JURISPRUDENCE IN INDIA, UNITED KINGDOM AND UNITED STATES

By Shreya Saraiya[184]

ABSTRACT

The Article revolves around the growing relevance of corporation in the United States, United Kingdom as well as in the Indian society albeit the resulting increase in the regulatory control on their conduct. The study of criminology focusing on crimes committed by individuals have evolved to include corporates within its ambit wherein the acts of individuals are attributed to the corporation. The peculiar features of corporate crime are discussed- not easy to detect, at times no direct contact between the offender and the victim, and presence of innumerable victims. The Article lays out a historical blueprint of the emergence of corporate criminal liability in United States, United Kingdom and India along with the ways and means being adopted to regulate corporate crime in the backdrop of wide emergence of corporate leadership in the world economy.

Keywords: White Collar Crime, Corporate Crime, Occupational Crime, Corporate Criminal Liability, Corporate Governance

Introduction

"*Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief, and are less amenable to disgrace or punishment. They neither feel shame, remorse, gratitude nor goodwill.*"

\- **Hazlitt**

The corporation is a group of people coming together to achieve a business goal. The interplay of corporation and society is a dynamic phenomenon and with the changes taking place in society, the rippling effect is seen in the governance of a corporation. The significance of the role played by corporations in the growth and advancement of the society cannot be underestimated. The demand then arises to regulate the activities of a corporation to make it in

[184] *LLM, National Law Institute University; Bhopal, M.P.*

consonance with the intricate framework of laws which govern the society. The primitive times were marked by lesser emphasis on the need to impose regulations on the conduct of the corporation albeit their limited contribution towards the society, but this trend has undergone incremental changes over a period of time for different Nations.

The interactions of corporations with society witnessed the infractions by the former from the societal standards set in the form of norms, customs and laws. The imputation of liability on the corporation under the different laws, was a result of the global recognition of corporation as a separate legal entity from its members capable of distinct set of rights and liabilities[185]. Over a considerable portion of time, the corporations were only held responsible under the civil laws. However, with the advent of industrialization and globalization, the corporations have assumed a dominant role over global business. The deviant corporate behavior casted a negative impact on the public at large, the need arose to categorize such deviant corporate behavior as 'Crime'. It was against this backdrop, the common-law judges devised a theory of corporate accountability for crime[186].

However, the introduction of corporates in the realm of criminal law which focused on establishing individual guilt has remained a hot topic for jurisprudential deliberations. The research work brings forth a journey of emergence of corporate criminal liability in United States, United Kingdom and India. A comparison is attempted to be made between the jurisprudence on corporate criminal liability in the above-mentioned three nations. Further, the research work lays down suggestions to make India's corporate criminal liability regime more stringent with the aim of deterring the deviant criminal conduct of the corporations. The adoption of a balanced approach between ensuring 'ease of doing business' in India versus effectively deterring the corporates from indulging into criminal conduct, is suggested to ensure swift roll out of the corporate criminal liability in Indian legal regime.

History of Corporate Criminal Liability in US, UK and India

The historical background on 'Corporate Criminal Liability' ("CCL") is marked by a reluctance on part of the Judges to indict corporations for criminal liability. Early English cases held that corporations were not indictable for any wrongful act. Such reluctance to upheld CCL was

[185] *Salmon v Salmon and Company* [1897] AC 22.
[186] Mueller, 'Mens Rea and the Corporation' (1957) 19 *University of Pittsburgh Law Review* 21, 28-38.

partly attributable to a remark by Chief Justice Holt in an anonymous case: "*A corporation is not indictable but the particular members of it are*."[187] The anonymity of the statement as to the source or context did not dissuade the common-law judges to cite Holt's statement with approval.[188]

The doctrinal growth on CCL was also impeded by the clouds being cast upon the entire theory on CCL.[189] The reason behind the ambiguity behind CCL could be highlighted in the following considerations- the corporation being recognized not as natural person, but an artificial legal entity. As an abstract entity it lacked the physical, mental, and moral capacity to get involved in a wrongful conduct, or to suffer punishment. It could neither commit criminal acts, imputed with a criminal intent, nor suffer imprisonment. It had no soul, and so could not be blamed.[190]

The role played by corporation in the society was limited with its minimal impact on the general populace which deemed it unnecessary to impose CCL.[191] However, with the increased popularity and role of corporations in the society, there was a shift in the perspective. During the 16th and 17th century, a reluctance was observed on the part of shareholders to be responsible for the management of the corporations, albeit the growing impact of the corporations on the society.[192]

History of the English Jurisprudence on CCL

By 14th century, the corporation in UK was well organized and could be created only by a grant from the crown or by an Act of Parliament.[193] The crown signified incorporation to be a privilege and encouraged corporations to become legal entity to be under crown's control.[194] The primitive corporations in the earlier times were ecclesiastical bodies with the main function

[187] *Ibid.*
[188] *Ibid.*
[189] L. Leigh, 'The Criminal Liability of Corporations in English Law' 28 *Cambridge Law Journal* 329(1970).
[190] Case of Sutton's Hospital 77 *Eng. Rep.* 960, 973(1612).
[191] James R. Elkins, 'Corporations and the Criminal Law: An Uneasy Alliance' 65 *Kentucky Law Journal* 73, 87(1976).
[192] L. Leigh (n 11) 1525.
[193] Kathleen F. Brickey (n 8) 396.
[194] *Ibid.*

as the manager of the property of the church.[195] Gradually, the corporations evolved from being merely ecclesiastical bodies to being the precursors of the modem business corporation.

The 16th and 17th century marked the importance of growth of the corporate form of legal entities[196], the joint stock company came in the limelight by the end of this period.[197] With the spur in the growing impact of joint stock companies over the society, the importance in regulation of their activities was recognized in light of the power enjoyed by the joint stock companies in those times with least control over their activities.[198] The joint stock companies begun becoming responsible for the miseries of the country.[199]

In response to the growing scandalous deeds of the corporations, the Parliament enacted the Bubble Act.[200] The Act, charged those corporations who "contrived dangerous and mischievous undertakings or projects under false pretence of the public good", drawing in "unwary persons to subscribe"; who acted "as if they were corporate bodies" and pretended "to make their shares transferable" without legal authority; and who engaged in "many other unwarrantable practices (too many to enumerate), all contributing to "the common grievance, prejudice and inconvenience".[201] The punishment on the corporations were imposed on the charge of public nuisance.[202]

By next 18th century and half, business corporations and joint stock companies gained importance, contributing to the growth of commerce more than what an individual enterprise could.[203] The history on the CCL took its shape by an advent of growing recognition of corporate form as legal persons. The three principles came into place for upholding of the legal personality of the corporations – First, evolution of 'separate legal entity' theory in which the corporation came to be recognized as an entity separate from its owners.[204] Second, the

[195] *Ibid.*
[196] W.S. Holdsworth, 'English Corporation Law in the 16th and 17th Centuries' (1922) 31 *Yale Law Journal* 382.
[197] *Ibid.*
[198] *Ibid.*
[199] Bishop Carleton Hunt, 'The Development of the Business Corporation in England' *Harvard University Press* 1800-1867(1963).
[200] Bubble Act, (1719) 6 Geo. 1, cl. 18
[201] *Ibid.*
[202] *Ibid.*
[203] Bishop Carleton Hunt (n 21) 13.
[204] Kathleen F. Brickey (n 8) 400.

corporation's property came to be treated distinctly from that of its members.[205] Third, an execution of a judgment against a corporation only against the property of the corporation, not that of its members.[206]

The development of corporate liability was seen in light of the several facts, such as an early age notion of considering corporation as having the same capacities as a natural person, capacity to own property, enter into contracts, sue and be sued.[207] However, a coherent theory on corporate liability was seen more problematic. The abstract form of corporation gave it an abstract nature which indeed suggested that it has no mind of its own and could not be said to have formed an intent.

As early as 1635, however, a corporation was held liable on a presentment for nonfeasance.[208] By mid-nineteenth century, a corporation's liability in the form of a breach of duty consisting of inaction was well established, though not the liability for felonies or for crimes involving personal violence.[209] In the English law, corporate criminal liability was imposed for the first time in the case of *The Queen v. Great North of England Railway*[210], by importing the rule of vicarious liability from Tort Law, making corporation liable for misconduct of employees acting within the scope of employment. The ruling marked the spread of corporate liability from public nuisance to the crimes which did not require a criminal intent to be proved, where the corporation was held liable for misfeasance.

