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"Law and order exist for the purpose of establishing justice and when they fail in this purpose, they become the dangerously structured dams that block the flow of social progress."

~ Martin Luther King

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The Journal of Legal Methodology, Policy and Governance is a quarterly, double bind peer-reviewed Journal which aims to provide the students, Researchers, Members of the academia and other eminent persons with an opportunity to explore the arena of legal research and writing, and seeks to instill in them, the ability to critique. The Journal aims to render top quality publications on topics related to law.

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V O L U M E 2 I S S U E 1

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CONCEPT NOTE: -

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Warm Regards
Mayank Khari
(Editor-in-Chief)

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MEDIATION AND NEGOTIATION IN RESOLVING EMPLOYMENT DISPUTES

ALPA SHARMA[1] AND AADEESH SHARMA[2]

ABSTRACT

Nowadays, the increasing disputes between the employer and the employee are responsible for the irreparable damage to the employers, thus, sabotaging the reputation of employer. One of the methods of Alternate Dispute Resolution is Mediation and Negotiation. These methods should be adopted to deliver speedy trial at reasonable costs. Most of the employment contracts have a clause, that in case of a dispute, parties will refer it to Alternate Dispute Resolution. The paper deals with the ways the conflict can be resolved between the parties through Mediation and Negotiation, and the interpretation of cases by courts, related to employment disputes.

Keywords: *Alternate Dispute Resolution, Employment Disputes, Amicable Resolution, Employment Mediation Techniques, Mediation and Negotiation*

I. INTRODUCTION

Mediation and Negotiation are forms of Alternate Dispute Resolution. Because the courts are already burdened with cases, hence alternate dispute resolution mechanisms have come into picture. Mostly, ADR is used in conflicts, which are personal in nature. In this paper, we talk about Mediation and Negotiation in Employment Disputes. There is nothing wrong in having a Dispute, but what matters is that how the parties handle that dispute. There could be two modes of addressing a dispute: Adversarial like litigation, arbitration and Non- Adversarial like mediation, conciliation. Adversarial mode is a formal mode of resolving the Dispute whereas; the Non-Adversarial Mode is an informal or friendly way to resolve the Dispute. When we talk about the employment disputes, a common issue that will lead to litigation is, when an organization fires an employee for performance related reasons. In this situation, the person is not given any reasons for the termination, but the employer just says that the employee is unable to perform or do his job. Now, this is a situation of workplace related issue and in this, the employee and the employer should sit and resolve the matters through the process of mediation and negotiation.

II. PURPOSE

Purpose of this paper is to look upon the benefits of mediation and negotiation in resolving the employment disputes. The employer and the employee do not know the consequences of litigation nor do they know the psychological effect which will occur upon the parties and the business. The way disputes are to be resolved is discussed and by going through this process parties can achieve a good outcome. The court procedure leads the parties to economic, emotional, political, etc. loss, which is discussed in the paper with the help of case laws. In this paper we will discuss the types of mediation, mediation process, cases in which mediation is used, the benefits and limitations of mediation and negotiation, statistics as to how there has been an increase in such cases.

III. NATURE

When we talk about mediation and negotiation, they go hand in hand. If in an employment dispute the parties go for mediation, the mediator talks about the situation and inform the parties about the mediation process and the result. Now, the parties after the result given by the mediator sit and talk over it. This is negotiation where parties negotiate about something. In an employment dispute, negotiations are foremost. If the employer thinks that he is wrong in any way, then the only way he can make the employee feel good is through negotiation. In India there is no statutory recognition given to Negotiation. Negotiation is the simplest means for redress of disputes. In this mode, the parties begin their talk without interference of any third person. The aim of negotiation is the settlement of disputes by exchange of views and issues concerning the parties. Negotiation is a method where parties sit and talk and try to resolve the dispute.[1] It is a dialogue intensive method. In an employment dispute parties negotiate upon certain terms and conditions of employment. In this, both tend to produce an agreement upon the course of action and they do bargain over certain points. Negotiation in employment disputes is done so that both the parties receive more of what they are negotiating upon. This is called 'synergy'. If there is a dispute regarding the payment of bonus to the employee by the employer. Now, the employee demands a higher bonus and employer is not willing to pay. Therefore, the employer will talk with the employee and that talking is negotiation. After negotiating, the employee will either agree or disagree. Usually the employee agrees, and then will receive the bonus, and the employer will be satisfied because maybe he had managed to convince to pay less

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bonus at that point of time.[2] In negotiation, it is important that the employee listen to the employer and employer to the employee. If they do not listen then there can be no negotiation. A strategy must be formed.

IV. HOW TO MEDIATE

Now, it is necessary to decide if the parties want to mediate or not. Mediation can be done either mandatory or voluntary. In mandatory mediation, the employees are compelled to mediate with their employer, even if they do not want to because they have a mandatory dispute resolution procedure in an employment contract, an employee handbook, or a collective bargaining agreement. In addition, sometimes courts give order to mediate over the employment dispute. When parties mediate under this, they must come together in good faith and should bring in that person who has knowledge about the facts of the case. The decision of mediator is not binding in all the mediations. There is also, a voluntary mediation. In this, parties have entered into a contract that whenever there is a conflict or a dispute, parties will resolve it through mediation. Under this, parties get an equal opportunity of being heard. Also, in this confidentiality of the dispute and the parties is maintained. It also saves the parties litigation costs. Both the parties can discuss their points and think of a way out. Then there are court annexed mediation forums. If the employee has commenced a lawsuit, most courts have set out mediation programs for employment disputes, some that are mandatory some that offer mediation at no cost to the parties.[3]

V. CASES

In the case of *Reserve Bank of India & Or's.* v. *C.N. Sahasranama & Ors.*,[4] court said that in which the combined seniority list of different cadres is there for both the officers and the non-officers. But in September 1962 there was an issue regarding the seniority list for the matters of promotion and then the matter was referred to National Industrial Tribunal. A scheme by the bank known as the promotion scheme was launched by the bank. It was said that, *"the promotion scheme having been evolved after careful consideration and having been in operation ever since the inception of the Bank with modification from time to time as a result of the negotiations under the Industrial Disputes Act should not be modified drastically. In such matters one should hasten slowly."* The court further said that, "it is well to bear in mind the fact that settlement of disputes by direct negotiations or settlement through collective bargaining is always to be preferred for it is best suited for industrial peace which the aim of legislation for settlement of labour disputes." In another case which is being referred in here, *Reserve Bank of India* v. *N.C. Paliwal & Ors.*,[5] it was held that "the association continued to agitate for acceptance of its demand and ultimately, as a result of negotiations, an agreement dated 7th May, 1972 was arrived at between the Reserve Bank and the Association by which the demand of the Association was substantially conceded and the principle of a combined seniority list was accepted by the Reserve Bank. The petitioners and some other employees were, however, not members of the Association and they refused to accept the terms of this agreement and hence the Reserve Bank issued a Circular dated 13th May, 1972 introducing a Scheme for combined seniority list and switched over from non-clerical to clerical cadre with effect from 7th May, 1972. This Scheme was substantially in the same terms as the agreement dated 7th May, 1972 and we shall hereafter, for the sake of convenience, refer to this Scheme as the Combined Seniority Scheme." In another case of *Walchandnagar Industries* v. *Dattusingh Lalsing Pardeshi And Ors.*,[6] court said that if the employer is transparent and continuously in negotiations with the employees or the recognized union, and, both are aware of the problems of the industry, in that eventuality without having a head on collision, by initiation of an industrial dispute, both of them, in apprehension of the industrial dispute, can settle the dispute on the principles of collective bargaining in order to maintain the peace and harmony between the parties and sustainable economic growth in the industry. The definition of the settlement does not contemplate that the settlement can take place only after the industrial dispute has arisen. It can take place while the industrial dispute is in conciliation proceedings, the settlement is equally possible and even after the failure of the conciliation proceeding. We find that where the employer and employee relationships are good and sound it is equally possible before initiation of the industrial dispute as desired under the Rule. Such a settlement, on the contrary we will have to welcome for the industrial peace and good relations and development of the industry. The apex court in *Afcons Infrastructure Ltd.* v. *Cherian Varkey Construction Co. (P) Ltd.*,[7] gave an indicative list where mediation is allowed. These include all cases relating to trade, commerce, contracts, corporations, property, construction, banking/financial, shipping and real estate; matrimonial disputes, custody cases, maintenance, partition or division of family property; disputes between neighbor's employers and employees; cases relating to tortious liability; and consumer disputes. In the case titled as *S.B. Mathur And Others* v *Hon'ble The Chief Justice of Delhi* the question before the Apex Court was that there arose a dispute between different group of employees of the Delhi High Court, wherein the Superintendents were raising objections of them being treated at par with Personal Secretaries to Ld. Judges in the cases of promotion to the next higher post. The Supreme Court in the case, held that "where an employer has a large number of employees, performing diverse duties, he must enjoy some discretion in treating different categories of his employees as holding equal status, posts or equated posts, as questions of

promotion or transfer of employees inter se will necessarily arise for the purpose of maintaining the efficiency of the organization. There is nothing inherently wrong with an employer treating certain posts as equal posts or equal status posts, if in doing so he exercises his discretion reasonably and does not violate the principles of equality enshrined in Articles 14 and Article 16 of the Indian Constitution."

VI. MEDIATION PROCESS

In the mediation process, we first select the mediator. Mediator must be able to empathize with the client and should be able to build a relationship with him. The mediator must have the knowledge about the area to which the dispute is related i.e. the employment related matters. It has to be kept in mind that there has to be a proper mediation procedure, which must be, followed i.e. the place of mediation, manner, etc. If there are voluntary agreements then they are usually written up at the end of the mediation and provide the basis for a follow-up meeting with the mediator at some point in the future in order to see how the agreements are working out. Mediator recommends a follow-up meeting 1 - 3 months later to provide additional support and to hold the parties accountable to the commitments they made to each other. The mediator will also do in person talks with the parties and also help in coming to a conclusion.

VII. BENEFITS OF MEDIATION

When the employee goes for litigation, then there are chances that the costs of litigation and attorneys' fees, often exceed the damages that can be obtained even if the employee is successful. Then sometimes the employer is forced to pay for both of them. Whereas in mediation, the costs involved are low. Also, it does not expose one to litigation costs and does not stress the client. Parties opt for mediation only because they know that it is cost efficient. Mediated resolutions work better and last longer than authoritatively imposed resolutions because everyone involved has a stake and buys into them. Many disputes arise because either party or both parties fail to communicate, understand or consider the needs and interests of the other. People fix their attention on the question, "Who is right and who is wrong?" and become blind to the possibility that both may have a legitimate point of view. The mediator's task is to open communications between them about the reasons for the positions they have taken with each other, helping both parties to understand as fully as possible their own and the other's view of the situation. The mediation process is less damaging as it can help to rebuild, strengthen and maintain preexisting or new relationships, which could have been affected by litigation, Courts or Employment Tribunal actions, such as Commercial / business relationships, allowing for trading between one another to continue. Workplace employment relationships so, that individuals can continue to work alongside each other in a peaceful constructive manner. Family relationships, especially when children are involved. There is nothing to lose in the mediation process. If an amicable decision cannot be reached then also you have nothing to lose and your legal rights will not be affected, whereby if you wish you can still go through Court or other practices to try and resolve your dispute. Mediation process is informal as there are no courts, no judges, involved. The mediation procedure are less formal, less time consuming, more efficient and parties can choose a neutral venue to mediate.[8]

VIII. LIMITATIONS

There are certain limitations of mediation and negotiation such as parties are not compelled to continue mediation and they do not produce legal precedents. Also, it cannot compel parties to act in good faith. Parties will act in good faith only if they want to. Parties have limited bargaining capacities. Also, parties' legal rights may not be protected.

IX. WHEN IS MEDIATION EFFECTIVE?

There are certain employment conflicts in which mediation is very effective and any company would advise to offer mediation. Sexual harassment cases: People often assume that parties to a sexual harassment complaint cannot work together to resolve the dispute. Many disputes arise because of the differences in perception about what is funny or flattering and what is an offensive behavior, or they arise as a result of one person's failure to respect the other or to understand the effect of his or her behavior on the other. If the parties agree to talk with each other, and decide to go for mediation then sterling conclusions can be reached upon. The employer can save its relationship with both employees and avoid an expensive and painful lawsuit. Poor Performance: There are many reasons why the employee does not perform well. When the employer questions the employee, the employee responds with fear and defensiveness which results in further deterioration. Mediation or negotiation between them can help each understand the other's needs requirements and requests and can yield an agreement about how they will work together in the future. Both are more likely to observe such an agreement because both had a hand in creating it.

X. STATISTICS

A recent Report by Vidhi Centre for Legal Policy, a New Delhi based independent think-tank, released in July 2016 has analyzed the performances of Delhi and Bangalore Mediation Centers. The Report reveals that in the past five years (2011-2015), there has been a steady increase in the number of new cases referred for mediation each year at the Bangalore Mediation Centre. While 4903 new cases were referred for mediation in 2011, the number rose to 7020 in 2015. There is

also an overall increase of approximately 43% of cases over a period of five years and a steady year wise increase in the number of cases being referred to mediation. Further, the data for Delhi High Court Mediation Centre shows a steady increase in the settlement rate of case between 2011- 2015, except in the year 2013. In 2015, settlement rate of the Centre was as high as 75%. The Report concludes that while the amendment to Section 89 of the CPC was a right step in institutionalizing ADR practices in the country, including Mediation, there are still impediments to the acceptability and integration of mediation with the civil justice dispensation framework, which must be addressed with structured and concrete reforms.[9] The performance of the Mediation Centers in three southern states has been analyzed and presented in another recent report by Centre for Public Policy Research. The study says that the Court-annexed Mediation Centre in Bangalore has a success rate of 64%, and its counterpart in Kerala has an average success rate of 27.7%. Further, amongst the three southern states (Karnataka, Tamil Nadu and Kerala Tamil Nadu is said to have the highest adoption of dispute resolution, Kerala the least.[10]

XI. CONCLUSION

In this paper we discussed about the modes of doing mediation and negotiation. We also discussed the benefits such as it saves money, time, is informal and does not damage the reputation of the parties. The main and the most important benefit is that confidentiality is maintained during the proceedings. As, of today the number of cases in courts are increasing and to reduce the burden on courts and for speedy justice, parties should opt for ADR. Especially in matters like employment disputes, which involve the reputation of parties. In today's time when there is a Pandemic, the Parties should themselves try to resolve the Dispute through mediation and Negotiations and not go for litigation. In such disputes, confidentiality of the parties and the case has to be maintained which can be done only when ADR mechanism is opted for. In India, there should be a uniform statute to resolve the Dispute. Also, there should be laid down certain qualifications as to who can act as a mediator. Mediation should be made mandatory in cases of disputes that involve any contractual, consumer, etc. disputes. Lack of public awareness about non-adversarial modes of dispute resolution is the key reason people are inclined to the adversarial process by default. Mediation should be treated as the first mode of Dispute Resolution.

ARBITRATION: ALTERNATIVE DISPUTE RESOLUTION MECHANISMS DURING COVID-19

VIJAY AWANA[3]

I. INTRODUCTION

Arbitration is a form of dispute resolution where both the parties to a contract decides, not to take their dispute to courts instead they agree to appoint to an arbitrator disinterested with the claims of the law suit, who after hearing both the sides decides the case and the decision is mostly binding on the parties.[4] Whereas, litigation is the process of taking a case to a court of law so that a decision can be made over a legal question implicating a legal right, the party unsatisfied with the judgment can appeal in the superior forum[5]. The approach of the Arbitration & Conciliation Act, 1996 is very affable for the parties being involved in the arbitration disputes making arbitration process highly preferable among the parties involved exclusively in the civil disputes. There are various leverages for opting arbitration over litigation by the parties, mainly stated in the provisions of the Arbitration & Conciliation Act, 1996 making the process much more private, speedy, cost effective when contemplated with litigation. Some of these provisions are:- Section 29A of the Arbitration & Conciliation Act, 1996 fixes the time period for passing the arbitral award to be twelve months and an extension of six months can be granted on the request of the parties, overlapping which leaves the matter at the hand of the concerned court to extend the time period or render the change in the arbitral tribunal[6], whereas there are no such regulations barring the time limit for the completion of trial in the Code of Civil Procedure, 1908 which regulates the procedures on the matters relating to litigation. Section 19 of the Arbitration & Conciliation Act, 1996, provides with the rules of procedure to be adopted by the arbitral tribunal for conducting the arbitral proceedings. As per sub clause (1) of the said section arbitral tribunal is not required to be bound by the Code of Civil Procedure, (1908) nor the Indian Evidence Act, 1872. Sub clause (2) allows the parties to agree on the procedure to be followed by the arbitral tribunal, in case of failure in any sort of agreement between the parties regarding the procedure the arbitral tribunal shall conduct the proceeding the way they find is appropriate is provided under sub clause (3). Thereby, without expressly specifying the digital methods as one of a procedure for conducting the arbitral proceedings it paves way for arbitral proceedings to be conducted through online or digital methods, providing the scope to the tribunal for allowing and subsequently conducting online virtual arbitral proceedings[7]. The Supreme court of United states has stated that arbitration includes "its speed and simplicity and inexpensiveness" and the court describes these traits as features that distinguish arbitration from litigation[8]. Above mentioned provisions explicitly justify the dominance of arbitration over litigation in accordance with the current trends or rather especially in the current trend of COVID - 19. This pandemic has surely affected every sector with human existence and interference, hence legal sector is no different, due to severe increment in the spread of COVID - 19 supreme court of India from a vide order dated 23rd March, 2020 [9] has extended the limitation for filing petitions/applications/suits/appeals/all other proceedings before the court. Apart from this, the Supreme Court and the other subordinate courts in India have been conducting hearings through video conferencing since the lockdown have been implemented in India. In this research paper the researcher has tried to enumerate the role of arbitration for combating the issue of COVID - 19 with respect to legal sector and while slithering through the provisions of the Arbitration & Conciliation Act, 1996 will indulge in the international scenario with respect to employing of arbitration as a means of resolving disputes in these times of the pandemic and post this pandemic as well.

II. SIGNIFICANCE OF ARBITRATION

On March 31st, 2020, Queen's Bench of Alberta in Canada, have suggested people that in the light of COVID - 19 hearings are being suspended and hence the counsels and public should access the alternate dispute resolution mechanism, which includes mediation and arbitration and further urged people that after the courts being shut they should file e-applications for further subjecting there disputes for arbitration[10]. Arbitration is not only useful when the courts are shut

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[4] World Intellectual Property Organization (July 25, 2020 3:43 PM), https://www.wipo.int/amc/en/arbitration/wh at-is-arb.html.

[5] Cambridge Dictionary (July 25, 2020 1:23 PM), https://dictionary.cambridge.org/dictionary/english/litigation.

[6] Legislative Department (July 25, 2020 1:23 PM), http://legislative.gov.in/sites/default/files/A1996-26.pdf.

[7] *id.*

[8] Epic Sys. Corp. v. Lewis, 138 S. Ct.1612 (2018).

[9] Supreme Court of India (July 23, 2020 10:23 PM), https://main.sci.gov.in/pdf/cir/23032020_153213.pdf.

[10] McCarthy Tetreault (July 28, 2020 10:23 AM), https://www.mccarthy.ca/en/insights/blogs/international-arbitration-blog/how-will-covid-19-shape-future-arbitration.

but rather has various other advantages associated with it. The first and foremost advantage of opting arbitration for resolving a dispute instead of litigation is the efficiency of time. In today's world where time is equivalent to money hence like money it should be spent cautiously, it should not be unnecessarily dumped and arbitration realizes that very importance of time as most of the rules framed by different arbitration Centre contains the time for completing the proceeding, whereas in litigation you never really know whether the dispute be resolved in one's lifetime or not, there are various reasons associated with this delay caused by the litigation process and the reason is litigation is a old process with no statutory limitations for the completion of the trial, hence a lot of cases are already pending specially in the Indian courts, whereas arbitration is a new method and due to statutory limitations the cases are settled within the statutory time frame which results in quick disposal of cases making arbitration a time efficient method for resolving disputes. Time efficiency is not the only leverage associated with arbitration when compared with litigation but also, it is a method which keeps the information relating to arbitral proceedings confidential not just by the virtue of its private procedure adopted by the parties but rather by the virtue of Section 42A, as per which "the arbitrator, the arbitral institution and the parties of the arbitration agreement shall maintain confidentiality of all arbitral proceedings except for the award"[11], rendering confidentiality an essential ingredient of arbitration. Another, very crucial advantage which arbitration has over litigation is cost effectiveness, on the one hand it saves time and on the other hand it is specifically advantageous in monetary terms associated with the expenditure of the proceeding. In arbitration the expenditure incurred is of the arbitrator appointed and the place of arbitration which also you might not incur in situations of virtual hearing. Arbitration is a user-friendly process as it provides parties involved in the dispute to decide till some extent the procedure to be appointed, the arbitrator to be appointed, the seat of the arbitration etc. The conduct of the arbitral proceedings in India along with international commercial arbitrations is administered by the Indian Council of Arbitration (ICA). The ICA has been set up through the initiatives of the Government of India. As per the International Commercial Arbitration Rules framed and governed by ICA for governing the international commercial arbitration carried out by the ICA, an arbitral tribunal has a power to conduct arbitral proceeding through video or audio conferencing and any other means which arbitral tribunal deems fit and necessary for the smooth resolving of disputes among the parties. The ICA is well acquainted with the fact that parties involved in the international arbitration are often far off in different countries and in order to preserve arbitration as a cost effective and time efficient method of dispute resolving the use of modern technology is a necessity more than a preference[12]. Above discussed are some of the many advantages which arbitration has over litigation, opting arbitration over litigation makes the process much more flexible, pragmatic, time efficient as well as confidential.

III. LIMITATIONS UNDER SECTION 29A & SECTION 34 OF ARBITRATION & CONCILIATION ACT, 1996

As discussed above section 29A of the Arbitration & Conciliation Act, 1996 imposes limitation on the arbitral tribunal to conclude the arbitral proceeding within 12 months from the date of reference to the arbitral tribunal further permitted with an extension of six months on the plea of the parties. Hence, the imposition of lockdown all across India have resulted in several arbitral proceedings being postponed which ultimately leads us to the conclusion that Section 29A will come to the rescue of the parties in seeking extension of six months where the proceedings are not been concluded in the stipulated time of twelve months from the date of reference to the arbitral tribunal. Though as per the Supreme Court's order dated 23rd March, 2020[13] the time period for filing pleadings and conduction of trials have been extended for every court and tribunal in the country and hence arbitral tribunals are also covered under the same ambit[14]. Further, section 34 under Chapter VII of the Arbitration & Conciliation Act, 1996, provides procedures regarding the applications for setting aside the arbitral awards. Sub clause (3) of the said provision imposes a limitation of three months, beginning from the date on which applicant had received the arbitral award, on the parties for filing the application for setting aside the arbitral award, failing which the applicant have to convince the court about the relevance of sufficient grounds for the delay and a further period of thirty days may be granted by the court for filing the said application. Subsequently, under sub clause (6) an application for setting aside arbitral award shall be disposed of within a period of one year, whereas there are certain proceedings which will not be able to reach its course as per the prescribed timeline under section 34 but the supreme

[11] IBC Laws (July 29, 2020 4:23 PM), https://ibclaw.in/section-42a-confidentiality-of-information/.

[12] Ioana Jurca, how will COVID-19 shape the future of arbitration? Lexology (July 21, 2020 2:23 PM), https://www.lexology.com/library/detail.aspx?g=5cd4476e-d31d-4d44-a559-2c224f20f5bb.

[13] *id*

[14] Mirza Aslam Beg, Impact of Covid - 19 On Arbitration Proceedings in India, Mondaq (July 21, 2020 2:23 PM), https://www.mondaq.com/india/operational-impacts-and-strategy/911554/impact-of-covid-19-on-arbitration-proceedings-in-india?signup=true.

court's order dated 23rd March, 2020 paves way for dodging these limitations as well. Therefore, the Supreme Court's order renders parties subjected to the arbitral proceedings some relief in terms of limitations under section 29A & section 34 of the Arbitration & Conciliation Act, 1996 is concerned.

IV. POSSIBLE QUICK FIXES TO COVID - 19 IN THE FIELD OF ARBITRATION

The outbreak of the pandemic has surely halted the arbitration proceedings for a while, but in order to combat such a drastic state of affairs, there are certain steps which can be taken by the concerned authorities to make sure the effect of the pandemic can be minimized.

V. IMPACT ON LITIGATION ALL ACROSS THE GLOBE DUE TO COVID - 19

The litigation is being affected by COVID - 19 in various ways one such effect is drastic increase in conduction of remote hearings as a result of closure of general courts. The whole globe is being reformulated and reorganized to mitigate as well as to combat the effects of COVID - 19. The following is a brief of the major changes undertaken in the field of litigation globally: - In United Kingdom the courts and tribunals have been consolidated into fewer buildings, the Supreme Court has been closed and for the time being the trials are being conducted through the means of video links. Further, three new practices have been introduced firstly, PD 51Y which provides for the hearing to be conducted remotely, either through the means of video or audio, secondly, PD 51Z which puts a stay over certain proceedings for a period extending up to 90 days & Lastly, PD 51ZA as per which parties are allowed to extend the limitations up to fifty-six days in certain circumstances. Another, new step undertaken is the enactment of Coronavirus Act which further bolsters the propagation of video and audio hearings. Lord Chief Justice of the Supreme Court has further directed the proceedings with respect to civil and family matters requiring physical presence to be concluded as remote hearings. The Lord Chief Justice has further ordered that no trial should commence in the crown courts, and subsequently no jury trials are being held as well. However, a group has been constituted in order to look into the aspect of how the future tries will be conducted. UK for the time being have also suspended the dissemination of submission through hard copies. In United States of America, the announcement has been made by the Supreme Court about the conduction of hearings remotely for all forms of tribunals and courts in the country, due to severe increment in the cases in USA all forms of physical hearings are being suspended through the orders of their supreme court. Similar to UK courts, even the USA has suspended the conduction of jury trials and vast no. of court buildings are being sealed. In European Union, currently the ECJ is prioritizing only urgent matters and has subsequently postponed a number of cases. However, the deadlines for filing appeals are unaffected but deadline for other procedural aspects have been extended. The infrastructure has come to a halt and the officials are working from home. In France, only essential litigations (i.e., hearings of people in the custody, urgent cases handled by judges for children and the procedure relating to eviction of violent partners) are being allowed. In Germany, the hearings in the Federal Court of Justice are being conducted barring the visitors in the court's buildings. The general administrative court has started to hold hearings again following the norms of social distancing. In Italy, the Supreme court initially suspended its activities, but is beginning to deal with urgent matters again. It has started issuing judgments remotely. In Dubai, the hearings are not taking place in the onshore courts. However, in Dubai International Financial Centre (DIFC) hearings are being conducted through video conferencing or video link. In Israel, initially all courts were shut but from 3rd May, have started functioning for broader range of cases, including the criminal cases as well. In Australia, federal courts is putting in technology required for the conduction of proceedings through video conferencing and for now are encouraging on paper submissions. In China, Supreme People's Court of China, had ordered courts at all levels to help the litigants mitigate the difficulties in filing their cases online, are further encouraging the judges to make full use of online systems for litigation and has subsequently enhanced the usage of mobile micro courts. Apart from this there are three internet courts in China which handle litigation[15].

VI. IMPACT OF COVID 19 ON INTERNATIONAL COMMERCIAL ARBITRATION

There is enough disclosure of the ongoing outbreak of the pandemic on international commercial arbitration. Several theories as well as commentaries are being made to mitigate this effect which COVID - 19 has imposed on international commercial arbitration, with several bans and restrictions being imposed on the travel across the globe merging technology with dispute resolution have seen to be a favorable solution to combat COVID - 19. Likewise, major international arbitration centers such as in Singapore, London & Toronto have collaborated to share resources available to them for conducting virtual hearings and for further providing solutions if any regarding the same. Some such suggestions provided by the trio collaboration are increment in the use of electronic filings, online case management and virtual evidentiary hearings. Apart from the above mentioned technological tools the President of Singapore International

[15]Clyde & Co. (July 21, 2020 2:23 PM), https://www.clydeco.com/en/insights/2020/05/covid-19-impact-on-courts-and-arbitration.

Arbitration Centre's court of arbitration Mr. Gary Born has shared his thought via an open letter[16] about their team's involvement in trying to assess certain provisions for combating the effect of COVID - 19, he in his letter further appreciated the SIAC as due to its collaboration with technologically advanced tools SIAC was functional throughout the period of crisis and was continuously rendering services. Below mentioned are the case studies illustrating the working of International arbitration centers in these times of pandemic to mitigate the effect of COVID - 19 on proceedings: The use Emergency Arbitrators (EA) proceedings have observed a sudden demand to resolve the disputes in these horrendous times. The participants have utilized Maxwell Chambers ADR Hearing Solutions; Zoom and Microsoft Teams platforms for EA related virtual hearings subsequently on paper proceedings have also been seen to be utilized widely to cope with the current scenario. The SIAC rules provide EA to appoint within twenty-four hours of the filing of application. Hence, when one such application was made in the month of April, 2020 EA was appointed within twenty four hours and subsequent to the appointed the respective EA scheduled a video case management conference to hear the pleadings of the parties by their respective counsels, the video meeting was organized keeping in mind of the different time zones and parties were directed to make their written submissions through emails. A day prior to the scheduled hearing EA arranged a test call with the service provider which was Maxwell Chambers ADR Hearing Solutions in this case, to assess the virtual hearing software further a full day oral submission was made by the parties, the said hearing was being attended by the EA, nine party representatives, Moderator of the service provider and a transcriber. The decision of the EA was submitted to SIAC for examining and further the decision was transmitted with in a period of fourteen days as per SIAC rules[17]. Another case study also seated in Singapore applied the Expedited procedure of the SIAC Rules, 2016 which instructs the completion of the proceeding within a period of six months[18]. The parties were to decide the service provider among all the available methods for the examination of the expert witnesses on the basis of Guidance note of Remote Dispute resolution proceedings[19] and hence the parties reached on a common consensus with Maxwell Chambers ADR Hearing Solutions. Similarly, in this proceeding as well a day prior to the oral submissions a dry run was conducted with the software to be utilized in the process, then the oral submissions were made virtually on the next day comprising nineteen participants including the arbitrator, lawyers, expert witnesses, client's representatives, transcribers and an IT moderator. Subsequently the tribunal conducted a case management hearing over the telephone to discuss logistical issues and other procedural matters. During the hearing the parties were advised to use the option of chat function for the improved communication as well as for raising objections and subsequently the decision was delivered by the arbitrator[20]. Apart from the above two scenarios, there have been cases where due to the mandated physical presence of the witnesses some hearings were adjourned for a later more suitable date, or even some parties requested the respective tribunals to dispense with oral submissions and decide the matter only on the basis of documented submissions. Tribunals all across the globe are working on further improving the arbitral timelines. Not only the SIAC but major arbitration institutions around the world amended certain existing rules or introduced novel rules to mollify the impact of COVID - 19. These are below stated:

(1) The Australian Centre for International Commercial Arbitration (ACICA) promulgated guidelines for managing impact of COVID - 19, which also included the advantages of arbitration and further introduced the links to sample agreements and sample procedural order[21].
(2) Online Hearing Rules and procedures were published by Istanbul Arbitration Centre (ISTAC) to be followed in video conferencing to be adhered to by ISTAC.

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[16] Singapore International Arbitration Centre (July 18, 2020 12:23 AM), https://www.siac.org.sg/images/stories/press_release/2020/%5bOpen%20Letter%20from%20SIAC%20Court%20President%5d%20Arbitration%20at%20SIAC%20during%20%20COVID-19.pdf.

[17] Chahat Chawla, International Arbitration During COVID-19: A Case Counsel's Perspective, Kluwer Arbitration Blog (July 18, 2020 5:54 PM), http://arbitrationblog.kluwerarbitration.com/2020/06/04/international-arbitration-during-covid-19-a-case-counsels-perspective/?doing_wp_cron=1596090605.7620570659637451171875.

[18] Singapore International Arbitration Centre (July 18, 2020 12:23 AM), https://www.siac.org.sg/our-rules/rules/siac-rules-2016.

[19] Chartered Institute of Arbitrators (July 22, 2020 10:25 AM), https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf.

[20] Chahat Chawla, International Arbitration During COVID-19: A Case Counsel's Perspective, Kluwer Arbitration Blog (July 22, 2020 10:12 AM), http://arbitrationblog.kluwerarbitration.com/2020/06/04/internation al-arbitration-during-covid-19-a-case-counsels-perspective/?doing_wp_cron=1596090605.7620570659637451171875.

[21] Important Information for ACICA Users — COVID-19 Update, Australian Centre for International Commercial Arbitration (July 26, 2020 10:16 PM), (http://acica.org.au/important-information-for-acica-users/.

(3) Hong Kong International Arbitration Centre (HKIAC) has also updated the existing and formulated the novel rules and regulations for conducting the virtual hearings.[22]
(4) London Centre of International Arbitration (LCIA) also updated the guidelines dated 18th March, 2020, instructing the closing of its offices and working remotely therefrom.[23]
(5) A checklist was also provided by Vienna International Arbitral Centre for holding arbitration proceedings during the pandemic.[24]
(6) International court of arbitration (ICC) uploaded a Guidance Note dated 9th April, 2020 on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic. The note allows the arbitral tribunals to take necessary steps in appropriate circumstances while exercising their authority to establish procedure and accordingly fulfil their duty to conduct the arbitration in an expeditious and cost-effective manner.[25]

VII. TRIO OF TOP ARBITRATION BODIES FORM INTERNATIONAL ALLIANCE

Arbitration Place, International Dispute Resolution Centre (IDRC) and Maxwell Chambers are the three leading arbitration bodies situated in London, Canada & Singapore respectively, have announced a collaboration or the formulation of alliance named International Arbitration Centre Alliance (IACA), the objective of the alliance is to ameliorate the impact of COVID - 19 by aiming at reducing distance, Time zone and other challenges associated with conducting the international arbitration proceedings. As per the Damian Hickman CEO of IDRC, Katherine Yap CEO of Maxwell Chambers and Kimberly Stewart CEO of Arbitration Place "The alliance breaks barriers and builds international bridges, providing the platform for our partners to connect globally, allowing a seamless and smooth dispute resolution experience" further adding "This is something the dispute resolution world desperately needs right now because of Covid-19 travel and assembly restrictions. We also firmly believe it's the way of the future. International arbitration practitioners are becoming comfortable with virtual hearings. Longer term, even when global travel restrictions are eased, virtual will be used regularly to reduce travel time and cost".[26]

VIII. A CRITIC

Though there are multifold benefits attached with online dispute resolution but it too signs in with certain critics, as per the belief of well-known experienced practitioners video conferencing affects the transmission of quality evidence. The witness testimonies gets affected or rather it does not remain the same as it would have been in, had the witness been physically present in front of a judge, the practitioners does not go with online dispute resolution because the cross examination is not as effective as it would have been in witness's presence, as per them the prime reason for conducting the cross examination of a witness in - person is to evaluate the facial expressions, the body language to test the credibility of the witness which cannot be attained through virtual means.[27] Though in, Capic v Ford Motor Company of Australia Limited[28], the respondent's application for the adjournment of virtual arbitral trial on the basis of they being virtual was denied by the Federal Court of Australia stating "public institutions such as the Court must do all they can to facilitate the continuation of the economy and essential services of government, including the administration of justice and hence, though there are certain onerous and undesirable aspects of virtual hearing but they are not insurmountable therefore does not render the trial unfair or unjust". Another critic associated virtual hearings is the issue of cyber security and data protection, because by uploading the confidential information in the public domain, it can be easily accessed by potential hackers, to strengthen this particular aspect the ICCA-NYC Bar-CPR Working Group on Cyber security in Arbitration has issued its cyber security protocols[29] in order to adhere with the high standards of cyber security, similarly the ICCA-

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[22] Hong Kong International Arbitration Centre (July 20, 2020 3:34 PM), http://hkiac.org/sites/default/files/ck_ filebro.wser/HKIAC%20for%virtual%20hearings_0.pdf.
[23] London Commercial International Arbitration (July 25, 2020 3:34 AM), http://lcia.org/lcia-services-update-covid-19.aspx.
[24] Vienna International Arbitral Centre (July 26, 2020 3:59 AM), viac.eu/en/news/checklist-on-holding-hearings-in-times-of-covid-19
[25] International Chamber of Commerce (July 26, 2020 3:59 PM), https://iccwbo.org/content/uploads/sites/3/ 2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf.
[26] Trio of top arbitration bodies form international alliance to hear 'hybrid' Covid-19 compliant hearings, Global Legal Post (July 26, 2020 1:44 AM), https://m.globallegalpost.com/big-stories/trio-of-top-arbitration-bodies-form-international-alliance-to-hear-hybrid-covid-19-compliant-hearings-98099925/.
25 Stephan Wilske, The Impact of COVID - 19 on International Arbitration, Hein online (July 22, 2020 9:34 PM), http://heinonline.org.elibrarydsnlu.remotexs.in/HOL/Page?collection=journals&handle=hein.journals/caaj13&id=16&men_tab=srchresults.
[27] Capic v Ford Motor Company of Australia Limited, FCA 486 [2020].
[28] International Council for Commercial Arbitration (July 26, 2020 2:43 AM), https://www.arbitration-icca.org/projects/Cybersecurity-in-International-Arbitration.html.
[29] International Council for Commercial Arbitration (July 26, 2020 2:43 AM), https://www.arbitration-icca.org/projects/Cybersecurity-

IBA Roadmap to Data Protection in International Arbitration has issued guidelines[30] to strengthen the protection of data present in the public domain in lieu of the arbitral proceedings. Hence, there are challenges which are been advanced towards online or virtual mechanism of solving disputes but if regulated systematically challenges can be overcome in order to avail greater benefits from the use of technology.

IX. CONCLUSION

Arbitration is not only useful when the courts are shut but rather has various other advantages associated with it. The first and foremost advantage of opting arbitration for resolving a dispute instead of litigation is the efficiency of time. In today's world where time is equivalent to money hence like money it should be spent cautiously, it should not be unnecessarily dumped and arbitration realizes that very importance of time as most of the rules framed by different arbitration Centre contains the time for completing the proceeding, whereas in litigation you never really know whether the dispute be resolved in one's lifetime or not, there are various reasons associated with this delay caused by the litigation process and the reason is litigation is a old process with no statutory limitations for the completion of the trial, hence a lot of cases are already pending specially in the Indian courts, whereas arbitration is a new method and due to statutory limitations the cases are settled within the statutory time frame which results in quick disposal of cases making arbitration a time efficient method for resolving disputes. "Justice delayed is justice denied" is legal maxim, which needs to adhered by the dispute resolving institutions in order to deliver justice in effective and trustworthily manner. Virtual hearings allow the dispute resolving institutions to deliver justice effectively, hence in these times of the pandemic it is full of utility and therefore should be adopted by the tribunals and the arbitral institutions must propagate the conduction of these arbitration proceedings through virtual methods also it is the responsibility of the arbitral institution to increase the awareness of arbitration among the parties involved in disputes and further promote the process of online dispute resolution.

in-International-Arbitration.html.

[30] International Council for Commercial Arbitration (July 26, 2020 1:29 AM), https://www.arbitration-icca.org/projects/ICCA-IBA_TaskForce.html.

CUSTODIAL VIOLENCE IN INDIA: A REVAMP IN ORDER?

ASMITA CHAKRABORTY[31] AND KUMAR GOURAV[32]

ABSTRACT

Custodial violence is a social menace that prevails globally in various forms and types. It is the practice of inflicting violence by the law enforcement agencies on those people who are placed in custody. Custody violence is not a new concept and has prevailed over a very long period of time. However, in the recent times the instances of custodial violence have increased tremendously with the number of cases being reported each year going higher up than the previous years. Even though there are many laws, conventions, policies in place in almost every country globally the instances of custodial violence do not exhibit any declining trend. Therefore, this research paper aims to analyze the issue of custodial violence and its various aspects and come with suggestions for curbing this social menace of custodial violence.