In *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Company Ltd*.[211], Viscount Haldane brought-forth the 'alter-ego doctrine' or 'organic theory of corporate criminal liability', held-

"*A corporation is an abstraction. It has no mind of its own any more than it has a body of its own, its active and directing mind will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation…. The Board*

[205] *Ibid.*
[206] *Ibid.*
[207] *Ibid.*
[208] *Case of Langforth Bridge*, 79 Eng. Rep. 919(1635).
[209] *The Queen v. Birmingham & Gloucester Railway* 114 Eng. Rep. 492(1842)
[210] *The Queen v. Great North of England Railway* 115 Eng. Rep. 1294 (1846).
[211] *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Company Limited* AC 705, (1915).

of Directors are the brains of the company which is the body, and the company can and does act only through them."[212]

In another case, *Tesco Supermarkets Ltd. v. Nattrass*[213], Lord Reid gave an account on CCL by laying down the contemporary position on CCL, premising the theory on alter-ego principle.

History of the American Jurisprudence on CCL

In earlier year, the power to create corporations was with the King. The King exercised the power by granting the corporate charter to the governors, which was the basis of creation of many forms of political organization in American colonies. As the colonies gained independence and became States, the power to create the corporations was shifted to the legislation, which marked the beginning of the era of corporate form of governance. In the American colonial phase, the private business corporation incorporated in the mainstream of economic activity at a gradual pace.[214]

The typical form of colonial corporations was mostly quasi-public in nature with the objective of improving public transport facilities. The corporations which were public or quasi-public in nature were the ones which first became the subject of criminal liability.[215]

Nuisance

The corporations came to be criminally prosecuted for the first time under the law of Nuisance.[216] The definition of common nuisance is "an offense against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires,"[217] however, the neglect prong of the definition was first applied to the American corporations.

The first case of nuisance in which corporate criminal prosecution was instituted was *People v. Corporation of Albany*[218], which related to the indictment on the City of Albany for its failure to clean Hudson River, which had become "foul, filled and choked up with mud, rubbish, and

[212] *Ibid.*
[213] (1971) 2 All ER 127.
[214] Kathleen F. Brickey (n 8) 404.
[215] *Ibid.*
[216] *Commonwealth v. Hancock Free Bridge Corporation* 68 Mass. 58(1854) .
[217] (1834) 11 N.Y. Sup. Ct 539.
[218] *Ibid.*

dead carcasses of animals." The ruling on the pertinent case was notable in two respects- first, it settled a principle on CCL for non-feasance; second, it brought into focus the public impact because of the harm and the necessity arising, as a result, to put forth effective mechanisms to remedy the harm.

Non-feasance versus Mis-feasance

By the mid-19th century, the question as to whether the corporations were indictable for some affirmative acts or for omissions to act as well was settled by the rulings in the following cases. Firstly, in *State v. Morris & Essex Railroad*[219], the company was indicted for nuisance for constructing a building on a public highway and for obstructing road with rail road cars. The question arose as to whether the indictment can be done for nuisance for an affirmative act. The Supreme Court of New Jersey began the analysis of the case by questioning a statement by the Chief Justice Holt, "*a corporation is not indictable, but the particular members of it are*".[220] The Supreme Court refused to upheld the reliability of the above-mentioned statement and proceeded towards the analysis of the development of CCL.

The Supreme Court observed that, when corporations' liability for non-feasance is upheld then the reasons which are cited against the CCL fell short of explaining the argument against CCL.[221] The reasons such as corporations' intangible character, incapacity of being arrested, or to appear in the Court, or to be made liable for imprisonment, or consideration of innocent stakeholders are cited against the argument to make a corporation criminally liable. However, these must be dispensed with as these are applicable equally in corporations' indictment for non-feasance or misfeasance.

The Courts started recognizing a corporation's liability for torts committed by its agents.[222] If the corporations could be held liable for tortious acts committed by its agents, then there was no sound reasoning for its incapacity to be made liable for the same acts in a criminal prosecution. Another objection to the criminal liability arose stating that the corporate cannot

[219] (1852) 23 NJ.L. 360.
[220] (1841) 20 Me. 41.
[221] *People v. Corporation of Albany* (n 39) 366.
[222] *Ibid.*.

be made liable for such acts which are not approved by its charter, such acts being ultra vires, such objection was also overruled by the courts.

The other objection which was pointed out in the case, revolved around the argument of individual liability for the acts done because they only get the benefit from the wrongful conduct. The court found the argument unpersuasive as the corporation equally benefit from such wrongful acts. The Supreme Court upheld the corporate criminal liability in this case.

The Second important case was *Commonwealth v. Proprietors of New Bedford Bridge*[223], the company was indicted for misfeasance. The Court ruled out in favour of upholding the liability of the Company for misfeasance and the argument indicating that the Company could be held liable for nonfeasance but not for misfeasance was not preferred.

Analysing the above two judgments, the argument was made that once the corporations could be made liable for creating nuisance, there was no theoretical impediment to indict the corporations for such acts of misfeasance which were not related to nuisance. The argument gave the space to the CCL to emerge in the American legal landscape. Accordingly, the corporations came to held liable for crimes such as Sabbath breaking[224], permitting gaming on a fair ground[225], charging usurious interest rates[226], furnishing liquor to minors[227], and the unauthorized practice of medicine.[228]

Crimes requiring Intent

Even with the development of CCL in the backdrop of absence of distinction between misfeasance and nonfeasance, as upheld by the courts in the above-mentioned judgments, the jurisprudence on the corporations' criminal liability for acts requiring intent could not take up the pace. The judges deciding on the above-mentioned judgments ruled in their other landmark decisions that the corporations could not be indicted for the crimes requiring the malafide intent. The arguments which were made against CCL concerned mainly with the fictive nature of corporation implying the lack of soul and so absence of "actual wicked intent"[229] and that

[223] (1854) 68 Mass. 339.
[224] *State v. Baltimore & O.R.R.*, (1879) 15 W. Va. 362.
[225] *Commonwealth v. Pulaski County Agricultural & Mechanical Association*, (1891) 92 Ky. 197.
[226] *State v. First National Bank*, (1892) 2 S.D. 568.
[227] *Southern Express Co. v. State*, (1907) 1 Ga. App. 700.
[228] *People v. John H. Woodbury Dermatological Institute*, (1908) 192 N.Y. 454.
[229] *State v. First National Bank* (n 49) 571.

non-indictment of the corporation for the ultra-vires acts. If a liability for the acts which are ultra-vires i.e. not authorised by the corporation's charter is imputed, then it would go against the settled principles of agency.

However, a distinction was drawn by the courts between the crimes requiring general intent and those requiring specific intent. The thumb rule which prevailed was that corporations were deemed to act through its employees, officers and directors and their intentions and motives were imputable to the corporations.[230] The rule gained the approval of the US Supreme Court in case namely - *New York Central & Hudson River Railroad v. United States*[231], the corporation was held liable for purposely committing the offense of prohibiting the mandate of the statute, by imputing the offense committed by the corporation's agents acting within the scope of their authority. The prosecution targeted the corporation which derived the benefit by such an unlawful practice. The Court held, that the law "cannot shut its eyes to the fact that the great majority of business transactions in modem times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands".[232] The Court emphasised that CCL is a quintessential tool to control corporate misconduct and to curb the abuse that the statute was designed to reach.[233]

The Court vide this case upheld CCL for the crimes requiring general intent and opened the debate as to whether there is any sound reasoning of making a distinction between specific and general intent at the time of holding a corporation criminally liable, despite the corporations being held vicariously liable for the intentional torts. The debate gave rise to an ever existing theoretical conundrum as to whether the corporation could be considered as competent person to form 'evil intent'.

In a case law namely *United States v. MacAndrews & Forbes Co.*, the Court observed, "The same law that creates the corporation may create the crime, and to assert that the Legislature cannot punish its own creature because it cannot make a creature capable of violating the law does not . . . bear discussion."[234]

[230] *United States v. John Kelso Co.*, 86 F. 304, 305-06 (N.D. Cal. 1898).
[231] (1909) 212 U.S. 481.
[232] *Ibid.*
[233] *Ibid.*
[234] 149 F. 823, 836 (C.C.S.D.N.Y. 1906).

During the 19th and 20th century, a trend towards Courts' acceptance towards CCL was observed on the premise of exposing the corporations to the same liabilities under the same legal regime under which the natural persons were subjected. The pertinent period of time was marked with subjecting the corporations to criminal prosecution for the offences such as contempt of court,[235] wilfully or knowingly obstructing a road,[236] conspiracy to violate federal and state antitrust laws,[237] knowingly mailing obscene materials,[238] etc.

The theory of CCL is a specie of vicarious liability since corporation acts through its agents whose conduct is imputed to it. The development of CCL as a part of corporate governance came to be looked paralleley in light of the growth of the doctrine of *vicarious criminal liability*. The principle by which a crime committed by a direct participant is imputed to another human being who had not role in the commission thereof has its source in an agency law doctrine *Respondent Superior*[239].

History of the Indian Jurisprudence on CCL

The industrialization brought about the need to control the companies and its activities, which culminated into the development of CCL across the western world. The concept of CCL gradually moved to India. In the post-independence era, the companies in India were State-owned. The concept of private companies emerged in the mid-1950s and this development brought about with it the need to have an effective mechanism to control the wrongful conduct of these companies. The government of India found itself in need of the requisite funds to roll out the welfare schemes for the masses. The Income Act, 1961 was enacted which provided for the provisions for collection of tax from the individuals as well as from the companies. The tax evasion as well as money swindling became popular misconduct on part of the corporations. Therefore, a need was felt by the Indian legal system to come up with stricter means to regulate the corporations' deviant conduct, which compelled the importation of CCL in India.

In India, the legislature did not enact a specific law governing the criminal liability of the corporation. The issue arose before the Supreme Court in various case laws and India's

[235] *Telegram Newspaper Co. v. Commonwealth*, (1899) 172 Mass. 294.
[236] *State v. White*, (1902) 69 S.W. 684.
[237] *United States v. MacAndrews & Forbes Co.*, 149 F. 823 (C.C.S.D.N.Y. 1906).
[238] *United States v. New York Herald Co.*, 159 F. 296 (C.C.S.D.N.Y. 1907).
[239] Frank W. Hackett, 'Why is a Master Liable for the Tort of His Servant?' 7 *Harvard Law Review* 107(1893).

historical position vis-à-vis CCL could be traced through the judicial interpretation of the doctrine on the nature of CCL as well as the extent of its applicability in India.

The Supreme Court witnessed theoretical roadblocks in imposing CCL. The corporation being juristic personality[240], having no mind of its own (like that of humans) so the issues arose in imputing 'mens rea' on the corporation. Further, even if the corporations' conduct could be seen as criminal, arresting it was not possible. The other moot point was the sentence which could be imposed would that be deterrent enough to serve the purpose of criminal laws, as corporation cannot be sentenced to imprisonment. Furthermore, the execution of sentence was also a problem in such a scenario.

The first case which came before the Supreme Court was *A K Khosla v. S Venkatesan*[241], two corporate bodies were charged with fraud under the Indian Penal Code, 1860 (hereinafter referred to as "IPC"). It was observed that, for prosecuting the corporations for fraud two requirements were- mens rea and the ability of the Court to levy a sentence of imprisonment. It was held by the apex court that the corporations could not possess the necessary mens rea for committing fraud, also it was not possible to impose upon it a sentence of imprisonment as it had no physical body of its own.

In another case *Zee Tele films Ltd. v. Sahara India Co. Corp. Ltd*[242], Zee Tele films Ltd. was charged under Section 500 of IPC for criminal defamation on the ground of telecasting a program which was based on falsehood. The Court dismissed the complaint and held that, the company cannot be said to possess the mens rea which supports the charge of criminal defamation.

In *Motorola Inc. v. Union of India*[243], a charge of cheating under Section 420 of IPC was placed upon a corporation. The Bombay High Court quashed the proceeding on the ground that the corporation could not be said to possess the mens rea which was the essential pre-requisite for the offence of cheating.

[240] Anca Iulia Pop, 'Criminal Liability of Corporations- Comparative Jurisprudence' *Michigan State University King Scholar Program* 51(2006).
[241] (1992) Cr.L.J. 1448.
[242] (2000) 2 Cal LJ 580.
[243] Cri L J 1576.

The jurisprudential trend, as can be observed after perusing the abovementioned case laws, was against the imposition of criminal liability on the corporation on the ground that the necessary ingredient of 'mens rea' cannot be imputed on the corporation. Secondly, even if the corporations could be convicted for the offences, they being juristic persons and not natural persons could not be sentenced to imprisonment, hence the execution of sentence was a perennial problem in such cases. However, the shift in such a trend is observed in the following cases.

The issue again came up for consideration before the Supreme Court in *The Assistant Commissioner, Assessment-II, Bangalore and Ors. Vs. Velliappa Textiles Ltd. and Ors*.[244], a private corporation was charged with violation of certain provisions of Income Tax Act which provided for mandatory punishment for their violation in the form of both imprisonment and fine. The apex court held that, when offences are punishable with a mandatory term of imprisonment coupled with fine, then the courts are not empowered to punish the corporations for such offences by imposing upon them a sentence of fine. However, the position of the Supreme Court on the question as to whether the company could possess mens rea indicated in the direction of allowing the import of alter-ego doctrine and imputing upon the corporation the mens rea of the directing minds and will of the corporation.

The Allahabad High Court in *Oswal Vanaspati & Allied Industries v. State of U.P*[245], laid down that a corporation is a juristic person and due to which it cannot be sentenced with imprisonment. The question then came up before the Court for consideration as to whether a fine alone can be imposed (for offences punishable with both imprisonment and fine) upon the corporate entity or the same would be illegal as not being sanctioned vide a legislature. The court affirmed that a corporation cannot be imprisoned but ruled in favour of imposing fine (for offences punishable with both imprisonment and fine).

The paradigm on CCL witnessed a sweeping change with the landmark judgment of the Supreme Court in *Standard Chartered Bank and Ors. v. Directorate of Enforcement*[246]. In the pertinent case, the prosecution was initiated against the Standard Chartered Bank upon the allegation of violation of certain provisions of Foreign Exchange Regulation Act, 1973. A five

[244] AIR 2004 SC 86.
[245] (1993) 1 Comp LJ 172.
[246] (2005) 4 SCC 530.

judge constitution bench of the Supreme Court overruled the Vellliappa Textiles dictum and deviated from the literal and strict interpretation of the penal statute and held that the corporation being a 'person' under Section 11 of the IPC can be made liable for any offence punishable under the law, irrespective of mandatory punishment of imprisonment prescribed under the statute.

The Court emphasised that the corporation cannot be absolved from the liability merely on the point of technicality that it cannot practically be imprisoned. The Court allowed the discretion to be exercised in imposing fine only (in cases when punishment prescribed for the offence is imprisonment and fine) upon the company so far as juristic persons are concerned and ignore the punishment of imprisonment as it is impossible to execute. It clarified that, the corporation can be convicted for any offence which is not subject to only custodial sentence. Such discretion cannot be exercised as the sentence would then be considered as illegal, being passed not in accordance with law.

The Standard Chartered Bank Case settled the position on the one of the issues associated with the 'sentence which could be imposed upon a corporation as well as how it can be enforced'. However, the other issue relating to CCL relating to imputation of mens rea upon the corporation was not discussed in the pertinent case. The Supreme Court discussed on the 'mens rea' part of the problem associated with CCL in the following case law.

In another case, *Iridium India Telecom Ltd. v Motorala Incorporated and Ors*[247], the Supreme Court laid down that, the corporations can be made liable even for those offences for which 'mens rea' is an essential pre-requisite. The apex court upheld 'alter-ego doctrine' by specifying that the criminal intent of the directing minds of the corporations shall be imputed upon the corporation for the purposes of CCL.

In *Sunil Bharti Mittal v. Central Bureau of Investigation*[248], the Supreme Court reiterated the decision passed in Iridium Case. The apex court upheld the 'alter ego doctrine' and laid down the that:

[247] AIR 2011 SC 20.
[248] AIR 2015 SC 923.

"*No doubt, a corporate entity is an artificial person which acts through its officers, directors, managing director, chairman etc. If such a company commits an offence involving mens rea, it would be normally the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is cardinal principle of criminal jurisprudence that there is no vicarious liability unless statute specifically provides so*".[249]

The Supreme Court clarified the rule on vicarious liability in criminal law and clarified that, in India the vicarious liability rule is not used for imputing criminal liability unless and until the same is imported to be used for CCL in accordance with the specific penal statute.

In *Aneeta Hada v. Godfather Travels & Tours (P) Ltd*.[250], the Supreme Court had laid down that, a company can be held criminally liable and if the persons controlling the business of the company possess criminal intent, that can be imputed to the body corporate.

Contemporary Law regarding Corporate Criminal Liability in US, UK and India

Indian Position

In India, the legal position on CCL is well settled by the jurisprudence laid down by the various judgments of the Supreme Court, as discussed in the preceding paragraphs. It may be reiterated that, India follows 'alter-ego doctrine' and according a corporation can be held liable for the offences with 'mens rea' as an essential ingredient as the mens rea of the directing minds of the company can be imputed upon the corporation. The Supreme Court has further clarified that the corporation guilty of CCL could still be liable for the offence even if the section which penalizes the wrongful act provides for the mandatory sentence of imprisonment or imprisonment and fine, by imposition of a sentence of fine upon such a corporation.