I. INTRODUCTION

Custodial violence and custodial death, one of the cruelest forms of crime still prevails rampantly even in the 21st century civilized society. The term "Custodial Violence" has not been explicitly defined under any law. However, it involves the combination of two words that is custody and violence. Black' Law Dictionary define custody as the detainer of a man's person by virtue of lawful process or authority.[33] The definition so provided is elastic enough to include within its ambit imprisonment, physical detention or mere taking of manual possession.[34] However in common parlance whenever the term custody is used it is understood to mean imprisonment. Custodial violence globally, has often been seen giving rise to custodial deaths. Custodial deaths could be a result of various factors which mainly includes abuse of power and office and discrimination on basis of race, color, gender ethnicity, nationality etc. often custodial violence takes place at the roots and is augured because of the persistent neglect and overlooking by the higher authorities and justice system. There are ample number of laws which protect the rights of an accused and often in a custodial death these rights are not taken care off and also not implemented properly. For example, in India, the Constitution of India under Article 21 provides that every Indian Citizen shall have the right to life and liberty. Further after a flurry of landmark cases on custodial violence the Supreme Court of India pronounced several notable guidelines to safeguard the rights of those in custody in the famous case of D K Basu V. State of West Bengal[35]. The recent death of a father son duo of Jayaraj and Fenix in Tamil Nadu while in police custody has sparked the need for an effective implementation of the guidelines which has been laid down in various judgements. In the United States the murder of George Floyd by uniformed police officers in broad day light which sparked the world-wide protest of "Black Lives Matter" are few of the very real examples of the botched law enforcement system and the custodial violence and deaths prevalent globally. In India where importance has been given to the rule of law and right to life and personal liberty is regarded as prized fundamental right among other rights, instances of torture, usage of third-degree methods upon suspects during detention and police remand casts a slur on the very system of administration. In India there is a provision under 176 CRPC that an inquiry should be held by a magistrate in case of custodial death. Although there exists various laws and rights of poisoners but still the administrative machinery that's responsible for ensuring such rights has failed to implement them. National Human Rights Commission (NHRC) is a regulatory body who's responsible for ensuring human rights has issued various guidelines but recent incidents show that such rules and guidelines has failed to ensure the rights. A report states that a total of 1731 people have died in custody in India during 2019[36]. The report also states that various torturing method used in custodial violence include hammering iron nails in the body, applying roller on legs and burning and also hitting in private parts.[37] This research paper aims to analyze the issue of custodial violence both globally and in India and come with some suggestions for curbing the menace of custodial violence.

II. CUSTODIAL VIOLENCE: GLOBAL THEORIES AND PERSPECTIVE

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[31] 5th year, Chanakya National Law University, Patna.
[32] 5th year, Vivekananda Institute of Professional Studies, New Delhi.
[33] 460, Black's Law Dictionary.
[34] Jones V. State, 26 Ga. App. 635.
[35] 1997 1 SCC 416.
[36] Vignesh Radhakrishnan, *Five Custodial Deaths In India Daily Says The Report*, The Hindu, 20th September 2020, https://www.thehindu.com/news/national/five-custodial-deaths-in-india-daily-says-report/article31928611.ece
[37] *Ibid.*

Custodial violence and police brutality are a recurrent global menace. Abuse of authority by the police both in custody and while in open have often sparked heated debates globally. Custodial violence can be broadly divided into two forms namely physical violence which involves all forms of physical assault and non-physical violence which involves use of verbal abuse and slurs.[38] Global incidents of custodial violence by police have dominated headlines for quite some time. The custodial violence ranges from exceeding the standard range of punishment to extra judicial killing.[39] There have been various theories for understanding what causes custodial violence and police brutality in the first place. Prima Facie the cause of custodial violence can be attributed to deep seated prejudice and discrimination that prevails among the police officers. This practice of systematic discrimination can source from a number of reasons. It could be attributed to one's race, ethnicity, color, religion, language, gender, social status. One of the theories that is the Sociological Theory of Law given by Donald Black, says that Police behavior is often influenced by the social dynamics of the police-citizen encounter.[40] According to this theory the police are less likely to take coercive action those who are poor, or belong to racial and ethnic minority, when complained against by people of lower status. This however doesn't hold true when a complaint is filed against the poor, racial and ethnic minority by someone who belongs to a higher social status that is someone who belongs to the racial or ethnic majority.[41] Another theory that is the Psychological Theory attributes the coercive action of police to their psychological composure and attribute which dictates different responses from the different police officers to the same scenario.[42] This idea behind this theory also underlies the supposition that police officers who come from minority race, ethnicity or gender exhibit different behavioral patterns than those who hail from the majority race, ethnicity etc. However, much of this theory has been rebutted by the argument that people's behavior is often inconsistent with their attitudes. The third theory that is the Organizational Theory attributes aspects of the police officers behavior to the organization of which he is a part.[43] This theory also focuses on the idea that the organizational properties are more likely to influence the behavior of the police officers.[44] For example an organizational structure which indulges in disincentives whenever a police officer uses unauthorized coercive action can help reform the police officers behavior till some extent. However, theories can only do so much. Years of systematic prejudice and discrimination and non-accountability is one the most significant reason of rise and continuance custodial violence. Despite having adequate laws, regulation and guidelines in place, the lack of adequate accountability and fair and just redressal have caused the custodial violence to go on unchecked and without much apprehension. As pointed by Professor Osagie K. Obasogie[45] and Zachery Newman[46] in their article on Police Violence and Public Health[47], one of the major factors which hinder the accountability of police violence is the Use of Force policies. The Use of Force Policies are those policies which put a bracket to the kinds, levels of force and also the circumstances in which the police may use such force. This would additionally ensure setting of a benchmark to determine whether excessive force has been used or not. However, no matter how many laws or policies are implemented or how many protests and social movements are organized as long there is no iron fisted accountability mechanism put in place and proportionate system of punishment is implemented custodial violence will remain at large. The George Floyd fiasco where a black man was killed by a white police officer who kept his knee knelt on George Floyd's neck for around 8 minutes[48] thereby by suffocating George Floyd to death. The sheer brutality of this act and violence exhibited by the police without any provocation from the deceased went onto show the extent till which custodial violence has become rampant. Despite brutality of the attack on an unarmed black man and the

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[38] Chowdhury Md. Sirazus Salekin, (2016), *Effect of Police Brutality on Society*, Research Gate, available at https://www.researchgate.net/publication/303401114_Effects_of_Police_Brutality_on_Society accessed on 20th September 2020.

[39] *Ibid.*

[40] Robert E Worden (1995), *The Cause of Police Brutality: Theory and Evidence on Police Use of Force*, Research Gate, available at https://www.researchgate.net/publication/258835334_The_'Causes'_of_Police_Brutality_Theory_and_Evidence_on_Police_Use_of_Force accessed on 21st September, 2020.

[41] *Ibid.*

[42] *Ibid.*

[43] Supra Note 38.

[44] *Ibid.*

[45] Haas Distinguished Chair and Professor of Bioethics, University of California, Berkeley. B.A., Yale University; J.D., Columbia Law School; Ph.D., University of California, Berkeley.

[46] Visiting Scholar at the Haas Institute for a Fair and Inclusive Society, University of California, Berkeley. B.A. University of California, Santa Cruz; J.D. University of California, Hastings College of the Law.

[47] Osagie K. Obasogie, Zachery Newman, *Police Violence, Use of Force Policies and Public Health*, American Journal of Law & Medicine, 43 (2017): 279-295.

[48] Evan Hill, Ainara Tiefenthaler, Christiaan Triebert, Drew Jordan, Haley Willis and Robin Stein, How George Floyd was killed in Police Custody, New York Times, 31st May 2020.

severe support that Black Lives Matter protest has garnered globally, the accused are yet to be convicted. A month after the George Floyd incident another incident took place where Ms. Breonna Tyler, a 26 year old black an emergency medical technician was shot dead by the police who had entered her home on the pretext of alleged drug bust and had fired 8 shots at Ms. Taylor.[49] No drugs were however recovered from her apartment and the lawsuit that was filled against the police officers by Ms. Taylor's family revealed that the police officers were indeed not looking for Ms. Taylor and her partner but for someone completed unrelated who did not even live at the said address. Recently the Jefferson County Grand Jury charged only of the three police officers involved in the Breonna Taylor incident, for wanton endangerment and disregard for human life which is punishable with 5 years of imprisonment unlike manslaughter which has a lengthier sentence. The above two incidents are among the most recent and most highlighted cases of custodial and police violence. There exists ample number of such cases which are yet to be reported or highlighted. These two incidents act as a standing reminder as to why there needs to be overhaul of the existing police policies with respect to custodial violence and their accountability.

III. CUSTODIAL VIOLENCE: THE INDIA PERSPECTIVE

The concept of custodial death in India is not new but it exists from pre independence era. The torture commission was established in 1855 and it found that personal violence practiced by native revenue and police officials generally prevail throughout the presidency and also held that the law and order administration in the province was in a bad shape and inefficient[50]. The reforms which they suggested included a moral agency at appropriate levels and also organization of police as an independent agency. These reforms were regarded as the first reform in this crime. A report states that there were around 300 custodial deaths from 2008-2016 but there were zero convictions.[51] The report also stated that from 1997-2016 there were around 790 deaths, over 385 policemen were charged and over 120 such cases were dismissed by courts after a charge sheet was filed and in all these cases only 8 police personal were convicted of such crimes.[52] This clearly shows that despite various laws and regulatory bodies custodial death is still happening and there is lack of efficient functioning of various administrative machinery. In a case of ***State of U.P v/s Ram Sagar Yadav***[53] a farmer, falsely accused of cattle trespass by his neighbor over a dispute was allegedly threatened by police for bribes. The officer in charge of enquiry arrested the farmer and within 6 hours of registering the initial case the farmer died due to injuries. The apex court in this case said that police can give evidence regarding the circumstances in which a person in custody dies. But they prefer often to remain silent and prevent the truth. Keeping this case in mind the Law Commission of 1985 in its report suggested changes for section 114 of the Indian evidence act, 1872. Section 114B (1) was recommended which stated that if there is any injury caused during a custodial period to a person then the court may presume that the injury was caused by the police officer having custody of such person during that period. In the case of ***Nilabati Behara v/s State of Orissa & others***[54] a letter was sent by the petitioner to the Supreme Court stating that her twenty-year-old son had died in the police custody after being inflicted with several injuries. The court took Suo moto action and converted it into a writ petition. Petitioner claimed for compensation under Article 21 constitution of India. The court held noted that there was no evidence of any search by the police to find his son and of his escape from police custody. The doctor also told that the injury was caused due to several lathi blows and there was no evidence of death by train accident. The court finally held that a compensation of Rs. 1,50,000 to be paid to the petitioner by the state and Rs. 10,000 to be paid to the Supreme Court legal aid committee. Prior to this judgment there was no structured formulation for granting compensation in custodial deaths. The Supreme Court in the case of ***Sunil Batra v/s Delhi Administration***[55] issued directives for the state and prison staff. Some of them have given below:

- Lawyers nominated by the DM, judges shall be given facilities for interviews and visits with prisoners.
- DM, judges shall personally visit prisons in their jurisdiction and should afford effective opportunities for ventilating legal grievances and take suitable remedial action.[56]

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[49] *Breonna Taylor: Louisville Officer to be Fired for Deadly Force Use*, BBC, 20th June 2020.

[50] Vidisha Singh, *Custodial Death & Torture a Human Rights Abuse: Indian and International Perspective*, https://www.latestlaws.com/human-rights-news/custodial-death-torture-a-human-rights-abuse-indian-and-international-perspective/#_ftn17 last seen 23rd September 2020.

[51] Debayan Roy https://theprint.in/india/there-were-300-custodial-deaths-from-2008-to-2016-but-zero-convictions/254450/ last seen 23rd September 2020.

[52] *Ibid.*

[53] State of UP v. Ram sagar Yadav AIR 1985 S.C. 416.

[54] Nilabati Behera v. State of Orissa AIR 1993 SC 1960.

[55] Sunil Batra v. Delhi Administration, 1980 SCC 488.

[56] Justice T.S Sivagnaman *Rights of Prisoners and Convicts under the Criminal Justice Administration*,

- No solitary or punitive cell, no hard labor or dietary change as painful addictive, no transfer to other prisons with penal consequences, shall be imposed without judicial appraisal of the sessions judge and if such imitation is done in emergency then information shall be given within two days.
- Further the court issued for quasi mandates for the state which shall be followed which includes maintaining a prison handbook, treatment of prisoners, prisoner's manual shall be rehabilitated and the rights of prisoners shall be protected by writ jurisdiction and contempt power.[57]

An important landmark judgment given by Hon'ble Apex Court in case of ***D K Basu v/s State of W. B***[58] which lays down certain guidelines to be followed in case of arrest or detention till legal provisions are made in behalf of custodial violence. The 11 commandments said in the above focused on vital processual safeguards which included:

- Officials shall carry name tags and full identification,
- An arrest memo shall be prepared,
- Arrest memo shall contain all details regarding time and place of arrest,
- It shall be attested by one family member,
- Location of arrest shall be intimated to one family member or next friend,
- Details must be modified to nearest legal aid organization,
- Arrestee must be known all of these rights,
- All compliances must be recorded in police register,
- Periodical medical examination,
- Inspection memo must be signed by arrestee,
- All such information shall be recorded in a central police control room.

The courts from time to time has pronounced various judgments and issued several guidelines regarding custodial death and violence. But all these guidelines seem to be getting ignored when we see the recent case of death of father-son duo in Tamil Nadu jail. The Apex court in DK Basu case also clearly stated that breach of the guidelines would amount to severe departmental action and additionally contempt also. The Supreme Court directed to establish a subcommittee to monitor the crime and where no SHRC exist the Chief Justice of the High Court of that state to monitor. The contention of the police in Tamil Nadu case was that DK Basu applies only in police custody and not in judicial custody.[59] There has been several controversies regarding the data of custodial deaths. According to National Crime Records Beauru there has been 70 custodial deaths in 2018 while for the same period NHRC shoes 1966 deaths.[60] This clearly states that how our system has failed to control the deaths and how they try to hide the figures.

There have been various instances when courts have raises questions over not proper implementation of guidelines. The DK Basu case came as an important landmark judgment as how to treat prisoners. But year by year custodial deaths are occurring and a proper data is also not released. India has not yet ratified the United Nations Convention on Torture which it has signed on October 1997. The failure can also be seen in way that Law Commission of 1985 clearly stated that there is a need for amendment of Section 114 of the Indian Evidence Act, 1872 and insertion of Section 114B (1) which states that the police official shall be held responsible if any person dies in custody. But this bill was laid down in Lok Sabha in the year 2016 at a gap of 21 years after the commission gave the report[61] and still has not been yet passed. The increase in the number of custodial deaths have given an implication that the guidelines issued in DK Basu is not being followed in an efficient manner. Various NGO's and also NHRC are constantly monitoring this issue but still what is needed is that there is a need for a strong legislation and also the living conditions in the prisons shall be improved because in India we've many prisons which are unhygienic. The recent case of custodial death of father son in Tamil Nadu tells us that such crime is not tolerable at all and police officials shall be held responsible in such deaths.

IV. CUSTODIAL VIOLENCE IN INDIA: SUGGESTED CHANGES

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http://tnsja.tn.gov.in/article/Role%20of%20Prisoner%20and%20Conv%20TSSJ.pdf last seen 23rd Septmeber 2020.

[57] *Ibid.*

[58] D.K Basu v. State of West Bengal, 1997 (1) SCC 416.

[59] Abhishek M. Shingvi, *Implementation Of DK Basu Judgements Can Protect Against Custodial Torture, Death*, http://tnsja.tn.gov.in/article/Role%20of%20Prisoner%20and%20Conv%20TSSJ.pdf last seen 24th September 2020.

[60] Mohammed Kudrati, *Custodial Deaths: Official Data Does Not Reveal The Full Picture*, https://www.boomlive.in/fact-file/custodial-deaths-official-data-does-not-reveal-the-full-picture-8734?infinitescroll=1 last seen 24th September 2020.

[61] *The Indian Evidence Amendment Bill, 2016*, Law Times Journal, available athttp://lawtimesjournal.in/the-indian-evidence-amendment-bill-2016/ accessed on 24th September 2020.

In India the police framework doesn't exist in legal void. There are ample provisions which safeguard the citizens against the misuse of power by police through Article 21 of the Indian Constitution, guidelines as laid down in the case of Sunil Batra[62] and D K Basu [63] and even protect the police from bouts of vexatious litigation by providing them protection through sections 132 and 197 of the Code of Criminal Procedure, 1973. However, as have been stated in the previous chapters, the instances of custodial violence and subsequent deaths have only increased over the year, as the data shows that in 2018 alone there have been 1966 custodial death cases. What is even more appalling is the difference in data as provided by National Human Rights Commission and that of National Crime Records Bureau which only showed data for custodial deaths to be only 70 during 2018.[64] In 2019 the total number of custodial deaths increased further to 1731.[65]The most recent incident of custodial death of Jayaraj and Bennix in Tamil Nadu which sparked nation-wide outrage only goes onto show that the our prevailing legal system surrounding custodial violence is in the dire need of a complete overhaul. Some of the suggested changes are:

1. Framing of a complete separate and special legislation with the purpose of exclusively dealing with custodial violence, custodial tortures, custodial deaths and other allied issues. Such a legislation should also include the concept of "Use of Force"[66] which would lay down the circumstances, levels and kinds of force that the police are authorized to use. This would also help in identifying whether a particular act of the police using the force is excessive or coercive. This will also help in brining accountability of the police towards their actions. As long as the real offenders are not held accountable no legislation can curb this issue of custodial violence.
2. Setting up of a framework for providing judicial accountability to the victims of custodial violence. There have been ample examples where the Supreme Court has awarded compensation to the various victims of custodial violence. However, in India, such litigations are prolonged and expensive and due to these reasons, most of the victims or their families are often reluctant in seeking adequate judicial remedy causing the actual offender to escape scot free. Setting up a judicial framework that can ensure that not only adequate compensation is provided to the victim and or victim's family but also punish the actual offenders will beneficial in both helping the victim and or his family and in restoring the faith of the common masses in the justice delivery system of the country.
3. Mandatory Sensitization and training of all police officers and all personnel of the police department for handling violence or violent situations. More often than not, the police officers aren't trained to react to actual violent situations which often causes them to react violently on the slightest of provocation. If done successfully, this could alone prevent a number of situations where custodial violence takes place because of wrongful reactions.
4. Stricter implementation of D K Basu guidelines and stricter imposition of penalty for not abiding by those guidelines. These are some of the suggestions that maybe considered for revamping the judicial system surrounding the conundrum of custodial violence and custodial deaths.

V. CONCLUSION

Custodial violence and death are a global menace be it in India or anywhere else. Even the most developed country like United States of America are fraught with incidents of custodial violence and inadequate victim redressal. Surprisingly most of the reported cases be it globally or in India are not adequately highlighted which could bring awareness to the general masses as to what constitutes custodial violence and what are its remedy. Custodial violence is not a new concept. It has prevailed for long in the past and with each passing year it continues to increase rapidly. Custodial violence or violence by law enforcement agencies in police custodies often create a ripple effect in the society. Whenever a police officer indulges or partakes in any form of violence on anyone in their custody it creates an impression in the minds of the common people that it is acceptable for them to involve in violence as well. This has ghastly effect on the general society as it can rapidly lead to the increase of violence in the particular society. India being a democratic country has seen its fair share of custodial violence cases and subsequent death cases. While there has been a number of previous law to prevent the misuse of power by the police like the Indian Constitution, Code of Criminal Procedure 1973 etc., however with the increasing number of custodial violence cases it has become clear, that there is a need for a separate legislation specifically focused on dealing with custodial violence and torture alongside stricter implementation of the already prevailing guidelines. The ethos of any democratic country lies in its law enforcement agencies like the police. Therefore,

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[62] Sunil Batra v. Delhi Administration, 1980 SCC 488.
[63] D.K Basu v State of West Bengal, 1997 (1) SCC.
[64] Supra Note 60.
[65] *Custodial Killings Shows India Needs To Go Beyond Police Reforms, Must Ratify Anti Torture Convention*, Commonwealth Human Rights Initiative, https://www.humanrightsinitiative.org/press-releases/custodial-killings-show-india-needs-to-go-beyond-police-reforms-must-ratify-anti-torture-convention-chri accessed on 25th September 2020.
[66] Supra Note 47.

in order to bring changes in the custodial violence scenario of any country it is necessary to overhaul and completely revamp the actions and policies of the respective law enforcement agencies of the particular countries. It is only when this becomes possible, that situation of custodial violence will automatically change for the better.

CYBER-CRIMES VIS-À-VIS VICTIMOLOGY THEORIES: KEY PROBLEMS AND SUGGESTIONS

PIYUSH MOHAN DWIVEDI[67]

ABSTRACT

It is from the ancient times that the development of the human race has brought the revolution in the lives. Nowadays, the physical world is gradually transforming itself into the cyber world, and except extremely remote areas, the entire urban and rural population is relying upon various technologies. Along with the development of cyber world the problem of cyber-crime has emerged. The interdisciplinary approach of studying the victimology theories with cyber-crime is a way forward to enhance the IT Laws in India. According to the victimology theories, the accused and victims and crimes are co-related. The first part relates to the evolution of crimes committed via cyber forum from the time when the computers were made to the extent of today's e-transaction. The second limb deals with the type of cyber-crimes that can occur in the cyber –world and the analysis of problem that are there in practical approach of Information and Technology Act, 2008. The third part further deals with the relevant case laws and their nexus with victimology theories. The last part is conclusion of the research where a few suggestions are appended on the basis of previous limbs of the article. Since every person is using one or the other form of technology, it should be aware of the types of cyber-crimes in vogue and prevent itself from falling as prey to cyber-crimes. Therefore, the crimes of fraud, extortion and social media crimes those including Bois locker room, Jamtara scam, harassment, stalking etc. need the attention of the people exploring the cyber-world every day and their role played in facilitating such crimes.

I. INTRODUCTION

Every country is endeavoring it's all means, including computer technology to cachet itself as the superpower of the world. The cyber technology used is almost the same[68] among all the participants, and due to standardization, the network protocols are also similar, resultantly providing the same internet service around the world. The cyber development inculcates a new dimension of criminal law, and the question is how effective and harmonized is criminal law to appraise the acts arising out of cyber technology. Cyber-crime and traditional crimes have very different natures and methods of execution. The traditional crimes occur on the place of crime, whereas the cyber-crime can be executed from a different place effecting a far location. The former lasts for a long period on the other hand; the latter is quick and vanishes swiftly. The offences committed in the cyber world have criminal nature as they attack and have a personal impact, psychological impact, legal harm, and economic impact. The internet did not recognize any limitation of accessing it but to curb the menace of cyber-crime certain safeguards that can be used are like, restricting the I-P address or blocking the websites and service provider storing the harmful websites. The challenge before the law enforcement agency arises due to rapid evolution and advancement in the form of committing cyber-crime. On analyzing this issue, it is ascertained that cyber-crimes and information & technology offences have grasped the society with a greater form of attacks. This is the era of development of the human race by advancing technologies. Therefore, it is necessary to understand the transition of cyber-crimes from era to era and society needs to get acquainted with the instances related to cyber-crime.

II. DEVELOPMENTS IN CYBER-CRIMES

There are various steps taken at the global level for controlling and having effective measures for cyber-crime. Over decades solutions and plans have been made and implemented by countries from time to time. The Budapest Convention is the first effective global initiative that provides a framework for international co-operation between the state parties. The convention covers the prominent form of cyber-crimes like illegal access, interference and interception of data and criminal misuse of the devices. The convention does not include crimes of identity theft, unsolicited e-mails and spams etc. Likewise, the provisions of the conventions are outdated and the domestic laws of the countries are bygone. The rampant growth of cyber-crimes puts the challenge before every country to revive the laws according to the need of the time.

Early 1960's

Two computer systems that were in use during the 1960's viz. transistor-based computer systems and the vacuum-tube based computer systems. Since the technology was new and not many complicated crimes relating to these systems were also simple and restricted to physical damage to the computer system and damage to stored data.[69] The discussion was

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[67] 5th Year, B.A. LL.B. (Hons.), The Rajiv Gandhi National University of Law.

[68] ANDREW S. TANEBAUM & DAVID J. WETHERALL, COMPUTER NETWORKS (Pearson, 5thedn 2010).

[69] McLaughlin, *Computer Crime: The Ribicoff Amendment to United States Code,* 2 Crim JJ, 217 (1978).

started in the United States for forming Data-Storage Authority for all the ministries and the subject of criminal use of data, privacy risks were widely discussed. On later evolvements, online frauds and scams were reported and higher risks were at stakes by the end of the decade.

1970- 1980

There was technological advancement by the time in 1970 and 1980, and so was the development in characteristics of cyber-crime. The observation was made that there was a shift of traditional crimes to the computer-related fraud.[70] The law enforcement agencies recorded a considerable amount of causes related to fraud by the end of 1970. The situation was escalating due to lack of legislation and debate over the solutions for the cyber-crimes. In 1980s; personal computers became popular for committing these sorts of crimes. The increase in cyber-crime during the decade was due to the development of the new form of attacks and the number of computer devices available. The critical infrastructure became the target of the attackers.[71] Another factor because of which the cyber-crimes have wider implication is the expansion and development of software. The crimes that were also expanding were software piracy, patent-related frauds, network-related crimes (where the offenders commit the crime from a place not included in the crime scene), distribution of malicious software, and viruses were the new type of crimes that were introduced by the end of 1980.

1990's

The graphical interface was introduced in the 1990s and the number of internet users increased rapidly. The "www" became the trend for every internet user, whereas the effect of the increase in the number of users they became as targets that were prone to the cyber-crime. The other challenge posed before the authorities of different countries was the pace by which the cyber-crimes were committed. The transition speed of commission of an act into the crime was rapid and difficult to detect. The mode of distribution of child pornography shifted from books and comics to the internet, websites and the computer system.[72]The preventive step was taken by the Resolution adopted by the UN General Assembly[73]and later in 1994; the manual for the prevention and control of computer-related cyber-crime was introduced.[74]

The 21stCentury

In this era, the crimes related to cyber-space were not only restricted to the computer system but were against the State. The object of the crime like, in previous decades, was damaging the system, making a little money but in the 21st century, it became the race of gaining power. The object of the crime escalated from making money by selling pirated software's to hacking bank accounts. The crimes relating to damaging of computer networks and the system was now focused on damaging the critical infrastructure of a country. Cyber-crimes have now been extended to frauds related to e-commerce, crypto-currency, bit-coins, and stock markets as well. The crimes relating to personal attacks are also prevalent from a long time but since the cyber -crimes can be committed from any place, it is necessary to expand the scope and look forward to the ways to deal with these critical situations. The extent of cyber-crime is wider and not easily traceable as that of traditional crime. Cyber-crime is quick and does not stay for a long period like traditional crime. Cyber-crimes occurring on social media are generally the breach of privacy and crime against women. The unidentified criminal and undisclosed location of the crime poses a challenge before the criminal law to detect and prevent cyber-crimes. The laws are meant for meeting the needs of society, and hence the law is dynamic if it changes according to the needs of the society.[75] The modern technologies have prospered mankind and made tremendous progress. The progressive trend of computer technology is very helpful in communication, storing of information, sharing of information and data in a very short span of time. However, there are certain problems like cyber criminality that have emerged with these developments. Issues like breach of intellectual property rights, commercial and banking frauds are instances of crime against property. The crimes like pornography, stalking, harassment is against person and Denial of Service Attack, breach of sovereignty is the crimes against State. Cyber-crime has no boundaries, possesses no physical characteristics of gender, sex, easily

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[70]Bequai, *Computer Crime: A Growing and Serious Problem*, 6 Pol LQ, 22 (1977).

[71]Elizabeth Glynn, *Computer Abuse: The Emerging Crime and the Need for Legislation*, Fordham Urb. L.J., 73 (1983).

[72] CSEC World Congress Yokohama Conference, "Child Pornography" [2001], 17; SEXUAL EXPLOITATION OF CHILDREN OVER INTERNET: THE FACE OF A CHILD PREDATOR AND OTHER ISSUES: HEARING BEFORE THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE COMMITTEE ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES, ONE HUNDRED NINTH CONGRESS, SECOND SESSION, SEPTEMBER 26, 2006, (2006).

[73] Eighth UN Congress on Prevention of Crime and Treatment of Retrieved September 13, 2020, fromhttps://www.unodc.org/documents/congress/Previous_Congresses/8th_Congress_1990/028_ACONF.144.28.Rev.1_Report_Eighth_United_Nations_Congress_on_the_Prevention_of_Crime_and_the_Treatment_of_Offenders.pdf.

[74]United Nations Manual on the prevention and control of computer, Retrieved September 12, 2020, from http://216.55.97.163/wp-content/themes/bcb/bdf/int_regulations/un/CompCrims_UN_Guide.pdf

[75]Navtej Singh Johar v Union of India (2018) 1 SCC 791(India).

perishable, and can be executed far away from the crime scene. Most of the cyber-crimes can be attributed to the ignorance of the victim and consequently, the offenders (often anonymously) grasp the opportunity to commit the cyber-crime. The important aspect is to understand the role of every individual that leads to the commission of cyber-crime. It can be a case where a victim may provide the opportunity to the offender to commit the crime as justified by the victimology theories and on the other hand it can be offender who is not aware when his act is converted into cyber-crime. Whereas, in the cases like Salami Attacks and other similar offences the possibility is that the victim is unconscious about a cyber-crime which is being committed against him. Therefore, the challenge before the law enforcing agencies, law-makers and society is to understand the role of every individual in commission of cyber-crime. Additionally, awareness is necessary about the laws and types of cyber-crimes that have originated by the evolution of the technologies.

III. ROLE OF VICTIMS IN CYBER-CRIMES

Crime affects a large number of people, by and large, these are the people forgotten in the criminal justice system. It is in these recent decades only where has been accepted that the victims are to be treated with dignity. The victimology theories in criminal law relate the victim, offender and crimes together. The definition and meaning[76] of the victimology is understood as the connection among the victim, criminal justice system and the social groups, institution such as media, social business groups etc. While criminology concerns with the causation of crime, victimology is primarily concerned with the study as to why people fall as a victim to the crime. The theory of "victim precipitation" emerged in 1940's, when the founders of the victimology branch, notably, Mendelson, Wolfgang explained that victim itself is responsible for its victimization and suffering, for e.g. indecent exposure of women in a public place. This theory was rebutted and criticized by the feminists in the 1980's where the theory was expanded. It was improved to the extent that anyone can be a victim who is "caught up in asymmetric relationship or situation". There are various theories of victimology regarding the victim's accused and the criminal justice system. The discarded theory of 'victim precipitation',[77]which blames the victim for the commission of the crime, does satisfy the cause of cyber-crime. The theory by Marvin Wolfgang, says that the victim plays a role of determinant in explaining the causative force between the victim and the offender.[78]The phenomenon behind the theory relates to the "victim facilitation" rather "victim blaming" as of victim precipitation theory. The idea behind this theory facilitates that there are certain factors involved that make a victim more accessible to a criminal attack. For instance, the unawareness and ignorance of safeguards amount to the vulnerability of a victim to fall prey to the cyber-crimes. In situations where a victim leaves its password shared and saved on certain computer systems can also be one of the generic illustrations of application of victim facilitation. The three model theory given by the father of victimology Benjamin Mendelson, analyzed the six facets emphasizing the culpability of the victim.[79] In the theory it was also asserted there can be cases where the victim is not a part of the crime and other being where a role is played by the victim on its character, actions, behavior etc. to allow the commission of crime. For instance, the behavior of a victim in accepting cookies and lethal advertisement on a different website may result in losing personal details. The other instance where this theory is justified is when a victim makes a transaction on the unsecured platforms or share details on social media. The 'Routine Activities Theory' by Cohen and Felson manifests the role played by the victims in the commission of a crime due to lack of guardianship[80]the general instance is the lack of firewall and anti-viruses in the computer system. The other instance justifying this theory is responding to the frivolous phone calls that enquire about the bank details.[81]'The Penal Couple' concept illustrates that there are two partners in crime, the offender- who commits the act and the victim, who provides the opportunity to the offender to commit the crime. [82]In terms of time and space, the victim can be said to be at the wrong place in the wrong time. The other contributing factor is victim typology[83] as concluded by Schater in his work is that there are victims who substantially contribute to their victimization knowingly or unknowingly because of the absence of security or lack of vigilance. In the cyber world the successive acts of committing crime perpetuate the offenders to advance in the commission of cyber-crimes. Certainly, it is the offender culpable if proved guilty of the crime but if on relating with the theories of victimology victims also contribute to the

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[76]ANDREW KARMAN, CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY (8th ed Cengage Learning).
[77]Martin F. Wolfgang, *Victim Precipitated Criminal Homicide*, 48 J Crim L, (1957-58).
[78]Von Hentig Hans, *The Criminal and His Victim*, Yale U Press, 383 (1948).
[79]DAIGLE, L. E. VICTIMOLOGY. (SAGE Publications 2017).
[80] Review of the Roots of Youth Violence: Executive Summary. Retrieved September 12, 2020, from http://www.children.gov.on.ca/htdocs/English/professionals/oyap/roots/index.aspx.
[81] *See also*,<https://www.youtube.com/watch?v=uIesw2JkDTA>accessed 22 September 2020.
[82]N.V. PARANJAPE, CRIMINOLOGY AND PENOLOGY WITH VICTIMOLOGY 665 (15thedn, 2012).
[83]DAIGLE, L. E. VICTIMOLOGY. (SAGE Publications 2017).

commencement of cyber-crime. In the light of the instances examined with the respective theories, the safe inference that can be drawn is that victim plays an important role in traditional crimes likewise such contribution is also done in cyber-crime. The extent that cyber world covers are vast and the crimes of cyber world affect various infrastructures and persons. Various types of cyber-crimes are as follows:

CYBER STALKING:

In cyber world, cyber stalking[84] can be committed in 3 ways:

a. E-MAIL: In these cases, emails are sent to the victim with the purpose of threatening or harassing. The message may contain any type of subject matter like pictures, videos, text messages, or pornographic material.
b. By Internet: The offender in these cases does not invade the privacy but publicly harasses a person by publishing any information globally. The instances of stalking can be posting the contact number, e-mail or address of a person. Such information can be posted on the objectionable website or may use the morphed picture for the purpose to harass or threaten someone.
c. Computer: In these types of cases, the offender can be a technocrat and invade into the person's computer or system and get control over it. The offender gets the password or the IP address and stalks the persons regularly whenever it uses the system.

E-Mail Spoofing

The misrepresentation of the origin of an e-mail is e-mail spoofing. In simple words when an e-mail is sent the origin of such e-mail is different from where it has originated. For instance, if a person A sends an e-mail containing threatening messages using the account of another person, this act is e-mail spoofing.

Phishing

This is an economic crime where the offenders steal the money by gaining information from the person discreetly. The fraudsters gain the login information, passwords, and account information by masquerading other reputable individual or entities in various emails or other communicating medium. For instance: The email containing the information of a reputed firm and asks to invest in stocks and have assured profits. Further on clicking the link, it asks for the bank details and passwords etc. to get a hold on the person's private data. These types of acts are the criminal activity of phishing.

Computer Vandalism

This crime deals with the physical damage of the computer system. It can be done by way of viruses and virus hoaxes. The person has to face a huge amount of loss like data loss, economic restrain etc. In general, the viruses can be of two types. Firstly, the file infectors, that are attached to the ordinary program files. These file infector viruses can be either resident or direct-action viruses. Direct action viruses are those, which are attached to the program and once the program is executed, it starts to corrupt or damage the program. A resident virus hides in the memory or any location of the computer system and once any program is executed the other program themselves get infected. The other type of viruses is boot record viruses. These are the codes that are present in any specific area of a disk which are not like any ordinary files.

Virus Hoax

A Virus Hoax is carried generally in an e-mail message describing a particular virus which does not exist. The writer or writers of the message email a warning and attach a plea to forward the other people. The virus is contained in that email and the innocent people forward it to the others. For instance, a virus named "Good Times" was circulated in 1994 and it circled the globe various times. It is advisable to ignore such messages and e-mails.

Cyber Terrorism

Despite various steps taken by the countries, the cyber terrorism is a complex problem. With the development and enhancement of technology, the mode and execution of terrorism have also undergone radical change. The mode communication, execution, planning for any terrorist attack is also done by using a cyber-medium.

Cyber Pornography

The term cyber pornography is a derivative of the term "porne" and "graphe" which relates to the writings about prostitutes. It can also mean as a reference to any kind of work or depicting art or form of literature connected with sex and sexual theme. When there is the distribution and the impact of the said work via a computer network, it is said to be a crime of cyber pornography. The Internet Filler Review report, 2010 suggests that 4.2 million websites offer porn content and around 72 million users are there world-wide who visits per month. The crime of cyber pornography can be in the various forms like to host obscene material in websites containing or use of the computer for the distribution or

[84]*Manish Kathuria and Ors. v. State of Punjab and Anr*C.W.P No. 14104 of 2013.

collecting or running business-related to obscene material. A person, who publishes, transmits or causes to be published and electronic form of any material which is lascivious, or if its effect is such that it may deprave or corrupt a person who uses the content is said to commit cyber pornography.

Cyber Defamation

This crime involves hate speech where any person with the intent to lower the dignity of a person by hacking the email account, sending or posting on social media using signs, language or objectionable content. In India, a person can be held liable for the crime of defamation under IPC. However, the provision added by the amendment in the Information and Technology Act, 2000, a person can be held liable under section 66(A) of the cyber defamation. Later in 2015,[85] the said section was struck down by the Supreme Court of India as it was grossly misused and in contradiction to Article 19(1)(a) of the Constitution of India.

IV. Denial of Service Attack or DDoS Attacks

In this type of attack, the huge amount of data is sent on the computers of the organization. This attack interrupts the flow of communication or finance and destroys the parts of the network infrastructure like routers and servers.

The nature of these attacks is:

- The huge volume of traffic data originates from millions of different devices.
- The attacks are caused by a hijacked network of computers, known as a botnet, controlled by a bot-master. These botnets can be used for cybercriminal activity.[86]
- The recent attacker uses a network of "zombie" computers - known as a "botnet".[87]

The DDoS attacks are also caused by the State over another State to gain control over their critical infrastructure like stock exchanges etc. and overpower them.

E-Mail Bombing

In these types of attacks, the person sends the e-mail bombs. A large number of data or email is sent to a person and as the person opens the mail, suddenly a plethora of e-mails are sent to a computer system crashing the servers.

Logic Bomb

A logic bomb is a code that is inserted in a software system, when a person installs the software or any other part of it and on furthering the steps, the malicious functions of the software and corrupt the functioning of the computer.

Trojan Horse

These are the very old form of viruses but the most dangerous of all the viruses. In this form of attack, the virus gets into the computer system and multiplies itself and harms the computer system.

Cyber Squatting

Cyber-squatting is making a claim for the domain name contesting the registration of a trademark. A mere claim is not cyber-squatting, but the act of using a domain name accompanied by intent to breach the domain name is cyber-squatting.

V. ANALYSIS AND CRITICISM

Cyber-crimes have no limit to the effects it causes. The crime executed in the cyber space can victimize a person, State and its sovereignty, property or a group of people. On juxtaposing the theories of victimology with the types of cyber-crimes the objective approach can be that the victims should be cautious and mindful while exploring its journey in the cyber world. This can be seen as a very narrow approach to the study of cyber-crimes vis-à-vis victims, whereas on the other hand, the broader aspect can be that though victim plays an important role in the commission of cyber-crimes, but the determining factor of when the victim has made amiss in the cyber world is to be studied which itself is not encyclopedic. The vast extent of the cyber world perplexes the victim who errs in understanding the consequences. The extent of cyber-crimes from Salami Attacks to the DDoS Attacks the chances to get hold of the accused are quite bleak so the victims should be cautious before touring in the cyber-world. In all the types of cyber-crimes mentioned the victims play an important role while authorizing the people to access and share their profile, personal details, domain names, monitoring the business in the cyber world. At this point the broader approach of assessment should be adopted i.e. to determine the factor of when the victim has made amiss in the cyber world. Therefore, the victimology theories are appropriately related to the cyber-crimes when enumerating the causes of the crime and the role of a victim. Also, in these aspects of crimes it is not only the victim who suffers the plight but it causes to form the secondary victims and tertiary

[85] Shreya Singhal v Union of India, AIR 2015 SC 1523 (India).

[86] C. Kavitha, *Complete Study on Distributed Denial of Service Attacks in the Presence of Clock Drift* (2014) (ICICES2014), 2014.

[87] Content Management Systems Security and Associated Risks | CISA. Retrieved September 24, 2020, from https://us-cert.cisa.gov/ncas/alerts/TA13-024A

victims like families, friends and member of the society. Hence, it is necessary to understand the boundaries of cyber laws and cyber world in contemporary times. The trustworthiness and reliability on sources are very necessary before exposing ourselves to cyber-world. The other lacunas that the Information and Technology Act possess are it is devoid of administrative guidelines. The IT Act, fails to administer for sharing the morphed photograph in private messages and consequence of same are not clearly stated in the Act. The other key issue in the above instances is that there is no consequence of creating or being a member of a social media group. Recently, the Court held that a member will be liable if on the social media group any objectionable material is shared.[88] Therefore, if any random member posts the objectionable material any member can be implicated. This issue cannot be solved by judicial pronouncement but it needs a law to administer such acts. Moreover, the Act lacks regulatory and administrative provisions to curb and control the menace of passive cyber-criminal liability. Additionally, crimes like cyber-bullying, undue-influence, recording obscenity, fraudulently seeking information are adding modernization of cyber-crime. The Act under section 72 penalizes the breach of privacy but it fails to give due regard to the privacy of two consenting adults. Hence, with the era advancement the Act needs modernization in new form of cyber-crimes.

VI. CASE LAWS

The analysis of the evolution of cyber-crimes has shown the escalations in the forms of cyber-crimes. The Courts have pronounced exemplary as well as deterrent punishments in various cases but it is necessary to learn from these cases the application of theories of victimology to the cyber-crimes.

Nikhil Chacko Sam V. State of Kerala[89]

In this case, the accused was charged under section 66-A of the Information and Technology Act. The act of the person was the transmission of certain photographs depicting the complainant and another person in a bad light. Similarly, in the case of *Sajeesh Krishnan V. State of Kerala*[90] the Court charged the accused under section 66-A(b) and 66D of the Act. The accused forged a CD against a minister and thereafter blackmailed the minister.

BSE And NSE Case

The threat email was sent to BSE and NSE containing the matter of challenging the security agencies to prevent a terror attack. The e-mail was traced to be sent from Bihar. The fake numbers were used while creating the e-mail id and the case under the provision of forgery for the purpose of cheating was registered.

Citibank, Pune- Call Centre Fraud

In this case, the fraud was committed by the employees of the call center. These offenders gained the confidence of the four US customers and got access to their PIN of the bank account. The call centers usually have very high security and employees are checked when they go in, and out of the center therefore, they cannot note down the numbers. The offenders in this case, got the PIN and started to transfer the money from the bank accounts. The customers complained about the transfer and the accounts were later frozen. The innocence of the call centre was proved and it was directed that the call centre should be kept in check by the call centre executives. However, the best case for the security check can be the national ID of the employee and a database of the employee. Also, the education to the customers is necessary and the bank should provide and elucidate certain guidelines for the protection of the bank accounts.

Bazee.Com Case[91]

In this case, the CEO of the website bazee.com was arrested for selling the CD with objectionable material. The owner was released on bail and the question arose that what distinction should be made between ISP‟s, content provider and the content owner. The burden rests on the accused that he was the “service provider” and not the “content provider”. The Court did not hold the owner of the website liability as IPC does not lay any provision for the criminal liability of a director where the company is an accused.

Parliament Attack Case

The Parliament of India was attacked on December 13, 2001, by terrorists. The Bureau of Police Research and Development at Hyderabad found the laptop of two terrorists and sent it to the Computer Forensics Division of BPRD. There were several shreds of evidence recovered from the laptop like the scanned Indian emblem, fake ID cards, and also the residence address of Jammu and Kashmir. After the discovery it was found that all the elements used were made from the laptop, therefore the covert attack made by the terrorist was because of the identity theft and making false representation which is covered under cyber-crimes.

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[88] Paramjeet Kaur v. State of Punjab, CRM-M-19150-2020, Or. Dt.17.07.2020.
[89] Nikhil Chacko Sam v State of Kerala, 2012 SCC OnLine Ker 15471 (India).
[90] Sajeesh Krishnan v State of Kerala, MANU/KE/3601/2019 (India).
[91] Avnish Bajaj v State, MANU/DE/1357/2004.

NASSCOM Vs. Ajay Sood& Others[92]

In this case, 'phishing' was declared to be an illegal act. In this type of crime, the person presents itself as a member or representative of a company or association and extracts the personal data of the other people and is mostly used in e-transaction, e-banking etc. The effect of these crimes is that it affects the goodwill and tarnishes the image of the company or association. The result of this case was that the matter was settled between the parties after the accused accepted its guilt. The main effect of the judgement was that it recognized phishing and other wrongful gains in the cyber world as a crime.

Attack on Estonia, 2007

The attack was made on Estonia and the accusation was made upon Kremlin. Estonia took the help of NATO to investigate the attack. The IP address was found to be that of the Russian State authorities but the attack was carried on by the computer of the Estonian Defense Minister and hence the attribution of the State was not possible. Russia denied the attacks and Estonia faced tens of millions of Euros.[93]

Georgia Attack, 2008

The attack was made on the network communication of Georgia. The analyst found the attack was done by the Russian agencies. The attack was made by the free download of certain software and few clicks only making a joint cyber-attack. Russia denied the responsibility of the attack.[94]

Sony Samabadh Case: The First Conviction

The first conviction of cyber-crime was made in this case. The case is of the fake transaction. The Sony Company started a website www.sony-sambandh.com where NRI"s can send the electronics and purchases from the Sony Company to the people residing in India. An account named Barbara Campa and ordered a Sony Color Television set and a cordless headphone and delivery was sent to Arif Azim in Noida. Later, the transaction was made by the account from the credit card which was stopped by the real owner. The CBI recovered the material from accused, Arif Azim. The accused accepted the guilt under Section 418, 419 and 420 of the Indian Penal Code.

Bois Locker Room Case

In 'Bois Locker Room' case the members of the private group of a social media platform discussed and shared inappropriate media content. The photographs shared were obtained by digging into the social media profile of victims.[95] The I.P.C is silent upon the callous discussion done in a private group, but the IT Act considers the community standard test while deciding the matter of obscenity.[96] The IT Act is silent upon the issue of sharing a picture of a person gained by visiting the social media profile of that person. Also, if that picture is shared on a private group the consequences for such act are not defined in any law in India. In these cases, it is important to recollect the theories of victimology and analyze the causes that eased the offenders in the commission of a crime. The victim precipitation theory is in reference to the traditional crimes but for the cyber-crimes when a person is found to be in asymmetric relationship or situation then he falls to be a victim of cyber-crime. If a person uses obscene picture, not for knowledge, academic information, scientific use, art or any other relevant purpose than that person facilitates an offender in the commission of a crime. Other cases those connected with harassment, breach of privacy, stalking etc. the offender obtains the private information from the social media platforms. The victims must be cautious by using proper privacy while uploading, sharing or demarking any of the personal information on any social media platform. The penal couple concept also demarcates the line of difference between the role of the victim and that of the offender. The other crimes those related to economic frauds, e-transaction, e-banking etc. the victims should avoid saving passwords or using random intermediaries while making any transaction. The infamous cyber-crimes originating from Jamtara district of Jharkhand elucidate the cause and ignorance that people make while receiving unknown and forged phone calls. Lastly, the cyber-crimes that affect the State like Parliament Attack Case and DDoS attacks, where the accesses to identity are easily available should be strictly monitored. Therefore, to curb the menace of cyber-crime, the opportunity to commit such crimes should also be minimized. The crime of cyber world affects the society at large and victims often face mental, economical and psychological imbalances. The offenders should be seriously punished and victims should be conscious while choosing and making their way to the cyber world.

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[92] Nasscom v Ajay Sood & Ors, (2005) 119 DLT 596.

[93] *Content Management Systems Security And Associated Risks*, US CERT, (September, 13,2020, 10:20 AM), available at http://www.Us-Cert.Gov/Cas/Techalerts/Ta13-024a.Html.

[94] John Markoff, *Before The Gunfire, Cyber Attack,s* N.Y. TIMES, August 13, 2008); Evegeny Morozov, *An Army Of Once and Zeros: How I Become A Soldier In The Georgia- Russia Cyber Wars*, SLATE, August 14, 2008.

[95] Suchitra Karthikeyan, *Bois Locker Room Case: Police Reveal 'Sexual Assault' Chat didn't originate in the Group* Republic TV, May 11, 2020.

[96] Aveek Sarkar &Anr v State of West Bengal, (2014) 4 SCC 257 (India).

VII. CONCLUSION & SUGGESSTIONS

The essence of all the cases discussed is that the attack of cyber-crime can extend from breaching the privacy of an individual to endangering the securities of States. On the one hand, the theories of punishment explain that the deterrent theory is essential to curb the menace of cyber-crime whereas on the other hand there are instances where the victimology theories explain that victims should be cautious while entering in the cyber world. The acts of such offenders should be punishable in the view of the deterrent theory of punishment. The retributive theory of punishment as put by Sir Hegal is related to harm the offender. When a victim is not capable of harming the offender itself, it demands that the offender be harmed by others. This application of theory is neither to deter the offender nor to purge the guilt but that the offender deserves to be punished.[97] This theory fails to satisfy the need of the present society. In cyber-crime for breach of privacy and harassment equal harm, in the same manner, will not fulfil the purpose of curbing the cyber-crimes. The other theory of punishment is preventive. The theory suggests that the crime should not be avenged but prevented. Bentham, Stuart Mill, Austin advocated this theory because of certainty of law and not its severity. The theory seems to be immaterial for cyber -crimes on the grounds that firstly, with the advancement in technology and new dimensions of the cyber world there is an increase in the mode of committing cyber-crime. Secondly, the pre-determination of the criminal is not possible in cyber-crime. Lastly, there is no exhaustive interpretation of acts which are culpable in cyber space.[98] Therefore, there is no certainty of the substantive law dealing with cyber-crimes and hence making preventive theory inappropriate for cyber-crime. The reformative theory of punishment can also not be said as a way forward. This theory has its roots on an individual treatment to a few offenders. Moreover, the theory refuses to deal with relevant causes of crime like poverty, unemployment, ignorance, illiteracy etc.[99] On the other hand, the deterrent theory of punishment can be the approach to deal with cyber-crimes. Jeremy Bentham, the founder of the theory states that the offender will be deterred if the punishment applied is swift, certain and severe. This theory states that the punishment should be exemplary for others.

The additional factor in determining the men's-rea of the offenders is that the cause of traditional crime can be rage, anger or provocation whereas in cyber-crimes the offender has the entire window and opportunity to rethink the reflexes in the commission of cyber-crime. The crime against person affecting society at large like harassment should be dealt with strict and harsh punishment. The rationale of using deterrent theory in cyber-crime is the acts of cyber criminals can be prevented by effective and strict laws. The maximum punishment in IT Act for breach of privacy is two years. Whereas, such acts are not only restricted to breach of privacy but also covers the ambit of harassment, annoyance, and mental agony. Generally, the cyber criminals are anonymous or run a malicious account which makes bleak chances of apprehension. Therefore, to curb the menace of cyber-crime, the deterrent theory of punishment is appropriate to exemplify the consequences of cyber-crime.

The aspect of cyber-crime is untouched in the society and with the increase in developments of the cyber world people are prone to make mistakes. Though victimology theories are clear upon the acts of the victims and the offenders in the commission of crime, the cyber-crime create a link between the offenders, victims and their inter-relation stronger than that of the traditional crimes. The widespread growth of the cyber-crimes has become a matter of global concern and a challenge for the new millennium. It is because of the peculiar nature of these crimes; they can be committed anonymously and far away from the victim without being physically present at the crime scene. Further, cyber criminals, have a major advantage that they can use computer technology to inflict damage without the risk of being caught. All these factors make the victim of the crime at a disadvantage position if compared with the traditional crimes.

Needless to say, that the offenders of the cyber-crime are well trained and also well aware of their acts while committing the crimes; therefore, the deterrent theory of punishment satisfies the need of contemporary times. Generally, the cyber criminals gain the information of the victim by their social media profiles, personal contacts details on computer applications and other relevant sources. Thereafter, the next step involved is to hit a vulnerable target and extract the relevant information and finally, the cyber-criminals inflict severe damages over the victim. The victimology theories suggest that the victimization is done by the offenders by certain ignorance of victims. In this reference at various instances the victim accepts cookies, enters into a domain of the website, or adds passwords, make transaction, shares password and personal bank account details etc.

These are the instances where the victim facilitates the offender and provide for the opportunity to commit the cyber-crime untraceably. Therefore, the criminal law is not silent upon the extent and effects of the cyber-crimes but it needs attention in today's era for the people who recklessly enter the cyber-world and are victimized due to their faults.

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[97] AC EWING, THE MORALITY OF PUNISHMENT 73-75 (Routledge, 1st ed, 2013).

[98] N.V. PARANJAPE, CRIMINOLOGY AND PENOLOGY WITH VICTIMOLOGY 665 (15thedn, 2012).

[99] EUGENE KAMENKEA & BROWN, LAW AND SOCIETY: THE CRISIS IN LEGAL IDEAS (IDEAS AND IDEOLOGIES) 112 (E. Arnold 1978).

Therefore, the pro-active cyber cells, preventive measures and strict laws in heinous and serious crimes shall be the approach. As discussed, the men's-rea in cyber-crime is exquisite thereby calling deterrent theory in punishment. Though, in other crimes the reformative theory is practiced but the provisions where serious offences are committed by way of cyber-crime should be strictly dealt in IT Laws.

It is needless to remark that the cautiousness of choosing the media platform, storing of data and sharing of data is necessary. Most of the time where the crimes are related to women it affects the whole society and the secondary and tertiary victims suffer equally as the primary victim. There are various types of crimes as discussed above informs that the victimization can be done at any platform because of the oversight of the people. Hence, the victimization in the cyber world can be prevented only after there is cautiousness in the people who are travelling and visiting the cyber world.

CYBER CRIMES AND ITS LEGAL CHALLENGES IN INDIA

JAYANTA BORUAH[100]

ABSTRACT

India is emerging as an Information Technology hub and at the same time is also becoming a major ground where cyber offences are increasing day by day victimizing the innocent users of the technological innovations. In such a situation it becomes very necessary to protect the rights of the citizens from those criminals who use to take advantage of the ignorance of the common people. Cyber world has made all the technologies to change in such a way that it has created a generation gap between those who are known to these technologies and those who stayed behind in this race. India is a country with much rich and poor divide along with-it higher rates of poverty and illiteracy. Therefore, such generation gap gets even more widened due to such reasons. Thus, both the law makers and the law keepers have a big responsibility to introduce an efficient legal mechanism for addressing such issues of cyber-crimes that takes place in the virtual world which is much difficult for monitoring through real mechanisms. This paper will thus make an attempt to analyze the legal framework with an aim of understanding the efficiency of in regulating cyber-crimes in India.

Keywords: *Cyber-crimes; Cyber world; Internet; Information Technology; and Legal Framework*

I. INTRODUCTION

Since the invention of Internet, its users are increasing day by day across the globe. in India too, the number of internet users are increasing and surprisingly India surpassed the number in US where US users amounts to only 4.4% population of global internet users while India amounts to 17.2% of total global users.[101] Majority of the population using internet in India belongs to age group of less than 30 years which indicates that the workforce in India is basically dependent on IT based technologies as a result of which IT and Business Process Outsourcing Industries have gained global prominence in India.[102] However, we must also acknowledge that this internet has also created a virtual world with no borders and to some extent with very limited regulatory control across the world. Many activities can take place through internet where the actors might not get recognized. In such cases it becomes quite difficult to regulate criminal activities and to secure the virtual world with legal rules that are fit for real world but may not suit the virtual world. This Article therefore will make an attempt to analyze the Indian legal framework over the matter of regulating cyber-crimes in the virtual cyber world especially at such a time when the process of digitalization has increased to a significant level.

II. CONCEPTUALIZING CYBER CRIMES AND OFFENCES

Cyber-crimes in a narrow sense refers to all those illegal activities committed through a set of electronic operations targeting the security of either the computer systems or the data possessed by them. While in a broader sense, cyber-crimes can be referred to all illegal behavior or activities committed in relation to a computer system or network that even includes possessing, offering, distributing or sharing of information through the means of such computer systems or network.[103] The Budapest Convention is the first International Legal Instrument that was adopted primarily with the objective of introducing a uniform set of regulations at the international level for combating various forms of cyber offences. It even became the first legal instrument to connect cyber offences with human rights violations. The principal categories of cyber offences as defined by this Convention are- data interference, illegal access, misuse of devices, illegal interception, computer related fraud or forgery, offences related to copyright, neighboring rights and child pornography.[104] Later publication of any content with racist or xenophobic propaganda was also made a criminal offence by an Additional Protocol to this Convention.[105] At present even cyber terrorism has also been included within the scope of this Convention. From these facts, it can be argued that the scope of cyber offences is much broader to even include all activities that are illegally committed through a computer system, mobile phones, networking, or any electronic device and even may include those illegal activities that are not committed through electronic devices or networking as such but are committed

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[100] Research Scholar, Former Asist Prof of Law & Advocate

[101] Internet World Stats, Top 20 Countries with the Highest Number of Internet Users (Sept, 02, 2020, 01:12 AM) http://internetworldstats.com/top20.htm.

[102] NASSCOM, Impact of BPO Industry on the Indian Economy and Society (Sept, 02, 2020, 02:45 AM) http://www.nasscom.in/impact-itbpo-industry-indian-economy-and-society?fg=71038.

[103] Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offender Vienna, 10-17 April 2000, UNITED NATIONS (2000), pdf.

[104] Convention on Cyber Crime (Budapest Convention), 2000.

[105] Additional Protocol to the Convention on Cybercrimes, concerning the criminalization of acts of a racial or xenophobic nature committed through computer systems, 2003.

in order to target such devices. However, in India no clear definition of cybercrimes or offences has been provided under any of the laws including IT Act of 2000 and 2008. It is therefore essential to analyze the provisions of various laws that deal with cyber offences along with their different categories that have taken place or have been committed in India.

III. INDIAN LEGAL FRAMEWORK ON CYBER CRIMES AND DIFFERENT KINDS OF CYBER OFFENCES

In India, the main legislation that deals with computer related offences is the Information Technology Act, 2000 which was last amended in 2008. However, laws like Indian Penal Code 1860, Indian Evidence Act, 1972, etc. do contains certain general provisions related to cyber offences and even such laws were amended to include certain specific provisions for dealing with IT related matters. The statement of objectives of the IT Act reveals that India has advanced towards the generation of e-commerce and e-governance, as a result of which it has become urgent necessary to have an efficient legal mechanism for regulating the IT sector in the country. The IT sector has revolutionized the communication facilities across the globe including India for which the term 'Global Village' has now become popular. This situation besides connecting people across the globe by bringing them together has also made it difficult for the governments to ensure security of information leading to several new emerging issues of human criminal behavior. Thus, the main objective of the IT Act was to provide new parameters for governing human conduct in the virtual world of cyberspace. In due course of time several new categories of offences started taking place in this virtual world which can be briefly analyzed in the following manner-

a. Cyber-squatting- cyber-squatting takes place when someone makes unauthorized use of the cyberspace. This is generally done by using a domain name that appears to be similar to any famous or popular name of domain, entity or brand. The offender is referred to as squatter and the name which he/she uses is known as squatted name. The squatter successfully registers the squatted domain name for acquiring legal rights over it by virtue of a first mover advantage. Subsequently, the squatter demands money from the owner of the popular brand in exchange of the squatted domain and in case if such owner refuses to purchase the domain then the squatter gets a legal right to stop the owner from using such names.[106] This kind of activities interferes with the Intellectual Property Rights and in India it interferes with the "Uniform Domain Name Dispute Resolution Policy".
b. Cyber-terrorism- the term 'cyber terrorism' was used first by a Research fellow at the California Institute for Security and Intelligence, Barry Collin. According to him cyber terrorism means and includes convergence of terrorism and cybernetics.[107] Cyber terrorism was even defined as a premeditated, politically, motivated attack against computer system, information, computer programs and data that amounts to violence against non-combatants targets through clandestine agents or sub-national groups, by a special FBI Officer Mark Politt. India first experienced cyber terrorism attacks when in 2002 several messages related to Kashmir issue were broadcasted on different famous websites in the country which was alleged to have been committed by Pakistani Hackers under the leadership of one Doctor Naikar. In April, 2010 the CBI website was also hacked by Pakistan Cyber Army.[108]
c. Data Theft- Data theft occurs when someone stoles or purchase information illegally that is of confidential nature and is restricted from being exposed in public domain.[109] Such offences are dealt under Section 43, 43A and 66 of IT Act, 2000. Section 43 deals with the offence while Section 43A and Section 66 provides the penal provisions for such offences. Section 66 was even invoked in the case of Syed Assifuddin and Others v. The State of Andhra Pradesh and Others.[110]
d. Hacking- it is a much broader offence and one must understand that it is one of such offences that can be committed very easily. Hacking generally implies any unauthorized utilization of computer or electronic devices, information, or any such other kind of data accessing or sharing devices, applications, etc. Hacking is such a broad category of offence that it may even include utilizing someone's email id without the permission of the owner of such id in cases where such email id has been kept in log in mode in a device by the owner by mistake. Hacking offences are the most commonly increasing offences in India. Even the website of the Ministry of Defense, Jadavpur University, and many such other important websites were hacked from time to time. Hacking has been dealt upon as an offence under Section 66(2) of the IT Act, however the term 'hacking' has been replaced by the term 'Computer related Offences' through the Amendment Act of

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[106] Winston & Strawn, what is the definition of cybersquatting? (Sept. 03, 2020, 01:33 AM) https://www.winston.com/en/legal-glossary/cybersquatting.html.
[107] Jonalam Brickey, Defining Cyber Terrorism: Capturing a Broad Range of Activities within Cyberspace, 5(8), CTC SENTINEL (Sept, 03, 2020, 02:10 AM) https://www.ctc.usma.edu/defining-cyberterrorism-capturing-a-broad-range-of-activities-in-cyberspace/.
[108] Souvik Kumar Gulha, Cyber Crimes in India, SWAYAM, pdf.
[109] Prashant Mali, Data theft in Organization and Legal Issues, TECHNOLOGY LIFE (Sept. 03, 2020, 02:11 AM) https://www.moneylife.in/article/data-theft-in-organisations-and-legal-issues/51604.html.
[110] 2006 (1) ALD Cri 96, 2005 CriLJ 4314.

2008. At the same time we must also acknowledge that hacking can be categorized into ethical and unethical hacking where ethical hacking implies hacking with the permission of the owner of the concerned system in order to identify the possible vulnerabilities in such system against future unethical hackings, while on the other every hacking done with a malicious or guilty intention for an illegal purpose will lead to unethical hacking and Section 66(2) deals with unethical hacking not with ethical hacking.[111]

e. Web-Jacking- web jacking occurs when someone forcibly takes over the possession of a website from a actual owner illegally by breaking the password and then starts modifying the contents within the website. Such forceful taking away of possession makes the actual owner to lose all control over the website. In Indian legal framework such offences are dealt under Section 65 of IT Act, 2000.[112]

f. Cyber Bullying- Bullying generally indicates threatening or intimidating somebody. When such threatening or intimidation takes place through cyber means then it amounts to cyber bullying. Cyber bullying is commonly known as repeated an willful harm affected through the utilization of cell phones, computers and other electronic devices. The Global Youth Online Behavior Survey conducted by Microsoft in 2011 revealed that India ranked third after China and Singapore in terms of cyber bullying where it was estimated that around 53% of children were once subjected to cyber bullying during their entire period of presence at the online platforms. Indian laws have not defined cyber bullying specifically but such kind of offences can be brought under the scope of Section 66 and the penal provisions of Section 43 of IT Act, 2000.[113]

g. Cyber Stalking- Stalking when done in cyberspace leads to cyber stalking. If a person is watched by some other person constantly then such activities are defined as stalking in general sense and are punishable in certain circumstances under Indian Penal Code. Cyber stalking takes place through online mediums.[114] It might not appear to be that harmful for any individual as such but might lead to grave violation of the Right to Privacy that has now been declared as a Fundamental Right under Article 21 of the Constitution of India. Although, no special provisions have been made under the Indian laws for dealing with cyber stalking, Section 72 of IT Act can be referred since it deals with breach of privacy as well as confidentiality. However, the 2013 Criminal Law (Amendment) Act made cyber stalking a punishable offence under Section 354D of IPC, but the Section is gender specific where it provides protection to only women victims against male offenders. Thus, reference to Section 72 of IT Act becomes more important although it is not specifically dealing with cyber stalking for which there might arise difficulties in interpreting this kind of offence from a gender-neutral perspective.

h. Phishing- Phishing means sending fraudulent emails to someone with an intention of obtaining valuable personal information of such person which might include information related to credit card numbers, account details, ATM card PIN numbers, etc. In India such offences will be dealt under the general provisions of laws related to fraudulent behavior and conducts.[115]

i. Damaging Computer System- Section 43 of the IT Act 2000 declares certain acts as offences of damaging the computer system if committed without the permission of the owner or the care taker of such computer systems. Those acts include- obtaining information from such computer systems without permission; exposing such computer systems or networks to virus or any other kind of contaminations; damaging such computer systems either digitally or physically; causing any sorts of disruptions in the working of a computer system; restricting someone to access the computer system who is legally entitled for such access; abetting offences with respect to any such computer systems; causing internet time theft; compromising with any kind of information stored in computer resources; or hiding of any computer codes with an intention of causing damages to such computer systems; etc. However, this Section fails to acknowledge damages caused to a computer system through the means of other computers and just focuses on digital and physical attacks on a computer which provides recognition to only a narrow category of cyber-crimes related to causing damages of computer system.

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[111] Lokesh Vyas, Is Ethical Hacking Legal in India? IPLEADERS (Sept. 03, 2020, 02:12 AM) https://blog.ipleaders.in/ethical-hacking/#:~:text=Hacking%20is%20a%20punishable%20offense%20in%20India%20with%20imprisonment%20up,a%20computer%20system%20is%20hacked.

[112] Supra n 8.

[113] Swati Shalini, what is Cyber Bullying or Anti-Bullying Laws in India? MYADVO (Sept. 04, 2020, 02:45 AM) https://www.myadvo.in/blog/must-read-what-is-cyber-bullying-or-anti-bullying-laws-in-india.

[114] Rohit Lohia, Cyber Stalking in India, LEGALSERVICEINDIA (Sept. 04, 2020, 03:12 AM) http://www.legalserviceindia.com/legal/article-1048-cyber-stalking-in-india.html.

[115] Phishing, CYBERJURELEGALCONSULTING (Sept. 05, 2020, 03:11 AM) http://www.cyberjure.com/phishing-c-11.html#:~:text=Phishing%20involves%20use%20of%20fake%20emails%20and%2For%20fake%20websites.&text=This%20website%20impersonates%20the%20bank's,1%20Crore.

This Section provides penal provision for committing such offences by virtue of fines while Section 66 provides for 3 years maximum imprisonment as a punishment against such kind of offences.[116]

j. Obscenity- Section 67 of the IT Act 2000 provides for a maximum punishment of 3 years and a fine up to Rs. 5 lakhs for publishing obscene materials on first conviction while for every subsequent conviction the imprisonment might increase up to 5 years and fine up to Rs. 10 lakhs.[117] However, the most important difficulty with this Section is regarding the definition of Obscene materials since legally any lascivious element that has the potential of causing excitement in any individual will amount to obscene materials. But the nature of lascivious elements may differ from individual to individual and even an element that might excite one individual might not excite the other. Further, cyberspace has no geographical boundaries therefore no specific culture, so a content that might be culturally obscene in India might not be regarded as such in US. In such cases question arises as regards the validity of the materials since everything published in the cyberspace can be accessed by anyone at anywhere. Moreover, this Section can even be challenged on the grounds of being unconstitutional for violating Article 19 of the Indian Constitution.

k. Defamation- Normally the offence of defamation is dealt under Section 499 IPC. But when such defamation is targeted towards the government or public officials then the offenders can be charged under Section 124A of IPC that provides for offences of Sedition. In cases where any defamation of sexual nature is made against female government or female public representative then the person making such defamation can be charged under Section 3 and 4 Indecent Representation of Women (Prohibition) Act 1986. However, for defamations made through online platforms Section 66A of IT Act, 2000 can be referred. If defamation is made against any famous personalities on social media then even Section 66C of the said Act can be referred.[118]

l. Child Pornography- Child pornography is an activity defined as offence universally across the globe. Child pornography means any pornographic activity involving children. In India, Section 67B of IT Act, 2000 makes transmitting materials contaminating sexually explicit contents of children as a severely punishable offence. Further, the Prevention of Children from Sexual Offences Act has also introduced severe penalties for engaging any children into pornographic activities. However, it is very hard to monitor children watching porn on their own. Most often they use to get exposed to advertisements containing sexually exciting contents. It even becomes very difficult to restrict children from getting access to such online contents at present as a result of which gender-based misconceptions or indecent behavior might get developed into the minds of such children, since those images are mostly glamorous but virtual with very less reality.[119]

m. Voyeurism- Voyeurism means an act where a man watches a woman in a situation when such woman is engaged in a private activity with a belief that she is not being watched by anyone. Such offences are made punishable in India under IPC but by the definition itself it means that this Section is a gender specific one where males cannot claim protection. However, Section 67 of IT Act 2000 can be referred to some extent for dealing with offences of voyeurism for a gender-neutral interpretations.[120]

Besides all these legal mechanisms, Indian Government has also adopted several other institutional measures for regulating the IT regime according to the global standards. For instance, all government departments and ministries were made bound to adhere to the security guidelines with the Information Security Management System (ISMS) Standard ISO 27001. The 5-year plan on Information security also focused on increasing the cyber security of the government departments. Further, several drills were conducted to measure the amount of preparedness required for facing cyber security emergencies. There is a National Cyber Security Policy but still there is no cyber certification authority in India. Audits regarding cyber security are conducted in different government offices from time to time. However, the implementation process of the 5-year plan on Information Security is still going at a very slow speed.

IV. JUDICIAL INTERPRETATIONS ON CYBER OFFENCES IN INDIA

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[116] Vinod Joseph & Deeya Ray, India: Cyber Crimes Under the IPC And IT Act - An Uneasy Co-Existence, ARGUSPARTNERS (Sept. 05, 2020, 03:12 AM) https://www.mondaq.com/india/it-and-internet/891738/cyber-crimes-under-the-ipc-and-it-act--an-uneasy-co-existence.

[117] Yeshwant Naik, Cyber Obscenity and Victimization of Women in India, IPLEADERS (Sept. 05, 2020, 04:13 AM) https://blog.ipleaders.in/cyber-obscenity/#:~:text=Concerning%20the%20law%20pertaining%20to,on%20the%20internet%20in%20India.&text=It%20merely%20prohibits%20the%20sale,exhibition%20of%20obscene%20words%2C%20etc.

[118] Supra note 110.

[119] *Ibid.*

[120] *Ibid.*

In the case of *Avnish Rajaj v. State (NCT) of Delhi*[121] popularly known as DPS MMS Scandal, an MMS where a DPS girl was involved in a highly sexually explicit act was uploaded on a website named "baazee.com" for sale and several copies of the MMS were sold making a huge amount of profit. The CEO, Avnish Bajaj of the website company was charged under Section 67 of IT Act for publication and transmission of obscene materials but the defendant argued that he was not directly involved in the case and since the Section prohibited publication and transmission of obscene materials, his act did not amount to any of such activities and the company took all reasonable steps to remove the video after 38 hours and the delay of 38 hours was due to the intervention of the weekend. His arguments were agreed by the landmark court and he was enlarged on bail. In the case of *Syed Astifuddin v. The State of Andhra Pradesh,*[122] Tata Indicom interfered with a scheme of Reliance Info COMM where Reliance introduced a mobile handset in the market at a reasonable price but the services under the scheme were restricted only to Reliance Info COMM. The employees of Tata indicom somehow managed to manipulate the mobile handset and started providing their own services which caused a loss to the Reliance Company. Later when the matter was brought before the court, Tata Indicom employees argued that they committed no offence under IT Act. But the court refused their arguments and held that the mobile phone comes within the meaning of the term 'Computer' under Section 2 of the Act and thus their act constitutes an offence under Section 65. In the case of *PR Transport Agency v. Union of India,*[123] a contract reached through email between two parties was the issue where the defendant first entered into a contract and later rescinded it on an excuse of technological grounds. The defendant argued that the court did not competent jurisdiction to try the case, since the place of receiving the email was outside the territorial jurisdiction of the concerned court. The court rejecting the defendant's argument interpreted Section 13 of the IT Act which lays down the general provision regarding contract reached through email. It says that in cases of contract by emails, the usual place of occurrence of the business shall be taken into consideration for determining the jurisdiction of a particular court when any dispute arises, since emails can be received at any place in the world therefore taking into consideration the place of receiving the emails will amount to a lot of practical hardships. In the case of *Times Internet v. M/s Belize Domain Who is Service Ltd,*[124] the plaintiff was running a website named 'indiatimes.com' and provided a number of services including travel services, while the defendant registered a domain name 'indiatimestravel'.com' and started offering travelling services in the domain name 'travel.indiatimes.com'. when the dispute between the two was brought before Delhi High Court, it was held that the act of defendant constituted the offence of cyber-squatting that is similar to passing off in case of trademarks since both the domain names were deceptively similar. The court followed the judgment that was laid down in the case of Satyam Info way Limited v. Sifynet Solutions Pvt Ltd. In the case of *NASSCOM v. Ajay Sood,*[125] the court went on to set a precedent as regards the offence of phishing by holding that any act of misrepresentation in the usual course trade that causes confusion as regards the origin and the source of email which results into grave loss of the customer as well as the person whose name and identity were used will lead to phishing. In this case the defendant collected personal information from different individuals in the name of the plaintiff through emails. Later the court held the defendant guilty for committing the offence of phishing and made the defendant to pay compensation to the plaintiff. By this case only phishing was brought within the scope of India laws which means that IT laws are incomplete and cannot be held to be exhaustive in its own sphere since much of its scope were clarified through judicial interpretations.

V. CONCLUSION

The laws regulating cyber offences in India are still inadequate enough for preventing a lot amount of newly emerging cyber-crimes for which Indian Judiciary had to face many issues in making interpretations of the existing legal provisions in the wake of newly emerging nature of offences. However, we must also acknowledge that the sources of cyber offences are not limited to one particular National territory. Such offences can be committed from any geographical locations in the world and at any time. In such situations a concrete theory for determining the jurisdiction of the law adjudicating agencies is required. Further, cyber offences can also amount from cultural diversity across the globe since what is legal in India might not be legal in other countries and vice versa but cyberspace knows no National boundaries. For such reasons it also necessary to have a proper certifying authority to monitor the contents available on the internet throughout day and night. Moreover, international agreements must be reached for bringing uniformity in the legal regime since non uniformity may also lead to several cyber offences, like for instance for opening a Facebook account one must be above 14 years of age that means anybody can enter into contract with Facebook if he/she is above 14 years of age but Indian

[121] (2005) 3 CompLJ 364 Del, 116 (2005) DLT 427, 2005 (79) DRJ 576.
[122] 2006 (1) ALD Cri 96, 2005 CriLJ 4314.
[123] AIR 2006 All 23, 2006 (1) AWC 504.
[124] CS(OS) No. 1289/2008.
[125] 119 (2005) DLT 596, 2005 (30) PTC 437 Del.

Contract Act provides for the age of 18 years to be able to form a valid contract and the State has not provided any restriction on Facebook. All these conflicting provisions make it very difficult in determining the liability of the offenders. Thus, laws must be made more specific and dynamic so that they can adjust with the changing needs of the time since cyberspace is a constantly developing world where new methods of committing crimes for escaping legal liabilities will be devised again and again within short notices of time.

I SEEK TO ENTER: A CONSTITUTIONAL ANALYSIS OF THE SABARIMALA JUDGMENT

GARGI WHORRA[126]

ABSTRACT

Sabarimala judgment is an instance of judicial social engineering undertaken by the Hon'ble Supreme Court of India, reinforcing egalitarianism envisaged by the Constitution of India. The primary issue pertains to the restriction imposed on women having attained menstruating age from entering the ancient temple of Lord Ayyappa at Sabarimala, Kerala. At first blush, the issue in question may seem direct and simple however on deeper introspection, the Sabarimala issue is multifaceted and complex, having extensive social and religious ramifications. Ultimately, the Court was grappled by a socio-religious fact which stood on a crossroads. The primary task placed with the Court was to resolve a quintessential conflict between fundamental rights; the right of an individual not to be discriminated in her right to pray at the place of her choice and the right of religious group asserting her exclusion as an essential religious practice.

I. INTRODUCTION

Society is an organic phenomenon, ever evolving, redefining its essential fabric including religious practices, moral beliefs and socially acceptable conduct. During this process of transformation, various social facts go through change, often determining their status. In a country where religion is not an individual choice but a way of life, it cannot be divorced from social life. Therefore, much akin to other social facts, religious practices and customs are also challenged against the prevalent societal standards. The conflict arises when the societal standards themselves are in flux and a consensus is not apparent thereby creating an instant dichotomy. All across the world, the relationship of women and religion has been inflicted by its own peculiarities and restrictions. In India, as well, this perception of women and religion has manifested itself in various forms ranging from a woman revered as a *Devi*, a symbol of worship, to a *dasi*, a symbol of allegiance and servitude to the Lord. Recently, the issue of women's status in the fabric of religion was opened to great speculation through the judgment of the Hon'ble Supreme Court in Indian Young Lawyers Association v. Union of India.[127] A peculiar practice followed at Lord Ayyapas temple situated at Sabarimala, imposed a ban on menstruating women between the age of 10 to 50 years of age from entering the revered Sabarimala temple of Lord Ayyapa. The practice was codified and enforced under Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules 1965 as framed under the Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965. The rationale behind the prohibition was mainly theological. It is believed that since time immemorial the restriction on menstruating women has been practiced in pursuance of the notion of purity of the temple and the vow of eternal celibacy of the deity. Furthermore, the practice followed by the devotees requiring 41days of penance before visiting the shrine cannot be fulfilled by women between the age of 10 to 50 since they cannot undertake the same due to physiological strain and state of impurity during menstruation. Therefore, it is undeniable that the right to worship is an inherent right of every person born as a Hindu. However, the right to worship itself is conditional, subject to several notional and socially constructed riders. The Sabarimala Temple falls under the control of the Travancore Devaswom Board, a statutory board created by the Travancore Cochin Hindu Religious Institutions Act, 1950. The board is also financed under Article 290-A of the Constitution of India from the Consolidated Fund of Kerala and Tamil and therefore qualifies as State in light of Article 12 of the Constitution. Reflecting on the issues of the case, there were primarily three cardinal issues which formed the bone of contention before the Apex Court. Firstly, whether the act of restricting women into the temple vide Rule 3(b), irrespective of whether it is an essential practice or not, is violative of Article 14, 15 and 17 guaranteed under the Constitution. Secondly, whether the devotees of Lord Ayyappa constitute a separate religious denomination and if so, whether a statutory board can indulge in practices which *de facto* violate the principle of constitutional morality as envisaged in Article 14, Article 15(3), Article 39(a) and Article 51-A(e). Lastly, whether restricting the entry of women constituted an essential religious practice under Article 25 of the Constitution of India.

II. THE NOTIONS OF RIGHTS

The essence of substantive notions of equality as envisaged by the Constitution of India particularly protects those who suffer on account of perpetual historical discrimination. Fundamentally speaking, exclusion of women on account of a physiological factor specific to the particular gender amounts to blatant discrimination on the basis of sex.[128] The

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[127] Indian Young Lawyers Association v. Union of India, 2018 SCC Online SC 1690.

[128] Anuj Garg & others v. Hotel Association of India, AIR 2008 SC 663; Charu Khurana and others v. Union of India, (2015) 1 SCC192.

theological understanding that the deity who presides in the *Brahma Chari* form is to be protected from being polluted by the presence of women of a menstruating age, is not based in religion but rather in the notion of purity and impurity. Ergo, the very nature of the object runs contrary to constitutional objects of liberty, equality, dignity and justice. It further denies a section of women the right to equality before law considering that discrimination founded on gender and physiological factors cannot satisfy the test of reasonable classification nor can it be in furtherance of any valid object as understood under Article 14.[129] The issue cannot be shielded by saying that the matter is exclusively the domain of religion. Rather the heart of the matter lies in the ability of the Constitution to assert that the exclusion of women from worship is incompatible with dignity, destructive of liberty and a denial of equality. With the evolution of the jurisprudence of Article 21 it is established that the notion of life cannot be divorced from the idea of dignity under the Constitution. A discriminatory practice rooted in stereotypes about a class prohibited by Article 15(1) when tested on the touchstone of constitutional values will fail scrutiny and will not survive as permissible discrimination.[130] Therefore, the indignity caused to women by their exclusion cannot be upheld by the Constitution to legitimize stereotypical claims and patriarchal understanding of gender. Therefore, the Court observed that certain constitutional values form the edifice on which the Constitution stands and the right to life of dignity is one of them. Exclusion on the basis of sex is destructive of dignity and therefore the exclusion of women to worship is fundamentally in conflict with the constitutional values. The Sabarimala issue has also given rise to a rare opportunity to explore the jurisprudence of Article 17 beyond its traditional rhetoric. Justice D.Y. Chandrachud undertook this exercise and explored a new understanding of the said provision. After analyzing the Constituent Assembly Debates, it was apparent that there was a lack of consensus over the precise scope and ambit of the phrase *untouchability*, the first indicator of which is the language of Article 17 which provides for the abolition of untouchability *in any form*. The Government of India Act, 1935 explicitly stated the communities it covered under the realm of untouchables, however Dr. Ambedkar decided not to approach the concept of untouchability with such specificity. Mr. Naziruddin Ahmed, member of the drafting committee, proposed to restrict the scope of untouchability to untouchability practiced along the lines of religion or caste. Similarly, Mr. Kanaiyalal Maneklal Munshi suggested that the term untouchability should remain associated with only caste-based practices. However, neither view was endorsed by Dr. Ambedkar and ultimately the term untouchability was left wide open despite objections from members such as Mr. K. T. Shah who warned against it, considering that the term may be used by other sections of society particularly women, who often are treated as untouchables by society. Reflecting upon Justice Chandrachuds' judgment, at no point does he deny that caste-based untouchability forms the heart and soul of Article 17. However, he acknowledges that similar to caste-based untouchability, the understanding of purity and pollution afflicts women as well. He connotes the notion of impurity as a stigma attached to menstruating women as a source of justification exploited for their exclusion from important social and religious activities, thereby limiting their status and presence in society. Though, such manifestations may not form the core of Article 17, nevertheless, Justice Chandrachud observed that they do deserve similar protection. It is undeniable that if the scope of Article 17 is revisited and given a wide understanding it will open a pandora's box keeping in mind the fact that the provision will be enforceable not only against the State but also against private individuals.