However, no prosecution can be initiated against the corporation for the offences which naturally are beyond the scope of the acts which a corporation can participate in and which can only be committed by natural person, for instance, sexual offences, bigamy, perjury, murder, treason. In addition, it cannot be convicted for offences which prescribe a mandatory corporal or capital punishment as the same cannot be executed against a corporation.

[249] *Ibid.*, 941.
[250] AIR 2012 SC 2795.

However, it must be brought into consideration that Indian legal regime does not provide for a straight-jacket formula for CCL vide a specific legislature and the same is dispersed in the variety of different legislatures which deals with CCL. In India, IPC which came into force in 1862 is the substantive law in India which provides for the acts which shall be considered as 'offences' and the punishment which shall be imposed on the commission of such offences.

The Code provides for the definition of 'person'[251] who shall be dealt under the criminal law of the country and whose conduct shall have to be in consonance with the provisions of the Code. The definition of 'person' is as follows-

"*The word 'person' includes any Company or Association or body of persons, whether incorporated or not*."

The pertinent definition points out that, apart from the natural persons, a corporation also comes under the ambit of criminal law of the country. It forms the basis of criminal liability of a corporation in India. The following paragraphs details out the statutory provisions which are being drafted by the Indian legislature to deal with the harmful and overreaching impact of the criminal conduct of the corporation and lay down the punishments for the same, as a deterrent measure.

Under the IPC, corporations can be held liable for Public nuisance (Section 268), Negligent act likely to spread infection of disease dangerous to life (Section 269), Malignant act likely to spread infection of disease dangerous to life (Section 270), Disobedience to the quarantine rule (Section 271), Adulteration of food or drink intended for sale (Section 272), Sale of noxious food or drink (Section 273), Adulteration of drugs (Section 274), Sale of adulterated drugs (Section 275), Sale of drug as a different drug or preparation (Section 276), Fouling water of public spring or reservoir (Section 277), Making atmosphere noxious to health (Section 278), Negligent conduct with respect to poisonous substance (Section 284), Negligent conduct with respect to fire or combustible matter (Section 285), Negligent conduct with respect to explosive substance (Section 286), Negligent conduct with respect to machinery (Section 287), Negligent conduct with respect to pulling down or repairing buildings (Section 288), Negligent conduct with respect to animal (Section 289), Punishment of public nuisance in cases not otherwise

[251] *Ibid.*, s 11.

provided for (Section 290), Continuance of nuisance after injunction to discontinue (Section 291), Sale etc. of obscene books etc. (Section 292), Sale etc. of obscene objects to young person (Section 293), Culpable Homicide (Section 299), Murder (Section 300), Cheating (Section 415), Defamation (Section 500), etc.

Criminal liability on corporation is imposed in instances of corruption, the act which regulates the same is *Prevention of Corruption Act 1988 ("PCA")*[252]**.** The Act has undergone with several amendments in the year 2018 to bring it at par with the changing paradigm on corruption related cases. Section 8(1)[253], third proviso of PCA provides that, if any person associated with commercial organization is a giver of any undue benefit then such commercial organization shall be made liable for fine. Further, if any person associated with the commercial organization is a giver of undue benefit to a public servant then, as per Section 10[254], a liability shall be imputed upon the director, manager, secretary, or other responsible officer subject to the proof of consent or connivance to such act. Such person shall be liable for both imprisonment and fine and the corporation shall be made liable for fine only.

Another legislation which deals with the menace of corruption by dealing with issues which arise out of a benami property is *Prohibition of Benami Property Transaction Act, 1988*.[255] Section 62 of the pertinent Act provides that if any act related to benami property is committed by a company then corporate criminal liability shall be imposed on the company. The liability is also imposed on every person-in-charge in control of the business[256] who can defend his case by stating that he has no knowledge of the violation of the Act.

Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994[257], Section 22 imposes liability on the advertising company, hospital and medical practitioner for committing the offence of publishing an advertisement for pre-natal sex determination. Additionally, CCL is also imposed on any clinic as well which makes use of such advertisement for sex-determination[258]. A restriction is imposed on manufacturers or

[252] Prevention of Corruption Act, 1988 (Act 49 of 1988).
[253] *Ibid.*, s 8(1).
[254] *Ibid.*, s 10.
[255] Prohibition of Benami Property Transaction Act, 1988 (Act 45 of 1988).
[256] *Ibid.*, s 62(3).
[257] Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (Act 57 of 1994).
[258] *Ibid.*, s 22.

dealers on supplying any ultra sound machines or scanners or any equipment which may be used for sex detection, unless the hospital or other institution is registered under the Act[259].

Another legislation which incorporates CCL is *Transplant of Human Organs Act 1994*.[260] The pertinent Act is being drafted in order to provide the appropriate means for tackling the menace of organ transplant. Section 19 imposes CCL on advertising company, hospital as well as a liability on any person advertising the supply of human organ.[261] A corporate criminal liability is imposed on the hospitals and the persons in-charge are also made criminally liable for illegal removal of the organ and unlawful organ transplant.[262]

Companies Act, 2013[263], Section 86 provides "*punishment for contravention- if a company contravenes any provision of the Companies Act, then the company shall be punishable with fine which may extend to 10 lakhs from 1 lakh and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 6 months.*"[264] However, the two polar objects of the law to regulate the conduct of corporations are- to impose sanctions as well as to maintain the ease of doing business. As a response to the same, the Parliament, vide the Companies (Amendment) Act, 2020[265], has decriminalised certain compoundable offences or classified many such offences as civil wrongs.

The other legislations which enunciate the provisions for CCL are -Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015[266], Section 56(1); Prevention of Money Laundering Act 2002[267], Section 70; Drugs and Cosmetics Act 1940[268], Section 34; Drugs and Magic Remedies (Objectionable Advertisements) Act 1954[269], Section 9; Essential Commodities Act 1955[270], Section 10; Protection of Civil Rights Act 1955[271], Section 14; Arms

[259] *Ibid.*, s 3-A.
[260] Transplant of Human Organs Act, 1994 (Act 42 of 1994).
[261] *Ibid.*, s 19.
[262] *Ibid.*, s 21.
[263] Companies Act, 2013 (Act 18 of 2013).
[264] *Ibid.*, s 86.
[265] Companies (Amendment) Act, 2020 (Act 29 of 2020).
[266] Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (Act 22 of 2015).
[267] Prevention of Money Laundering Act, 2002 (Act 15 of 2003).
[268] Drugs and Cosmetics Act, 1940 (Act 23 of 1940).
[269] Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 (Act 21 of 1954).
[270] Essential Commodities Act, 1955 (Act 10 of 1955).
[271] Protection of Civil Rights Act, 1955 (Act 22 of 1955).

Act 1959[272], Section 33; Indecent Representation of Women (Prohibition) Act 1986[273], Section 7; and Section 42 of Foreign Exchange Management Act 1999[274], etc.

The statutory provisions as enumerated in the above paragraphs provide for a shift in burden of proof from prosecution to prove the charge to the person who are being charged with the commission of the offence. The presumption of guilt is made in respect of persons who control the company and the burden lies on them to prove that the offence was committed without their knowledge or that he exercised the due diligence for preventing the commission of the offence.[275]

UK's Position

The CCL theory started to gain wide-spread approval across UK. However, the UK legal landscape witnessed that the law on CCL was inadequate in dealing with more serious crimes such a corporate manslaughter, which remained difficult to prosecute. The gap in law resulted in unsuccessful prosecutions in cases such as Attorney General Reference (no. 2 of 1999) (2000)[276], the company could not be made liable for the train crash which led to the death of seven persons and injuries to 151 persons, because of the difficulty in attributing liability to any person working for the company.

In light of such issues, the Parliament enacted Corporate Manslaughter and Corporate Homicide Act 2007,[277] which laid down an offence pertaining to Corporate Manslaughter whereby criminal liability could be imputed on any company due to whose breach of duty of care, any person dies. The criminal liability of the company for death caused culminated out of the two sets of development – Piper Alpha Oil Rig Explosion[278] (1988) leading to the death of 167 people, and King's cross fire (1987) in which 31 people died as a result of failure on part of the individuals and groups within the overall corporate structure to discharge their respective responsibilities.

[272] Arms Act, 1959 (Act 54 of 1959).
[273] Indecent Representation of Women (Prohibition) Act, 1986 (Act 60 of 1986).
[274] Foreign Exchange Management Act, 1999 (Act 42 of 1999).
[275] *Uttar Pradesh Pollution Control Board v Modi Distillery*, AIR 1988 SC 1128.
[276] *Attorney General Reference (no. 2 of 1999)* (2000) 3 All ER 182.
[277] Corporate Manslaughter and Corporate Homicide Act, 2007 cl. 19.
[278] Department of Energy, The Public Inquiry into the Piper Alpha Disaster-The Cullen Report, 1990.