III. CONSTITUTIONAL MORALITY

The Sabarimala dispute has further implored the Supreme Court to test practices followed in the name religion against the threshold of constitutional morality in place of popular public morality. Article 26(b) has an inbuilt restriction on practices which stand in contravention to morality thereby resurrecting the question as to how the term morality is to be understood. The Apex Court has observed in the matter of Government of NCT of Delhi v. Union of India and Others[131], that constitutional morality, connotes such morality which has inherent elements in the constitutional values and the conscience of the Constitution. Therefore, any argument to justify a practice in consonance with morality has to stand in harmony with the constitutional values and spirit.[132] Courts are duty bound to uphold and reinforce the constitutional principles and values while adjudicating the validity of a law, at the same time, it has to remain unaffected by the majoritarian views pervading popular notions of morality. Ergo, no valid justification can be found to restrict fundamental rights by pursuing popular morality. Popular morality stands distinct from constitutional morality since the latter is drawn from constitutional values and if both are pitted against each other constitutional morality must outweigh public morality,

[129] Shayara Bano v. Union of India (2017) 9 SCC 1.
[130] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[131] Government of NCT of Delhi v. Union of India and Ors., 2018 (8) SCALE 72.
[132] *Ibid.*

each and every time.[133] The argument that gender justice is integral to constitutional morality as furthered by the Petitioner does seem attractive it however will be limited to State under its applicability vide Article 14 and Article 15. Therefore, the ambit and applicability of the argument can be expanded further by suggesting that exclusion principle discriminates and blocks access to crucial aspects of public life, both material and symbolic, thereby denying equal moral membership in the cultural and social community as well. Ultimately, the Hon'ble Apex Court did observe that an exclusionary rule which derogates a woman's dignity and her fundamental right to worship including choice of place of worship cannot be trampled on accord of the notion of public morality.

IV. JUDICIAL SCRUTINY OF RELIGIOUS PRACTICES

The concept of a religious denomination is well settled by the Hon'ble Supreme Court in Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Shirur Mutt whereby the Court laid down three requisites to qualify as a religious denomination:

1) The existence of a religious sect or body;
2) A common faith shared by those who belong to the religious sect and a common spiritual organization;
3) The existence of a distinctive name.[134]

The notion of common faith is one which should have its bearings in religion and not in caste, community or societal beliefs.[135] The Hon'ble Supreme Court rightfully observed that the followers of Lord Ayyappa fail to fulfill the requisites to form a religious denomination. Firstly, the devotees are not recognized by a common distinctive name. Secondly, they lack a common faith and the tenets followed by the devotees are attributable to the Hindu religion at large. Thirdly, devotees of Lord Ayyappa do not adhere to a specific form of religion and lack a common spiritual organization. Though, the devotees of Lord Ayyappa do not constitute a religious denomination, nevertheless, it is pertinent to answer whether the exclusionary practice in fact forms an essential religious practice beyond the realm of judicial scrutiny. The Hon'ble Supreme Court while interpreting the term "matters of religious affairs" under Article 26(b) propounds that the essential part of a religion can be ascertained only by referring to the principles and tenets of that religion. The Court ensures that the practice in question should not be unessential to the religion or based in superstition or prejudice, and if so then the practice cannot claim any protection under Article 26 and will be open to judicial scrutiny.[136] Ergo, to distinguish religious from secular practices, the Court needs to undertake the study of the particular religion itself. Time and again the Apex Court has observed that for a practice to qualify as an essential religious practice it needs to find its bearing as a core belief upon which the religion is founded.[137] The practice in order to be categorized as an essential religious practice has to be fundamental and essential to the religion, devoid of which the entire nature of the religion will be altered. The Apex Court observed that the exclusionary practice under challenge could not be traced back to any relevant religious text. On the contrary, women between the age of 10 to 50 years were permitted to enter the premises of the shrine to perform their child's rice feeding ceremony. Most importantly the Constitution cannot extend its protection to an exclusionary practice which is neither essential to the religion nor is it in consonance with the fundamental values of the Constitution. The exclusionary rule lacks uniformity and is not fundamental to the foundation of the religion, therefore, cannot be deemed to be an essential religious practice.

V. CONCLUSION

The Supreme Court of India through the Sabarimala judgment has undoubtedly reinforced the egalitarian virtues of the Constitution, breaking away from social and religious diktats. The judgment stands out as an endeavor of social engineering, upholding Constitutional morality in the face of contrary popular public morality. Nevertheless, by virtue of the nature of issue at hand, the decision of the Hon'ble Apex Court has attracted fractioned opinions and reactions towards itself. The fact remains that questions of rights intermingled with religion do require the Court to tread into ambiguous territory. It may be observed that the judicial innovation of the essential religious practice doctrine, leads the court into the rather obscure area of theology and faith. This often requires the Court to act rather cautiously and selectively by not instinctively negating practices, considering that this test in itself engages considerable subjective interpretation. The fact remains that the essential religious practice test is a formalistic definitional test, based on select criteria open to tremendous subjectivity. Therefore, in a religiously pluralistic society, to presume judges to have judicial competence to

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[133] Naz Foundation v. Government of NCT of Delhi, (2009) 3 CCR 1.
[134] Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Shirur Mutt, AIR 1954 SC 282.
[135] Nallor Marthandam Vellalar v Commissioner, Hindu Religious and Charitable Endowments, AIR 2003 SC 4225.
[136] Durgah committee, Ajmer v. Syed Hussain, AIR 1961 SC 1402.
[137] Commissioner of Police v. Acharya Jagdishwarananda Avadhuta, (2004) 12 SCC 770.

have theological expertise over all religions is highly debatable. Even if the test has evolved and has been legitimized time and again by the Hon'ble Supreme Court, it still does not stand as proof against the competence and legitimacy of a Court to decide as to what principles, doctrines or beliefs should stand integral and essential to a religion. This practice by the Court may develop a tendency to draw a rather zig-zag line between protected and non-protected religious beliefs or practices, which in turn might raise a several eyebrows in a pluralistic democracy like India.

NORTH SEA CONTINENTAL SHELF (FEDERAL REPUBLIC OF GERMANY V NETHERLANDS; FEDERAL REPUBLIC OF GERMANY V DENMARK) (1969)[138]

SHARDUL R CHOUHAN[139]

The North Sea, a marginal sea lying between the eastern coast of Great Britain and the north-western part of continental Europe, has featured prominently in European history as the source of crucial battles fought not only with Viking long ships but also with law books since the days of Grotius[140].It is a cause célèbre, however, for its articulation of important principles relating to the sources of international law and their interaction. In geological terms, the continental shelf is the part of the seabed on which the continent rests; it is adjacent to the coast and it slopes down gradually from the shore. Usually at an average depth of 130 meters the downward slope of the seabed becomes steeper, and at this point the continental shelf is followed by another section of the seabed, the continental slope[141]. Gradually, pre-world war II the discovery that the continental shelf was extremely rich in minerals as well as a fertile fishing ground, the legal aspects and consequences of the uses of the continental shelf began to pique the interest of scholars. A 1942 bilateral treaty between the UK and Venezuela relating to the submarine areas of the Gulf of Paria, is an example of a rapidly emerging trend since the 1940s, whereby coastal states claimed jurisdiction over the resources found in the continental shelf adjacent to their coast. The International Law Commission (ILC) considered the topic as part of its work on the law of the sea between 1949 and 1956, and its Articles10 served as the basis for the adoption, among three other treaties, of the 1958 Convention on the Continental Shelf[142]. This was the first international treaty to outline the regime applicable to the continental shelf. According to the (legal) definition of the concept, the seaward limit of the continental shelf was placed at the point where the waters reach a depth of 200 meters or, beyond that limit, where the depth of the waters permits exploitation of the natural resources of the seabed and subsoil[143]. Notably, neither depth nor exploitability reflected any scientific (geological) benchmarks, and in this sense this first legal definition of the continental shelf was different from the scientific (geological) definition. Further, the 1958 Convention provided for the delimitation of a continental shelf that is adjacent to the territories of two or more states, distinguishing cases where the said states have 'opposite' coasts from cases where the coasts of the relevant states are 'adjacent' to each other. Priority is given to delimitation by agreement between the states and, if agreement cannot be reached, the boundary will be a line equidistant from the nearest points of the baselines of the parties, unless special circumstances warrant drawing a different delimitation line. The North Sea, surrounded by the shores of Norway, Denmark, the Federal Republic of Germany, the Netherlands, Belgium, France and the United Kingdom (Great Britain, Orkney and Shetlands), has the general look of an enclosed (or semi enclosed) sea. The seabed of the North Sea essentially consists of a single continental shelf at a depth of less than 200 meters (except for a somewhat deeper narrow belt of water off the south-western coast of Norway). The discovery of oil and natural gas in its seabed in the 1960s20 motivated the states surrounding it to seek to delimit their respective continental shelves. Given the legal definition of the continental shelf in the 1958 Convention, the coastal states held overlapping claims over the same North Sea continental shelf. Within a few years, Denmark, the United Kingdom and the Netherlands became parties to the 1958 Convention, and a series of bilateral continental shelf delimitation agreements were concluded between Denmark, the Netherlands, Norway (which became a party rather later, in 1971) and the United Kingdom, on the basis of the equidistance principle provided for in Article 6 of the Convention. By way of contrast, Germany signed but never ratified the 1958 Convention, although it had declared in a public Proclamation of 1964 its intention to do so, acknowledging that the Convention expressed the development of general international law[144].Unsurprisingly, the delimitation of the continental shelf between Germany and its adjacent states (Denmark and the Netherlands) was more problematic. Germany accepted the principle of equidistance for the establishment of a partial boundary between each of its neighbor's but it refused to draw an equidistance line throughout the course of the continental shelf boundary. In fact, Germany did not consider itself bound by the delimitation method enshrined in Article 6 of the 1958 Convention, as it

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[138] [1969] ICJ Rep 3.
[139] L.L.M in Intellectual Property Rights, IIT Kharagpur (Rajiv Gandhi School of Intellectual Property Law).
[140] The Oxford Handbook of the History of International Law (Oxford, OUP, 2012) 364–69.
[141] UNESCO Secretariat, 'Scientific Considerations Relating to the Continental Shelf'.
[142] Convention on the Continental Shelf (signed 29 April 1958, entered into force 10 June 1964).
[143] 1958 Convention, Art 1.
[144] Promulgation of the Proclamation of the Federal Government concerning the Exploration and Exploitation of the German Continental Shelf of 22 January 1964, reproduced in Counter-memorial submitted by the Government of the Kingdom of Denmark (ICJ Pleadings vol I 157, 244).

was not party to the latter, and argued that the principle of equidistance should be departed from when it would yield an 'inequitable result'. Germany argued that delimitation in such instances should be governed by the principle that each coastal state is entitled to a 'just and equitable share'. Denmark and the Netherlands, on the other hand, contended that Germany was obligated to abide by the delimitation method provided for in Article 6 of the 1958 Convention and that, in the absence of any special circumstances, an equidistance line ought to be drawn between the continental shelf of Germany and that of each of the two states. Following new rounds of trilateral negotiations, the three states agreed to submit the dispute to the ICJ on the basis of two essentially identical special agreements between Germany and Denmark, and between Germany and the Netherlands, respectively. Pursuant to a request by the parties, the Court joined the two cases, as it found that Denmark and the Netherlands were in the same interest. In neither case was the Court tasked with delimiting the continental shelf boundary; rather, it was requested merely to declare the principles and rules of international law applicable to the delimitation of the continental shelf, while the three states undertook the obligation to affect the delimitation pursuant to the Court's decision subsequently. According to Germany, the principle that each state be accorded a 'just and equitable share' was not a principle of equity, which would be applicable by the Court only if expressly so requested by the parties, but rather a general principle of law. Alternatively, Germany contended that even if the rule of Article 6 were applicable in this case, the configuration of the German coast would constitute 'special circumstances' excluding the use of an equidistance line. Germany, for its part, did not consider itself bound by the rule contained in Article 6 of the 1958 Convention, whether as a matter of treaty or as a matter of customary international law. While recognizing the utility of equidistance as a method of delimitation, Germany argued that this method should be used only if it would achieve a just and equitable apportionment of the continental shelf among the states concerned. According to Germany, the principle that each state be accorded a 'just and equitable share' was not a principle of equity, which would be applicable by the Court only if expressly so requested by the parties[145], but rather a general principle of law. By referring to an 'apportionment' of the continental shelf in a way that awards a just and equitable 'share' to all states concerned, Germany seemed to suggest that the continental shelf in areas like that of the North Sea consisted of an integral or even undivided whole, which ought to be 'shared' or 'apportioned' between the littoral states through the performance of particular legal acts. As the Court held, this conception ran contrary to the rule that the rights of the coastal State in respect of the area of continental shelf "that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources[146]." The Court began by acknowledging that delimitation on the basis of equidistance combines unparalleled practical convenience and certainty of application, but this did not mean that it was the only method of delimitation conceivable[147]. As the Court explained, the principle of equidistance is based on the notion of proximity, namely the notion that to a coastal state appertain all those parts of the shelf that are (but only if they are) closer to it than they are to any point on the coast of another state[148]. Proximity, however, was not fundamental to the concept of continental shelf; rather, what defined the continental shelf was its continuity with the land territory of the coastal state in a way that classified the shelf as a 'natural prolongation' of the latter. Consequently, the principle of equidistance could not be regarded as the only principle thinkable, as if logically necessary, for the delimitation of overlapping continental shelf areas, at least for states with adjacent coasts[149]. The Court then sought to ascertain whether the provision of Article 6 of the 1958 Convention reflected a rule of customary international law. In the Court's opinion, there were three ways in which the treaty provision could have come to reflect custom. First, a rule of customary international law of the same content might have pre-dated the 1958 Convention, and the states merely wrote the rule down in the Convention (codification). Second, the rule might have emerged by and through the process of drawing up the 1958 Convention. In other words, the process of drawing up the Convention might have crystallized a customary rule (crystallization). Third, a customary rule might have emerged in the light of state practice subsequent to the Convention, i.e. the Convention rule might have served as a basis for the development of a new customary rule in the image of the Convention rule (development). The Court then found that the delimitation method in question was rather included on an experimental and certainly on an optional basis (the Convention permitted states to opt-out from that method through reservations), which indicated that there could not be a mandatory equivalent rule of

[145] Art 38(2) ICJ Statute.
[146] North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark) [1969] ICJ Rep 3 (hereinafter NSCS).
[147] NSCS (n 2) [23]– [24].
[148] *Ibid.*
[149] *Ibid.*

customary international law[150].The Court held that the parties were not obligated to use any particular method, including equidistance, for the delimitation of the continental shelf areas concerned. Rather, they were obligated to enter into negotiations with a view to reaching an agreement based on equitable principles[151].Indeed, Several factors ought to be taken into account in the process of delimitation, including the geographical configuration of the coasts, physical and geological features, the unity of any deposits of natural resources, as well as a degree of proportionality between the length of the coastline and the extent of the continental shelf[152]. The NSCS judgment is considered to contain one of the classic statements of the Court on the processes of formation and the evidence of rules of customary international law[153].This is because, besides reaffirming the two constituent elements of custom (general practice and opinio juris), the judgment articulates specific criteria for the assessment of evidence regarding the existence of each of the two elements. With respect to the element of practice, the Court affirmed the principle already alluded to by its predecessor that a short time span of practice could suffice for the formation of custom. Very few years had elapsed since the first references to the concept of the continental shelf under international law, still fewer since the adoption of the 1958 Convention; but this would not preclude the creation of customary rules on the continental shelf. Several judges writing individually also insisted that the formation of customary law should not be impeded by time requirements, especially in the light of the exigencies of contemporary reality[154].What is crucial according to the Court is not the passage of considerable time, but rather that the practice be 'extensive and virtually uniform'[155]. By emphasizing that the continental shelf delimitation was a process of drawing boundaries between areas already appertaining to the states involved, the Court primarily addressed the German contention that the North Sea continental shelf should be shared equitably among the disputing parties. The Court's proposition, however, had several wider implications. To begin with, the Court held that the rights of coastal states over the continental shelf existed 'quite independent[ly]' of the 1958 Convention', is under customary international law. This finding was arguably not controversial in the context of that particular case, because all three states accepted the binding nature of the provisions of the 1958 Convention relating to the content of the rights over the continental shelf. Denmark and the Netherlands were parties to the Convention, and Germany had essentially reproduced its Article 2 in a 1964 governmental proclamation. The existence of continental shelf rights under customary international law had been affirmed in academic literature before the adoption of the 1958 Convention[156], but they had been equally denied. Thus, the NSCS cases will invariably be cited for the principled elaboration of the sources of international law and their relationship, rather than for any significant contribution they may have made with respect to the law of the sea.

[150] *Ibid.*
[151] *Ibid.*
[152] *Ibid.*
[153] M Wood, 'First Report on formation and evidence of customary international law' (2013) UN Doc A/CN.4/663, [57].
[154] NSCS (n 2) 177 (dissenting opinion Tanaka); 230 (dissenting opinion Lachs).
[155] NSCS (n 2) [74].
[156] Lauterpacht, 'Sovereignty' (n 83) 393–98.

PRACTICAL EFFECTS OF THE LAW ON CYBER SECURITY 2018 ON VIETNAM'S NATIONAL SECURITY AND STATE INFORMATION SAFETY IN CYBERSPACE

NGUYỄN MAU HUNG[157]

ABSTRACT

Based on analysis results of different sources by qualitative and quantitative methods, the paper affirms that national security and state information safety in cyberspace is one of the top priorities focuses of all industrialized countries in the era of globalization and the context of the 4.0 Industrial Revolution. However, the introduction of the Law on Cyber Information Security in 2015 has not been able to meet the actual development needs of online services in Vietnam. Therefore, the Law on Cyber Security 2018 has been expected to not only improve national security and state information safety, but also protect legal rights and legitimate interests of Vietnam in electronic transactions of cyberspace. Vietnam's recent achievements in national security and state information safety in cyberspace have shown that the provisions of the Law on Cyber Security 2018 have led to unexpectedly practical results in the fight to protect the country's national security and state information safety in cyberspace. Vietnam's Law on Cyber Security 2018 is therefore not only an indispensable product of the world cyber security era, but also contributes to significantly improving Vietnam's position on the information safety map of the world cyberspace (50/175) and do not essentially affect Vietnam's development efforts. Nevertheless, further concretization of the basic contents of the concept of national security and dialectical relationships between centralities, localities, and citizens in the fight to protect state information safety in Vietnam's cyberspace is an urgent recommendation that Vietnam's 2018 Law on Cyber Security of Vietnam should be supplemented as soon as possible. Meanwhile, citizens must protect themselves against unwholesome pieces of information in cyberspace is advice for each individual user of online services, but information technology capabilities determine each citizen's possibilities of national security protection on cyberspace.

***Key words**: Law on Cyber Security 2018, Vietnam, national security, state information safety, cyberspace*

I. INTRODUCTION

The appearance of online services has made people's quality of life significantly improved and the production capacity of all countries has progressed considerably. The world has never been as strongly connected and flat as it is today. Nearly all aspects of modern life in civilized and developed societies could be carried out via online services. However, the development of online services has also changed traditional security concepts substantially. If national security was often only directly threatened by military attacks on the territories of the sovereign states, non-traditional security threats are currently top concerns of developed countries. There are billions of connected electronic devices in cyberspace.[158] Internet of Things (IoT) devices such as routers, Wi-Fi, surveillance cameras... are often hotspots for hacker attacks in cyber security.[159] This fact opens up many connection opportunities for all parties involved, but also creates a lot of challenges on the cyber security front. Cyber-attacks are more complicated and cyber security challenges become increasingly unpredictable to all countries.[160] In such a context, all states have different responding solutions and handling measures to ensure national security (NS) and state information safety (SIS) in cyberspace. While many industrial powers of the modern world choose technological solutions to protect NS and respond to cyber security challenges, a number of countries of potential shortages select legal roads or a combination of the two aforementioned solutions to best suit their actual conditions. The introduction of Vietnam's Law on Cyber Security[161] on June 12, 2018 based on the Law on Cyber Information Security 2015[162] is one of Vietnam's efforts in the fight to protect NS and SIS in cyberspace. Although a lot of contents of this law stipulates clearly measures to protect NS and SIS in cyberspace and it has officially come into

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[158] QUỲNH NGA, *TẤN CÔNG AN NINH MẠNG: DOANH NGHIỆP VIỆT TỔN THẤT HÀNG TRIỆU USD* (JAN. 22, 2019, 08:51 AM), AVAILABLE AT: HTTP://TAPCHITAICHINH.VN/TAI-CHINH-KINH-DOANH/TAN-CONG-AN-NINH-MANG-DOANH-NGHIEP-VIET-TON-THAT-HANG-TRIEU-USD-302376.HTML,ACCESSED ON SEPT. 18, 2020.

[159] THU HẰNG, *NHỮNG CON SỐ NỔI BẬT AN NINH MẠNG NĂM 2019 VÀ DỰ BÁO 2020* (JAN. 10, 2020, 09:30 PM), AVAILABLE AT: HTTP://TAPCHITAICHINH.VN/TAI-CHINH-GIA-DINH/NHUNG-CON-SO-NOI-BAT-AN-NINH-MANG-NAM-2019-VA-DU-BAO-2020-317741.HTML, ACCESSED ON SEPT. 18, 2020.

[160] QUỲNH NGA, *SUPRA* NOTE 158.

[161] Quốc hội, *Luật An ninh mạng,* Luật số: 24/2018/QH14 (Hà Nội, June 12, 2018).

[162] Quốc Hội, *Luật An toàn thông tin mạng, Luật số: 86/2015/QH13 (Hà Nội, Nov. 19, 2015).*

force since January 1, 2019,[163] how it actually affects NS and SIS in Vietnam's cyberspace[164] is still a big question. Therefore, the study not only explores the practical efficiency of the Law on Cyber Security 2018 on Vietnam's NS and SIS, but also proposes some recommendations to improve Vietnam's ability to ensure NS and SIS in cyberspace by legal means.

II. LITERATURE REVIEW AND DATABASE

Although the impact of Vietnam's Law on Cyber Security 2018 on stakeholders has been relatively enthusiastically discussed, its practical effects on Vietnam's NS and SIS in cyberspace are only restricted to sporadic statistics of authorities and some general comments of functionaries. The number of the aforementioned documents is not plentiful, but the majority of which affirm more or less positive impacts and expected effects of the 2018 Cyber Security Law on Vietnam's NS and SIS in cyberspace. The most typical of these is Thuy My's comment that the 2018 Cyber Security Law is an enormous contribution to Vietnam's NS and SIS.[165] It means its necessity for the protection of Vietnam's NS is not only strongly confirmed, but it[166]s influences on the minimization of condemnable behaviors in cyberspace[167] are also not a matter of debate. Most of these supportive opinions are products of authorities in the state apparatus and represent Vietnam's mainstream voice. However, negative impacts of the Law on Cyber Security 2018 on Vietnam's NS and SIS in cyberspace could not be completely eliminated. The economic losses caused by the Law on Cyber Security 2018[168] will partly limit Vietnam's defensive capacity and reactive ability in cyberspace by technological solutions due to the shortage of "professional technologies."[169] Nevertheless, most of the points given in these documents only reflect a certain number of impacts of the Law on Cyber Security 2018 on Vietnam in general. There has been no research on its practical effects on Vietnam's NS and SIS in cyberspace in particular. This study will therefore address the aforementioned issue by three basic sources of documents. The indispensable of these is the system of state legal documents related to Vietnam's Law on Cyber Security 2018, but initial statistics of authorities on the impacts of this law on Vietnam's development practice cannot be ignored. The most frequently used in this study are the Law on Cyber Information Security 2015,[170] the Law on Cyber Security 2018,[171] and the drafted Decree detailing a number of articles of the Law on Cyber Security.[172] Nevertheless, published research results on this issue are also a notable source of reference. The most prominent of this group are Warning: Cryptocurrency mining malware hit hard on cyber security vulnerabilities in 2018,[173] Understanding Cybercrimes in Vietnam: From Leading-Point Provisions to Legislative System

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[163] Nguyễn Tiến Phương, *Luật An ninh mạng chính thức có hiệu lực* (Jan. 1, 2019, 10:34 AM), available at: https://moh.gov.vn/an-toan-thong-tin/-/asset_publisher/Bw4QBWFuEE3k/content/luat-an-ninh-mang-chinh-thuc-co-hieu-luc, accessed on Sept. 18, 2020.

[164] Phan Minh Thuận, *Quyền lợi của cá nhân theo quy định của Luật An ninh mạng* (Dec. 25, 2019, 10:35:02 AM), available at: http://congan.travinh.gov.vn/ch10/798-Quyen-loi-cua-ca-nhan-theo-quy-dinh-cua-Luat-An-ninh-mang.html, accessed on Sept. 18, 2020.

[165] THỤY MY, *VIỆT NAM: LUẬT AN NINH MẠNG BẮT ĐẦU CÓ HIỆU LỰC* (JAN, 1, 2019, 14:3 PM), AVAILABLE AT: HTTPS://WWW.RFI.FR/VI/VIET-NAM/20190101-VIET-NAM-LUAT-AN-NINH-MANG-BAT-DAU-CO-HIEU-LUC, ACCESSED ON SEPT. 18, 2020.

[166] SHIRA, DEZAN & ASSOCIATES, VIETNAM APPROVES NEW LAW ON CYBERSECURITY (DEC., 2018), AVAILABLE AT: HTTPS://WWW.GPMINSTITUTE.COM/PUBLICATIONS-RESOURCES/GLOBAL-PAYROLL-MAGAZINE/DECEMBER-2018/VIETNAM-APPROVES-NEW-LAW-ON-CYBERSECURITY, ACCESSED ON SEPT. 19, 2020

[167] PHƯƠNG NGUYÊN, *HƠN MỘT NĂM LUẬT AN NINH MẠNG CÓ HIỆU LỰC: XÂY DỰNG KHÔNG GIAN MẠNG LÀNH MẠNH* (FEB.), AVAILABLE AT: HTTP://TAPCHITAICHINH.VN/TAI-CHINH-PHAP-LUAT/HON-MOT-NAM-LUAT-AN-NINH-MANG-CO-HIEU-LUC-XAY-DUNG-KHONG-GIAN-MAN14, 2020, 13:38 PM G-LANH-MANH-318940.HTML, ACCESSED ON SEPT. 18, 2020.

[168] *SHIRA*, DEZAN & ASSOCIATES, SUPRA NOTE 165.

[169] HAI THANH LUONG, HUY DUC PHAN, DUNG VAN CHU , VIET QUOC NGUYEN, KIEN TRUNG LE & LUC TRONG HOANG, UNDERSTANDING CYBERCRIMES IN VIETNAM: FROM LEADING-POINT PROVISIONS TO LEGISLATIVE SYSTEM AND LAW ENFORCEMENT, 13(2) INTERNATIONAL JOURNAL OF CYBER CRIMINOLOGY, 290 (2019).

[170] Quốc Hội, *supra* note 161

[171] Quốc hội, *supra* note 160.

[172] CHÍNH PHỦ, *NGHỊ ĐỊNH QUY ĐỊNH CHI TIẾT MỘT SỐ ĐIỀU CỦA LUẬT AN NINH MẠNG* (DỰ THẢO), SỐ: /2018/NĐ-CP (HÀ NỘI, OCT. 31, 2018).

[173] Thu Hằng, *Cảnh báo: Mã độc đào tiền ảo đánh mạnh vào lỗ hổng an ninh mạng* (Dec. 21, 2018, 14:00 PM), available at: http://tapchitaichinh.vn/tai-chinh-phap-luat/canh-bao-ma-doc-dao-tien-ao-danh-manh-vao-lo-hong-an-ninh-mang-301085.html, accessed on Sept. 18, 2020.

and Law Enforcement in 2019,[174] and Cyber Security Attacks: Vietnamese businesses lost millions of dollars in 2019.[175] However, the system of updated information and events related to the direct application of the Law on Cyber Security 2018 for the protection of Vietnam's NS and SIS in cyberspace really plays a key role. The most noticeable of these is Being disciplined for 'defaming' the provincial Chairman on Facebook in 2015,[176] Social networks are being used by hostile forces to sabotage in 2019,[177] Highlighted figures for cyber security 2019 and forecast for 2020.[178]

III. METHODOLOGY AND RESEARCH METHODS

NS is one of the most concerning issues for all countries. NS was previously often only directly threatened by invasions by force, but NS of many countries can currently be in danger due to many forms of invisible attacks and stealth weapons in cyberspace. Cyber security is one of the most dangerous intangible battles of all countries. The protection of NS and SIS in cyberspace thus becomes one of the most pressing tasks of all technology powers. Vietnam cannot stay outside of that general law of development. However, it should be noted the difference of NS in cyberspace on two aspects. *Firstly*, Vietnam is an independent country and sovereign state as all other ones. In this respect, Vietnam's NS in cyberspace is affected whenever there is a threat or an act of infringement on Vietnam's activities in the global cyberspace. Vietnam's NS in cyberspace in this sense is always present in all cyberspace relationships between any member of Vietnam and all stakeholders of all countries. All risks and dangers to Vietnam arising from cyber activities in this case need to be fully understood by Vietnam's NS defense system. *Secondly*, in addition to NS in cyberspace in relation to all other states, Vietnam's concept of nation is often used to refer to the central level in differentiation from the regional and local one. For example, national teams often perform national missions, while local clubs usually represent only localities. NS in cyberspace in many cases is therefore often understood as cyberspace risks and threats that only occur to agencies, organizations, and problems at national level which are not matters of regions and localities. As long as they are not regional or local issues, the settlement responsibility also usually only belongs to authorities at central level. In contrast, regional and local cyber security issues often fall under the jurisdiction of regional and local authorities and they are not the function of central authorities. In the specific case of Vietnam, the central government takes full control of power throughout the country, NS in cyberspace in many cases is therefore often associated with the risks and threats to cyber activities of the state apparatus. Vietnam's NS in cyberspace in this section is understood according to this final sense. Theoretically, all the threats and dangers arising from cyber activities to Vietnamese people fall within the scope of functional responsibilities and protective obligations of the state at all levels. However, the reality shows that most Vietnamese authorities often react faster and offer better responding solutions to threats and dangers in cyberspace of the state apparatus. Vietnam's NS in cyberspace in many cases is therefore often first associated with the cyber security of the political system. This organizational characteristic of the state apparatus makes Vietnam's NS in cyberspace is often threatened by cyberspace activities from other countries and non-state people's unfriendly activities. All dangerous actions and potential risks to Vietnam's NS in cyberspace in recent years have mainly originated from these two forces. The aforementioned methodological principles are the main bases for this paper to use qualitative and quantitative methods as well as specialized and interdisciplinary approaches in the research process. While quantitative methods help the study build its arguments on accurate figures, data, and facts, qualitative methods provide the paper's claims with several experts' published research results and authorities' practically verified conclusions. For instance, to prove the point that Vietnam's NS and SIS are very alarming prior to the enforcement of the 2018 Law on Cyber Security, the paper uses a system of specific figures. Specifically, more than 18,000 Vietnam's websites and web portals were attacked from 2014 to the first half of 2017.[179] In 2017, Vietnam's websites suffered 9,964 cyber-attacks.[180] Likewise, to reinforce the

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[174] Hai Thanh Luong, Huy Duc Phan, Dung Van Chu , Viet Quoc Nguyen, Kien Trung Le & Luc Trong Hoang, *supra* note 168, at 290.
[175] Quỳnh Nga, *supra* note 158.
[176] Tiền Phong, *Bị kỷ luật vì 'nói xấu' Chủ tịch tỉnh trên Facebook* (Nov. 16,2015, 08:38 AM), available at: https://vietnamnet.vn/vn/thoi-su/bi-ky-luat-vi-noi-xau-chu-tich-tinh-tren-facebook-273330.html, accessed on Sept. 18, 2020.
[177] Thu Hằng, *'Mạng xã hội đang bị các thế lực thù địch lợi dụng để chống phá'* (Sept. 12, 2019, 14:49 PM), available at: https://vietnamnet.vn/vn/thoi-su/quoc-hoi/mang-xa-hoi-dang-bi-cac-the-luc-thu-dich-loi-dung-de-chong-pha-566959.html, accessed on Sept. 18, 2020
[178] Thu Hằng, *supra* note 158.
[179] THÚY HẠNH, *100 VỤ LỘ, LỌT BÍ MẬT NHÀ NƯỚC TRÊN KHÔNG GIAN MẠNG* (AUG. 25, 2017, 16:19 PM), AVAILABLE AT: HTTPS://VIETNAMNET.VN/VN/THOI-SU/100-VU-LO-LOT-BI-MAT-NHA-NUOC-TREN-KHONG-GIAN-MANG-395101.HTML, ACCESSED ON SEPT. 18, 2020.
[180] Phan Minh Thuận, *Hệ thống thông tin quan trọng về an ninh quốc gia theo quy định của Luật An ninh mạng* (Dec. 25, 2019, 10:39:37 AM), available at: http://congan.travinh.gov.vn/ch10/801-He-thong-thong-tin-quan-trong-ve-an-ninh-quoc-gia-theo-quy-dinh-cua-Luat-An-ninh-mang.html, accessed on Sept. 18, 2020.

conclusions that the actual efficiencies of the Law on Cyber Security 2018 on Vietnam's NS and SIS have been very positive, the study has inherited a Vietnamese leader's assumption that the country's cyberspace in 2019 was cleaner, but not completely clean.[181] In addition, this research is conducted by specialized and interdisciplinary methods, but the most common are logical, historical, analytical, comparative, synthesized methods... For example, Vietnam's state information insecurity in cyberspace is presented in chronological order of historical logic. Similarly, to recommend that the Law on Cyber Security 2018 should protect all legitimate rights and interests of Vietnamese people in cyberspace, the study analyzes the concept of NS and SIS in cyberspace from many different perspectives and suggests that this concept should be understood as everything belongs to Vietnam and should not restrict to the level of central government or state apparatus. All contribute to the affirmation that although the introduction of the Law on Cyber Security 2018 was at first controversial, its practical effects on NS and SIS in Vietnam's cyberspace has been undeniable over the past few years.

IV. RESEARCH RESULTS: PRACTICAL EFFECTS OF THE LAW ON CYBER SECURITY 2018 ON VIETNAM'S NATIONAL SECURITY AND STATE INFORMATION SAFETY IN CYBERSPACE

Vietnam is simultaneously facing enormous challenges to NS in cyberspace, the *first* is activities of using cyberspace to spread and propagate false and harmful information to Vietnam's national development. The *second* is the activities of using cyberspace to entice, gather, and incite uncooperative parties to undermine Vietnam's nation-building efforts. The *third* is the use of high-tech achievements to attack Vietnam's information networks and cyberspace infrastructure intensively from outside to paralyze, stall, and destroy Vietnam's important national information systems.[182] The *fourth* is the use of technological measures to exploit national secret documents and steal state secrets in cyberspace. The *fifth* is to deliberately defame images of Vietnam's leaders, smear the true nature of the current political regime, and distort Vietnam's true history of formation and development. In essence, nevertheless, all the aforementioned challenges focus on two main threats. On the one hand are the attacks on Vietnam's cyber security infrastructure and on the other hand is the use of cyberspace to propagate and distribute uncooperative information, or in other words, cyber security and SIS.

4.1. NATIONAL SECURITY IN VIETNAM'S CYBER SPACE

Although cyber-attacks cost the world economy around 600 billion USD per year,[183] about 120-200 billion USD in East Asia,[184] and 100 million USD of the banking system,[185] Vietnam is still one of the most attractive destinations of the world's leading technology corporations. Vietnam's Internet economy reached $ 9 billion in 2018 and predictably $ 33 billion by 2025.[186] Vietnam's e-commerce market is therefore not only attractive to investors, but also to hackers. Vietnam is currently one of the most Southeast Asian cyber-attacked countries.[187] Vietnam faces thousands of large-scale and high-intensive cyber-attacks that directly threaten NS and cause heavy economic losses.[188] Cyber-attacks are increasing in number, more sophisticated in the way they operate, and more intense for a certain number of specific targets.[189] Only in the first 6 months of 2017, 4,605 websites and web portals in Vietnam were attacked. This figure increased by nearly 50% compared to that of last year's respective period. Of these, 148 websites belong to state agencies

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[181] HƯƠNG QUỲNH, *ÔNG VÕ VĂN THƯỞNG: MẠNG XÃ HỘI ĐÃ SẠCH HƠN CHỨ CHƯA SẠCH HẲN* (DEC. 23, 2019, 19:10 PM), AVAILABLE AT: HTTPS://VIETNAMNET.VN/VN/THOI-SU/CHINH-TRI/ONG-VO-VAN-THUONG-MANG-XA-HOI-DA-SACH-HON-CHU-CHUA-SACH-HAN-602746.HTML, ACCESSED ON SEPT. 18, 2020.

[182] THÚY HẠNH, *SUPRA* NOTE 178.

[183] TRẦN LƯU, QUYỀN VÀ TRÁCH NHIỆM TRÊN KHÔNG GIAN MẠNG (JAN. 11, 2019, 08:21 AM), AVAILABLE AT: HTTP://TAPCHITAICHINH.VN/TAI-CHINH-PHAP-LUAT/QUYEN-VA-TRACH-NHIEM-TREN-KHONG-GIAN-MANG-301918.HTML, ACCESSED ON SEPT. 18, 2020.

[184] THU HẰNG, SUPRA NOTE 172.

[185] LÊ SÁNG, VIỆT NAM ĐANG LÀ THỊ TRƯỜNG CỦA CÁC CÔNG TY AN NINH MẠNG HÀNG ĐẦU THẾ GIỚI (JUNE 11, 2019, 15:35 PM), AVAILABLE AT: HTTP://TAPCHITAICHINH.VN/TAI-CHINH-KINH-DOANH/VIET-NAM-DANG-LA-THI-TRUONG-CUA-CAC-CONG-TY-AN-NINH-MANG-HANG-DAU-THE-GIOI-308302.HTML, ACCESSED ON SEPT. 18, 2020.

[186] McLaughlin, Timothy, Under Vietnam's new cybersecurity law, U.S. tech giants face stricter censorship (March 17, 2019, 4:07 AM), available at: https://www.washingtonpost.com/world/asia_pacific/under-vietnams-new-cybersecurity-law-us-tech-giants-face-stricter-censorship/2019/03/16/8259cfae-3c24-11e9-a06c-3ec8ed509d15_story.html, accessed on Sept. 19, 2020.

[187] THÚY HẠNH, SUPRA NOTE 178.

[188] TRẦN LƯU, SUPRA NOTE 182.

[189] THÚY HẠNH, SUPRA NOTE 178.