The Corporate Manslaughter and Corporate Homicide Act, 2007 was a landmark legislation which introduced, for the first time, liability of corporate manslaughter for the corporations who indulged in a breach of their duty of care resulting in causing death of another person. Section 1(4)(b) of the Corporate Manslaughter & Corporate Homicide Act 2007 provides that- "*a breach of a duty of care by an organization is a gross breach if the alleged conduct amounts to a breach of that duty that falls far below what can reasonably be expected of the organization in the circumstances".*[279] The Act imposes the following penalties- Penalties will include unlimited fines[280],remedial orders and publicity orders.

Another piece of legislation in UK focussing on the management systems and controls of a corporate entity is Bribery Act, 2010[281]. The pertinent Act criminalises the conduct on the part of a corporation for its failure to prevent an act of bribery. The corporate entity can defend the liability by stating that it had adequate procedural mechanisms in place to effectively prevent such an act of bribery.

In response to the obstacles which arise in prosecuting a company because of high threshold needed under the identification doctrine, the Deferred Prosecution Agreements were created under the Crime and Courts Act 2013.[282] They are the instruments by which corporates who are being prosecuted for offences can avoid prosecution. The corporation enters into an agreement with prosecution under the supervision of a Judge to abide by the requirements put forth by the prosecution in return for dropping of the case which was filed against such corporation.

The other legislation which relates to imposing criminal liability on the corporation for its failure to prevent tax evasion, as enacted was Criminal Finances Act 2017[283].

US's Position

In the US, the Supreme Court accepted the proposition of holding a corporation criminally liable in 1909[284] vide a judgment in *N. Y Central & Hudson River R.R. Co. v. United States*.

[279] Corporate Manslaughter and Corporate Homicide Act, 2007 (n 100) s 1(4)(b).
[280] *Ibid.*, s 1(6).
[281] Bribery Act, 2010 c. 23.
[282] Ministry of Justice, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations, May 2012.
[283] Criminal Finances Act, 2017 cl. 22.
[284] *New York Central & Hudson River Railroad v. United States* (n 53).

The legal scenario pertaining to CCL has witnessed a gradual development both by way of jurisprudential interpretations as well as the statutory law as a tool to regulate corporation's criminal conduct.

The CCL in US comprises of the following pre-requisites- (a) the offence committed by the corporation's employees, officer or agents; (b) which act is within the scope of their employment; (c) committed to ensure some benefit to the corporation.[285] The U.S federal law follow 'respondent superior doctrine' which makes the corporations vicariously criminally liable for offence committed by its employees.[286]

The Model Penal Code, on the other hand, has been brought forth for providing for CCL for misconduct on the part of corporation's senior management officials.[287] The decision as to whether to prosecute the corporations, or its employees, or both for the criminal acts, lies with the Department of Justice. Once the decision is made by the prosecutor to go ahead with the prosecution, the various alternatives to trial which are at the disposal are – corporation's right to plead guilty of the alleged offence[288], deferred prosecution agreements, non-prosecution agreements, or forgoing criminal prosecution and agreeing on civil sanctions.

The deferred prosecution agreements and the non-prosecution agreements contain the provisions requiring the corporates to cooperate with the ongoing investigations and to initiate the steps for implementing the compliance programs, hence these agreements serve one of the most important purposes of criminal law i.e. *deterrence*.[289]

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[285] Charles Doyle, 'Corporation Criminal Liability: An Overview of Federal Law' 1 *Congressional Research Service* 3 (2013).
[286] Clifford Chance, *'Corporate Criminal Liability'* 2016 *available at* <https://www.cliffordchance.com/briefings/2016/04/corporate_criminalliability.html#:~:text=This%20survey%20of%20corporate%20criminal,boards'%20and%20prosecutors'%20agendas> (last visited on 21 September 2022.)
[287] Model Penal Code, 1985 s 2.07.
[288] *Ibid.*
[289] Bruce Coleman, '*Is Corporate Criminal Liability Really Necessary'* 29 SMU L. Rev. 908, 925 (1975) .

Suggestions for Indian Legal Regime on Corporate Criminal Liability

The concept of CCL finds its place in the Indian legal landscape under various statutes and has been the subject of judicial interpretation in numerous cases. Although, as a fine can be imposed upon a corporation upon it being held criminally liable[290], but the question arises as to whether the same shall serve the ultimate goal of criminal law i.e. deterrence. The analysis of the jurisprudence of UK and US on CCL indicates towards a slightly advanced approach in the direction of deterrence of criminal conduct on part of the corporation, in the form of specific legislations being enacted against corporate manslaughter, preventing bribery, tax evasion, vide the instruments such as DPAs and NPAs.

The Indian legislations do provide for holding the directors liable, who are the directing minds of the corporations, for the offences committed by them on behalf of the corporations. However, the legislations should also devise means to ensure that the consequence of the imposition of CCL also affects the corporation on a more direct level. The Australian model on CCL do provide for the direct criminal liability of the corporations for their acts and omission, after perusing the culture, practices, management, policies or other characteristics of the corporations which encourages the commission of the offence.

One of the ways in which a corporation can be directly punished is, "*Stigma*". In the public minds, the offence must be linked with the corporation's name. Thus, it is quintessential to have a procedure in place, for instance, a judgment of condemnation, which is prescribed in case of anti-social or economic offences. The same being similar to public censure as proposed for the natural persons. Further, *'illegal profits' earned by the corporation must be attached* and it must not be allowed to retain the fruits of its own illegal conduct.

The '*corporate disintegration*' can also be a punishment which may be ordered by the Court in cases of CCL with the bar on reincorporation, the same being equivalent to capital punishment and can be ordered in severe cases of CCL. A corporation may be 'disqualified' or 'debarred' from dealing in certain activities in respect to which they were being charged for CCL.

[290] *Standard Chartered Bank and Ors. v Directorate of Enforcement* (n 68).

The need is felt for exploring other corporate sanctions based on the various theories of criminal punishment[291] such as deterrence, retribution, reformation and prevention theories of criminal punishment and bring into effect a '*corporate sentencing policy*' in India. The policy must detail out the means to comply with the law vide corporation's internal mechanism.

A remedial provision in the form of '*probation*' could also be introduced in the punishment of the corporation for CCL. Accordingly, as a part of sentence the corporate may agree to comply with certain requirements and to be subject to a period of supervision. The aim of such a provision being the corporation to remedy the harm caused by the offence, or rehabilitative, i.e. to take measures to bring about an organizational change.

The Law Commission of India vide its 42nd Report[292], suggested for expanding the scope of punishments which are prescribed under IPC, to include among others, the following as relevant for the discussion on CCL- imposition of a duty to make amends to the victim by repairing the damage done by the offence, publication of the name of the offender and details of the offence and sentence, and confiscation.

In order to bring the punishment of fine for CCL in consonance with the IPC, the Law Commission of India suggested, in its 47th Report[293] that-

The following provision must be inserted in the IPC:

"*Section 62-*

(1) In every case in which the offence is punishable with imprisonment only or with imprisonment and fine, and the offender is a corporation, it shall be competent for the court to sentence it with fine only.

(2) In every case in which the offence is punishable with imprisonment and any other punishment not being fine, and the offender is a corporation, it shall be competent for the court to sentence it with fine only.

[291] Brent Fisse and Brent, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' 56 *Southern California Law Review* 1141(1983).
[292] Law Commission of India, *Report on Indian Penal Code* (Law Com No 42, 1971).
[293] Law Commission of India, *Report on The Trial and Punishment of Social and Economic Offences* (Law Com No 47, 1972).

(3) *In this section, 'corporation' means an incorporated company or other body corporate, and includes a firm and other association of individuals*."

Conclusion

The concept of corporate criminal liability has gained worldwide acceptance in light of the emerging need to effectively regulate and control the economic activities of the corporation. The deviant conduct on part of the corporation has been given the status of crime, in order to place a strong system of deterrence. The concept is at the stage of development in different States where such development is not uniform among the States but is in the process of fructifying at varied pace. The United Kingdom has given a recognition, both statutory as well as judicial, to CCL. It follows the principle of vicarious criminal liability while upholding CCL.

In contrast, US has adopted identification doctrine for CCL. The Indian legal position vis a vis CCL is on the footprints of the US system and also follows the identification doctrine. However, with the increasing globalization and industrialization, the corporate structure is gradually becoming more diverse and decentralized, thus imposing CCL on the directors, employees or agents has become difficult, for the prosecution fails to identity a single individual who is directing mind of the corporation and fix upon him the CCL for the offence. In order to supply the gaps in the application of identification doctrine in India, the corporate veil must be lifted and corporations must be made directly liability.