[190] ID

(.gov.vn). If it has been counted since 2014, this number grows to more than 18,000 websites and web portals.[190] In 2017, Vietnam's websites suffered 9,964 cyber-attacks. Although this number dropped to 9,300 cases in 2018,[191] this is still a very worrying rate for a developing country such as Vietnam. In 2015, Vietnam's state information security index was only 46.5%. This figure is below the average and far behind that of many other countries.[192] Vietnam's state Information Security Index in 2018 was 45.6%.[193] Although this index of Vietnam has improved over the years, the level of increase is not really significant. In 2018, Vietnam ranked eleventh in the world regarding threats of cyber-attacks.[194] In the first quarter of 2018, Vietnam ranked first in the top 20 countries most affected by cyber-attacks on ICS computers (with 75.1%) and regularly in the top 3 countries suffered most cyber-attacks in 2018.[195] This made Vietnam ranked in the list of Southeast Asian countries of the highest rates of malware infections.[196] In the first quarter of 2019, Vietnam ranked second in the group of countries receiving the most harmful spam in the world (6%), while this rate was 12% in Germany.[197] Approximately 46.8% of Vietnamese internet users were attacked offline in 2019 (35th of the world). In the fourth quarter of 2019, 0.03% of Vietnam's servers suffered cyber security incidents (151,187 ones).[198] Vietnam discovered a large-scale planned campaign of foreign hackers to actively attack weak password servers in Vietnam's territories. These hackers do not use the usual lines of malware infection. Instead, they focus on detecting weak password servers for remote unauthorized access and installing malicious codes to encrypt data in manual ways. This attack method makes the server's anti-virus software almost completely disabled and hackers easily take full control of Vietnam's servers.[199] These malicious attacks will be even more sophisticated and dangerous in 2020.[200] Annual cyber-attacks cost Vietnam around 642 million USD[201] (14,900 billion VND).[202] This number is very alarmingly[203] equivalent to about 0.26% of Vietnam's GDP in 2018.[204] About 85.2 million Vietnam's computers were infected with malware in 2019. This number increases by 3.5% compared to that of 2018.[205] Up to 1.8 million Vietnam's computers lost data in 2019. This number increased around 12% compared to that of 2018.[206] Of ten Vietnam's computers installed with Internet downloaded software, eight ones will be infected with virus. Simultaneously, the rate of virus infection via USB in Vietnam decreased by 22% compared to that of 2018, but still at 55%.[207] Meanwhile, more than 46% of computer users had data problems in 2018.[208] Of these, about 420,000 Vietnam's computers were infected with attack malware APT (W32.Fileless). The technique that W32.Fileless used is so sophisticated that it is *stealthy*. This malware does not leave any indication of their existence as binary files on computer's hard drives as conventional malware.[209] Instead, W32.Fileless lurks in system configuration parameters.[210] Thanks to its superior stealth, these malicious codes will be

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[191] Phan Minh Thuận, *supra note* 179.
[192] THÚY HẠNH, SUPRA NOTE 178.
[193] NGUYỄN VŨ, NGÂN HÀNG TĂNG CƯỜNG BẢO MẬT TRƯỚC RỦI RO AN NINH MẠNG (JUNE 8, 2019, 11:00 AM), AVAILABLE AT: HTTP://TAPCHITAICHINH.VN/NGAN-HANG/NGAN-HANG-TANG-CUONG-BAO-MAT-TRUOC-RUI-RO-AN-NINH-MANG-308196.HTML, ACCESSED ON SEPT. 18, 2020.
[194] ID.
[195] TRỌNG ĐẠT, SỐ LƯỢNG CÁC CUỘC TẤN CÔNG MẠNG NHẰM VÀO VIỆT NAM GIẢM MẠNH (APR. 1, 2019, 14:41 PM), AVAILABLE AT: HTTPS://VIETNAMNET.VN/VN/CONG-NGHE/BAO-MAT/SO-LUONG-CAC-CUOC-TAN-CONG-MANG-NHAM-VAO-VIET-NAM-GIAM-MANH-517617.HTML, ACCESSED ON SEPT. 18, 2020
[196] NGUYỄN VŨ, SUPRA NOTE 192.
[197] ID.
[198] HẢI PHONG, SỐ LƯỢNG MỐI ĐE DỌA TRỰC TUYẾN TẠI VIỆT NAM GIẢM MẠNH TRONG QUÝ IV 2019 (FEB. 4, 2020, 15:25 PM), AVAILABLE AT: HTTPS://VIETNAMNET.VN/VN/CONG-NGHE/BAO-MAT/SO-LUONG-MOI-DE-DOA-TRUC-TUYEN-TAI-VIET-NAM-GIAM-DANG-KE-613718.HTML, ACCESSED ON SEPT. 18, 2020.
[199] THU HẰNG, SUPRA NOTE 158.
[200] ID.
[201] McLaughlin, Timothy, supra note 185.
[202] TRẦN LƯU, SUPRA NOTE 182.
[203] ID.
[204] THU HẰNG, SUPRA NOTE 172.
[205] THU HẰNG, SUPRA NOTE 158.
[206] ID.
[207] ID.
[208] THU HẰNG, SUPRA NOTE 172.
[209] THU HẰNG, SUPRA NOTE 58.
[210] ID.

waiting in the computer, stealing user information, and opening backdoors so that hackers can take control of the computers remotely. In addition, there are a number of W32.Fileless lines that are able to download additional malicious codes to take advantage of computer resources for virtual money mining.[211] The damages caused by computer viruses to Vietnamese users in 2019 amounted to 20,892 billion VND (902 million USD). This figure exceeded the amount of 14,900 billion VND in 2018.[212] The increase in the number of computers infected with data encryption malware and APT attack malware is the main cause of these huge economic losses.[213] However, the two most popular lines of malware in Vietnam causing most data lose for users are ransomware and USB data deletion viruses.[214] Nevertheless, most of these malicious codes were spread via USB or operating system vulnerabilities.[215] As USB is the most popular means of data exchange in Vietnam, the number of computers infected with malware via USB is always high. Around 77% of Vietnam's USB are infected with malware at least once a year.[216] However, the biggest threat to Internet users comes from ransomware, data deletion malware, cryptocurrency mining malware, and APT attacks. These types of malware can combine different infection pathways to maximize their ability of spread. The most common of which are exploiting software vulnerabilities, operating systems, and via phishing emails.[217] In 2018, there emerged the phenomenon of stealing Facebook accounts via luring comments. Approximately 83% of Vietnam's Facebook users encountered this type of comments.[218] Spam phishing on Facebook will vary considerably in the near future.[219] In 2019, Vietnam continued to witness the rampage of ransomware.[220] About 60% of Vietnam's agencies and enterprises are infected with cryptocurrency mining malware.[221] Meanwhile, phishing attacks to hijack bank accounts are predicted to continuously increase and develop unpredictably.[222] In the first quarter of 2019, Vietnam belonged to the group of Southeast Asian countries most attacked by cyber security threats. Of these, the most concerned are ransomware, banking malware, macro malware, and cyber security threats that derive from electronic transactions of emails.[223] Vietnam's rate of virus infection via email in 2019 reached 20%, an increase of 4% compared to that of 2018.[224] Ransomware mainly spread via email, but 74% of Vietnamese users still keep the habit of directly opening attachment files from email without Safe Run.[225] Around 55% of Vietnamese users still use the same password for accounts of many different online services.[226] In mid-March 2019, Vietnamese authorities discovered a campaign to distribute GandCrab 5.2 ransomware targeting at Vietnam and Southeast Asian countries.[227] Vietnam is leading Southeast Asia in terms of risks of this ransomware attacks. The main cause of the widespread cryptocurrency mining malware is that Vietnam's agencies and enterprises have not yet been equipped with comprehensive and synchronous anti-virus solutions for all computers in the internal cyberspace.[228] In 2017 and 2018, the announced number of security vulnerabilities in software and applications spiked to more than 15,700 vulnerabilities, approximately 2.5 times higher than those of previous years.[229] By 2020, APT malware is predicted to attack even more sophisticated.[230] Facing such a situation, Vietnam's authorities have conducted a series of measures to overcome the circumstance. Authorities discovered 287 cases, charged 437 criminals, and prosecuted 127 cases with 258 defendants.[231] In 2019, the Government of Vietnam agreed to share information and coordinate linkages between

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[211] **ID.**
[212] **ID.**
[213] **THU HẰNG, SUPRA NOTE 172.**
[214] **ID.**
[215] **THU HẰNG, SUPRA NOTE 158.**
[216] **THU HẰNG, SUPRA NOTE 176.**
[217] **TRỌNG ĐẠT, SUPRA NOTE 198.**
[218] **THU HẰNG, SUPRA NOTE 176.**
[219] **ID.**
[220] **THU HẰNG, SUPRA NOTE 158.**
[221] **THU HẰNG, SUPRA NOTE 176.**
[222] **THU HẰNG, SUPRA NOTE 158.**
[223] **LÊ SÁNG, SUPRA NOTE 184.**
[224] **THU HẰNG, SUPRA NOTE 158.**
[225] **THU HẰNG, SUPRA NOTE 172.**
[226] **NGUYỄN VŨ, SUPRA NOTE 192.**
[227] **TRỌNG ĐẠT, SUPRA NOTE 194.**
[228] **THU HẰNG, SUPRA NOTE 172.**
[229] **ID.**
[230] **THU HẰNG, SUPRA NOTE 158.**
[231] **THU HẰNG, SUPRA NOTE 176.**

specialized forces of the Ministry of Information and Communications (Department of State Information Security), the Ministry of Public Security (Department of Cyber Security and High Tech Crime Prevention and Control), the Ministry of Defense (Cyberspace Operation Command) and owners of the Information Safety System of agencies.[232] Malware-handling campaigns in Hanoi and Ho Chi Minh City have also achieved a certain number of results.[233] In summary, Vietnam has witnessed an increasing number of large-scale, intense, and serious cyber-attacks. Many of these attacks have directly threatened NS and SIS. Cybercrime activities are increasing in the number of cases, while their tricks are increasingly sophisticated.[234] Vietnam's cyber security is really worrying. Meanwhile, Vietnam's technical infrastructure and information security contain many fatal loopholes.[235] Around 40% of Vietnam's websites contain vulnerabilities and more than 300 websites are monthly attacked.[236] 41.04% of Vietnam's computers contain SMB vulnerabilities and were exploited by Wanna Cry to infect more than 300,000 computers in just a few hours. These are big risks for Vietnam's information safety and cyber security.[237] However, authorities' drastic direction helped Vietnam increase 50 places in the global state information security index in 2019.[238] In the first quarter of 2019, the total number of cyber-attacks targeted at Vietnam's information systems decreased 21.17% compared to that of the fourth quarter of 2018. The number of Vietnamese IP addresses located in ghost computer networks declined 17.42% compared to that of the fourth quarter of 2018. These indicators show that Vietnam's SIS and cyber security have changed positively.[239] Although Vietnam's information network has developed rapidly, the infrastructure could not keep up with the general growth rate and cannot meet requirements of national cyber security.[240]

4.2. VIETNAM'S STATE INFORMATION SAFETY IN CYBERSPACE

Aside from undeniable benefits, cyberspace is also a source of threats and challenges to NS.[241] Vietnam's cyber security is very alarming[242] while SIS continue to develop complicatedly.[243] State secrets leakage on the internet took place seriously.[244] Data sources in Vietnam's cyberspace are being used rampantly for self-interest. A large amount of information is being used for political conspiracy or law violation.[245] NS information is always the target of theft and destruction by many stakeholders. Many cyber espionage groups have attacked and controlled information systems and appropriated state secret documents from outside. These activities have caused a lot of serious damages to the country.[246] Cyberspace is being thoroughly exploited by hostile forces, reactionaries, and other types of crimes to sabotage[247] the country and distribute truth distorted materials.[248] The publication of inaccurate information to distort Vietnam's

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[232] D.BÙI, PHẢI VÀO CUỘC LẬP TỨC KHI XẢY RA SỰ CỐ AN NINH MẠNG (NOV. 25, 2019, 17:301 PM), AVAILABLE AT: HTTP://TAPCHITAICHINH.VN/TAI-CHINH-PHAP-LUAT/PHAI-VAO-CUOC-LAP-TUC-KHI-XAY-RA-SU-CO-AN-NINH-MANG-315754.HTML, ACCESSED ON SEPT. 18, 2020.

[233] QUỲNH NGA, HIỂM HỌA AN NINH MẠNG: ỨNG PHÓ LINH HOẠT (APR. 10, 2019, 13:28 PM), AVAILABLE AT: HTTP://TAPCHITAICHINH.VN/TAI-CHINH-PHAP-LUAT/HIEM-HOA-AN-NINH-MANG-UNG-PHO-LINH-HOAT-305264.HTML, ACCESSED ON SEPT. 18, 2020.

[234] Phan Minh Thuận, supra note 179.

[235] THÚY HẠNH, SUPRA NOTE 178.

[236] PV., THANH TOÁN TRỰC TUYẾN VÀ NỖI LO VỀ AN NINH MẠNG (JULY 25, 2018, 14:50 PM), AVAILABLE AT: HTTP://TAPCHITAICHINH.VN/KINH-TE-VI-MO/THANH-TOAN-TRUC-TUYEN-VA-NOI-LO-VE-AN-NINH-MANG-141898.HTML, ACCESSED ON SEPT. 18, 2020.

[237] THU HẰNG, SUPRA NOTE 158.

[238] ID.

[239] QUỲNH NGA, SUPRA NOTE 232.

[240] THÚY HẠNH, SUPRA NOTE 178.

[241] Phan Minh Thuận, Nâng cao ý thức cá nhân để xây dựng không gian mạng lành mạnh (Dec. 25, 2019, 10:37:26 AM), available at: http://congan.travinh.gov.vn/ch10/800-Nang-cao-y-thuc-ca-nhan-de-xay-dung-khong-gian-mang-lanh-manh.html, accessed on Sept. 18, 2020.

[242] THÚY HẠNH, SUPRA NOTE 178.

[243] THU HẰNG, SUPRA NOTE 176.

[244] THÚY HẠNH, SUPRA NOTE 22.

[245] Phan Minh Thuận, Vấn đề lưu trữ dữ liệu, đặt chi nhánh hoặc văn phòng đại diện tại Việt Nam theo quy định của Luật An ninh mạng (Dec. 25, 2019, 09:34:14 AM), available at: http://congan.travinh.gov.vn/ch10/796-Van-de-luu-tru-du-lieu-dat-chi-nhanh-hoac-van-phong-dai-dien-tai-Viet-Nam-theo-quy-dinh-cua-Luat-An-ninh-mang.html, accessed on Sept. 18, 2020.

[246] Phan Minh Thuận, supra note 179.

[247] THU HẰNG, SUPRA NOTE 176.

[248] Phan Minh Thuận, supra note 240.

development efforts has been rampant in cyberspace,[249] but the state has not had enough legal corridors to manage[250] and offer effective handling measures.[251] The behavior of this type of crime is more diverse. The number of foreigners taking advantage of Vietnam's area to commit high-tech crimes is growing.[252] Simultaneously, cyber espionage activities become worrying challenges to NS. Many state agencies reveal national secrets in cyberspace. The dangers of cyber war and loss of cyber security control because of backwardness and dependence on foreign technology are more evident. All of these have contributed to making Vietnam's national information security system in danger. Thousands of Vietnam's websites are actively attacked annually to modify structures, insert inappropriate contents, and install sophisticated malware. Critical information systems are often strongly attacked.[253] In 2012, informal websites were a major problem for officials and young people, but it was not easy to clearly distinguish true and false expressions on many websites. State documents indicate that uncooperative forces are taking advantage of online information to make Vietnamese people confused and wavering, but it is difficult for grassroots authorities to clarify the left and right information.[254] For example, in 2014, two young people in Hải Phòng set up their own Facebook pages to write articles and post pictures that distorted activities of functional forces, but on December 1, 2015, both were declared six months of imprisonment for illegal use of information on the Internet.[255] In October 2015, a leader of An Giang province was recommended to review due to weaknesses in land management. This information was uploaded to a high school teacher's personal Facebook. Her native comment was shared by two others. All of them were subsequently disciplined by various forms and degrees.[256] Likewise, as the HD 981 rig incident had occurred, electronic portals of the Ministry of Public Security and the Ministry of Transport were attacked and published fake information. It took these agencies 4-5 hours to recover.[257] In 2016, three pupils created their own Facebook accounts and acted in name of members of the Islamic State (IS) to incite terrorist attacks. This event attracted more or less attention and made the public somewhat confused.[258] On July 29, 2016, hackers attacked the electronic portal of Vietnam Airline. These hackers have taken control of the display interface at Nội Bài Airport, Tân Sơn Nhất Airport, and put up some sensitive information.[259] Furthermore, hackers also attacked Vietnam Airlines' server system and distributed personal information of all 411,000 customers of the Golden Lotus programmed. This incident delayed nearly Vietnam Airlines' 100 flights on July 29, 2017.[260] More seriously, bad news even distorted Vietnamese state leaders' activities. In 2017, while a leader of Vietnam's National Assembly was working at the office, but was informed on unfriendly forces' websites that she was visiting her hometown and accompanied by ambulances. Bến Tre province was in reality doing a military exercise and invited other province's forces to join. Of the vehicles mobilized to take part in the exercise, there were a number of red-plate cars and ambulances. However, a passerby filmed the scene and posted it online with the content that the Vietnamese National Assembly leader was visiting her hometown.[261] Facing such complicated developments of NS in cyberspace, Vietnam passed the 2018 Law on Cyber Security.[262] The law dedicates Chapter II to stipulating solutions to ensure NS in cyberspace.[263] According to Article 16 of this law, all legal violations related to NS and SIS in cyberspace are prohibited, while all Anti-Vietnam cyberspace activities are not only

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[249] TRẦN LƯU, SUPRA NOTE 182.

[250] Phan Minh Thuận, supra note 244.

[251] TRẦN LƯU, SUPRA NOTE 182.

[252] THU HẰNG, SUPRA NOTE 176.

[253] THÚY HẠNH, SUPRA NOTE 174.

[254] TÁ LÂM, 'PHẢI ĐỀ KHÁNG CÁC TRANG MẠNG NÓI XẤU CÁN BỘ' (DEC. 18, 2012, 00:45 AM), AVAILABLE AT: HTTPS://VIETNAMNET.VN/VN/THOI-SU/PHAI-DE-KHANG-CAC-TRANG-MANG-NOI-XAU-CAN-BO-101469.HTML, ACCESSED ON SEPT. 18, 2020.

[255] Q. MINH, VÀO TÙ VÌ LẬP FACEBOOK NÓI XẤU CSGT (DEC. 2, 2015, 13:11 PM), AVAILABLE AT: HTTPS://VIETNAMNET.VN/VN/THOI-SU/VA-O-TU-VI-LAP-FACEBOOK-NOI-XAU-CSGT-276597.HTML#INNER-ARTICLE, ACCESSED ON SEPT. 18, 2020.

[256] TIỀN PHONG, SUPRA NOTE 175.

[257] THÚY HẠNH, SUPRA NOTE 178.

[258] ID.

[259] ID.

[260] ID.

[261] HOÀI THANH, CHỦ TỊCH QH: NHIỀU THÔNG TIN XUYÊN TẠC, CHỐNG PHÁ ĐẢNG, NHÀ NƯỚC (JUNE 28, 2017, 21:40 PM), AVAILABLE AT: HTTPS://VIETNAMNET.VN/VN/THOI-SU/QUOC-HOI/CHU-TICH-QH-NHIEU-THONG-TIN-XUYEN-TAC-CHONG-PHA-DANG-NHA-NUOC-380927.HTML#INNER-ARTICLE, ACCESSED ON SEPT. 18, 2020.

[262] Phan Minh Thuận, supra note 163.

[263] Phan Minh Thuận, supra note 179.

prevented, but also strictly handled.[264] Article 17 of the law stipulates measures to prevent cyber-espionage and protect state secret information in cyberspace.[265] Although the introduction of the Law on Cyber Security 2018 has led to many mixed opinions,[266] Vietnam has basically since then had legal bases to protect NS and SIS in cyberspace. In addition, the authorities have also intensified the fight to limit false information in cyberspace.[267] Both the Ministry of Justice[268] and the Ministry of Information and Communications have repeatedly worked with foreign online service providers to remove contents that violate Vietnamese laws[269] and initially received effective forms of cooperation.[270] Google was regularly requested to eliminate unfriendly contents in cyberspace from Vietnam's functionaries. This number remained only five in the period of 2010 and the first half of 2016, but rose to 67 between 2017 and the first half of 2018. Google removed totally 7,366 pieces of information in cyberspace according to Vietnam's requests since 2009, but 7,359 of which took place in the period of 2017 and the first half of 2018. Most of the eliminated were hostile videos on YouTube.[271] From the beginning of 2016 to the first half of 2017, the Ministry of Public Security discovered and handled over 100 cases of state secret leaks in cyberspace.[272] In conclusion, the battle to protect national information safety in cyberspace is a tough and complicated one. Despite many difficulties, authorities' efforts have led to initial respectable results. Of 90 agencies and institutions classified for state information security in 2018, 17% was rated B (fair), 70% ranked C (average), and 13% was rated D (warm-up). This plan is expected to take place for all other enterprises in the future,[273] but the number of successful stories is still very limited.[274] In 2017, Vietnam was ranked 101, but it rose to 50 out of 175 in the Global Cyber Security Index (GCI) in 2018. Vietnam's level of SIS and cyber security also jumped to the 5th in Southeast Asia and 11th in the Asia-Pacific.[275] The Vietnamese leaders have admitted that Vietnam's Internet and social network environment in 2019 was cleaner, but not completely clean and needs to strive to be absolutely clean.[276] However, these positive changes have mainly occurred in central agencies and in some of the country's leading urban centers. The systems to ensure SIS and NS in cyberspace are still very weak in most localities.[277]

4.3. PROBLEMS AND SOLUTIONS

Based on the aforementioned analysis results, the paper recommends some reference solutions as follows: *Firstly*, there are currently in Vietnam two different types of cyberspace: a domestic cyberspace directly managed by Vietnam and a national cross-border cyberspace controlled by international corporations.[278] However, once NS and SIS are identified as all activities to protect Vietnam against negative external impacts on the entire country, everything that belongs to Vietnam needs to be protected by the Law on Cyber Security and the national defense forces. That means Vietnam's NS and SIS in cyberspace is not just restricted to the scope of risks and threats to activities in Vietnam's cyberspace, but also includes all of Vietnam's cyberspace activities outside of Vietnam's territories. Ideally, all the activities supporting Vietnam in international cyberspace should be protected by the Law on Cyber Security and Vietnam's defense forces. On

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[264] THU HẰNG, LUẬT AN NINH MẠNG: CHỐNG NHÀ NƯỚC THÌ ĐƯƠNG NHIÊN PHẢI NGĂN CHẶN (JUNE 15, 2018, 17:39 PM), AVAILABLE AT: HTTPS://VIETNAMNET.VN/VN/THOI-SU/QUOC-HOI/LUAT-AN-NINH-MANG-CHONG-LAI-NHA-NUOC-THI-DUONG-NHIEN-PHAI-NGAN-CHAN-457094.HTML#INNER-ARTICLE, ACCESSED ON SEPT. 18, 2020.

[265] Phan Minh Thuận, supra note 163.

[266] Phan Minh Thuận, supra note 240.

[267] THU HẰNG, SUPRA NOTE 176.

[268] Phan Minh Thuận, supra note 244.

[269] THU HẰNG, SUPRA NOTE 176.

[270] HOÀI THANH, SUPRA NOTE 260.

[271] McLaughlin, Timothy, supra note 185.

[272] THÚY HẠNH, SUPRA NOTE 178.

[273] TRỌNG ĐẠT, XẾP HẠNG ATTT VIỆT NAM: 17% CƠ QUAN, TỈNH THÀNH LOẠI KHÁ, 70% LOẠI TRUNG BÌNH (APR. 17, 2019), AVAILABLE AT: HTTPS://VIETNAMNET.VN/VN/THONG-TIN-TRUYEN-THONG/XEP-HANG-ATTT-VIET-NAM-17-CO-QUAN-TINH-THANH-LOAI-KHA-70-LOAI-TRUNG-BINH-524149.HTML, ACCESSED ON SEPT. 18, 2020.

[274] TRỌNG ĐẠT, SUPRA NOTE 172.

[275] ID.

[276] HƯƠNG QUỲNH, SUPRA NOTE 180.

[277] THU HẰNG, SUPRA NOTE 158.

[278] TRỌNG ĐẠT, CẦN QUY ĐỊNH VỀ VIỆC SỬ DỤNG TÊN THẬT TRÊN MẠNG XÃ HỘI (JAN. 14, 2020, 07:26 AM), AVAILABLE AT: HTTPS://VIETNAMNET.VN/VN/CONG-NGHE/VIET-NAM-CAN-QUY-DINH-VE-VIEC-SU-DUNG-TEN-THAT-TREN-MANG-XA-HOI-608871.HTML, ACCESSED ON SEPT. 18, 2020.

the contrary, all the threats and challenges to Vietnam in the world cyberspace also need to be prevented and timely handled before directly affecting the country's NS and SIS. Although Vietnamese cyberspace activities outside of Vietnam's national territories have to comply with the laws of the host country first and Vietnam's current resources are difficult to prevent and thoroughly protect all the threats and cyber-attacks from outside, only such an approach can strengthen national unity and create synergy for the country to continuously develop more sustainably. *Secondly*, NS is confined to national level only in difference from regional and local one. For instance, the national football team consists of elite representatives of the country's football. Although the national players are teammates and work together to carry out national duties in the national team, they can become each other's rivals in the tournaments of local clubs. According to this way of understanding, NS and SIS in cyberspace are the tasks of specialized agencies of the central government, while localities also have their own specialized departments for cyber security and SIS. That means it is necessary to have very detailed and clear regulations on NS and SIS in cyberspace. In what circumstances can NS measures be applied only at the central level and in what cases is NS understood as all of what related to Vietnam? If NS is only limited to central government cyberspace activities, local specialized departments are often not entitled to participate directly in the fight to protect NS and SIS in cyberspace. In contrast, protective forces of NS and SIS in cyberspace at the central level do not usually intervene in local cyber security activities. This fact will make it difficult to handle issues of cyber security and SIS in cyberspace, which are related to transnational factors, but only occur within the scope of a particular locality. For this reason, the defensive forces of NS and SIS in cyberspace such as the State Information Security Department (Ministry of Information and Communications), the Department of Cyber Security and High Technology Crime Prevention (Ministry of Public Security), and Cyberspace Operations Command (Ministry of Defense)[279] should be given full authorities to protect all the activities related to Vietnam in cyberspace. *Thirdly*, Vietnam's NS and SIS in cyberspace can also be understood as activities that affect Vietnam's political system, state apparatus, and public agencies. In reality, this system represents Vietnam as a nation state in external relations with the outside and in internal relations with all non-governmental forces. Regarding the protection of NS and SIS in Vietnam's cyberspace, the first responsibility belongs to the state apparatus, but when Vietnam achieves a certain number of achievements in this respect, the government system also represents Vietnam to work with international partners. Although Vietnam's administration system has actively employed progressive achievements of science and technology to modernize functional management processes, better meet people's needs to enjoy convenient public service packages, and try to integrate into general development trends of human public administration, Vietnamese state's online database system is still one of the hackers' main targets of attack in two aspects. On the one hand, unfriendly groups of hackers would like to destroy Vietnamese government's cyber security infrastructure. On the other hand, many cyber-attacks are targeted at national secret sources and SIS in cyberspace to possess more advantages in international relations related to Vietnam. All cyber-attacks may derive from external competitors and may also originate from internal uncooperative non-state forces. Many cyber-attacks took place according to carefully prepared plans, but there have also been a number of completely random and unintentional actions. Therefore, to limit cyber-attacks against Vietnamese government and avoid unnecessary losses caused by unintentional actions to all stakeholders in cyberspace, The Law on Cyber Security 2018 needs to further specify the contents and actions that are considered to affect NS and SIS in cyberspace. The most important of these are pieces of information and documents of state secrets on which unrelated parties are absolutely not allowed to comment and used in cyberspace. *The fourth* is the SIS and cyber security of the leaders of the nation, state, and high-level government apparatus. Leaders are usually the elite force of each nation and invaluable assets of peoples. Many ordinary people are very proud of their talented leaders and devote their faith to them. However, these achievements do not come overnight. They are instead often formed via long-term efforts and attempts of each leader as well as tireless endeavors of their supporters. In the era of the current Industrial Revolution 4.0,[280] a lot of political leaders of developed countries have taken advantage of technological advancements of cyberspace to improve the efficiency of their country management. Nevertheless, cyberspace is also an information channel that political opponents often use to beat each other down. Although these phenomena in Vietnam are not so alarming, they have not been absolutely eliminated. It is hence recommended that Vietnam's Law on Cyber Security 2018 clearly define the behaviors and information contents that are considered to affect national leaders and the mechanisms to ensure the legal use of information sources related to Vietnamese leaders. Of course, the defamation and distortion of the national leaders' images in cyberspace must be absolutely forbidden, but the appearance of too much

[279] **D.BÙI, SUPRA NOTE 231.**

[280] **TTXVN, KHỐI DOANH NGHIỆP VỪA VÀ NHỎ CHƯA CÓ SỰ CHUẨN BỊ TỐT CHO CPTPP (NOV. 14,2018, 13:00 AM), AVAILABLE AT: HTTP://TAPCHITAICHINH.VN/TAI-CHINH-KINH-DOANH/KHOI-DOANH-NGHIEP-VUA-VA-NHO-CHUA-CO-SU-CHUAN-BI-TOT-CHO-CPTPP-146153.HTML, ACCESSED ON SEPT. 18, 2020.**

information on behalf of the national leaders to serve illegal purposes should also be strictly prohibited as detailed and specific as possible. If all of these cyberspace activities are clearly regulated, the violation of NS and SIS in cyberspace due to different ways of interpretation will be greatly reduced. *Fifthly*, NS and SIS in cyberspace is the duty of each Vietnamese citizen. The Socialist Republic of Vietnam is considered to be a state of the people, by the people, and for the people. All the cyberspace activities of Vietnamese citizens are not only protected by the Law on Cyber Security 2018 and the national defense system, but every action of the Vietnamese people must also contribute to protecting NS and SIS in cyberspace. This principle is, however, largely only of theoretical significance. In practice, each citizen's ability to participate in the protection of NS and SIS in cyberspace depends on many other factors. The most prominent of these is the degree of being protected of Vietnamese citizens in cyberspace. Once Vietnamese citizens' legal rights and legitimate interests in cyberspace are not protected by Vietnamese laws, the ability to require them to contribute to the protection of NS and SIS in cyberspace is impractical. In addition, individual citizens' level of legal awareness, information technology competency, and individual circumstances also have certain impacts on their ability of protecting NS and SIS in cyberspace. This means that it is not enough just to legalize the aforementioned contents in legal documents, because all the contents of the law can be circumvented. Instead, awareness of law observance and law enforcement capacity of the public apparatus play a decisive role.

V. CONCLUSION

To conclude, NS and SIS in cyberspace are the top concerns of all advanced states in the context of the Industrial Revolution 4.0.[281] Meanwhile, cyber activities against Vietnam are increasing and complicated. These incidents not only diminish people's confidence in state leaders, but also significantly affect Vietnam's nature of development policies and coming prosperous future.[282] This fact requires Vietnam not only to build more newly effective legal corridors, but also to put in place clear regulations on behaviors that affect NS and SIS in cyberspace. Many countries have detailed regulations on this issue in their criminal laws[283] and strictly handled acts of intentional fake news affecting NS and SIS in cyberspace, but sanctions for these acts in Vietnam are still relatively loose and fragmented.[284] In such a context, the introduction of Vietnam's Law on Cyber Security 2018 is not only consistent with international practices and contributes to improving Vietnam's NS and SIS in cyberspace, but also help stakeholders to avoid many of greatly concerned cyber security vulnerabilities[285] in electronic transactions. Although the Association of Asian Internet Companies, of which Facebook and Google are members, believes that the 2018 Cyber Security Law not only affects people's freedom of speech, but also has a significant impacts on Vietnam's prospects for digital economic development in the coming time,[286] but recent achievements in NS and SIS have shown that the provisions of Vietnam's Law on Cyber Security have played an vital part in the fight to protect the country's NS and SIS in cyberspace. Vietnam's Law on Cyber Security 2018 is thus not only in accordance with the general development trends of world cyber security, but also contributes to the protection of Vietnam's national legitimate rights and interests, but does not affect stakeholders' freedom of information and expression in cyberspace.[287] Nevertheless, it is recommended that Vietnam's Law on Cyber Security be further concretized the basic contents of the concept of NS and dialectical relations between state, locality, and citizen in Vietnam's fight for the protection of SIS in cyberspace. Each Internet use is recommended not to click on links from incompletely trusted senders. Even though these links are sent from friends and relatives, Internet users should actively check the information carefully before using it.[288] That means each individual user of online services needs to be more vigilant about the deceptive tactics of high-tech criminal groups.[289] In other words, to fight against malicious information that is likely to affect NS and SIS, citizens must protect themselves against unfriendly information in cyberspace and

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[281] THÚY HẠNH, SUPRA NOTE 178.

[282] HƯƠNG QUỲNH, BÔI NHỌ LÃNH ĐẠO ĐẢNG, NHÀ NƯỚC: ĐỀ NGHỊ XỬ HÌNH SỰ (MAY 24, 2017, 12:19 PM), AVAILABLE AT: HTTPS://VIETNAMNET.VN/VN/THOI-SU/QUOC-HOI/BOI-NHO-LANH-DAO-DANG-NHA-NUOC-DE-NGHI-XU-HINH-SU-374513.HTML#INNER-ARTICLE, ACCESSED ON SEPT. 18, 2020.

[283] ID.

[284] HƯƠNG QUỲNH, SUPRA NOTE 180.

[285] THU HẰNG VÀ HỒNG NHÌ, BỘ CÔNG AN: LUẬT AN NINH MẠNG PHÙ HỢP THÔNG LỆ QUỐC TẾ (NOV. 3, 2018, 19:47 PM), AVAILABLE AT: HTTPS://VIETNAMNET.VN/VN/THOI-SU/CHINH-TRI/BO-CONG-AN-LUAT-AN-NINH-MANG-PHU-HOP-THONG-LE-QUOC-TE-486828.HTML#INNER-ARTICLE, ACCESSED ON SEPT. 18, 2020.

[286] THU HẰNG, SUPRA NOTE 263.

[287] TRẦN LƯU, SUPRA NOTE 182.

[288] THU HẰNG, SUPRA NOTE 172.

[289] ID.

restrict the dissemination of unconfirmed information.[290] This action is considered as one of the solutions to contribute to protecting NS and SIS in cyberspace, but the reality shows that it is each citizens' degree of being protected by law, awareness of law observance, and information technology capacity determines their ability of participation in the protection of NS and SIS in cyberspace.

[290] **HOÀI THANH, SUPRA NOTE 260.**

RADICAL HUMANISM AND INTEGRAL HUMANISM - A JURISPRUDENTIAL VIEWPOINT ON 'BHARATIYA' IN THE BHARATIYA JANATA PARTY

SATVIK MISHRA[291]

ABSTRACT

Bhartiya Janata Party, the ruling political party doesn't have much long but an ideologically intricate history. While most of the people are aware of the Jan Sangh from which the current regime grew, very few are aware of the core principles on which it was founded. This paper brings into light those very concepts and critically analyses how there has been a shift in ideologies since the party was founded. The paper discusses in detail the concept of Humanism along with its elements, objectives and its significance. The paper defines Humanism as an ideology where human beings are responsible for their own opportunities and prosperity, and goes on to elaborate the same. It also talks about how Humanism spread in different parts of the world and got divided into various segments as it evolved, the two primary segregations being Radical Humanism and Integral Humanism. The paper elaborates on the definitions of both the kinds of Humanism and discusses important components of the same including the quest for freedom, the humanist approach to the history, the fallacies of Communism and the inadequacies of formal parliamentary democracy in case of Radical Humanism, and Gandhian influences, disregards to Western principles of development and the integration of souls in case of Integral Humanism. The research paper critically analyses the differences and similarities in the two types and further goes on to discuss the real-life application of Humanism, i.e., the BJP. The research findings display how BJP has shifted from the ideology its foundation was based on, the ideas of Pandit Deendayal Upadhyaya, and how it can soon lead to its own decline if some self-introspection is not undertaken by the party. The paper concludes by discussing the concept of 'Bhartiya' as per these ideologies instead of what is being propagated by the media and the politicians in recent times and urges people to be reminded of the true concept of 'Rastriya' instead of being misguided for personal or professional advantages of other entities.

Keywords*: Bhartiya Janata Party, Humanism, Radical Humanism, Integral Humanism, Rastriya*

I. INTRODUCTION TO HUMANISM

Humanism can be considered to be a philosophical and ethical position that weighs on the value and organization of individuals, singularly and jointly, and inclines toward essential thinking and evidence (authenticity and perception) over acknowledgment of philosophy or belief.[292] The significance of the term humanism has vacillated by the successive intellectual movements which have related to it.[293] Humanism is an attribute that affirms the thought of chances and human prosperity.[294] It considers people to be solely at risk for the headway and improvement of individuals and complements a concern for man in association with the world. A humanist carries on with their life as per a collection of qualities that organize logical thinking and sympathy for other people.[295] The community likewise accepts that the universe is a natural wonder with no logical structure behind it and that importance is something we make ourselves rather than being something that is out there for us to discover. Humanism is thought to have started in the late fourteenth century in Italy and was a significant development of the Renaissance. It spread to the remainder of Europe in the mid-fifteenth century and by the sixteenth century, it was the prevailing scholarly movement. In those days, humanism was fundamentally about restoring traditional learning techniques and was about scholarly information and semantic abilities, rather than an overall way to deal with life. It turned into the humanism we know today in the mid-1800s when the term was utilized by a German student of history, Georg Voigt, to portray a way of thinking fixated on mankind.[296]

II. RADICAL HUMANISM

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[292] Eugene Anowai & Stephen Chukwujekwu, *Philosophy of Authentic Humanism: The only way of curbing conflict and violence,* 7 INTERNATIONAL JOURNAL OF HISTORY AND PHILOSOPHICAL RESEARCH 1, 1 (2019).

[293] Jennifer Powell McNutt, *Renaissance Humanism: The tie that binds the Protestant Reformation*, LOGOS TALK (Oct. 30, 2019), https://blog.logos.com/2019/10/renaissance-humanism-the-tie-that-binds-the-protestant-reformation/.

[294] Anowai, *supra* note 292.

[295] Olivia Peter, World Humanist Day: What is Humanism and when did it start, INDEPENDENT (Jun. 19, 2019), https://www.independent.co.uk/life-style/world-humanist-day-2019-humanism-what-beliefs-a8965186.html.

[296] *Id.*

Radical Humanism or New Humanism was a way of thinking visualized by M.N. Roy. Roy felt the need of another way of thinking to be introduced which must be an essentially worried about human life, a way of thinking which would liberate human soul, a way of thinking which would clarify every one of the marvels of nature and encounters of human existence with no reference to otherworldly controls, a reasoning with a social reason. For Roy, the end of humanist tradition in the wake of modernization through motorization was a catastrophe marking the beginning of a decent civilization prevailing at that point. He wanted to accentuate the individual more than the class, regardless of whether it be the working class or the middle class. Roy affirmed that Marxian emphasis on insurgency and on the autocracy of the Proletariat would prompt totalitarianism. Transformations couldn't achieve wonders. As a Radical Humanist, Roy came to accept that an upset ought to be realized not through class battle or armed rebellion but through education. Radicalism comprises of every positive component of Marxism liberated from its paradoxes and explained in the light of more prominent scientific information. Radicalism is neither hopeful nor cynical. It is somewhat a combination of activism and realism. In breaking down the real human situation, Radicalism attempts to discover the different potential outcomes. This holds out no false expectation and without being cynical it looks to modify the technique of activity to the plausibility of accessible assets. Radicalism proposes a typical battle against universal anti-social components. To Roy, the fundamental thought of another progressive social way of thinking must be that the person must be before society, and personal freedom must be of importance before an association.[297]

III. KEY FEATURES OF RADICAL HUMANISM

Quest for Freedom:

Quest for truth and freedom, as per Roy, establish the fundamental inclination of human advancement. The inspiration driving all-rational human undertaking, singular and aggregate both, is the achievement of freedom in normally extending measure. The extent of liberty available to the population is equivalent to the extent of social advancement. Roy gives a reference to the struggle for liberty to an individual's battle for sustenance and concludes that truth is the final result of the said struggle.[298] Reason, as shown by Roy, is an organic property, and it isn't contrary to the human will. Following are few of the key features of Radical Humanism.

Humanist Historical Interpretation:

Roy denotes a huge importance to human will as a decision-making component in history, and underlines at work of thoughts and visions during the social turn of events. The creation of thoughts is, as demonstrated by Roy, a physiological method yet once created, thoughts exist without any other individual's input and are directed by their own one-of-a-kind laws. The components of thoughts run corresponding to the methodology of the social turn of events and the two affect each other. Social examples and moral qualities are not insignificant super structures of set up financial relations but rather have a history and rationale of their own.[299]

Fallacies of Communism:

As shown by Roy, freedom doesn't generally emerge from the catch of political force for the persecuted sections of society and abrogation of private property for the sake of production. For making a different universe of liberty, unrest must reach past a monetary overhaul of society. A political framework and a financial assessment which degrade the fragile living creature of a man to a nonexistent aggregate of ego, can't in any capacity be, in Roy's opinion, the proper techniques for the achievement of freedom. According to Roy, the society is just a way to achieve the end, the end being the individual itself.[300] He stated that society is a human creation with a certain objective in mind. The objective to promote liberty and all relations, be it social, political, financial or any of any other kind, would be adjusted for the fulfilment of the said objective.

Inadequacies of Formal Parliamentary Democracy:

These imperfections, as indicated by Roy, are result of the deputation of authority. Individual residents of the nation are, in Roy's opinion, feeble for every single practical reason, and almost every time. They neither have a way to uphold and exercise sovereignty nor to a way to take proper control of the government apparatus. As indicated by Roy, to make democratically elected government successful, power should consistently remain with the population and there must be

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[297] Bibhuti Mahakul, *Radical Humanism of MN Roy*, 66 INDIAN JOURNAL OF POLITICAL SCIENCE 607, 615 (2005).