The research work suggests various punishments which can be imposed in case of CCL in India. Further, since corporate organizations contribute immensely to the growth of the economy and development of the nation, too strict a law is likely to impede its smooth functioning and have a deleterious impact on the economic position if India. Thus, a balance should be achieved and criminal liability should be imposed against corporate body in such manner that corporate activities are effectively and properly regulated and at the same time corporate legitimate activities are not affected.

Winter 2022: Vol. 3: Issue 2
ISSN: 2583-5653

AFFIRMATIVE ACTION V. MERITOCRACY: A CONCEPTUAL ANALYSIS

By Vikram Lathwal[294]

ABSTRACT

Affirmative action is a policy that aims to increase the representation of underrepresented groups in various fields such as education and employment. The debate between merit-based and quota-based systems has been ongoing for decades, with proponents of merit-based systems arguing that it is fair and merit-based, while proponents of quota-based systems argue that it is necessary to increase representation and promote diversity. The paper conducts a conceptual analysis of the existing literature on affirmative action and its impact on diversity and inclusion.

The research design includes a literature review and data analysis of existing studies on affirmative action. The findings suggest that both merit-based and quota-based affirmative action have the potential to promote diversity and inclusion, but have their own advantages and disadvantages. Merit-based systems focus on individual merit and are seen as fair, while quota-based systems focus on increasing representation and can result in more diversity. However, quota-based systems may face resistance and backlash. The study highlights the importance of understanding the effectiveness of different affirmative action policies in promoting diversity and inclusion.

KEYWORDS: Affirmative action, Meritocracy, Quota-based System, Diversity, Inclusion, Representation

INTRODUCTION

The topic of affirmative action has been a contentious issue for decades, with an ongoing debate about the most effective ways to increase representation and promote diversity in various fields such as education, employment, and government. One of the key debates within the affirmative action discourse centers on the choice between merit-based and quota-based systems.

On one hand, merit-based systems focus on individual merit and are seen as fair and unbiased, as they do not give preference to certain groups based on their race, gender, or other

[294] Faculty of Law, SGT University

characteristics. This approach is based on the belief that the best candidates for a particular job or school should be selected based on their qualifications, regardless of their background. However, merit-based systems have been criticized for not fully addressing the systemic inequalities that exist in society, which can make it difficult for certain groups to succeed and be considered based on merit alone.

On the other hand, quota-based systems focus on increasing representation and can result in more diversity within a given field. This approach is based on the belief that underrepresented groups have historically been excluded from certain opportunities and that targeted efforts are needed to correct this imbalance. This approach can increase the representation of underrepresented groups, but it may also face resistance and backlash, as it may be perceived as reverse discrimination.

This research paper aims to give a perspective on merit-based and quota-based affirmative action in promoting diversity and inclusion. Through a conceptual analysis of existing literature on affirmative action and its impact on diversity and inclusion, the paper will analyze the arguments put forth by both the sides and will use them to analyze the effectiveness of merit-based and quota-based affirmative action. The research design includes a comprehensive literature review of existing studies on affirmative action. By analyzing literature from various fields such as education, employment, and government, the paper will provide a comprehensive understanding of the effectiveness and perspectives of both systems.

The purpose of this paper is to contribute to the ongoing debate by providing an in-depth examination of the effectiveness of merit-based and quota-based affirmative action in promoting diversity and inclusion. The paper will provide insights into the advantages and disadvantages of both systems and will help to understand the best ways to design and implement affirmative action policies in various fields. This research paper will add to the existing literature by providing a fresh perspective on the subject and addressing gaps in the literature.

AFFIRMATIVE ACTION: A COMPENSATORY DISCRIMINATION AND A TOOL OF SOCIAL JUSTICE

The basic premise of affirmative action is that it aims to provide a level playing field for historically marginalized groups by compensating for the effects of past discrimination. This policy is meant to counteract the lingering effects of racism, sexism, and other forms of discrimination, which have made it difficult for certain groups to access education, employment, and other opportunities. By giving these groups a boost, affirmative action aims to create greater diversity and inclusiveness, and to break down the barriers that have historically excluded certain groups from equal opportunities[295].

The proponents of affirmative action argue that it is a necessary measure to counteract the lingering effects of past discrimination. They point out that without affirmative action, many historically marginalized groups would continue to face significant barriers to education and employment, and that these barriers would perpetuate the cycle of inequality. By providing a boost to these groups, affirmative action aims to help level the playing field, making it possible for all individuals to have an equal shot at success.

The main aim of Affirmative Action is social justice[296] and social justice is not exhaustive. It comprises distributive justice, protective justice, and corrective justice. In other words, social justice is centred on ideas of fair distribution and it works as a balancing wheel between the haves and haves not's. As per Dr. BR Ambedkar, Social justice has two main components equal opportunity and equality in general[297]. And many times, to correct the existing imbalances of society, giving preferential treatment to the weaker sections of society becomes a necessity.

It demands a favoured treatment for the backward and neglected section to correct the prevalent inequalities. In addition to it, the equality which is sought to be promoted through social justice is also based on two fundamental propositions viz. that individuals are not exactly like in their physical and natural characteristics, and major inequalities in society are products of social arrangements. Hence, it requires affirmative action from a state to correct these inequalities caused by social arrangements.

[295]V A Pai Panandiker, *The Politics of Backwardness: Reservation Policy in India* (Konark Publishers Pvt. Ltd., 1997).
[296]Anshuman Gupta "The Concept of Social Justice and the Poor", *Legal Service India*, 2006, *available at* https://www.legalserviceindia.com/articles/sojt.htm (last visited on Sept. 03, 2023) - "Social Justice is a revolutionary concept which provides meaning and significance to life and makes the rule of law dynamic."
[297]Santosh V Kumar, *Social justice and the politics of reservation in India* (Mittal publication, 2008)

But at the same time, there is a need for efficiency in public sector jobs. There are always arguments, that decreased inefficiency induced by reservations in the public sector has two major repercussions on the rest of the economy. First, the public sector provides the essential infrastructure for the economy at large; its deterioration, therefore, has a multiplier effect on the performance of the whole economy. Second, an inefficient public sector has to be subsidized; it is a drain on the general revenue which reduces the surplus available for investment and development.

Moreover, reservations have consequences for the relative sizes of the public and private sectors. Since affirmative Action apply to the public sector alone, they inevitably generate demands for its relative expansion. The area of subsidized inefficiency widens. Government becomes a growing incubus on the economy, whose only function is to provide even more sinecures for the politically important. Social justice is one of the essential aspects of the concept of justice[298] and it mainly concerned with an equal treatment among the equals.

The other major aim of social justice is an equal distribution of the benefits and burdens throughout society[299]. It is warranted because this results from the major social institutions, property systems, public organizations, etc. However, social justice is not always about the individual versus society because many who are supporters of individualistic approach also contends that this furthers the overall well-being of society.

In this context, formal equality and proportional equality[300] are two criteria that might be used to define equality. Formal equality entails that everyone is treated equally by the law and that no one is given a break just because they are a member of a socially disadvantaged group. Within the framework of the liberal democratic polity, the notion of proportional equality calls for the state to take some positive actions in support of underprivileged groups in society.

In every democratic constitution, "some basic liberties are guaranteed and individual initiative is encouraged. The state has got the role of ensuring that no class prospers at the cost of other

[298]John Rawls, *A theory of justice* (Belknap Press,1999). - "Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."
[299]Om Prakash Sharma, *Scheduled castes, Population, and Literates* (Kar Kripa Publishers, 1990).
[300]Stefan Gosepath, "Equality", *Stanford Encyclopedia of Philosophy,* Apr 26, 2021. *Available at:* https://plato.stanford.edu/entries/equality/#ProEqu (last visited on Aug 1, 2022)

classes and no person suffers because of drawbacks that are not his but social."[301] In the case of India, its constitution enjoins the state to make special provisions[302] of affirmative action in public employment and public institution in favour of SC, ST, and Backward classes of citizens. These are the people not adequately represented in the services of the state[303] and it is also to protect those who are not able to protect themselves because of their physical inabilities or more chances of exploitation by dominating class of society[304].

There is a duty upon the state to protect the weaker section of society and this duty finds basis and objectives in the constitution while achieving social justice. The rule of welfare is the material welfare of the society and the greatest welfare of the largest numbers. Many democratic countries where the concept of affirmative action is prevailing are those countries that have embraced quality as a cardinal value against the background of value.

The persons who are the beneficiaries of affirmative actions are those who were the victims of community wrongs i.e. isolation and deprivation without any remedy. In the case of India, these wrongs were the result of the "doctrine of caste autonomy"[305]. The whole community of disadvantaged persons was suffering from these wrongs without any remedy neither legally nor socially.

In US[306] and India, even the courts were supporting these wrongs and refused to provide any remedy, while citing the endorsements of some customs behind these wrongs and the judiciary was reluctant to oppose these customs[307]. But the rules of affirmative action convert the above-mentioned wrongs without remedies into the wrongs with a legal remedy and make those wrongs an actionable injury. This new tool of legal remedy of community wrong adds a new dimension to social justice jurisprudence.

The concept of Affirmative Action and giving special status to disadvantaged classes is attributed to Dr. BR. Ambedkar in our country. He had a crucial role in formulating the constitution. The principle behind his arguments for affirmative actions was "if all the

[301] *M Nagaraj and others V Union of India and others*, AIR 2007 SC 71
[302] The Constitution of India, art. 15(3), (4), (5).
[303] *Id., art.* 16(4).
[304] *Id., art.* 16(3).
[305] On "caste autonomy" see L. T. Kikani, *Caste in Courts* (Ganatra Printing Works, 1912).
[306] Jim Crow laws, separate but equal doctrine etc.
[307] K.S. Padhy and Jayashree Mahapatra, *Reservation Policy in India* (Ashish Publishing House,1988),

oppressed communities are to be brought up to the level of equality then the only remedy is to adopt the principle of equality and to give favored treatment to those who are below the level."[308]

The concept of equality and inequality is built on the tenets that no two persons can be equal and that opportunity equality might mitigate the disadvantages that many people experience as a result of their social status[309]. According to Andre Beteile, "the distinction between natural equality and social inequality is inherently ambiguous"[310]. In words of Pandit Jawahar Lal Nehru "… while equality does not and cannot mean that everybody physically or intellectually or spiritually equal or can be made so, but it does mean equal opportunity for all. And no political, economic or social barrier in the way of development of an individual or group should come.

Not only equal opportunities must be given to all, but a special opportunity for educational, economic, and cultural growth should be given to backward groups to enable them to catch up with those who are ahead of them."[311] The nation is a larger concept of a household; if one member of the family is unhappy or not in great health, it has an impact on the health of the whole family[312]. Social and economic justice cannot be achieved in the nation unless the underprivileged class has access to good education, diverse housing options, and prosperous means of subsistence[313].

MERIT AS THE MAIN OPPONENT OF THE AFFIRMATIVE ACTION SYSTEM

Merit is often cited as one of the main opponents of affirmative action, as it seems to contradict the very principles of the policy. Affirmative action is designed to provide equal opportunities and level the playing field for marginalized and underrepresented groups, while merit-based systems reward individuals based on their abilities, qualifications, and experience.

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[308] C. Rupa, *Reservation policy- Mandal commission and after* 20 (Sterling publishers Pvt. Ltd., Delhi, 1995).
[309]Ashok Kumar Meena, *Right to Equality and Protective Discrimination* (2018) (Unpublished Ph.D. thesis, University of Kota)
[310]Andre Beteile, *The idea of natural equality and other essays* 18 (Oxford press, Delhi, 1983).
[311]Jawaharlal Nehru, *The discovery of India* (Meridian Books, 1946).
[312]"Reservation for Dalits in Private Sector", *available at:* http://www.truthaboutdalits.com/Udit_articles/Reservation%20For%20Dalits%20In%20Private%20Sector.htm (last visited on Sept. 03, 2023)
[313] Rochana Bajpai, *Debating Difference-group rights and liberal democracy in India* (Oxford publications, 2011)

The concept of merit is often associated with meritocracy, a system in which individuals are selected and promoted based on their merit, rather than their race, gender, or ethnicity. Merit is considered to be the most fair and objective way of selecting individuals for opportunities, as it is based on individual abilities, rather than other factors.

The idea of meritocracy holds that the distribution of material rewards in society depends on merit that is thought to be premised on traits such as intellect, hard work, and aspiration rather than belonging to predetermined social groups, regardless of their normative criteria, such as class, sex, race, or ethnicity. According to the meritocratic theory, social success, not social categorization, determines one's class rank in society.

The persons who emphasize the meritocratic system of opportunities in various public institutions argue that it will encourage the employer to select the most suitable and most eligible person for a job. They said that merit brings efficiency. It seems that according to them efficiency can be achieved only through the meritocratic system of selection. In its broadest sense "meritocracy," describe a social order in which individuals are ranked according to some individual worth or merit[314]. In broader sense merit can be defined in a retrospective and a Prospective definition.

Retrospective model of meritocracy[315]:- It defines merit in terms of past achievements, this mode of employment system considers the past achievement of a candidate as a criterion for merit. And the most distinguished candidate who has the highest achievement has a right over that job. In this model, merit is determined based on an individual's education, work experience, and previous achievements. This approach emphasizes a person's track record and assumes that past performance is the best indicator of future success.

The retrospective model can be seen as a traditional approach to merit-based selection and is often used in industries such as finance and law, where prior experience and credentials are highly valued. So the supporters of this model of merit always argue that affirmative action will automatically exterminate the achievements of that meritorious person, and will throw him out of the race despite being termed as the most suitable candidate for the job.

[314] Norman Daniels, "Merit and Meritocracy", 7 Philosophy & Public Affairs 206 (1978).
[315] This model was discussed by U.S supreme court in Wards Cove Packing v. Antonio, 490 U.S. 642 (1989)

However, the retrospective model has been criticized for perpetuating the advantages of privilege and for failing to take into account the barriers that marginalized and underrepresented groups may face in building their track record. Additionally, the retrospective model may overlook individuals with untapped potential who have not yet had the opportunity to demonstrate their abilities.

Prospective model of meritocracy[316]:-According to this optimistic theory, the ideal candidate for a job is the one who would utilize it in the most effective way, boosting society's general production in the process. Given this situation, the employment in consideration should be awarded based on projections of who would do that task the most effectively. This model of meritocracy focuses on an individual's potential and considers factors such as talent, ambition, and motivation. This approach is often used in creative fields, such as the arts and technology, where merit is seen as less dependent on past accomplishments and more closely tied to a person's innate abilities and drive.

Although, this perspective approach is not a convenient mode when we try to rationalize how past accomplishments can relate to the efficiency of a person, where his past achievement may not contribute to his future designation, due to the dynamic nature of the work he is going to do. And the prediction is always subjective it depends upon the subjectivity of the predictor whom he thinks is a fit candidate for the job[317].

The other most important thing is, a predictor can have certain deficiencies namely, (1) inaccurately measuring ability and (2) measuring ability that is insufficiently related to job performance (3) disregarding social context[318]. So proposing a candidate based on a prediction of a person who can have the above-mentioned deficiencies will not be a good criterion for the selection of the candidate for a job.

We should not forget that history is full of an example where men and women gave an exceptional performances in their field without having any degree, diploma, or any past achievement they prove themselves the best in their field without having any past

[316]This model was described by U.S court in Griggs v. Duke Power Co., 401 U.S. 424, 427–28 (1971).
[317]R.G. Misra and Gurvinder Kaur, *Reservation policy and personnel selection* (Uppal publication house, 1990).
[318]Nicole J. DeSario, "Conceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law" 38 *Harvard Civil Rights-Civil Liberties Law Review* 487 (2003).

accomplishment. Merit is a useful servant but not the necessary one. Merit is an empty vessel to be infused with meaning by the employer.

Supporters of Meritocracy argue that the policy of affirmative action undermines merit-based systems, as it prioritizes certain groups over others. They argue that affirmative action allows individuals who are not fully qualified for a job or education program to receive opportunities over more qualified candidates, simply because of their race, gender, or ethnicity.

Moreover, affirmative action policy perpetuates negative stereotypes and reinforces the idea that certain groups are not capable of achieving success on their own. This creates a self-fulfilling prophecy, in which individuals who receive opportunities through affirmative action are seen as not fully qualified, and are therefore less likely to succeed.

The emergence of powerful casteist lobbies has exerted tremendous pressure on political parties and government by either depriving them of reservation or meting out preferential treatment to other communities. This policy has also been utilized as a powerful weapon in making and unmaking governments. One of the most frequent arguments which is been put forth by the anti-reservationists is the merit and efficiency of the candidates, against those who are getting admission in public institutions while neglecting those candidates who got more marks than the candidates belonging to a reserved category.

It is widely alleged that Affirmative actions, encourage the selection of candidates with mediocre talents often at the expense of those with brilliant academic performance. Anti-reservationists said that the sacrifices that this policy exacts are so severe that it often discouraged candidates with excellent academic records from seeking recruitment for government jobs.