[298] Ramendra Nath, *Manbendra Nath Roy*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (Apr. 28, 2020), https://www.iep.utm.edu/roy_mn/#SH4d.

[299] ACHARYA KRTASHIVANANDA, PROUT: HUMANISTIC SOCIALISM AND ECONOMIC DEMOCRACY 50 (2013)

[300] N. JAYAPALAN, INDIAN POLITICAL THINKERS: MODERN INDIAN POLITICAL THOUGHT 255 (2000).

available resources for the individuals to employ sovereign authority adequately, not occasionally, yet on a regular basis.[301]

IV. INTEGRAL HUMANISM

Similar, but marginally different was the idea of Integral Humanism propounded by Pandit Deen Dayal Upadhyaya. As shown by him, the primary explanation behind the different issues that advanced India is seen with lies in the capricious utilization of the Western sense of thoughts to Indian political life. In this way it is against both western industrialist independence and Marxist socialism of their excesses and alienness, however inviting western science. It shows a native financial framework that puts the person at middle of everyone's attention. According to him- "Humankind had four hierarchically organized attributes of body, mind, intellect and soul which corresponded to four universal objectives, kama (desire or satisfaction), artha (wealth), dharma (moral duties) and moksha (total liberation or 'salvation'). While none could be ignored, dharma is the 'basic', and moksha the 'ultimate' objective of humankind and society. He claimed that the main problem with both capitalist and socialist ideologies is this that they only consider the needs of body and mind, and were hence based on the materialist objectives of desire and wealth".[302] Integral humanism contains idealistic dreams made around two subjects: morality in relation to policy issues and swadeshi, and development of lower-grade industries in economies, all Gandhian in their broader topical yet unquestionably Hindu nationalist. These thoughts turn around the major subjects of friendliness, the intensity of social national characteristics, and commands. It was because of such interpretations that Upadhyaya introduced an elective vision. Tracing its origin to the non-dualistic way of thinking of Advaita Vedanta, integral humanism engendered the unification of all spirits, be it any sort of living being.[303] Deen Dayal Upadhyay had given another idea to Gandhi's swadeshi movement which expresses that swadeshi symbolizes a lifestyle with a responsibility and devotion propounded and rehearsed to support the citizens of the nation in general and to the rustic population in specific who reside in over six lakh townships.[304] Swadeshi commands us to utilize and provide our services to our immediate environment. Consequently, it is everyone's commitment to enabling neighbors who can provide to our necessities.

V. KEY FEATURES OF INTEGRAL HUMANISM

Gandhian Principles:

Integral humanism was a collection of ideas formulated by Deendayal Upadhyaya as a politically driven initiative and which turned out to be the ideology on which the Jan Sangh was formed in 1965. Upadhyaya borrowed the Gandhian standards such as swadeshi, swaraj, etc., and these standards were taken over specifically to provide more significance to social national qualities.

Disregards Western Influences:

Western ideas of people, and society were generally acknowledged on account of the decline of scholarly activities in India during the medieval times. Integral Humanism has always been a promoter of Western progress, yet doesn't have confidence in the similarity of western financial developments in the vast nation of India. Upadhyaya dismissed this Western style of statism and praised liberal ideas of individual freedom inside the more extensive domain of aggregate moral obligation. Similar to financial specialists are presently upholding for a public-private organization model around the world, comparably, Upadhyay imagined the possibility of a "national sector", where the option to work and a safety net for the impeded went connected with the monetary enterprise.[305] Furthermore, this was a principled stand. Upadhyaya himself demonstrated the same when he showed the way to seven MLAs from Jan Sangh who restricted the nullification of the Zamindari framework in Rajasthan. To give another example of his down to earth financial rationale, he contradicted the centralization of ownership which prompts defilement and accumulation of goods or wealth. Integral humanism addresses the authenticity of improvements like secularism as it was essentially a retaliation to priesthood (the Church rule) and communalism, a retaliation to abuse. Communism stays as opposed to singular freedoms.

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[301] MANABENDRA NATH ROY, THE RADICAL HUMANIST 46 (1998).

[302] Sanjeet Singh et al., A review paper on Integral Humanism: Comparison of Deen Dayal Upadhyay and his counterparts, 5 SHIV SHAKTI INTERNATIONAL JOURNAL OF MULTIDISCIPLINARY AND ACADEMIC RESEARCH 1, 2 (2017).

[303] Tushar Singh, Deendayal Upadhyaya: De-falsifying our history for the future, DAILYHUNT (Sep. 26, 2017), https://m.dailyhunt.in/news/india/english/the+indian+economist-epaper-indecono/deendayal+upadhyaya+de+falsifying+our+history+for+the+future-newsid-73885539.

[304] *supra note* 301.

[305] Ananya Awasthi, Explained: What Integral Humanism is and why India needs it, SWARAJYA (Sep. 25, 2017), https://swarajyamag.com/blogs/explained-what-integral-humanism-is-and-why-india-needs-it.

Integration of Souls:

Following its initial stages to the non-dualistic hypothesis of Advaita Vedanta, this kind of humanism dispersed the solidarity of various spirits, be it of any sort of a living being.[306] Rejecting the diverse variety subject to race, or religion, it recognized each person as a significant part of the singular natural unity, sharing a typical attention to a national idea. Additionally, setting this into a political perspective, either then or now, it inferred the people of any faith and segment are imperatively one and their natural solidarity should be established on this conventional thought of "Rastriya".

VI. WHAT DIFFERENTIATES THE TWO KINDS OF HUMANISM?

Integral humanism is a more profound and more organized model than Radical Humanism. The prerequisite for integral humanism was felt for the first time since India attained independence fundamentally in light of the fact that ideological conflicts were kept away in order to attain the goal of self-rule and sustenance.[307] A circumstance of philosophical and ideological vagueness in the country was the necessity that led to clear financial ways of thinking. As per Upadhyaya, Nations just as ideological groups don't exist by negligible cohabitation. He spread the concept of Chiti or the spirit of the country, and the way that foundations ought to be made remembering this spirit. He accepted that contention was not the way to progress, but beating them and concentrating on integrated improvement was. The main distinction is that integral humanism pivots less on heroics and doesn't consider the modern framework of development as the main framework for improvement, which isn't the situation with radical humanism. Despite the fact that being genuine supporters of Indian idea, we make certain to absorb what best the West brings to the table like its utilization of IT, modern industrial aptitude and dignity of labor.

VII. PRACTICAL APPLICATION OF HUMANISM: THE BJP

Integral Humanism is one of the center philosophies based on which the Jana Sangh, and subsequently, the BJP were established.[308] Deen Dayal felt the rise in expediency in the decision-making party similarly as restriction was becoming unfavorable to the national interest. Majority of the Opposition was of the opinion that one could get anything from phenomenal Marxism to Capitalism just to pound the Congress. Additionally, the proximity of people from all limits and extents, from the right to the left in the Congress Party furthermore made a sentiment of disillusionment and equivocalness in the nation. The same can be observed even today, anyway the BJP can't attract other parties to form alliances, and those that it manages to pull in likely don't have any ideological comprehension with it. Integral humanism was a knowledge-based framework which he accepted would persistently develop and adjust to different occurrences on the planet. He referred to heartbreaking impacts of a blend of patriotism and communism in Hitler, which covered democratic government and removed individual opportunity. Marxism, he accepted guaranteed bread, however at last individuals neither had bread, nor voting rights. It is not hard to find Atal Bihari Vajpayee calling Marxism and Capitalism twins, while talking in his first adhiveshan held in Mumbai because both had similar ideological limitations.[309] When Pandit Ji discussed genuineness being a rule instead of a strategy, hardly did he envision that numerous who might be operating under the pennant of integral humanism, later on, would make a joke of his recommendation. Boundless centralization of intensity, he accepted, in the hands of the State brings about a decrease in Dharma, as it powers individuals into over the top dependence on the state, and guarantees revolt.[310] BJP is by all accounts moving gradually towards the mode of centralization undertaken by the Congress beforehand, albeit numerous components have not permitted that change to happen totally. He acknowledged that be it the State, the general population itself or even the singular representative of the nation, none of them were supreme in nature. Accordingly, has the BJP not taken in the conclusion that as a politically active group, it has more prominent duties than battling elections and winning them to have a share in the powers of the country?[311] A genuine introspection is required by the BJP at present, else, it is well known that it doesn't take much for political parties to separate once they lack mutual understanding and arrive at political insensibility.

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[306] supra note 11.

[307] Pulakesh Upadhyaya, Integral Humanism and the BJP, SWARAJYA (Dec. 8, 2012), https://swarajyamag.com/commentary/integral-humanism-and-the-bjp.

[308] *Id.*

[309] ET Online, *Atal Bihari Vajpayee's five steps that changed India forever*, THE ECONOMIC TIMES (Dec. 25, 2017), https://m.economictimes.com/news/politics-and-nation/atal-bihari-vajpayees-five-steps-that-changed-india-forever/articleshow/62240161.cms.

[310] Upadhyay, *supra,* note 16.

[311] *Id.*

VIII. CONCLUSION

Conclusively, integral humanism develops a characteristic thought, where it imagines a nation, which is steered by regular concepts of moral order. A nation, where all inhabitants separate themselves as a piece of similar Indian ethos, where we tend to be modern but don't Westernize, where we have personal monetary independence but which is joined together by a social savings net, all in all, where we ascend above collecting discernment as individual people from different social circles to develop a common national cognizance. Henceforth as responsible citizens of this nation, let us figure out how to welcome the down to earth value of applying unique Bhartiya thought to address a portion of the contemporary political, social what's more, financial challenges. Proof from recent history, as featured above, have just exemplified the intensity of depending on indigenous information.

REGISTRATION- THE MATRIMONIAL EVIDENCE

VINAY SINGH MORIYA[312] AND AISHWARYA BHATIA[313]

ABSTRACT

Marriage is an important phase of every individual's life. It is considered a big step towards the life full of responsibilities, love and support. Marriage is a big decision to be made accurately and perfectly because everyone gets this chance once in life and for sure everyone wants this to face only once in their life-span. To make this ceremony, legally approved and valid, there is a process of registration of marriage, which hardly anyone follows it. Humans have a psychology, of not performing their liabilities and tasks until it is made mandatory or until a fine does not gets imposed on it or until they land into a troublesome situation, where they would be compelled to do that job. Compulsory Registration of marriage is not just a Nation-wide controversy but also has different level of disputes over the whole world. The journey of judicial pronouncements and the State made laws on Compulsory Registration of Marriage Acts will draw a transparent view on the relevance of mandatory laws for registration of marriage. This research paper forecasts problems that arise particularly on feminine gender for not registering their marriages and what are the difficulties faced by the legislators in making Compulsory Law on Registration of Marriage irrespective of caste, religion, region and creed.

Keywords- *Compulsory Registration of Marriage, unique law, State made laws, judicial pronouncements, world-wide scenario.*

I. INTRODUCTION

Marriage is like a fictional painting filled with happiness and love drawn in different styles and patterns. Marriage is basically considered to be a formal or legal tie up of two persons in a personal relationship. It is primarily a commitment between two individuals. This bond is associated with love, responsibility, tolerance and support. It's not just a tie up between two individuals but society observes it as a bond between two families. The union of this sacred ceremony is known as marriage. Marriage confirms the status of men and women living together as husbands and wives and also provides status of legitimacy to children born under this relationship. Marriage is said to be fulfilled after performing the customary ceremonies. Before 1955, the ceremony of marriage was considered to be purely sacramental, a holy union for seven births, indissoluble and everlasting. It had no age limit, no consensus, no consideration, nothing just a devotional bond. But the concept of marriage began changing with the change of time and thinking, after 1955 and before 1976, it got modified from purely sacrament to quasi-sacrament; meaning more features of sacramental than contractual. Procedure of marriage got slightly different. Now, there were sacrament features like ceremonies and rituals but also some unaccustomed rules were attached to it like specific age limit for marriage, the concept of divorce, void and voidable marriages. After 1976, the marriages got a status of quasi-contract, more contractual than sacramental. By this time only sacred ceremonies were performed rest all got changed from unbreakable to divorce and then to other special grounds for dissolving the marriage like cruelty, desertion, impotency, etc. So, in this era, marriage is treated as contract than a holy union for which registration of marriages is important.

II. WHAT IS REGISTRATION?

Registration basically means an act or process of entering or uploading the data or information about something or someone in the system, books or in public records. According to Section 8 of Hindu Marriage Act, 1955, Registration of Hindu marriage is[314]- For encouraging registration as verification for a speedy trial in Hindu Marriages, the State Governments have opportunity to make laws particularly for the regulation of registration in their States, with respect to the particulars of marriage authorized in the Hindu Marriage Register and must maintain a record for the same. It is totally on the obligation of the rules and regulations made by the State to make it mandatory or not. If mandatory, the State Government can impose a fine extending to twenty-five rupees, where they found any sort of breach in registering the marriage. The register maintained for registration of marriages, should be at all reasonable times kept unlocked for scrutiny and shall be permitted as corroboration whenever required. According to this, registration is considered as a proof for marriage. This provision of registration was not compulsory in many States as it is on the discretion of the State Governments. They have power to make it compulsory in their States. As the registration of marriage cannot he held void

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[314] Hindu Marriage Act, 1955, available at http://legislative.gov.in/actsofparliamentfromtheyear/hindu-marriage-act-1955 (Visited on September 3, 2020).

on the failure of registration of marriage. The main reason for maximum number of non-registered marriages is - firstly, it is more based on customs and publicity than on law. So, people do not find it necessary and secondly, because of our judicial system, which is not that active. So, everything becomes very time consuming. It only becomes necessary when a situation arises to prove the marriage. Like in **Kangavalli v. Saroja**[315]**,** where paternity of a born child of not a valid marriage was challenged. In this case, there was no registration of marriage, so a woman was unable to prove her marriage which left her with neither her right under the law nor recognition in society. People get difficulty in getting divorce from first marriage, because it was not registered. Face difficulties in getting passports, as the marriage was not registered. So, to get rid of unexpected problems, registration is necessary. Although registration takes a little more time in paper-work along with two witnesses, but then it proves to be worthy at the end. [316]

III. COMPULSORY REGISTRATION OF MARRIAGE IN INDIA

In India, a customary marriage is regarded to be a legal marriage. However, a certificate of the same proves the marriage legal in the eyes of law.[317] Getting marriage registered helps in many ways like applying for visa or filing a divorce case. In all these types of cases, the proof of marriage is required, which is basically a certificate of the marriage. The fight for demand of compulsory marriage in India began in 2005, when the National Commission for Women drafted a Compulsory Registration of Marriages Bill which was taken up further. In 2006, the Supreme Court in its decision made registration of marriages obligatory for all religions, irrespective of their caste, color and creed. In 2013, the Rajya Sabha proposed an amendment to include compulsory registration of marriages in the Registration of Births and Deaths Act, but it was not passed by the Lok Sabha.[318]

But some states had already made laws for compulsory registration of marriage. Himachal Pradesh was the first State to pass legislation on compulsory registration of marriage in 2004, in 2006, Bihar made it compulsory and in 2008, Kerala. In 2009, Rajasthan introduced a law relating to it but it did not apply on marriage solemnized under Christian and Parsi laws.[319] In 2017, Uttar Pradesh made law for compulsory registration and in 2016; it already introduced the method of registration of marriages through Aadhar card on online basis. Also, the officials claimed that total 87,000 people got their marriages registered on the new system till then.[320] In 2007, Smt. **Seema v. Ashwani Kumar**[321], a transfer petition was presented before the Supreme Court drawing attention towards the rapidly growing quantity of cases of harassment in matrimonial life and maintenance due to the significance of non-registration of marriages in some states. Need of compulsion on registration of marriages was the main issue in this case. On looking on the facts and circumstances of the case the Supreme Court held the registration of marriage mandatory on all religions in their respective States and Union Territories. The non-registration was proving disadvantageous on women to seek redressal and affected women at a great measure as there was no official record of marriage present. Therefore, declaring registration of marriage compulsory was only the need and in interest of the society. Hence, the decision was observed as a positive step of great value in matters of custody, rights and maintenance of child born out of wedlock of two persons.[322]Through this judgment Supreme Court laid some guidelines for the State and Central Government to frame and amend necessary rules that should be taken into consideration on behalf of registration of marriage.

"The respective States were compelled to inform about their policy of registration before the termination period of 3months from the date of decision. On expiry of this period, an appropriate notification bringing the rules must be issued,

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[315] AIR 2002 Mad 73 [LNIND 2001 MAD 687] : (2001) 3 HLJ 360.

[316] Poonam Pradhan Saxena, Family Law (LexisNexis, 4th edn., 2019).

[317] 'Is Compulsory Registration of Marriage Required in India?, available at http://legaldesk.com/marriage/compulsory-registration-marriage-in-india (Visited at September 10, 2020).

[318] Aarefa Johari, "Should marriage registration be mandatory? Only if the process is simplified, say couples" available at https://amp-scroll-in.cdn.ampproject.org/v/s/amp.scroll.in/article/84351/should-marriage-registration-be-mandatory-only-if-the-process-is-simplified-say-couples?amp_js_v=a3&amp_gsa=1&usqp=mq331AQFKAGwASA%3D#aoh=15991399633199&referrer=https%3A%2F%2Fwww.google.com&amp_tf=From%20%251%24s&ampshare=https%3A%2F%2Fscroll.in%2Farticle%2F843571%2Fshould-marriage-registration-be-mandatory-only-if-the-process-is-simplified-say-couples (Last modified July 16, 2017).

[319] *Ibid.*

[320] *Ibid.*

[321] AIR 2006 SC 1158, [2006] 2 SCC 578.

[322] Aapka Consultant, 'COMPULSORY REGISTRATION OF MARRIAGE' available at http://www.aapkaconsultant.com/blog/legality-andor-validity-of-second-marriage-by-embracing-another-religion-during-the-first-marriage-2/ (Last modified January 3, 2018).

after considering objections raised by general public."[323] The States were advised to appoint an officer, who would be strictly permitted for registering the marriages after solemnization. The age and marital status should be clearly stated and consequences of non-registration of marriages or for filing false declaration shall also be provided to fulfill the purpose of the Court.[324] "After the ratification of the detailed resolution on the Compulsory Registration of marriage, the Central Government is required to deposit it before the Court for review".[325]

IV. NEED FOR COMPULSORY REGISTRATION OF MARRIAGES IN INDIA

Due to absence of compulsory registration of marriages, women and children at times, have to face (innumerable) problems. Registration of marriage is necessary to deal with some critical situations that occur in society like-

- To prevent child marriage and to have a check on the minimum age limit of marriage.
- To prevent non-consensual marriage.
- To have a check on social practices such as bigamy and polygamy.[326]
- To enable married woman for claiming her rights to live in the matrimonial house and ask for maintenance.
- To (enable) widows to claim their inheritance rights and other entitled rights and privileges from her in-laws after their husband's death.
- To dissuade men from abandoning women after marriage.
- To prevent guardians and parents from illegally commercializing women to any known person or stranger or a foreign national, under the influence of marriage.[327]

V. DIFFICULTIES IN ENACTING COMPULSORY REGISTRATION OF MARRIAGES ACT

- ***Lack of Uniform Civil Code***- In India, personal laws and customs play a very important role in the ceremonies of marriage. This situation develops obstacles in the registration of the important event of life like marriage. Despite of the diversity among marriage customs, different religions and their personal laws is also a difficult to task to get over.
- ***Lack of consensus***- All the States and Union Territories have not announced it and observed it as an important matter for making registration of marriage compulsory. Only some states like Bihar, Madhya Pradesh and Kerala, which have not legislated it but only made rules upon it and on the other side there are some States which have legislated their concern on this topic like Punjab, Haryana and Tamil Nadu. During the UPA Government's 2nd term, the Rajya Sabha proposed an amendment to make registration mandatory under the Registration of Births and Deaths Act, 1969 but it was unable to pass from Lok Sabha and later it collapsed.
- ***Conflicting laws***- Conflicts among the existing laws prior to personal laws like child marriage act, dowry prohibition act and medical termination of pregnancy act are also a matter of great concern for the policy makers. The concern for minimum age limit for the registration of marriage is also an important factor as every personal law or other acts have different ages prescribed for marriage.[328]

VI. STATES FOLLOWING COMPULSORY REGISTRATION OF MARRIAGES ACTS OR BILLS

- Punjab follows The Punjab Compulsory Registration of Marriages Act, 2012, for the marriages in solemnized within the State, irrespective of their religion, caste, creed or nationality.
- Delhi has The Delhi (Compulsory Registration of Marriage) Order, 2014 which is irrespective of caste, creed and religion for the marriages solemnizing in Delhi.
- States and Union Territories having proper acts for registration for compulsory marriage, irrespective of their caste, religion and creed applying within their States are- The Haryana Compulsory Registration of Marriages Act, 2008, The Meghalaya Compulsory Registration of Marriages Act,2012, The Uttarakhand Compulsory Registration of Marriages Act, 2010, Tamil Nadu Registration of Marriages Act, 2009, The Rajasthan Compulsory Registration of Marriages Act,

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[323] *Ibid.*

[324] *Ibid.*

[325] *Ibid.*

[326] Shravan Nune, 'Compulsory Registration of Marriages: Need & Necessary Reform' available at https://m-jagranjosh-com.cdn.ampproject.org/v/s/m.jagranjosh.com/current-affairs/amp/compilsory-registration-of-marriages-need-necessary-reform-1499953666-1?amp_js_v=a3&amp_gsa=1&usqp=mq331AQFKAGwASA%3D#aoh=15991405000007&referrer=https%3A%2F%2Fwww.google.com&amp_tf=From%20%251%24s&ampshare=https%3A%2Fwww.jagranjosh.com%2Fcurrent-affairs%2Fcompulsory-registration-of-marriages-need-necessary-reform-1499953666-null (Last modified July 13, 2017).

[327] *Ibid.*

[328] *Ibid.*

2009, The Mizoram Compulsory Registration of Marriages Act, 2007, The Karnataka Mizoram Marriages (Registration and Miscellaneous Provisions)Act, 1976, The Himachal Pradesh Registration of Marriages Act, 1996, The Andhra Pradesh Compulsory Registration of Marriages Act, 2002, The Jammu and Kashmir Muslim Marriages Registration Act, 1981, The Hindu Marriage Registration Rules, 1966 for Chandigarh and The Tripura Recording of Marriage Act, 2003.

- The States and Union Territories following Rules for Compulsory Registration of Marriage are- Bihar having Bihar Marriage Registration Rules, 2006, Madhya Pradesh Compulsory Marriage Registration Rules, 2008 for the state of Madhya Pradesh, Kerala Registration of Marriages (Common) Rules, 2008 for Kerala and Compulsory Marriage Registration Rules, Chhattisgarh, 2006 provides solemnization of marriages within their States irrespective of caste, creed and religion.
- Recently in 2017, U.P. has also make marriages compulsory under the Uttar Pradesh Marriage Registration Guidelines, 2017.[329]

VII. GLOBAL STAND ON COMPULSORY REGISTRATION OF MARRIAGE

The official status of marriage is recognized until all events have been reported and registered in the family or civil register. In Japan, the marriage is considered legal only after the event "Koseki". Marriage becomes legally valid only after updating the event in the household register. In Germany, there is a system of centralized repositories of registering all family events like births, deaths, marriages and other events which needs legal documentations and necessary for verifications. The register in which all this is entered is known as "familienbuch". The same process of registration of all-important legal repercussions is done in France but the register is known as "livret de famille".[330] Every marriage solemnized under the Muslim Law in Pakistan under the Muslim Family Law Ordinance, 1961 are ordered to compulsorily register their marriage. Even the registration of marriage is compulsory for Hindus living in Pakistan under the bill passed in 2017, the Hindu Marriage Bill.[331] Although, the registration of marriage is not mandatory in all countries, yet some recognize it as the need of the society by regularly dealing with family matters where registration is the only loophole by which women are unable to seek their proper rights and privileges.

VIII. PROBLEMS THAT ARISE IN UNREGISTERED MARRIAGE

- Increases the quantity of fraudulent/force/non-consensus practices of marriage.
- Women's safety and rights are not protected. Does not get right to claim her privileges and maintenance after divorce or after husband's death.
- Illegal social practices of marriage like polygamy and bigamy increases.
- The marriage is not legally documented or recorded.

IX. JOURNEY OF COMPULSORY REGISTRATION OF MARRIAGE

Now when we talk about compulsory registration of marriage in India, there is not any single law which provides the compulsory registration of marriage irrespective of religion, region and custom. If we analyze some religion/personal laws, we find some provisions for registration that exists under some laws on the both religion and personal basis like Hindu Marriage Act, 1955, Special Marriage Act 1554, Indian Christian Marriage Act, 1872.[332] The journey starts when the National Commission of Women had solved all the problems arising out of non-registration of marriage by drafting a Compulsory Registration of Marriage Bill, 2005 asking amendments in The Birth, Death and Marriages Registration Act, 1886.[333] In 2007, the committee for Empowerment of Women, depending upon the Bill drafted by the National Commission of Women stated that there should be Compulsory[334] Registration of Marriage Act irrespective of their religion. Further in 2008, in 18th Law Commission of India, in its 250th report recommended to eradicate the evils of child marriage, registration should be done within some prescribed period of time of all communities and should be compulsorily made by central government. The working and recommendations did not stop here. In 2012, another was tabled in the Parliament which followed the footprints of Honorable Supreme Court (Ashwani Case[335]) guidelines, the Bill emphasized to amend the Registration of Birth and Death Act, 1969, to provide for Mandatory Registration of Marriage regardless of religious denomination of parties. This amended Bill enabled to pass from Lok Sabha but Rajya

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[329] Law Commission of India, 270th Report on Compulsory Registration of Marriages (July, 2017).
[330] *Supra* note 324.
[331] *Ibid.*
[332] *Supra* note 327.
[333] *Ibid.*
[334] *Ibid.*
[335] Seema v. Ashwani Kumar AIR 2006 SC 1158, [2006] 2 SCC 578.

Sabha showed it a green chit and referred it to the Standing Committee, hoping that the Bill would be a best step taken by the Parliament to protect women in the issues of maintenance and property and will also act as a checker on bigamous relationship. [336] Lastly, the Legislative department on the basis of former Bill drafted a fresh Bill on The Registration of Birth and Death Amendment Bill, 2005 and asked the Commission to submit the report on issue pertaining to Compulsory Registration of Marriage. The report then suggested to amend Registration of Birth and Death Amendment Act, 1969 and to mandate Registration of Marriage. Therefore, the recommendation were not to alter or intervene into any personal law but to give a change in Registration of Birth and Death Act and make registration of marriage mandatory as it will prevent child marriage and also help in eliminating the malpractice such as early forced marriages and will also provide a better platform in achieving gender equality and empower women.

X. STAND OF JUDICIARY ON COMPULSORY REGISTRATION OF MARRIAGE

The Supreme Court was always in favor to empower women and always paid a heat in making registration of marriage compulsory. It categorically said in Seema v. Ashwani Kumar's[337] case that we are of the view that registration of marriage of all persons, who are citizens of India belonging to various religions should be made compulsory in their respective States, when the marriage is solemnized and further court directed the States and the Central Government to make up a mechanism to operate this law. In **Kanaggavalli v. Saroja**[338], the Madras high court critically examined and opined that Making registration of marriage compulsory would mark prosecution of bigamy cases easy and provide speedy Justice. Therefore, if any Hindu male contracts a second marriage and it get registered the second wife has the proof of it. Similarly, in **Baljit Kaur & Anr v. State of Punjab & Anr**[339] stood up with the Seema case and recommended making the registration of marriage compulsory. In **Deepu Dev vs. The State of Kerala**[340] it was also been opined by the Kerala High Court that the recommendation formulated by the court, that the marriage solemnized between the person belonging to different religion are not within the rules formulated pursuant to Supreme Court decision in seema case and is repulsive and contrary to the rules. The court also in **Sushma W/O Hemant Rao v. Malti W/O Madhukar Machile**[341], Bombay High Court said that because of the compulsory registration of marriage, wife has a proof of valid marriage in respect in matter of succession and other disputes. Therefore the courts in India very critically examined the need of compulsory registration of marriage as it would solve many problems arising out of matrimonial bond and also protect the marriage caused due to fraud.[342] Lastly in the 17th Law Commission of India, the Government, after examining all the former bills and recommendation by committees came with a proposal and critically reported that India needs a central legislation to regulate compulsory registration of marriage. The main question here arises that whether there is a need for center legislation on compulsory registration of marriage? If yes, so do we need fresh and separate stand-alone legislation for the registration of marriage or it should be added as an extra clause in the Births and Deaths Registration Act, 1969. Then it can be said that because of the conflict between the laws, the Registration of Death and Birth Act should be amended and made the Births, Deaths and Marriages Registration Act, 1886.

XI. CONCLUSION

The advantages of Registration have been earlier discussed above in the paper, though globally Registration was made compulsory but because of the diversity in India and the relevance of existing customary laws made it a quite difficult job for legislatures. But because of just one reason of difficulty in implementation the other merits of such enactment should not be overlooked. Therefore, once it is enacted, the amended law will grant the speedy and smooth implementation on the civil as well as criminal laws. The amended version thought does not provide any new rights to the citizens of India but the enactment acted as a catalyst in speedy enforcement of many rights of the spouses within their marriage. Under the Constitution, there is a power to make laws regarding marriages and divorces, mentioned under entry 5 of the Concurrent list.[343] If we analyze the provision of article 254, the law enacted by any State got enforced on the date of commencement of this Act (Bill of 2015), if not in accordance with this Act (Bill) shall be declared void. The Bill should

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[336] *Supra* note 327.
[337] *Supra* note 319.
[338] AIR 2002 Mad 73.
[339] (2008) 151 PLR 326.
[340] AIR 2013 Ker 51.
[341] 2009 (111) Bom LR 3974.
[342] *Supra* note 324.
[343] The Constitution of India, 1950, available at http://legislative.gov.in/actsofparliamentfromtheyear/hindu-marriage-act-1955 (Visited on September 10, 2020).

not be in contravention of any provision in existing law, where there is Compulsory Registration of Marriage. The intention of Bills was neither to intervene into the domain of family law that already existed, nor to remove or amend any specific regional or cultural practices or on the laws which are still prevailing in some personal laws in India. Its intention or main motive was just to add procedural changes which will then make Registration of Marriage Compulsory. Though entry 5 of the Concurrent listed in the 7th Schedule of the Constitution includes many matters of family law, giving authority to the State to legislate on these issues. Thus, the Bill only suggested and acted as a guiding principle across the country where State can make some amendments according to their State. The paper is of the opinion that there is a dire need of the compulsory registration of marriage and the reform, therefore it is recommended that there should be an amendment in registration of birth and death 1969 and add up compulsory registration of marriage within its ambit. So, that there should not be any extra central expenditure to provide a different infrastructure and existing administrative mechanism would smoothly carry out registration.

RELEVANCE OF 'NONE OF THE ABOVE' OPTION IN THE ELECTIONS

ANIKET CHAUDHARY[344] AND KUMAR AMRITANSHU[345]

I. INTRODUCTION

Elections are the biggest game changers of Indian society because it decides who is going to govern the diverse masses of the Indian Society. With the right to vote being practiced by the citizens there was no way to show dissatisfaction apart from voting for any other candidate. But there were times when the people wanted a better candidate and also at the same time did not desire to waste their valuable votes. This matter was looked after by the Election Commission of India when it approached the Law Ministry in 2001 with the opinion to protect identity and secrecy of individual who did not wanted to cast his vote for any candidate[346]. This matter was sub sequentially taken by the PUCL as it moved into the Supreme Court in 2009 thus paving the way for the Concept of NOTA. NOTA thus can be considered a breakthrough path for those who want to project their dissatisfaction. It also keeps a check on the types of candidate that the Political Parties nominate for elections. In the recent times when the popularity and muscle power is considered to influence the elections, the concept of NOTA has its own effects. The initial idea was not only to provide a variety of candidates to be put up by the Political Parties but also to keep criminals out of politics but the objective seems to be a utopian idea. NOTA option was likely to remove the restrictions on individual preferences by expanding choice one bold step further through the aggregation procedure[347]. The new dispensation was to ensure more wise and rational choice of deserving candidates and people's representatives by majority decisions.[348] Thus NOTA was a much-needed reform but in subsequent years it grew out to be just another option which required it to be worked only on political will. Nonetheless, people have tried to use this option and have been able to send a message that this option can turn out to be the real winner, tomorrow or after.

II. OBSERVATIONS REGARDING THE NOTA INFLUENCE

In the recent Delhi Assembly elections, the share of NOTA was comparatively higher than the previous elections.[349] In 2013, the share of votes polled for NOTA was 0.63%. During the 2015 elections, the share of NOTA fell too with only 0.39%. But in 2020 it slightly increased, NOTA polled 43,108 votes out of the total 92.85 lakh votes polled i.e. 0.46%. However, this does not show that there is a significant discontent with the people breaking the popular perception that there are more NOTA voting in urban areas. In the Gujarat Assembly Elections of 2017, there was a significant difficulty that the NOTA created for the Political parties, to consider it next time for winning a seat[350]. There were 21 seats approximately in which the votes polled by NOTA were more than the margin between the first two candidates. Looking at the data of some of the constituencies, In Chhota Udaipur, the Congress won by under 1,000 votes and there were 5,870 NOTA votes. In Dang, the Congress' edge was only 800; however, 2,184 votes squeezed the NOTA button. In Deodar, the Congress' edge of triumph was under 1,000 yet the quantity of NOTA votes was 2,988. Analysis of this data shows that the NOTA votes if polled in the favor of the first runner up candidate then it would have resulted in a different scenario. It could have resulted in a greater winning margin indicating the popular support of the people or win for the runner up political party. Thus, NOTA cannot be taken for granted by the Political Parties as it sometimes jeopardizes their winning chances. There has been an observation by political analysts that NOTA option was more voted for in the reserved constituencies. In the Chhattisgarh elections of 2013, when NOTA was used for the first time in India, Bijapur constituency in south Bastar had topped the list in terms of NOTA votes with 10% of the total votes in the tribal seat going to NOTA. Chitrakot in Bastar and Dantewada in south Bastar, both seats reserved for the STs, had followed with 9%. The ST constituency of Jagannathpur had recorded the highest NOTA vote share of 4% amongst all assembly seats

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[344] 3rd Year, B.A LL.B. (Hons), Dr. Ram Manohar Lohiya National Law University, Lucknow.
[345] 3rd Year, B.A LL.B. (Hons), Dr. Ram Manohar Lohiya National Law University, Lucknow
[346] N. Gopalaswami, *NOTA small matter, this*, The Hindu(OCTOBER 09, 2013), available at< https://www.thehindu.com/opinion/lead/nota-small-matter-this/article5214816.ece>
[347]Tapan Kumar Mukherjee, *NOTA: The New Provision*,48 EPW 42, (2013), available at <https://www.epw.in/author/tapan-kumar-mukherjee>
[348] *Ibid*
[349] BHARATH KANCHARLA, *Data Analysis: Not many takers for NOTA in Delhi*, FACTLY, (FEBRUARY 18, 2020), available at < https://factly.in/data-analysis-not-many-takers-for-nota-in-delhi/>
[350] Surya Prakash, The power of NOTA and the Indian voter, The Pioneer (January 1, 2018), available at <https://www.dailypioneer.com/2018/columnists/the-power-of-nota-and-the-indian-voter.html>

in the Jharkhand elections of 2014.[351] Looking at the 2014 General Elections, this perception still stands true. By looking at the data it suggests that in the 2014 Lok Sabha elections, the top five constituencies in NOTA votes were all reserved constituencies. These are Bastar (5.03%) in Chhattisgarh, Nilgiris (4.98%) in Tamil Nadu, Nabarangpur (4.34%) in Odisha, Tura (4.1%) in Meghalaya, and Dahod (3.58%) in Gujarat.[352] In the 2019 Lok-Sabha elections, 1.76% of the voters in ST seats and 1.16% in the SC seats chose NOTA as opposed to 0.98% of the voters choosing NOTA on the general seats.[353] The dominance of NOTA in reserved constituencies casts an impression of the disdain among the general class voters about the necessity of picking a SC or ST candidate. There may be other reasons such as the mobilization of non-SC/ST's castes to look for alternatives. This may be due to voting on ethnic lines. Like reserved constituencies, areas affected by left wing extremism have also registered higher NOTA share. Of the top 10 constituencies with the highest NOTA vote in 2019, six are in areas affected by left-wing related violence which include Bastar in Chhattisgarh where 4.56% of votes cast were for NOTA-second only to Gopalganj which recorded a 5.04% NOTA vote[354]. The reason may be the tribal choose NOTA option to show dissent and dissatisfaction they had from the state. Sometimes it is reported that the Naxals try to threaten tribal to vote for NOTA to show their anger. Sometimes it is the common disappointment of the people which makes them do so. The various factors are needed to be considered in order to arrive at a particular conclusion. After the insertion of NOTA option, it was believed that there would be a larger turnout of voters as in the words[355] of the Court But it is difficult to comment on this issue as initial data does not suggest that NOTA have had a significant effect on the voter turnout[356]. Voter turnout has been systematically increasing but keeping in mind the new voters added during this period and also the other factors need to be considered. On analyzing the voting pattern "If introducing a NOTA button can increase the participation of democracy then, in our cogent view, nothing should stop the same. The voters' participation in the election is indeed the participation in the democracy itself." from its inception till recent 2019 Lok Sabha Elections then it can be observed that unlike popular belief that more urbanized population would be using more NOTA option, is not true. In 2019 Lok Sabha Elections, Bihar second least urbanized state has seen 8.17 lakh voters opting for NOTA which accounts for 2 percent of total votes polled in the state that has 40 Lok Sabha Seats- the highest in the country while exercising the franchise in 17th Lok Sabha Election[357]. Bihar also saw 2.49 percent of NOTA votes in its last assembly elections in 2015 which remains the highest NOTA votes polled so far in any state in assembly elections[358].

III. JUDICIAL REMARKS ABOUT THE OPTION OF NOTA

When ballot paper was used for conducting elections, people used to exercise NOTA unofficially. The paper could either be left blank and simultaneously people could cast their vote without revealing that they didn't vote for anyone but on introduction of the Elections Voting Machine, this method could not be utilized as there was no button to reject candidates, what happened was that when an elector decided not to his vote, a remark to this effect was made against the said entry in form 17- A[359] thereby violating his right to secrecy. With this view the Election Commission of India approached the Government to offer the voter a 'NOTA' option but the Government was not in favor of such an idea. Some years later, People's Union for Civil Liberties (PUCL), a Non-Governmental Organization filed a writ petition under article 32 of the Constitution of India challenging the constitutional validity of Section 41(2)[360] and (3) and 49-0[361] of the Conduct of Election Rules, 1961 to the extent that these provisions violated the secrecy of voting. Thus, came the landmark judgement

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[351] V R Vachana, Maya Roy, NOTA and the Indian Voter , 53 EPW 6, (2018), available at <https://www.epw.in/journal/2018/6/commentary/nota-and-indian-voter.html>

[352] *Ibid*

[353] By Ishaan Bansal, Did NOTA Make An Impact In The 2019 Lok Sabha Elections?, Youthkiawaaz (4th July, 2019), available at < https://www.youthkiawaaz.com/2019/07/did-nota-matter-in-the-2019-lok-sabha-elections/>

[354] Ishaan Bansal, Mrunal Marathe, Most NOTA Votes In Areas Of Left-Wing Extremism, Reserved Seats, Bipolar Contests, Indiaspend(August 19, 2019), available at <https://www.indiaspend.com/most-nota-votes-in-areas-of-left-wing-extremism-reserved-seats-bipolar-contests/>

[355] People's Union for Civil Liberties and Ors. v. Union of India (UOI) and Ors. (2013) 10 SCC 1

[356] Graphs - Voter turnout comparison 2014 & 2009, available at <https://eci.gov.in/files/file/5533-graphs-voter-turnout-comparison-2014-2009/>

[357] Supra note 349

[358] PTI, Bihar sees highest number of NOTA votes, Gopalganj tops tally, Economic times (May 24, 2019), available at <https://economictimes.indiatimes.com/news/elections/lok-sabha/bihar/bihar-sees-highest-number-of-nota-votes-gopalganj-tops-tally/articleshow/69484108.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst>

[359] See <https://eci.gov.in/files/file/2801-scrutiny-of-form-17a-and-other-documents-reg/>

[360] See <https://indiankanoon.org/doc/30058108/>

[361] See <https://indiankanoon.org/doc/147020630/>

of the People's Union for Civil Liberties and Ors. V. Union of India (UOI) and Ors.[362], that validated the option of NOTA. The main purpose of enacting the NOTA option was to provide secrecy to the identity of voters. This was better defined in the case of S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra and Or's.[363]"It subserves a very vital public interest in that an elector or a voter should be absolutely free in exercise of his franchise untrammeled by any constraint, which includes constraint as to the disclosure. A remote or distinct possibility that at some point a voter may under a compulsion of law be forced to disclose for whom he has voted would act as a positive constraint and check on his freedom to exercise his franchise in the manner he freely chooses to exercise ..." The importance was further elaborated in the People's Union for Civil Liberties and Ors. v. Union of India (UOI) and Ors.[364] wherein it was held that "Free and fair election is a basic structure of the Constitution and necessarily includes within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion. Protection of elector's identity and affording secrecy is therefore integral to free and fair elections and an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violative of Article 14. Thus, secrecy is required to be maintained for both categories of persons." Remarking that NOTA will keep a check on bogus voting and provide the voters with a medium to express dissatisfaction, it was observed by the Court[365] that "The direction can also be supported by the fact that in the existing system a dissatisfied voter ordinarily does not turn up for voting which in turn provides a chance to unscrupulous elements to impersonate the dissatisfied voter and cast a vote, be it a negative one. Furthermore, a provision of negative voting would be in the interest of promoting democracy as it would send clear signals to political parties and their candidates as to what the electorate thinks about them." While the Honorable Supreme Court validated the NOTA option to be used by the general public, it was reluctant to add it for the voting in elections to the Council of States. The reasoning behind the decision can be understood in the case of Kuldip Nayar and others v. Union of India and others[366], wherein the Court had distinguished between the voting in general elections and voting in Council of States in the following words "...the Voting at elections to the Council of States cannot be compared with a general election. In a general election, the electors have to vote in a secret manner without fear that their votes would be disclosed to anyone or would result in victimization. There is no party affiliation and hence the choice is entirely with the voter. This is not the case when elections are held to the Council of States as the electors are elected Members of the Legislative Assemblies who in turn have party affiliations." While commenting on the negative impact of NOTA option to be used in the voting of Council of States, the Supreme Court in the case of Shailesh Manubhai Parmar vs. Election Commission of India and Ors. was of the view[367] that "The introduction of NOTA in indirect elections may on a first glance tempt the intellect but on a keen scrutiny, it falls to the ground, for it completely ignores the role of an elector in such an election and fully destroys the democratic value. It may be stated with profit that the idea may look attractive but its practical application defeats the fairness ingrained in an indirect election. More so where the elector's vote has value and the value of the vote is transferable." Commenting on the Role of elector and the problem of defection that will emerge after NOTA option in voting at Council of States, the Court further remarked[368] that "The introduction of NOTA in such an election will not only run counter to the discipline that is expected from an elector under the Tenth Schedule to the Constitution but also be counterproductive to the basic grammar of the law of disqualification of a member on the ground of defection. It is a well settled principle that what cannot be done directly, cannot be done indirectly. To elaborate, if NOTA is allowed in the election of the members to the Council of States, the prohibited aspect of defection would indirectly usher in with immense vigor." Thus it can be clearly stated that NOTA for the general public will act as a medium to express dissatisfaction, eliminate bogus voting and protect secrecy of voters but on the other hand NOTA option in Council of States will lead to more corruption and defections undermining the features of democracy, the voters in this case are affiliated to a Political party and have to vote as per directions of their leader. These are the observations as per the views of the Honorable Supreme Court in successive judgments while dealing with NOTA option.

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[362] (2013) 10 SCC 1.
[363] 1980 SCR (3) 1302.
[364] Supra note 359.
[365] *Ibid.*
[366] (2006) 7 SCC 1.
[367] Writ Petition (Civil) No. 631 of 2017.
[368] *Ibid.*

IV. THE INEFFICIENCY OF NOTA OPTION-

NOTA option was considered to be empowering voters, as in the words[369] of the Supreme Court, "By providing a NOTA button in the EVMs, it will accelerate the effective political participation in the present state of democratic system and the voters in fact will be empowered." It was also considered that NOTA will act as a sign to show dissent by the people. To express their dissatisfaction about the policies, rules, behavior or anything that people find not proper and political parties will take this into consideration and act accordingly to provide voters with a suitable candidate. This was remarked by the Court[370] as following "When the political parties will realize that a large number of people are expressing their disapproval with the candidates being put up by them, gradually there will be a systemic change and the political parties will be forced to accept the will of the people and field candidates who are known for their integrity." However, these predictions about the NOTA option have somewhat failed as NOTA's importance is nothing more than a statistic used for election analysis[371]. It has remained as legislation without teeth because any percentage of votes polled for NOTA in a constituency does not affect the results of election, even if it has bagged the most votes. The candidate who gets the highest number of votes after NOTA is declared the winner.[372] This clearly explains why NOTA is still not empowering voters because in any situation NOTA votes are not impacting the outcome of a candidate and as a result political parties also do not take this dissent into consideration. It may be noted that NOTA option has its inefficiencies but it does not mean that it cannot be resolved. There are some suggestions by the Association for Democratic Reforms which provided for a solution to the situation when in any constituency if the vote polled for NOTA are higher than all the contesting candidates then the following steps should be taken[373]:

- No candidates should be declared as elected,
- Fresh election should be conducted, in which none of the earlier candidates should be allowed to contest, and
- In the fresh elections, only a candidate who gets at least 50%+1 of the votes cast should be declared elected

These recommendations if applied would give a better shape in implementing NOTA and its effectiveness will increase. Moreover, the voters will also be more willing to use this option as this could have a direct impact on the election of any candidate and rather than waiting for the political parties to act on their political will. People will themselves get a power to make political parties more accountable while choosing their candidates.

V. THE PRESENCE OF NOTA IN DIFFERENT COUNTRIES

The Honorable Supreme Court of India in the case of PUCL V UOI[374] held that voters had a right to reject all candidates contesting polls in a constituency by pressing a button for negative vote, remarking that this could compel political parties to field "sound" candidates which are known for their integrity and therefore directed the Election Commission to make arrangements by introducing 'None of The Above'(NOTA) option in the EVM. But this was not the first time when negative voting was getting validity globally[375]. The countries where negative voting is in vogue apart from India are Belgium, Brazil, Bangladesh, Chile, Columbia, Finland, France, Greece, State of Nevada in the United States of America, Spain, Sweden and Ukraine.[376] In Latin American countries Brazil and Chile, where voting is compulsory, there is a positive abstention box-NOTA – on the ballot paper. Voters in Sweden have the option of the negative vote by way of a blank ballot; voter turnouts have been historically very high, around 85 percent on average. The State of Nevada in the U.S introduced this negative voting option in 1975. A year later in 1976, the option outpolled the two contesting candidates in the Republican primary for the House of Representatives; but because of the non-binding nature of the legislation, the

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[369] People's Union for Civil Liberties and Ors. v. Union of India (UOI) and Ors. (2013) 10 SCC 1.

[370] *Ibid.*

[371] Satinderpal Singh Bawa, NOTA Must Count, 52 EPW 32, (2017), available at <https://www.epw.in/journal/2017/32/letters/nota-must-count.html >.

[372] Richa Mishra, NOTA as a Right!, TheHinduBusinessline(April 29, 2019), available at <https://www.thehindubusinessline.com/opinion/columns/nota-as-a-right/article26983554.ece>

[373] See <https://adrindia.org/content/analysis-nota-votes-2013-2017-0>.

[374] Supra note 366.

[375] PRESS TRUST OF INDIA, INDIA MAY BECOME 14TH COUNTRY TO ALLOW NEGATIVE VOTING, BUSINESSSTANDARD(SEPTEMBER 2,2013), AVAILABLE AT <HTTPS://WWW.BUSINESS-STANDARD.COM/ARTICLE/POLITICS/INDIA-MAY-BECOME-14TH-COUNTRY-TO-ALLOW-NEGATIVE-VOTING-113092700854_1.HTML>.

[376] *Ibid.*

candidate having the most number of votes after NOTA option won the nomination.[377] In countries such as France, Spain, Greece and Columbia, NOTA is institutionalized as a blank vote, a ballot choice that generally is recognized as disapproval of the other ballot options but lacks the clarity of an actual NOTA vote. Thus, it can be observed that the use of NOTA has been significant in various countries across the world. The effect of negative voting varies across the different countries. It is different because all the countries which give negative voting rights to its people use this option for different purposes and it can be traced by finding the objectives behind introducing negative voting rights in individual countries. Some introduced NOTA for symbolic effect while others for direct effect. For example, in the State of Nevada which has been using NOTA option since 1976 for electing officials for federal offices as well as for state offices and India which uses NOTA option in direct elections both at union as well as state level, it is like a lion without claws. Even if NOTA gets a majority of votes then also there is no such provision of re-election or vacancy of such seats. Results will be decided as if NOTA is non-existent and the candidate who stands second in the list after NOTA will be elected. Hence, NOTA has got only symbolic value in these countries. In Indonesia NOTA has some direct role to play in elections. NOTA option is used here only in local elections and that too for those seats only where only a single candidate is contesting. So, now in these seats' voters have two options either to vote for the candidate or to vote for his rejection by choosing NOTA. If "none of the above" option receives more votes, then an acting office holder is appointed until the next election[378]. Chris Game in his paper 'Positive abstention: supporting none of the above' throws light on the effect of negative voting in France. NOTA Option has been in use in France since 1852, in the form of le vote blanc -the white or black vote. In 2014, a daring reform was introduced which changed the way in which these blank votes were counted. After this constitutional reform, blank votes were counted separately from other invalid votes. Indian electronic voting machines also calculate votes casted for NOTA option in a similar manner. The separation from counted total can matter as a candidate needs to get an absolute majority of votes casted to get elected to several offices including the President office. So higher the NOTA vote count, higher would be the majority required from the voters who support a candidate. It can be understood by taking this simple example- Let the total votes cast be 100 and out of these 100 votes, 15 are invalid while 5 have been cast for NOTA option. The cut off required for absolute majority pre 2014 reforms would have been 40 but after this reform it increases to 42.5 i.e. 43. It matters in Spain also, where they include votos-en-blanco, thereby raising the 3 percent or 5 percent of votes required for small parties to achieve representation.[379] Amongst these few countries where negative voting has validity, many reforms and changes are sought on a regular interval in order to fulfill the objective of introducing the concept of negative voting and changing societal paradigm. Recently, a constitutional reform bill was presented by parliamentarians in Chile to give validity to blank votes in the elections for the President and local Governors. In clear terms, the constitutional reform bill talked about re-elections if blank votes get more votes than any other candidate contesting the elections. In the second election, the same candidates may not present themselves as those who presented themselves for the first.[380] Many efforts are still underway in a number of countries to expand NOTA voting. For example, in the United Kingdom, parties having a single issue of electing lawmakers who promise to come with a legislation giving negative voting rights have been formed by lawyers. The NOTA party, one such similar organization formed for introducing negative voting in UK lost its status as its name came under prohibited party names, since voters might confuse this party with an[381] actual NOTA vote and might cast their vote for this party. In countries where the NOTA option is in practice, there people are using creative means to give NOTA voting more impact. Most notably, in Spain, parties have campaigned on a "blank seats" platform, where they would not fill any seats, they received based on their vote share, an end around that would provide representation for "none" in the Spanish Parliament. Many countries have petitions pending in their courts for the introduction of NOTA options in voting e.g.

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[377] Subhashree Sanyal, Moumita Laha, Society and Law: An Exploration across Disciplines 120-121 (Ayan Hazra ed, Cambridge Scholars Publishing 2017).

[378] Voting and Political Representation in America: Issues and Trends [2 volumes] 423 (Mark P. Jones ed, ABC-CLIO, 2020).

[379] Chris Game, *Positive abstention: supporting none of the above(chapter 12),* in book "*More Sex, Lies and the Ballot Box: Another 50 things you need to know about elections"* **(**Philip Cowley ed, Biteback Publishing, 2016).

[380] Viviana Ponce de Leon Solis,*Validity of blank ballots in Chile: a critical review*. 32 (ISSN 0718-0950) Valdivia 171-191, (2019), available at <https://scielo.conicyt.cl/scielo.php?script=sci_abstract&pid=S0718-09502019000100171&lng=en&nrm=iso>.

[381] Supra note 371.

Pakistan, U.K etc. So, it can be said that NOTA has significant presence all over the globe and it is expanding its meaning as well as presence all over the world with changing time.

VI. CONCLUSION

7 years since its implementation, the NOTA option is not close to fulfilling the purpose it was made for. It has just got reduced to a gesture where no real harm occurs. Indian voters seem to be using NOTA not just to show their disapproval of the candidates in the fray but to express their protest against things they perceive wrong in the political system.[382] But this dissatisfaction is taken for granted by the Political parties as a result neither are the candidates being out of clean background and nor are they accountable thus leading to criminalization of politics. There are some instances where NOTA was implemented in a better way, like in Maharashtra, the state election commission passed an order in October 2018 that re-elections will be held if NOTA gets a majority of the votes. A similar order was passed by the Haryana state election commission later.[383] The above stated decisions are for local body election but they can put forward the way for a much-needed breakthrough in implementation of NOTA. The solution can describe as the first step should be the provision that NOTA be counted as valid votes (at present they are counted as invalid votes) and if the total number of such votes equals or exceeds the highest number of votes secured by the leading candidates the election be declared null and void[384]. The second could be the provision of making voting compulsory for the citizens.[385] These ideas can be taken into consideration for the better framing of the NOTA option so that it proves itself to be much useful. Overall, it can be said that NOTA exercise falls within the realm of the collective responsibility of reflectively endorsing the relatively better candidate and reflectively rejecting the "bad" one[386]. For effective implementation effort is to be required not just on the part of the government to frame better policy for implementation of NOTA option but also on the part of citizens to exercise this power with award.

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[382] Supra note 345.

[383] M.J. Vinod, *A Decade of NOTA: Make it effective,available at, DeccanHerald(March 2, 2020), available at* <https://www.deccanherald.com/opinion/comment/a-decade-of-nota-make-it-effective-809642.html>.

[384] Rohit Kumar, *NOTA Not Enough*,48 EPW 44,(2013), available at <https://www.epw.in/journal/2013/44/letters/nota-not-enough.html>.

[385] *Ibid.*

[386] The Weight of a Vote, 54 EPW 18,(2019), available at <https://www.epw.in/journal/2019/18/editorials/edit-1.html>.

RELIGION VIS-À-VIS SECULARISM

SHIVANI BISHT[387] AND ANAND VIMAL[388]

ABSTRACT

A shared respect for religious faith and traditions as well as adherence to constitutional values is the main requisites for any logical discussion on any antagonist concern. This paper focuses on how we can bring religion and secularism together under the Constitution of India with special reference to Babri Masjid dispute (Sabarimala Controversy). It further discusses the inter-connection between secularism and religion in terms of affirmative, negative and neutral religious freedom. Freedom of religion is considered one of the most important Fundamental Right but just like all other Fundamental Rights, it is also subjected to reasonable restrictions that are health, public order, morality and other Fundamental rights provided under Article 25 of the Indian Constitution. Further, Secularism must not be interpreted as equal assistance to the fundamentalism of all societies. If we want to deny this facet of secularism then the interest of ruling classes fulfilled by secularism will be defeated. This paper also focuses on the role of Legislature in shaping religious freedom and current situation of religion freedom in India. Lastly, it discusses the role of the Supreme Court as a protector of secularism as well as religious freedom.

Keywords: *secularism, religious freedom, traditions, Sabarimala dispute.*

I. INTRODUCTION

The current advancement of communal seriousness all over the dispute of "Babri Masjid-Ram Janmabhoomi" as well as the resultant destruction of Babri masjid by Hindus[389] swayed most of them from their contentment. The ability of religion to fanaticize billions of people as well as assemble them on track has stunned almost all secularists. This resulted in a lot of discussions and the already existent doctrine of secularism was questioned. This discussion is useful as it helped us to perceive the meaning of the word to apply it to the Indian scenario. Few was of the view that even though communalism is a deliberate issue, secularism will not be able to work as per the Indian situations and further the advancement of communal seriousness is somewhat a response to endeavor by the state to enforce secularism on the majority[390]. Others were of the view that India as a state is by itself communal and it responds on behalf of the forces of Hindu communal[391]. Further, there are distinct shades of views betwixt these two opinions. Few see Sangh Parivar and BJP as communal but there are others who consider that Congress is also communal. According to the opinion of Sangh Parivar the people who are remaining as well as Congress are pseudo-secularists and blames them of assuaging the minor communities so that they can make use of them as vote banks. The legal and constitutional specialist has talked about secularism but many sociologists wrote about secularization as well as religion in the Indian community. There is no doubt that these views provide important awareness as well as make a contribution to expand doctrines on secularism. It is thus clear that if we do not comprehend the act of religion, it is very difficult to have a correct knowledge of secularism.

II. RELIGION: DOUBLE-EDGED SWORD

It was assumed that the grip of religion[392] will lessen during the post-industrial time. Irrespective of those assumptions, religion will carry on its strong influence in the recent global era, and that too not only in the backward nations of the third world but even in the developed nations of the first world. However, the absolutist nation criteria have led to the consolidation of the nation's resources into the hands of few peoples. The traditionalist governing classes of the rich wealthy third world nation is completely supported by the absolutist to restrain their people and ruthlessly smash any threat to the world order. Undoubtedly, the traditionalist governing class got few favorable circumstances to gather resources from the poor peoples and the natural resources in their jurisdiction. Further, people who moved from the third world to the first world in the hope of exploration of greener meadow, found that they are victims of racism even after they got education developed by their nations on resources. As they were not able to provide greener meadow, they also start approaching religious revivalists as well as religious revivalism developments in their home nations. The system of

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[387] L.L.M in Intellectual Property Rights (2019-21), IIT Kharagpur (Rajiv Gandhi School of Intellectual Property Law).
[388] L.L.M in Intellectual Property Rights (2019-21), IIT Kharagpur (Rajiv Gandhi School of Intellectual Property Law).
[389] 'Hinduism and Secularism'.
[390] Madan 1987, Nandy 1990.
[391] Reddy 1993, Kumar 1993.
[392] Seervai H.M., Constitutional Law of India, Universal Law Publishing Co.pvt. Ltd. Vol. 2 Reprint 2008 ISBN: 978-81-7534-403-7 Page No. 272.

third world nations has not fully outgrown the tendency as well as habits of the medieval era. They look for religious authorization from their restrictive authoritarianism. Very early, the religious institution[393] provided their backing to these regimes and India is also a part of this regime. But religion cannot be alone targeted. While apprehension arises in the origin of faith in the presence of few mysterious powers, religion in the real sense developed only could human community evolves surplus and a class of individuals who survived off it. That religion assists in upholding the status quo. Any person, who is making use of services of religion, makes one point very obvious that religion[394] is intensely rooted in the attitude of the majority. However, it is a very difficult task, particularly in the future, to do away with it. It is possible only through the religion that individuals can know the aim of their presence in society. At any time, if any individual feels insecure and uncertain in his or her life they usually lean towards religion.

III. MEANING OF RELIGION AND SECULARISM

It is very well mentioned in the Preamble of the Constitution of India that "India is a secular state". It is reflected in the Preamble that the way of living chosen by the citizens of India after India became independent. Religion[395] particularly mentions that people have a belief in complete principles of life. Belief in religion is repeatedly giving spirit to conserve the way of living and if this spirit is rejected, obedience deteriorated into the practice and then this practice gradually declines. So, we can say that the custom, legislation, fashion, agreement, etc. are not the only ways of ruling the society but along with these, morality and well as religion also defines the attitude of human beings. It is very well clear that religion is the main interest of the individual. Individuals are also having a religious concern which makes him capable of an agitated creature beyond the contentment of his physical desires. Religion rotates around the individual's belief in mysterious forces. A lot of communities have a huge spectrum of organizations associated with religion. As per Kingslay Davis, religion is an element of the community. It is very familiar to the group and its faith and traditions are gained by every person as a part of the group. Some believed that religion is a perpetual, influential, comprehensive and persistent organization and it has an important role in supporting the social system. As we know there is a variety of religions existing and so in this regard following questions arises:

a) Can the state have a religion of its own?
b) Which type of religion should be pursued by the individual?
c) Can a State Government be able to provide advantageous treatment to the persons of a specific religion?
d) Can a state force its citizens to pursue a specific religion?

Now, if we accept the doctrine of secularism, the answer to the entire above-mentioned question would be negative as a secular state is neither assumed to force its citizens to accept a specific religion nor it is assumed to provide favorable treatment to the individuals of the specific religion. Secularism seeks to remove God from the matters of state. The word 'secular' in simple sense signifies ternary linkage amongst state, religion as well as the individual. If we see the Indian Constitution of 1950 and 1976, nowhere the term secular has been mentioned or elucidated. But this term has its reflection in the Preamble to the Indian Constitution. A state which safeguards all the religions equitably and does not treat anyone religion to be a state religion is known as 'secular state'. The state behaves as a neutral state towards every religion. It is presumed that the secular state has to comply with the request of liberty, equality as well as neutrality. A very popular definition of religion was given by the Donald E. Smith and his definition pointed out three important components of secularism in the shape of inter-connection as:

1) Religion as well as individual
2) Individual as well as state
3) State as well as religion

These three components form part of a single triangle. The first part shows relation betwixt individuals as well as religion. This relationship between the two shows 'affirmative freedom of religion' which means each individual must have the liberty to pursue any religion and to act as per his preaching and to ignore every other religion without any obstruction from the side of the state. Freedom of religion is the fundamental part of liberty which is embedded in the Preamble of the Indian Constitution. The second part of this triangle shows the relation betwixt individual as well as the state. It reflects "negative freedom of religion' which means absenteeism of biasness, constraint, restriction and obligations which an individual may have been subjected to. The third part of the triangle shows relation betwixt religion and state which reflects 'neutral freedom of religion' which means there is no religion of state and state has a perspective of disinterest

[393] Article 25 (2) (b) of the Constitution of India.
[394] Bakshi P.M., The Constitution of India, Universal Law Publishing co New Delhi, xii edition ISBN: 978-93-5035-290-8 Page. No. 75.
[395] Religious Organizations in the United States: A Study of Legal Identity, Religious Freedom and the Law (Durham: Carolina Academic Press, 2006).

towards every religion. The very thought of secularism is the essential feature of the constitution of India was given in the landmark judgment of the Supreme Court in the case of St. *Xavier's College v/s State of Gujarat*. In this case, the court upheld that India is a secular state and further secularism removes God from the affairs of state and makes sure that no one shall be biased based on the religion.

IV. AFFIRMATIVE FREEDOM OF RELIGION: INDIVIDUAL AND RELIGION

Freedom of consciousness and moral sense is one of the most important civil rights of any person. Protection of freedom of consciousness, moral sense and thinking will be able to make it attainable for us to achieve other rights. If the consciousness and moral sense of an individual is in the chain, then all other rights will become obsolete. A free consciousness and free moral sense so is the important, elemental and intrinsic base of all other civil rights. The Indian Constitution, being the fundamental law of the land identifies religious freedom[396] of both organizations of individuals as well as of individuals who are integrated by common faith[397], habits and behaviors. So, we can conclude individual and combined facets of freedom of religion in this manner: Individual freedom of religion**:** As per Article 25 of the Indian Constitution, every citizen has the right to practice, profess and propagate any religion. Article 25(1) guarantees freedom of conscience and also the right to practice, profess and propagate any religion. The word 'religion' has not been explained anywhere in the Indian Constitution but the understanding of the word has been provided by the Supreme Court in the case of *Commissioner H.R.E. v/s L.T. Swammiar*. In this case, the court held that religion is a concern of belief with persons or societies and it is not merely sacred. It was further held that religion has its foundation in the system of faith or theories that are considered by those who acknowledge that religion as favorable to their religious well-being. The religious freedom[398] provided under the Constitution of India is not only limited to its citizens but it applies to 'all individuals along with aliens'.

This was confirmed by the Supreme Court in the case of *Ratilal Panchand v/s State of Bombay* because it is very crucial as the significant number of alien Christian preachers in India were committed then in propagating their faith amidst the supporters or followers of other religions. Collective freedom of religion**:** Religious denominations and persons have some essential privileges provided under Article 26 of the Indian Constitution. The expression 'religious denominations' is nowhere explained in our Constitution. The meaning of religious denomination has been provided in the Oxford Dictionary and this definition is also recognized by the Indian Supreme Court. The definition says as "Religious denomination is an assemblage of persons grouped collectively under the identical name" or "it is a religious sector of individuals who are having identical belief and association as well as who is entitled by a different name.' The right which is available under Article 26(a) is a collective right that applies to all the religious denominations. Further, Article 26(b) assures all the religious denominations the right to maintain its affairs in the matter of religion[399]. A significant case arose that included the right of a religious denomination to regulate their affairs in the matter of religion[400] was the landmark case of *Venkatraman Devaru v/s State of Mysore*. Article 26(c) and 26(d) make note of right of the religious denomination to administer, acquire and own property, both movable as well as immovable, as per the law. In the landmark case of *Surya Pal Singh v/s State of Uttar Pradesh*, it was observed that this assurance does not indicate that such property was not subject to mandatory acquisition as per the UP Abolition of Zamindari Act.

V. NEGATIVE FREEDOM OF RELIGION: STATE AND INDIVIDUAL

The second part of the secular state is that the notion of citizenship has the foundation on the thought that the persons and not the group is the main unit. The persons are usually opposed by the state which enforces obligations and burdens upon the person and in the favor of this burden and obligations state generally provides opportunities and benefits as well as rights to the person. If we combine the relation existing between the state and the persons then we will see that this relation provides the understanding of the term 'citizenship'. In the social sector[401], a large number of provisions are there which shows the relationship of citizens with the state. The provision which provides for the non-biasness in the governmental functions is also provided under the Indian Constitution.

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[396] Sri Venkataramana Devaru v. State of Mysore, A.I.R. 1958 S.C. 255.

[397] Radhakrishnan. Sarvapalli Dr, An Ideal View of Life Chapter III, Page No.84.

[398] Shetreet Shimon, Law and Social Pluralism, Lexis Nexis Butterworths, New Delhi ISBN: 81-8038-003-3 P.10.

[399] Mahmood Tahir Prof. Laws of India on Religion and Religious Affairs, Universal Law Publishing House Co., New Delhi ISBN 978-81-7534-659-8.

[400] Ratilal v. State of Bombay, SCR 1055 (1954).

[401] Kabeer (2007) points to a similar shift in focus in her discussion about the importance of 'horizontal' relationships within society as well as 'vertical' relations with the state.

VI. NEUTRAL FREEDOM OF RELIGION: RELIGION AND STATE

The third part of the secular state is the segregation of religion and the state[402]. This part safeguards the integrity of the other two relations, religious freedom as well as citizenship. But one has to be very careful regarding the relation existing between the state and the religion. The religious organizations were existing even before the state came into existence. It came into force only to set up social order[403] in the old aged era, as during that era, there was no presence of law and organizations like state. The most important task of religious organizations was to manage the actions of the persons on the ground of religion[404] and moreover, the religion was considered to be the fundamental law. Further, the state organizations came into force much later- therefore in the current situation, the community is based on the fragile harmony managed betwixt these two organizations, that is, religion as well as state. These two organizations are not dependent on each other and operate separately. Moreover, they must operate separately as if we give authority to one organization it will amount to disturbance. If at any point in time doctrine of segregation of religion and state is vacated, then the means are open for the intrusion of the state into the religious freedom[405] of individual. Previously religion was treated to be above the state, as it plays a significant part in administering the activities of the individuals and it was the means for the individuals towards the God but in the current situation, it should be borne in mind that the foremost part is being played by the state and considering the relationship between the God and the individual, the realm is free. If we see, during these days' religion is becoming inferior and the state is evolving as the primary component of the community. Therefore, there are a huge number of significant spheres where the intrusion by the state in the matter of religion is allowed by the Indian Constitution.

VII. INDIA- A SECULAR STATE OR NOT?

If we look from the perspective of the Constitution of India, then we can say that India is a secular state. It is very specifically mentioned in the Indian Constitution, the very ideas of the secular state. But, after India became independent, secularism was subjected to various disputes. It was asserted that because of the Uniform Civil Code, the very presence of minority groups is in threat. India as a secular country comprises many traditions and also has been able to maintain the secular nature of its polity. Judiciary is the only branch that is making efforts to bring harmony and along with judiciary it is also the responsibility of the citizens to bear in mind the aspirations of makers of the Indian Constitution and also the ideology of 'Sarva Dharma Sambhavah'.

VIII. THE COMPLIANCE OF CULTURE AND CUSTOM

It is seen from the time immemorial that our Constitution is subject to amendments but this is not the case with distinct religious traditions as well as the organizations. Further, we have witnessed a lot of amendments from the time Constitution brought into force but there is barely any considerable amendment in any of the religious traditions followed in India during the same time. There were few amendments in the religious fields which are more of rigid nature rather than disciplinary nature, for example, there were robust endeavor to homogenize several activities of 'Hinduism[406]'. This reveals that provisions of the constitution for the personal laws of different societies do not have the force of law but the faith[407] and traditions of those societies have the force of law. There is no doubt that in comparison to the more diverse and historically-rich practices of Hindu, the traditions of Muslims as well as Christian are historically much leaner and much decisively arranged. Moreover, they do not allow the profusion of traditions and activities that are allowed by "Hinduism[408]". So, we can say that they are little amenable to adjustment with the constitutional values with the help of innovative reanalysis, re-perception and standards. We can thus say that the Constitution only is under an obligation to delve into means to accommodate plea of specific religious society but at the same time doing that without stirring any other society as well as the provision of Constitution. Moreover, this approach is compelling that wants the judiciary as well as legislature also to comply with the same principles of the constitution upon which they also adjudicate. This is because the law cannot prevail upon the law; it must make sure that alteration is not only constitutionally legal but also legally valid.

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[402] Donald Eugene Smith, India as a Secular State.
[403] Sri Swami Narayana, p. 282.
[404] Smith, Secular State, 150.
[405] Jacobsohn, The Wheel of Law, p.18.
[406] Smith 'India as a Secular State.'
[407] Bhargava, ed., Secularism and its critics.
[408] D. Sura Dora v. V.V. Giri.

IX. THE LINK BETWEEN SECULARISM AND RELIGIOUS FREEDOM

In the Constitution of India, there is comprehensive provision talking about religious freedom[409]. In the landmark judgment of *S.R. Bommai v/s State of Kerala*[410], it was declared by the Supreme Court that secularism is the basic structure of the Constitution of India. By this court wants to say that neutrality in religious concerns will always be a priority of the state. Any authorized religion of India cannot be announced by the state as a state religion.

X. THE ACTION OF LEGISLATURE IN SHAPING SECULARISM AND RELIGIOUS FREEDOM

The Legislature is considered to be the most important part of democracy as it symbolizes the dreams and aspirations of the people. It is the responsibility of the legislature to serve the interest of people. It is observed that secularism[411] is the basic feature of the Constitution of India, so it is the responsibility of the state to safeguard the secular aspects of the Constitution of India.

XI. THE DARGAH KHWAJA SAHIB ACT OF 1955

There is a Khwaja Garib Saheb Dargah in the Ajmer District of Rajasthan. This Dargah is well known to all the religious people in India. It symbolizes peace and harmony. The legislation was made by the Rajasthan State Government to maintain the secular management of the Dargah. The court held that it is legal and valid and also observed that even if there is an intervention in the affairs of religion[412] but until secularism is an essential feature of the Constitution of India, it is the responsibility of the state to safeguard it and also state can intervene in the secular activities of the Dargah. In the case of *Dargah Committee, Ajmer v/s Syed Husain Ali*[413], it was observed by the Indian Supreme Court that the Act cannot be questioned as violative of Article 26 of the Constitution of India as the purpose of this act is to manage the property which is considered to be the secular activity of the religion.

XII. ANDHRA PRADESH DEVADASI PROTECTION ACT OF 1988

The Sati practice is the most hateful practice pursued by the people in Andhra Pradesh. As per the Sati practice if after the marriage of the woman her husband dies then she is also forced to die along with her husband, that is, she is forced to perform sati. Then after the sati, that is, after the death of the married women, the temple is made in that village. All of these practices were performed as an important part of the Hindu religion. This Act was then questioned as a violation of religious freedom under the Constitution of India. It was observed by the Indian Supreme Court that this Act is legal as well as valid because the wellbeing of the women is in threat and so to safeguard the strength of women and to make sure her respected living this legislation was made and adopted by the Indian judiciary.

XIII. ACQUISITION OF CERTAIN AREA OF AYODHYA ACT OF 1993

After the demise of Babri Masjid at Ayodhya[414], there was a lot of disturbance that took place. At the same time, there was a huge volume of civil suits undecided by the courts. Due to this, it became imperative to intervene in this issue to retain the status quo. The Indian Parliament made this legislation and captured the lands[415] until the final decision of the court. There is no doubt that it was the intervention of State in the affair of Islam as well as the Hindu religion. Further, this intervention was questioned in the famous case of *Ismail Farooqui*[416] in which the Indian Supreme Court accepted the constitutional validity of this Act. It was also observed that the ordre public is an exception to religious freedom and in this case, there was a significant risk to peace, harmony as well as order public.

XIV. SUPREME COURT AS PROTECTOR OF SECULARISM AND FREEDOM OF RELIGION

Among all the three branches, the judiciary is the significant and top-most branch of the state. The only main difficulty in our legal system is the lag in delivering speedy justice[417]. The judicial branch is also considered as the ultimate interpreter of the Constitution of India and caretaker of the Fundamental Rights of the citizens. Secularism and religious

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[409] Sri Venkataramana Devaru v. State of Mysore, A.I.R. 1958 S.C. 255.
[410] AIR 1994 SC 1918.
[411] The Constitution of India which is highly based on Government of India Act, 1935.
[412] Article 26 of Constitution of India.
[413] 1962 1 SCR 383.
[414] For the texts of the court judgment see Decision of Hon'ble Special Full Bench Hearing Ayodhya Matters 2010.
[415] Justice S.U. Khan's judgment delivered on 30 September 2010 (http://elegalix.allahabadhighcourt.in/elegalix/ayodhyafiles/honsukj.pdf) 277–78.
[416] AIR 1995 SC 605 A.
[417] Singhvi, L.M Dr. Evolution of Indian Judiciary, Ocean Books Pvt. Ltd. New Delhi, ISBN 978-81-8430- 127-4 Page No. 308.

freedom are two contradictory words in the Constitution of India. It is the main responsibility of the Court to safeguard the religious freedom of people and retain secularism in India. There came many cases before the court in the matter of religious freedom and the court decided to retain neutrality in these issues[418]. Moreover, religious freedom is based on three exceptions:

1) **Health:** State has a primary responsibility to safeguard and maintain the health of its citizens. If there is any kind of intervention by the state in the affairs of religion[419] which has an impact on the health of citizens then it cannot be said to be violative of Article 25 of the Constitution of India. In the case of *Nikhil Soni v/s Union of India*[420], it was observed that the religious practices[421] and behaviors of Jaina that is Santhara is violative of right to life as well as liberty. The court also observed that this Jaina religion is an entirely different religion and it has its existence[422]. In the case of *Acharya Jagdhishwarananda Avaduth v/s Commissioner of Police, Calcutta*[423], the court struck the tradition of tandava dance performed in public places and which is performed using sharp armaments.
2) **Morality:** It relies upon traditions as well as society. We can understand morality as regulations[424], doctrines, propositions and patterns through which men manage and supervise their relationships among themselves as well as with other individuals[425]. It is important to note the point that the concept of morality is very ambiguous and so it might not be given permission to intervene. It is dependent upon the court to decide on matters of morality. So, no community can allow releasing the murderer even though the victim has agreed to release him. Similarly, no community can ever allow polygamy even though the parties involved therein have no disapproval.
3) **Public Order:** It is the responsibility of the state to maintain peace and order in the community[426]. The state should also constrain circumstances that give rise to sectoral discord or conflict. It is very much possible that while exercising the fundamental rights or while exercising any kind of religion, it may interrupt public order in society. So, it is the state's responsibility to control these kinds of practices. So, it is very much clear that the Indian Supreme Court is the bulwark of religious freedom and guardian of secularism in India.

XV. RELIGIOUS FREEDOM AND SABARIMALA CASE

A Public Interest Litigation was filed in 2017 as per Article 32 of the Constitution of India by the claimant. As per this PIL, he questioned the tradition pursued in the Sabarimala temple which does not permit access to women of age 10-50 years. In 2018, a bench was established and that bench observed that the tradition followed in Sabarimala temple is not constitutional and lifted the restriction on the access of women. The bench gave the reasoning that admirer of Ayyappa does not constitute distinct religious denomination and they are only Hindus and therefore such restriction is not a fundamental tradition of the religion.

XVI. HAS SABARIMALA DECISION USURPED RELIGIOUS FREEDOM?

Right from the beginning of Article 25 and 26 in the Constitution of India, only the court had the authority to determine whether a tradition is important to a religion or not. In the decision of Sabarimala's case, the court enjoyed its authority and determined that this old tradition has no importance in today's era. It was also observed by the court that India is a developing nation and such kind of traditions that are specifically based on gender discrimination and which regards menstruating women as impure has no importance in today's time. After, the Sabarimala judgment, the court was flourished with a huge number of cases relating to discrimination against women. The court has acted most of the time for the benefit of women on the ground that old tradition is discriminatory and also in violation of the right to equality.

XVII. CURRENT POSITION OF RELIGIOUS FREEDOM IN INDIA

Presently, in India, the constraint of morality which was previously considered to be societal morality is now regarded as Constitutional morality. The word Constitutional morality is not defined in the Indian Constitution. This term has been

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[418] Vol. II – Issue 3 ISSN 2278-6996 B.L.R p.380 (2014).
[419] Article 26 of Constitution of India.
[420] Dated 10.08.015.
[421] Lloyd I. Rudolph and Susanne Hoeber Rudolph, 'Living with Multiculturalism, Universalism and Particularism.'
[422] Mahmood Tahir Prof., Laws of India on Religion and Religious Affairs, Universal Law Publishing co. edition 2008 ISBN: 978-81-7534-659-8 Page. No.124.
[423] AIR 1984 4 SCC 522.
[424] The Commissioner Hindu Endowment v. Sri Lakshmindra Tirtha Swamiar AIR 1954.
[425] Harding, A.L. Religion, Morality and Law, P. 28.
[426] Shetreet Shimon, Law and Social Pluralism Lexis Nexis ISBN 81-8038-003-3 P.17.

evolved by the judges and this term grants too much authority to the judges. If we take note of all the earlier decided judgments, we will realize that it is making efforts to adjust the nation to the current norms and providing dominance to 'living with dignity'. In the case of Sabarimala, the decision of the court to strike down the old tradition of not permitting women shows that Constitutional morality is making efforts to lift the community. So, we can agree that it is well said that "Power corrupts and absolute power corrupts absolutely".

XVIII. CONCLUSION

To conclude, it is very important to provide the elaborative meaning of secularism in the Constitution of India. The people should have a clear understanding of its origin. Secularism is very well consistent with Indian circumstances. According to my opinion, if there will be any other possible choice in place of secularism, then that choice will be devastating. There is a very thin line difference between religion and secularism and the court through various judgments proof that in essence, they are the same thing. Religion means following one's religion, beliefs, practices, traditions, culture, etc. Secularism, on the other hand, means there is no particular religion and as per state all religion is equal, that is, there is neutrality in religion. Finally, secularism affords to check on the autocracy of the majority that is a natural component of any socialist community. So, for this very reason, it is important to secure secularism.

SENTENCING POLICY: FROM UNGUIDED TO GUIDED DISCRETION

RITWICK SHRIVASTAV[427]

ABSTRACT

Punishing a wrongdoer is at the heart of the criminal justice delivery. However, in India, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the judge in meting out punishments to a convict. This unguided discretion often leads to vast inconsistencies between sentences. Similarly placed persons are awarded different sentences for the same offence. This inconsistency directly violates Article 14 and Article 21 of the Indian Constitution. In this article I highlight the need for a robust sentencing policy. I also discuss the recommendations provided by various parliamentary committees as well as the Hon'ble Supreme Court. Lastly, I enlist certain suggestions which ought to be included in India's sentencing policy.

I. INTRODUCTION

Sentencing refers to the judicial act of prescribing punishment to a convicted person. One would imagine it to be a standard judicial exercise where the punishment always corresponds to the severity of the offence; however, in India this is not the case. Instances of massive disparity between sentences awarded to similarly placed people convicted for the same offence are common. Time and again, the Hon'ble Supreme Court and 'Committees for Reforms' have demanded for a robust sentencing policy. However, these observations and recommendations have failed to grab the attention of the government. As of date, there is no sentencing policy in India and sentencing is solely dependent on judicial discretion. In this article I discuss the need of this judicial discretion but to guide it through a policy or legislation. I will also enlist certain suggestion which ought to be included in India's sentencing system.