Merit-based hiring is intended to attract the greatest people and use it for the benefit of the nation. To prevent nepotism, corruption, and favouritism in the hiring process, merit is set as a requirement for recruitment into government employment. Many people think that including a reservation policy will undermine the goal of merit-based hiring by introducing a different set of regulations.

In India, caste is a factor in hiring decisions in addition to merit. A decline in standards and quality will have a significant impact on professions that are crucial to the nation's prosperity

and welfare, such as teaching, engineering, and medicine. Respect and confidence in the capacity of these professions would cease to exist in the minds of the public. Bureaucracy, the steel frame of the Indian administration will fail to attract the best talents and it would be put in an unenviable position by failing to implement policies.

The horrendous consequence of this would be stagnation in the social and development spheres. It seems that the political leaders themselves were aware of this impact that they exclude certain higher echelons in the government service from reservations. Exemption form reservation in recruitment to certain select posts is puzzling.

It is baffling that while efficiency is a prime concern for recruitment to posts like the higher posts in Atomic Energy Commissions, defense establishments, how can that not be so in the case of posts in administration in whom is vested with the responsibility of implementing policies affecting the entire country should have personnel with brilliant talents. The teaching profession is responsible for the standard and quality of the next generation. By compromising merit and efficiency in recruitment to these posts, an entire generation gets ruined and hence is ludicrous and dangerous to the welfare and development of the nation.

MERITOCRACY A SUBJECTIVE AND CULTURALLY CONSTRUCTED CONCEPT

Meritocracy can be seen as a subjective and culturally constructed concept. Merit is often defined as an individual's abilities, skills, and qualifications, but these qualities can be influenced by cultural and societal biases and stereotypes. For example, certain qualities, such as assertiveness, may be seen as more valuable in Western cultures and thus more highly rewarded, while more collaborative and communicative approaches may be more valued in other cultures. Additionally, the criteria used to measure merit, such as standardized tests and grades, can be biased towards certain groups and may not accurately reflect an individual's true abilities.

Furthermore, the cultural context in which meritocracy is implemented can also impact the outcomes. For example, in a society where systemic barriers, such as discrimination and unequal access to resources, exist, merit-based systems may perpetuate these inequalities rather than mitigate them. As a result, meritocracy can be seen as a culturally constructed and

subjective concept, shaped by the social, economic, and political contexts in which it is implemented.

Supporters of affirmative action argue that the concept of merit is itself subjective and culturally constructed. They argue that the notion of merit is influenced by a variety of factors, including implicit biases, systemic barriers, and a lack of diversity in the selection process. For example, implicit biases can play a significant role in determining who is seen as "meritorious." These biases can be shaped by cultural and social factors, such as race, gender, and ethnicity, and can influence the way that individuals are perceived and evaluated.

Merit varies from job to job and profession to profession. A common criterion for determining merit cannot be laid down. For instance, in professions like medicine, engineering, teaching, and law, merit in these respective fields is inextricably linked to academic excellence. Whereas in a purely bureaucratic or a government job, like clerk academic merit need not be so greatly emphasized.

Indian bureaucracy has come under severe criticism since its incumbents are too academic and intellectual in orientation and hence lack professionalism. They have often been accused of dilly-dallying, diluting, and subverting government policies and thereby depriving the benefits of reaching its targets. “The bureaucracy had become notorious for its skills in annotating, diluting and even sabotaging the policies handed down to it for implementation”

Furthermore, systemic barriers can also play a role in determining who is seen as "meritorious." For example, historically marginalized and underrepresented groups may face more challenges in obtaining the necessary qualifications and experience, due to factors such as poverty, lack of access to quality education, and discrimination.

In addition, the lack of diversity in the selection process can also impact the perception of merit. Individuals who come from a similar background as those who are making the selection decisions are more likely to be seen as “meritorious." This can result in a narrow definition of merit, which excludes individuals from diverse backgrounds.

If there were no reservations, the second-class and third-class holders among the SC/ST recruits would have been replaced by the upper caste candidates with similar qualifications and achievements. The academic profile of those from upper castes eliminated by reservations is

found to be lower than others who were successful despite reservations. "The caste in entrants with third class degrees is attributed in part to the intake of Scheduled Castes and Tribes under reservations. But the studies have shown that only a minority of the third-class degree holders selected were Scheduled Caste and Tribes."

Therefore, supporters of affirmative action argue that merit should not be the only factor considered when selecting individuals for opportunities. Instead, they advocate for a more comprehensive approach, which takes into account a range of factors, including merit, but also considers the effects of systemic barriers and implicit biases.

The whole rhetoric of 'merit' needs to be subjected to systematic and rational scrutiny. We need not point out that the use of merit as a criterion of exclusion has a long and dishonourable history. Our colonial rulers, for example, were convinced that no Indian had enough merit to occupy an administrative or judicial position. No Indian judge, they argued, could be upright and incorruptible and enough to try a white person. Indeed, to this day the first world strongly believes that the third world is incapable of governing itself. It is curious and shocking that a very similar argument is being put forward by anti-reservationists. What is today being purveyed, as merit, is a narrowly conceived and often irrelevant set of qualities.

There is ample empirical evidence to indicate that these qualities are directly linked to the whole structure of privilege that perpetuates inequalities in our society. What exactly is the merit possessed by persons who have scored high marks in the examination? Does that person necessarily have the qualities that will make a good engineer or a good teacher? Or what use to society at large is a doctor who is only good for taking up employment in a five-star diagnostic centre or a computerized clinic, here or in the US? What is the use of an engineer who becomes an architect solely for the upper classes, or only knows how to work in an advanced western country? Why should the poor forgo their opportunity for education and employment to promote and preserve the rights of such paragons of merit?

It seems to us that merit today has been reduced to a measure of the capacity for individual advancement. The merit that is delinked from the masses does not remain merit at all. How many persons now described as meritorious possess skills or characteristics, which are of use to the broad masses of people in this society?

In the casteist rhetoric of the anti-reservationists, it is frequently alleged that we cannot trust an engineer who graduates on the reservation to build a safe bridge or a building. But it can be wagered that if we make a list of engineers who have built unsafe structures, it will turn out that most of them did not get their jobs through reservation and that what they lacked was not merit but morality.

Academic ability and administrative effectiveness are not always related. The relationship between academic achievement and administrative aptitude is unclear. It is also unclear how poor academic performance relates to the effectiveness and efficiency of government service. It would seem suitable to approach claims about the impact of reservations with some skepticism in light of the multiple factors that contribute to administrative ineffectiveness if only to prevent the pervasive tendency to blame the existence of scheduled castes for any inefficiency in governmental operations[319].

The possession of certain abilities or lack of it is said to be beyond the control of the individual and he cannot be held responsible for it. They are conditioned by IQ, home environment, socioeconomic status or class of parents, quality of school education, etc. hence it is asserted that there is no equality of opportunity and never can be unless equalitarian are prepared to control early upbringing, and size of families and breeding.

Without taking such steps there will always be the ineradicable difference between people which will affect how any system works in practice. Were there not such differences the principles of equality would have little point. John Rawls holds that "meritocracy is unfair because under meritocracy arrangements, equality of opportunity, signifies an equal chance for the more fortunate to leave the less fortunate behind. To be less fortunate…..is a matter of contingency. Disadvantages, defects, inequalities due to birth and endowment are undeserved and call for redress"

CONCLUSION

Merit and affirmative action are often seen as opposing forces, as merit-based systems prioritize individual abilities and qualifications, while affirmative action prioritizes equal opportunities

[319] Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (Oxford Publishers, India, 1992)

for marginalized and underrepresented groups. However, the concept of merit is not always objective, as it is influenced by implicit biases, systemic barriers, and a lack of diversity in the selection process. Therefore, supporters of affirmative action argue that a more comprehensive approach is necessary, which takes into account a range of factors, including merit, in order to ensure equal opportunities for all.

The debate between affirmative action and meritocracy remains a contentious and complex issue, with both sides presenting compelling arguments. On one hand, merit-based systems are seen as the most fair and objective way of selecting individuals for opportunities, as they are based on individual abilities and qualifications. On the other hand, affirmative action is designed to address systemic barriers and provide equal opportunities for marginalized and underrepresented groups.

While the concept of merit is often seen as objective, research has shown that it can be influenced by implicit biases, systemic barriers, and a lack of diversity in the selection process. In light of these findings, supporters of affirmative action argue that a more comprehensive approach is necessary, which takes into account a range of factors, including merit, in order to ensure equal opportunities for all.

In conclusion, this research paper has provided a conceptual analysis of the debate between affirmative action and meritocracy. While the issue remains complex and controversial, it is clear that both systems have important implications for promoting fairness and equal opportunities. Moving forward, it will be important to continue exploring ways to balance the principles of merit and affirmative action, in order to create a more inclusive and equitable society.