II. NEED FOR A SENTENCING POLICY

Since the British era, the criminal justice system has remained more or less consistent. Despite that, there exists massive disparity between the sentences awarded for crimes. This discrepancy has been perfectly summed by the Malimath Committee on Reforms of Criminal Justice System in 2003. Emphasizing on the need to minimize uncertainty in awarding sentences, the committee stated that, "For many offences only, the maximum punishment is prescribed and for some offences the minimum may be prescribed. The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore, each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries guidance regarding sentencing options is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimize uncertainty to the matter of awarding sentence."[428] In 2007, the Madhav Menon Committee on Draft National Policy on Criminal Justice, reiterated the need for statutory sentencing guidelines.[429] The same year, the Hon'ble Supreme Court also noted the absence of judiciary-driven guidelines in India's criminal justice system, stating, "…in our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts, except for making observations with regard to the purport and object for which punishment is imposed upon an offender, had not issued any guidelines."[430] The Court further stated that the superior courts have come across a large number of cases that "show anomalies as regards the policy of sentencing,"[431] adding, "…whereas the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where the same sentence is imposed, the principles applied are found to be different. Similar discrepancies have been noticed in regard to imposition of fines."[432] The reasons for these discrepancies are (i) complex structure of sentencing and (ii) institutional inconsistency by the Supreme Court.

1. Complex Structure

Sentencing in India is governed by a cobweb of laws. While sentencing, the Judges have to keep in mind substantive criminal laws, special legislation creating specific offences, procedural laws mainly the Criminal Procedure Code 1973, Constitution of India, judicial interpretations and guidelines laid down by superior courts. Adding to the complexity, the

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[427] Lawyer.
[428] Vol I, Committee on Reforms of Criminal Justice System Report, Government of India, Ministry of Home Affairs, March 2003.
[429] Draft National Policy on Criminal Justice, Government of India, Ministry of Home Affairs, July 2007.
[430] State of Punjab v. Prem Sagar & Ors. 7 SCC 550 (2008).
[431] Supra p.3.
[432] Supra p.3.

Judges also enjoy considerable discretion to select and appropriate the punishment for the crime. This discretion is not guided by any policy or guideline, it's absolute.

Therefore, even if the judge overlooks certain aspects of sentencing, such as hearing mitigation and aggravating circumstance, the discretion will still be absolute. This complex system along with an unguided discretion makes it impossible to achieve sentencing consistency. While it is trite to blame the government for its inaction in formulating a sentencing policy, we cannot ignore the part played by the Supreme Court in decaying the sentencing structure even further.

2. **Institution inconsistency of the Apex Court**

Despite recognizing the problems with the sentencing structure, the Supreme Court has done nothing but make it more complex and inconsistent. An example can be the "rarest of rare" doctrine. After laying down the doctrine in Bachan Singh v. State of Punjab[433], it completely reversed its decision (within 3 years) in Machhi Singh[434]. Due to this confusion, courts continued to follow the Macchi Singh judgment despite Bacchan Singh being a decision of a Constitutional Bench. This lack of institutional coherence has resulted in several incorrect decisions. It is therefore not surprising that 90% of the trial court decisions are overturned by the higher courts. Infact in case of death sentence only 4.9% cases are eventually confirmed by the Appellate Courts.[435] Due to decisions like these, the legislature is attempting to curb the disparity by taking away judicial discretion. Recent laws are prescribing harsher compulsory minimum punishments in order to shorten the range of sentencing discretion. For example, the POCSO (Amendment) Act, 2019, in case of aggravated penetrative sexual assault (Section 6), prescribes a minimum punishment of rigorous imprisonment for a term not less than twenty years, but which may extend to imprisonment for life. The judge while punishing under Section 6 of POSCO can only decide between rigorous imprisonment for 20 years or for life which for all practical purposes mean almost the same thing. Interestingly, the minimum prescribed punishment in Section 6 of POSCO is greater than a remitted sentence of life imprisonment (14 years). If such a system continues then the judiciary will not be left with any discretion to be exercised. Taking away all judicial discretion is certainly an easy way out but it's not the correct way. I content that judicial discretion in sentencing must be retained within established parameters with due flexibility to dispense justice as per needs of the case in hand. Discretion as a reasoned process must be used judiciously. The discretion of the judge while pronouncing the sentence must be based on reasons and should be free from any kind of extraneous influences. As such, sentencing is a human process and cannot be imposed mechanically. Therefore, I am suggesting a few concepts that will harmoniously establish a new sentencing regime.

III. SUGGESTIONS

1. **Reduce Complexity**

In India, the laws relating to sentencing are scattered across legislation. It makes the sentencing process burdensome for the Judges and increases changes of disparity. India must have a separate codified legislation for sentencing. The Justice Malimath Committee in 2003 also hinted at a separate codification for sentences in its recommendations. It is suggested that an act on the lines of the 'Coroners and Justice Act, 2009' of England and Wales must be legislated upon to increase the consistency in sentencing.

2. **Trial Courts — First**

The primary focus of the policy should be its implementation by trial courts. The sentencing policy should be concrete, easily understandable and simple to comprehend. As aforementioned, 90% of the trial court decisions are reversed by the higher courts. This is an abysmal record for a country already dealing with massive backlog.

The Hon'ble Supreme Court should also refrain from passing contradictory judgments which confuse the trial judges. The trial judges should be trained about principles of proportionality and equity. They should be further be given a definite guideline to decide on what constitutes mitigating & aggravation circumstances, rarest of rare and other principles of sentencing.

3. **Future-proof policy**

Sentences should continuously be monitored and modified if need be. Especially fines which lose their deterrence over the years. A Sentencing Committee can be set up at the ground level to assess the impact of punishments awarded to

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[433] Bachan Singh v. State of Punjab AIR SC 898 (1980).
[434] Macchi Singh v. State of Punjab AIR 957 (1983).
[435] Neetika Vishwanath, How India's Trail Courts Pass Death Sentences They Should Not, June 23, 2020, www.project39a.com/blog/how-indias-trial-courts-pass-death-sentences-they-should-not (Last visited: 15.09.2020).

different offenders for different offences. The Committee will have the power to recommend modifications in the quantum, nature and severity of the punishments to the Parliament.

4. **From custodial to non-custodial punishments**
   Short term punishments under substantive laws should be substituted with other alternatives. Non-Custodial measures must be incorporated in the policy (or separate codified legislation) for compoundable offences. These measures will help to bring change in the convicted persons and reform them to be reintegrated in the society. Some courts in rare cases use non-custodial measures like fine, censure, probation, parole, plea bargaining etc. but such provisions much specifically be incorporated in the policy.
5. **Provisions relating to mandatory death sentence**
   It is a settled law as laid down by the Apex Court that prescription of Death Sentence without alternative punishment is violative of Right to life as ensured under Article 21 of the Constitution. Therefore, the sentencing policy should especially state that there can be no offence punishable only by death.
6. **Eliminate delay in disposal of Mercy Petitions**
   There is an inordinate delay in disposal of mercy petitions filed in cases of death sentence. The procedural aspect of disposal of Mercy Petitions needs to be fast-tracked by the government. Notably, the government has filed an Application on 22.01.2020 in Supreme Court seeking clarifications / modifications of the guidelines passed by the Supreme Court in the case of Shatrughan Chauhan and another vs UOI & Ors.[436], to curtail delay in execution of death sentence.[437]
7. **Victim Compensation**
   Victim Compensation shall be made a part of the sentencing policy. In all the provisions where the fine is imposed, courts should have the power to provide adequate compensation to the victim or his/her family.
8. **Penological Research and Study**
   The Ministry of Home Affairs should undertake penological research and study on the basis of the available data on sentencing. The Ministry should also hire qualified and competitive staff for evaluating and analyzing disparity or deficiency in awarding of sentences as well its execution.

IV. CONCLUSION

While the sentencing policy may prima facie not appear to violate the fundamental right of individuals, a careful examination reveals how unregulated policy of sentencing affects fundamental rights. Article 14 of the Constitution states that everyone shall be treated equally before the law. However, the application of the same law over two persons under the same circumstances resulting in different consequences ostensibly violates article 14. Undeniably, a strong and effective sentencing policy is the need of the hour. India can learn from USA, UK and Australia who have worked out detailed sentencing policies. These countries have clearly laid down guidelines whilst keeping judicial discretion intact. A sentencing policy will prove to be beneficial for the entire criminal justice system and would greatly improve our justice delivery mechanism.

[436] Shatrughan Chauhan vs Union of India, 3 SCC 1 (2014).
[437] Lok Sabha, Parliament of India, Unstarred Question No. 3694, March 17, 2020.

SEXUAL HARASSMENT AS TRESPASS TO PERSON: A STUDY OF SEXUAL HARASSMENT AT WORKPLACE IN INDIA

NIKHIL VAGHMAREY[438]

ABSTRACT

Sexual harassment at the workplace is a common problem in India, especially for women. Most of the cases of sexual harassment are filed as criminal suits, which has many drawbacks and causes many hardships to the victims. This paper will analyze whether sexual harassment is trespass to person and whether it can be filed as a civil suit. This paper will also focus on the problem of sexual harassment in India, the guidelines framed by the Supreme Court in the landmark case of Vishaka v. State of Rajasthan and the recommendations of Justice Verma report which were incorporated in the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

Keywords: *Tort, sexual harassment, trespass to person, workplace.*

I. INTRODUCTION

The word 'Tort' is derived from the Latin term 'tortum' which means twisted. A tort is a civil wrong the remedy for which is unliquidated damages. The law of tort is an old concept but there are few areas in the law of tort which are changing with the changing world. The tort of Trespass is an old school tort law, but with the evolution in law and society, a new concept i.e. 'tort of sexual harassment' has emerged, which is a form of trespass to person. The tort of sexual harassment is very new and a very wide concept. Thus, in this paper, we will be focusing only on sexual harassment at workplaces. In this we will be discussing the mental elements of tort, sexual harassment as trespass to person, the role of consent in cases of trespass and sexual harassment, the advantages and disadvantages of filing a civil suit for sexual harassment. Furthermore, we will study the case of Vishaka v. State of Rajasthan and the guidelines given by the Supreme Court in this case, Justice Verma Committee report and finally the paper will conclude with some suggestions and views of the author. The main purpose of this research paper is to analyze whether sexual harassment can be considered as trespass to person? Also, the purpose of this paper is to discuss the recommendations of the Justice Verma Committee report and its impact on the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

II. SEXUAL HARASSMENT AS A TORT

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) which is an international treaty adopted in 1979 by the United Nations General Assembly, describes sexual harassment as "An act which includes such unwelcome sexually determined behavior as physical contact and advances, sexually colored remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment".[439] However because of various factors nowadays, there is an increase in some awareness about this problem. Some of these factors are an increase in the percentage of women's education, a greater number of women in the workplace, women rights movements, etc. A tort is an act or omission of a duty which causes harm or legal injury to someone. The offence of sexual harassment fulfils all the elements of tort which are-

An act or omission- Sexual harassment is a wrongful act in the eyes of law.

Legal injury- The act of sexual harassment causes legal injury to the victim. The injury here does not mean a physical injury; it means the violation of a legal right. According to the principle of "Injuria sine damnum" i.e. injury without damage, sexual harassment does not cause a physical injury rather it violates the legal right of the individual.

Legal remedy- For every violation of a legal right, the law must provide some remedy to the concerned individual. The victims of sexual harassment are also provided compensation or some other remedy in tort law. Thus, sexual harassment is both a crime and a tort, as it fulfils all the elements of tort.

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[438] B.A.LL.B.(Hons.), 2nd Year, Maharashtra National Law University Nagpur.

[439] https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx (accessed on 25th April 2020).

III. MENTAL ELEMENTS OF TORT

In the law of tort, the liability of the wrong-doer is decided on the basis of the injury caused to the plaintiff. The liability can be incurred regardless of whether the tort was committed intentionally or unintentionally. However, there are some torts which have some mental element behind them. These mental elements are-

Malice- Malice in old times meant 'a desire of revenge or settled anger against a particular person' but in modern times malice simply means 'any improper motive' i.e. a wrongful act done intentionally without any just cause or excuse.

Intention- Intention is an internal phenomenon. Something which happens in mind and the direct evidence of which is not available is intention. The intention behind an act can be ascertained only by happening or non- happening of event(s). An act can be said to be intentional if the person had the knowledge that his acts will cause harm to someone. In some torts like battery, trespass to land or person, the intention is important.

Motive- Motive is the purpose behind doing an act. Usually motive is irrelevant in torts, but the motive is relevant in the torts of defamation or malicious prosecution. These mental elements are not essential in determining whether an act is a tort or not, however, in some of the torts, these mental elements are considered. All these elements must be fulfilled for a case of sexual harassment or trespass to person. These elements can only be ascertained by the circumstances or facts of each case.

IV. TRESPASS TO PERSON

Trespass to person is a modern tort and was not included in the old school trespass. Some other forms of trespass are, trespass to land and trespass to chattel, which covers interferences with moveable property. Generally, liability for trespass to person is more serious than that of trespass to land or chattel. Also, in case of trespass to person, the intention of the defendant is given more importance, whereas, in case of trespass to land or chattel, the intention is given less importance. The gravity of intention in trespass to person is more than in trespass to chattel or land.[440] Trespass to person generally includes assault, battery, false imprisonment and intentional infliction of emotional distress. Since there is no specific law for the tort of sexual harassment, the case for sexual harassment needs to be filed under these four types to trespass to persons, i.e. a recognized tort. Hence a civil suit for sexual harassment can be filed under following headings-

Assault- An assault is an attempt or threat to do a physical hurt to another, backed with an ability and intention to cause such harm. In the case of assault, physical harm is not caused rather only a threat or attempt is made. The essentials of assault are:

The defendant intended to cause the harm.

The plaintiff had an apprehension of threat.

The defendant had the ability to cause the harm. [441]

However, only verbal abuse is not enough to be actionable as assault unless it creates an apprehension of threat in the mind of the victim.

Battery- Battery is an intentional application of force on another person. It is hitting a person or touching him/her in a rude, revengeful or insolent manner. Battery is the next step of assault i.e. in assault no physical contact takes place and only threat is made whereas, in battery actual physical contact is made. To make someone liable against battery, the victim only needs to prove that the other person touched her against her wish.[442] Thus, in cases of sexual harassment, it is possible that the victim got the apprehension of an unwanted touch accompanied with actual touch. Therefore, a suit can be filed for both assault and battery.

False Imprisonment- False imprisonment also known as wrongful confinement is the total restraint of a person's liberty, for, however, a shorter period of time, without any lawful excuse. For a tort of false imprisonment, both, total restraint of the liberty of the person and unlawful detention are essential. It can be achieved through the actual use of force or constructive use of power or authority.[443] In cases of sexual harassment, the victim generally goes through false imprisonment. Thus, a suit for sexual harassment can also be filed under false imprisonment.

Intentional Infliction of Emotional Distress- In most of the cases of sexual harassment, the victim suffers emotional distress. For establishing the liability under this tort, the victim needs to prove various things. Firstly, that the defendant

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[440] Joanne Conaghan, "Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment", Vol. 16, Oxford Journal of Legal Studies, No. 3 (Autumn, 1996).

[441] Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, The Law of Torts, 27th ed. 2016.

[442] *Ibid.*

[443] *Ibid.*

either caused emotional distress through shameful conduct or intended to cause emotional distress to the victim or had a reasonable knowledge that the victim could suffer emotional distress through his conduct. Secondly, the victim needs to prove that actual emotional distress was caused. [444] Thus, any person with a malicious mind, coupled with intention and motive to sexually exploit someone, commits assault and/or battery on that person, and imprisons the person without her consent, thereby causing emotional distress to that person, is said to have committed the tort of sexual harassment. Hence, sexual harassment can be said to be trespass to person.

V. THE ROLE OF CONSENT IN CASES OF TRESPASS AND SEXUAL HARASSMENT

In the cases of trespass, whether to person, land or chattel, consent of the victim or owner matters the most. This is because, consent of the victim or owner, helps in determining whether the other person was liable in the first place for trespass or not. For example, one may give consent for a slap on the face, or a sudden appearance of a ghost in a haunted house; in these cases, there will be no assault or battery, as consent given by the person. In the law of tort there is a common saying, 'to the willing there is no harm.' The willingness to suffer a slap on the face or getting frightened by a ghost does not amount to assault or battery, similarly, neither does consent given to have a sexual relationship. According to the law of trespass, no one can get into the locus of possession which the possessor does not approve. Similar to rule of privity of contract, which allows the parties to bilaterally decide how to govern and limit themselves, the possessor of land can also unilaterally decide how to govern and limit the number of entrants on his land. A prospective visitor can enter the locus of possession either directly or fugitively, and he must accept the rejection of the possessor if he receives it. Whether the rejection is reasonable or unreasonable, kind or unkind, it must be accepted by the visitor. Similarly, a woman is a self-possessor of her body, and as a self-possessor, she can refuse access to her body. Whether it is out of vengeance, laziness, prejudice, hatred or any baseless dislike for someone, the law protects her choice. Similar to the possessor of land, a woman has a right to bar anyone for the geography of her body. Thus, she can obtain a criminal punishment for the intruder who entered without her consent. Hence, sexual harassment is a form of trespass and similar to cases of trespass, in cases of sexual harassment also consent matters.

VI. FILING A CIVIL SUIT FOR SEXUAL HARASSMENT

Since sexual harassment is trespass to person, a case for sexual harassment can also be filed as a civil suit. And as each coin has two sides, similarly, filing a civil suit in place of a criminal suit has both some advantages and disadvantages.

ADVANTAGES

Direct control – In a civil suit a plaintiff is in direct control of the suit but within the confines of the law i.e. she can take some important decisions like whether to proceed with the case further or not, whether to settle the case etc. whereas, in a criminal case, the state controls every important decision because the state is a party in a criminal matter and not the individual. The victim only becomes a mere witness in the case.

Compensation – A civil suit filed for compensation can yield monetary as well as some non-monetary benefits for the victim. A successful suit can be financially beneficial for the victim. A victim can also get some non-monetary benefits such as an apology from the defendant etc.

Flexible tort law- The law is tort is flexible compared to criminal law. The victims do not need to specify which part of her body was touched. She only needs to prove that the defendant touched. Because of this, the victim does not need to go through emotional distress again. [445]

Lower burden of proof- In criminal law, guilt must be proven beyond a reasonable doubt i.e. the judge must be absolutely convinced that the crime was committed by the defendant. There shall be no scope of doubt in the mind of the judge. Whereas, in the law of tort the burden of proof on the victim is much less.

Deposition- A civil suit allows the victim to depose the defendant and ask him some questions under oath. This is emotionally empowering for the victim.

Lawyer of own choice- The financially well-off victims can get better lawyers of their own choice rather than public prosecutors.

DISADVANTAGES

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[444] https://injury.findlaw.com/torts-and-personal-injuries/intentional-infliction-of-emotional-distress.html (accessed on 25th April, 2020).

[445] *Para* Ellen Bublick, 'Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils' http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=2150 (accessed on 27th April 2020).

Delay- A civil suit generally continues or drags for more than six years. It will take more than six years to complete the trial court level alone. Whereas, a criminal case is decided much faster. Also, such long-term interactions with the defendant can cause emotional distress to the victim.[446]

More expensive- The full cost of litigation is to be borne by the victim alone as the state cannot sponsor it. Also, as the suit goes on for years, the cost of litigation becomes more expensive. The victims who are not financially well-off cannot afford the cost of lawyers and litigation.

Finding a competent lawyer- the victim might face a problem to find a competent lawyer who will fight for justice rather than filling his own pockets.

VII. SEXUAL HARASSMENT AT WORKPLACE IN INDIA

Sexual harassment is an immoral, uncivilized and a fundamental legal wrong. Nowadays, it is a very big problem for working women in India. Sexual harassment may include, comments on women's body, touching women's body inappropriately, use of sexually abusive language, outright solicitation of sexual intercourse etc. This creates a hostile work environment for women which ultimately affects their work-life also. Generally, sexual harassment is divided into two parts, first is where the boss uses his power and authority and either threatens to damage their working conditions or to benefit their working condition. This is known as 'Quid pro quo' i.e. something for another. The second is the creation of a hostile work environment by either making sexual remarks or passing lewd comments on women's body, touching her body inappropriately without her consent etc. [447] In India, this is a common problem faced by women in workplaces. The Hon'ble Supreme Court of India recognized this problem and through the Vishakha v. State of Rajasthan[448] and gave certain guidelines regarding prevention of sexual harassment at the workplace. Also, on the recommendations of the Justice Verma committee report of 2013, Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2014 was passed by the parliament. Prior to the landmark Vishaka case, there were no specific rules or guidelines to prosecute sexual harassment cases. There was no particular legislation which directly addressed this problem. Hence, the Vishaka judgement is a landmark judgement in the history of the Supreme Court of India.

VIII. CASE STUDY: VISHAKA AND OTHERS V. STATE OF RAJASTHAN[449]

Facts of the case- Bhanwari Devi was a social worker in the state of Rajasthan. As part of her job, she tried to stop the marriage of Ramkaran's daughter who was a minor. Though the marriage successfully happened, but Bhanwari Devi was brutally gang-raped, in front of her husband, by some Thakurs because she tried to stop Ramkaran's daughter' marriage. A rape case was filed, and the judgement of the trial court was against her. But she did not lose hope. Her co-workers filed a PIL in the Supreme Court. The PIL was filed seeking the Supreme Court's direction regarding sexual harassment which women face at the workplace.

Issues before the court- Whether, the enactment of guidelines mandatory for curbing the problem of sexual harassment at the workplace.

Holding of the court- the Vishaka judgement is considered as a landmark judgement because it was the first authoritative judgement which addressed the problem of sexual harassment at the workplace in India. Sexual Harassment was considered as a constitutional tort because it violated some fundamental rights of working women like, [450]**Article 14- Right to equality, Article 15- Right to not be discriminated on grounds 'only' of religion, caste, race, sex, and place of birth, Article 19(1)(g)- Right to practice any profession i.e. right to a safe environment that is free from sexual harassment and Article 21- Right to Life: the right to live with dignity.** Thus, through this judgement it was considered that even the working women had the fundamental right to equality, to work freely and have a harassment-free work environment. Since there was no specific law for sexual harassment in India, the Supreme Court addressed this issue by framing certain guidelines. The court directed that these guidelines were to be implemented until a legislation addressing this issue would be passed.

Vishaka case guidelines- Some important guidelines given by the court are as follows:

1. It is the duty of the employer to check and prevent the cases of sexual harassment, and to form some procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

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[446] *Ibid.*

[447] Krista J. Schoenheider, "A Theory of Tort Liability for Sexual Harassment in the Workplace", University of Pennsylvania Law Review, Vol. 134.

[448] Vishaka and others Vs State of Rajasthan AIR 1997 SC 3011.

[449] *Ibid.*

[450] *Ibid.*

2. Relevant service rules and code of conduct must be framed by the employer and disciplinary action must be taken against those violating these rules.
Whether such conduct constitutes an offence under the law, a proper complaint mechanism must be set up to address the complaint made by the victim.
A complaints committee must be constituted at workplaces, headed by a women employee, with more than half of its members being women.
If sexual harassment happens because of acts of a third party during the course of the work, the employer must take necessary measures to support the victim.
The employees must be allowed to raise the issue of sexual harassment during the employee-employer meetings. [451]

IX. JUSTICE VERMA COMMITTEE REPORT, 2013

Justice Verma Committee was set up in the year 2012 to recommend amendments to the Criminal Law to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women. The committee recommended amendments in many areas such as sexual assault, rape, child trafficking, acid attacks, and many other areas including sexual harassment at the workplace. "When the committee was constituted, the Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 was pending before the parliament. The bill had many faults which were later scrapped while making the act. The Committee pointed out those flaws in the bill. Some important recommendations given by the committee are as follows-
The committee recommended to include 'domestic workers' under the bill.
The committee recommended to scrap out the provision of conciliation which stated that conciliation must be made between the harasser and the victim.
The victim must be given compensation by the employer.
To constitute an 'Employment Tribunal' because the internal complaints committee was formed of the employees itself. In such a case the employer might use his power and authority to exert some pressure on the committee members. This would have defeated the principle of natural justice. Some of these recommendations were not included in the act like no provision was made to constitute the 'employment tribunal' and the internal complaints committee was the redressal mechanism. However, the Justice Verma Committee report made some important and essential suggestions, most of which were included in the Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013. [452]

X. PRESENT SCENARIO: SEXUAL HARASSMENT AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013.

The sexual harassment bill was later passed by the parliament in the year 2013, after incorporating some recommendations of the Justice Verma Committee report. The act was named Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013. The act aimed to prevent, prohibit, and redress the growing problem of sexual harassment at the workplace in India.[453] The act defines sexual harassment as- Anyone or more of the following unwelcome acts or behavior (whether directly or by implication) with the employee namely:
Physical contact and advances;
A demand or request for sexual favors;
Making sexually coloured remarks;
Showing pornography; or
Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.[454]
The act is applicable at all private as well as public institutions, organization, associations etc. or any other place visited by the employee during the course of the employment. Because of the power granted by the Sexual Harassment at Workplace (Prevention, Prohibition, and Redressal) Act, 2013, the Internal Complaints Committee can recommend to the employer, at the request of the employee to take certain interim measures like, the victim can be transferred to another workplace, or the victim can be granted three months' pay leave in addition to the regular leaves.[455]

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[451] *Ibid.*
[452] *Centre for Law and Policy Research," Highlights* of the Justice Verma Committee Report*".*
[453] Law Commission of India, *"*The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 *(N0. 14 of 2013)".*
[454] *Sexual Harassment at Workplace (Prevention, Prohibition* and Redressal) Act, 2013.
[455] *Ibid.*

XI. SUGGESTIONS

Most of the cases of sexual harassment are filed as criminal cases. Whereas the law of tort can be used as a means to get compensation from the defendant. There is a strong need to develop a much stricter law of torts, through which the victim can get monetary compensation for her sufferings and emotional distress or due to resigning/ getting fired from the job. Also, in criminal law, the burden of proof on the victim is much higher, because in criminal law the guilt must be proven beyond a reasonable doubt. Whereas in tort law the burden of proof is much less than in criminal law. Therefore, much stricter tort law must be made which addresses the issues of sexual harassment.

XII. CONCLUSION- MY VIEWS

Sexual harassment at workplaces has been a common problem faced generally by women. Through this paper one can say that sexual harassment can be considered as trespass to person. Though most of the cases of sexual harassment are filed under criminal law, it can also be filed as a civil suit under various types of trespass to person like assault, battery, false imprisonment and intentional infliction of emotional distress. The various advantages and disadvantages of filing a civil suit were discussed in this paper. Cases of sexual harassment are not filed as civil suits maybe because compensation is given generally in terms of back pay and not for the pain and sufferings suffered by the victim. Every citizen has a fundamental right to live with dignity and have a safe environment for the workplace, free from sexual harassment. This right was recognized by the Supreme Court of India in the landmark case of Vishaka v. State of Rajasthan. The recommendations of the Justice Verma Committee report were incorporated in the Sexual Harassment at Workplace (Prevention, Prohibition, and Redressal) Act, 2013. This act helps to prevent, prohibit, and redress the issue of sexual harassment at the workplace in India. Though the act was not fully able to curb this problem, it has helped significantly to decrease the number of sexual harassment cases at the workplace in India and it has also helped to create awareness among the people regarding this issue. Though criminal action can be brought against the harasser still there is a strong need to bring a stricter tort law which can provide monetary benefits to the victims for the economic loss which she has suffered.

CYBERSECURITY THREATS TO ONLINE BUSINESSES AND THE ROLE OF LAW, POLICY AND TECHNOLOGICAL MEASURES

RAKSHITH BHALLAMUDI[456]

ABSTRACT

The internet and mass digitization of information have transformed the way the world works. In providing a platform for online businesses to offer better service quality to consumers, they have also raised an opportunity for deviant and criminal behavior through and within these platforms. This paper identifies two most prominent and dangerous cybersecurity threats to online businesses - phishing and DDoS. Following a discussion on their constant 'smart' evolution and their implications, this paper sheds light on legal, policy and technological initiatives that can be taken to curb the potential devastating impact of these threats.

I. INTRODUCTION

A security threat can be thought of as an event or a situation, the happening of which would result enormous economic hardship to network resources and data in many forms like destruction, data modification, disclosure, abuse and waste, and security, is protection against these. E-Commerce surfacing over extranets, intranets and internet, which, combined with increase in amount and complexity of cracking tools[457], borderless-ness, easy anonymity and new tools to engross in criminal activity, is at risk. Cybersecurity threats impact large firms and especially small and medium-sized online service providers.[458] Around 43% of attacks aim small businesses due to their non-affordability; 54% online businesses faced one or more successful attacks; at least 60% online businesses shut down within 6 months of the attacks and given huge costs, only 38% of global e-commerce establishments could successfully handle them.[459] Digital sectors record £116.5 billion in contribution to UK economy in 2016 and over £32 billion in digital sector exports in 2015.[460] Security qualms cause million dollars loss for e-commerce retailers.[461] Given that 83% believe that their business has been attacked and 71% of those stated increase in threats,[462] one would imagine that there is general awareness on the gravity and that they would adopt stringent measures. Unfortunately, it is not all that simple given new developments like mobile commerce[463], Internet of Things (IoT), smart homes, cities, communities are business models adopted under their umbrella. IoT is a model that ponders universal existence in the milieu of many things which co-operate and interact with each other and other connected things using wired and wireless connections, to reach mutual goals and to generate contextual and communication services.[464] They are embedded computing devices, which collect and report vast amounts of individual and household data.[465] Devices linking up with the net is increasing exponentially[466] and "literally almost

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[456] LLM (2019-20), The University of Edinburgh.

[457] Jonathan Reuvid, The Secure Online Business Handbook: A Practical Guide To Risk Management And Business Continuity (Kogan Page 2006).

[458] H.L. Armstrong and P.J. Forde, 'Internet Anonymity Practices In Computer Crime' (2003) 11 Information Management & Computer Security.

[459] Ronak Meghani, 'E-Commerce Security Infographics – Statistic, Issues, And Solutions For 2018' (*Magneto IT Solutions*, 2018) <https://magnetoitsolutions.com/infographic/ecommerce-security> accessed 26 April 2020.

[460] 'DCMS Sectors Economic Estimates 2017: Employment And Trade' (*Assets.publishing.service.gov.uk*, 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/640628/DCMS_Sectors_Economic_Estimates_2017_Employment_and_Trade.pdf> accessed 26 April 2020.

[461] J. Sheila, 'What Security Fears Cost E-Commerce' (*Ecommercetimes.com*, 2011) <https://www.ecommercetimes.com/story/69667.html> accessed 26 April 2020.

[462] Kunal Sharma, Amarjeet Singh and Ved Prakash Sharma, 'Smes And Cybersecurity Threats In E-Commerce' (2009) 39 EDPACS.

[463] Sangsun Kim, Jeongwan Hong and Yenyoo You, 'An Exploratory Study On E-Business Risks Due To The Sector Classification Of Small And Medium-Sized Enterprises' (2015) 8 Indian Journal of Science and Technology.

[464] Sridipta Misra and others, *Security Challenges And Approaches In Internet Of Things* (Springer 2017).

[465] Stacy Elvy (*Digitalcommons.nyls.edu*, 2016) <https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1453&context=fac_articles_chapters> accessed 26 April 2020. See also L. Tan and N. Wang, 'Future Internet: The Internet Of Things - IEEE Conference Publication' (*Ieeexplore.ieee.org*, 2010) <https://ieeexplore.ieee.org/abstract/document/5579543/> accessed 26 April 2020.; 'Internet Of Things In 2020: A Roadmap For The Future' (*Docbox.etsi.org*, 2008) <https://docbox.etsi.org/erm/Open/CERP%2020080609-10/Internet-of-Things_in_2020_EC-EPoSS_Workshop_Report_2008_v1-1.pdf> accessed 26 April 2020, for other definitions.

[466] Shradha Jain and another, 'Effective Analysis Of Risks And Vulnerabilities In Internet Of Things' (2015) 5 International Journal of Computing and Corporate Research.

everything will have IoT technology at some point."[467] IoT growing rapidly without proper thought of weighty security encounters and regulatory changes is a major cause for concern, especially when many objects within IoT atmosphere assume greater role than computers. Section I will elaborate on the two major contemporary cybersecurity threats to online businesses- one a potent B2C and the other a B2B-Phishing and Distributed Denial of Service threats (DDoS). Section II will critically analyze their management by law, policy and technological measures and the challenges they encounter in the course of their management. Finally, concluding thoughts will be offered.

II. SECTION-1: CYBERSECURITY THREATS TO ONLINE BUSINESSES

Most e-commerce threats even within IoT, smart homes, cities and communities, cannot be classified as 'new'. The threats highlighted here- Phishing and DDoS, categorized as non-technical and technical respectively,[468] have been in the picture long before the advent of IoT, and their evolving continuance speaks volumes about the gravity of their threat.

1. Phishing: 'smartly' evolving and appallingly damaging

In Phishing, by using scare tactics, a disguised email which uses the trademarks and logos of an e-commerce entity or of a financial institution, is sent by the "phisher" to the users.[469] Phishing burdens a price not only on the victim and the wrongly represented entity, but the society and internet users as a whole.[470] Phishing affected over 9.5 million Americans' personal data, costing businesses over 45 billion US dollars.[471] Augmented use of databases to store consumer data gives easy access to large amounts of personal data at one go.[472] It may not be discovered until long after it has taken place. The attacks keep evolving in sophistication- using spyware to exploit the security flaws to avoid spam and fraud filters. Given the anonymity, the traditional barriers to offline crime do not apply to phishing and are therefore very difficult to deter, and at the same time drastically reducing the risk of being caught.[473] Even in the context of IoT, the confidential data can be spoofed through phishing websites. In fact, the danger is increased because the IoT devices are not intelligent, and it is not always possible for the consumer to take extreme caution.[474]Identity theft has established itself as one of the most lucrative, threatening and most serious attacks[475].

According to many studies conducted, it is seen that-

- Organizations keep falling prey to phishing, and are increasing in sophistication.
- Two-thirds of the global online businesses suffer targeted/personalized attacks
- Nine out of ten emails had a ransomware and any technical information in them prompted opening.[476]
- Malicious pages reduced from over 18,000 to less than 15,000 but phishing pages went from over 24,000 to over 33,000.
- 70% of the IoT devices are vulnerable to cyber-attacks and phishing[477]

Ineffectiveness to curb is due to the way the potential solution and its vulnerabilities are exploited. Phishing is "a high-tech, rapidly advancing scam which uses pop-up or spam messages to deceive an individual into revealing their valuable and sensitive information related to bank account, credit card, social security and other passwords."[478] In its advanced evolution, the scam also embezzles the "look and feel" of a specific, revered website in order to tempt exposure of

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[467] Paul Taylor, 'SAP Brandvoice: How The Internet Of Things Makes Dumb Devices Smart' (*Forbes*, 2016) <https://www.forbes.com/sites/sap/2016/09/22/how-the-internet-of-things-makes-dumb-devices-smart/> accessed 26 April 2020. http://www.forbes.com/sites/sap/2016/09/22/how-the-internet-of-thingsmakes-dumb-devices-smart/#38cae0f7726c (last visited Mar. 5, 2017

[468]Poonam Patel and others, 'A Study On E-Commerce Security Threats' (2017) 5 Ijircce.

[469] Jennifer Lynch, 'Identity Theft In Cyberspace: Crime Control Methods And Their Effectiveness In Combating Phishing Attacks On JSTOR' (*Jstor.org*, 2005) <https://www.jstor.org/stable/24117505> accessed 26 April 2020.

[470] Sridipta Misra (n. 8)

[471] 'Federal Trade Commission – Identity Theft Survey Report' (*Ftc.gov*, 2003) <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-identity-theft-program/synovatereport.pdf> accessed 26 April 2020.

[472]Gillian Dempsey and others, *Electronic Theft: Unlawful Acquisition In Cyberspace* (Cambridge University Press 2001).

[473] Neal Kumar Katyal, 'Criminal Law In Cyberspace' (2001) 149 University of Pennsylvania Law Review.

[474] Surya Molugu and others, 'Security And Privacy Challenges In Internet Of Things - IEEE Conference Publication' (*Ieeexplore.ieee.org*, 2018) <https://ieeexplore.ieee.org/document/8553919> accessed 26 April 2020.

[475] Christina Goggi, 'The 13 Worst Security Threats Of 2013' (*GFI Blog*, 2013) <https://techtalk.gfi.com/the-13-worst-security-threats-of-2013/> accessed 11 May 2020.

[476] Christina Goggi (n. 19)

[477] 'Phishing: Distribution Of Attacks By Country 2019 | Statista' (*Statista*, 2019) <https://www.statista.com/statistics/266362/phishing-attacks-country/> accessed 26 April 2020.

[478] Kunal Sharma (n. 6)

sensitive data. In technical terms, it uses e-mail platforms to mount "malware" covertly like trojan keyloggers on the computer of a customer with the objective of snipping sensitive data. Generally speaking, the in-scam advancements these days chiefly focus on cash transactions that are facilitated by financial institutions. In addition to this and 'spoofing', "exploit based" attacks, which take place by taking advantage of a known flaw in the browser programs and then install through viruses, various keyloggers are rampant too, and this cause devastating effects, as it happened in Mexico.[479] Phishing may be (and usually is) very difficult to detect due to phishers meticulously imitating a SME site for example, which seems very convincing to the users, and they may sway them to carry out transactions with them that end in huge losses.[480] Phishing's new modifications are constantly tested through an attack on various customers, financial and business institutions. There are numerous types of Phishing. *Deceptive Phishing* that require and need re-entering of users information through messages to steal data; *Malware - Based Phishing* where a downloadable email attachment unknowingly runs highly malevolent software on computers; *Keyloggers and Screen loggers* are the ones that track the input typed by the user on keyboard backdoor and send to the scammer; *Session Hijacking* involves monitoring of the activities of the user pending their signing-in onto a particular transaction or target account; *Web Trojans* are a pop up kind that invisibly run on computers; *Hosts File Poisoning* is where the operating system's host files are changed and the IP addresses in them correspond to web addresses.; *System Reconfiguration Attacks* involve the modification of a computers settings.; *Data Theft* is where sensitive information and their subsets stored locally on computers are stolen.; *DNS-Based Phishing* involve tampering with the host files of a company or its domain name system,; *Content-Injection Phishing* is where the content, or a part of it, of a legitimate site are replaced by the hackers with bogus content; *Man-in-the-Middle Phishing* involve the self-positioning of the hackers between a legitimate site or system and the user to record the confidential data.; *Search Engine Phishing* happens when fake sites are genuinely indexed with search engines. *Spear Phishing* involves sending of genuine-appearing spurious mails to a group of users that are particularly identified for this. *Vishing or Voice phishing* which can be done in many ways. One way involves exploiting and taking advantage of cheap, anonymous calling like Voice over Internet Protocol and emulating bank protocols seeking information authentication.[481]

2. DDoS: Dangerously Delving on Services

A large portion of networks rely on private networks, on an infrastructure that is mostly public-shared where the knowledge about security measures being implemented is lacking. So, no wonder Distributed Denial of Service (DDoS) largely plagued e-commerce. In DDoS, a vast number of SME computers are hijacked and in them, "time bombs" are planted on their employee systems. When these 'bombs' are initiated, useless messages flood the targeted site thereby overloading it and blocking legitimate traffic effectively. They occur in all sorts of networks where physical infrastructure is required to carry it out; all that is required is flooding the core e-business server with many invalid requests with the intention of crashing/slowing it down to make it inaccessible. Their triumph hangs on failure of intermediate sites to spot, hold and eradicate the said network penetration. In addition to the target site, internet as a whole gets congested due to the number of packets routed via several diverse routes to the target.[482] There are many layers in an e commerce business and DDoS potentially targets all of them, however some layers are at a risk of greater threat, like the transport and processing Layers.[483] In VANET, these attacks[484] can happen in several ways but the goal is to foil legitimate and genuine vehicles from getting access to VANET and/or its services, using a wide range of malicious vehicles at different time slots and locations. Even smart appliances are used to carry out DDoS. Similar to how several computers are compromised by malware to carry execute cyber-attacks so as to create a big botnet network, thing-bot with IoT devices and smart home appliances can be infected and interrupted by DDoS by simply knowing the real IP addresses and manipulating them through "standards-based network protocols" like Internet Relay Chat (IRC) and Hypertext Transfer Protocol

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[479] 'The Web Application Security Consortium / Web-Hacking-Incident-Database' (*Projects.webappsec.org*, 2007) <http://projects.webappsec.org/w/page/13246995/Web-Hacking-Incident-Database> accessed 26 April 2020.; Kunal Sharma (n. 6)

[480] Kunal Sharma (n. 6)

[481] M. and Tariq Banday and Jameel Qadri, 'Phishing - A Growing Threat To E-Commerce' (*Researchgate*, 2011) <https://www.researchgate.net/publication/51968129_Phishing_-_A_Growing_Threat_to_E-Commerce> accessed 26 April 2020. see also David Lazarus, 'Phishing Expedition At Heart Of AT&T Hacking' (*SFGate*, 2006) <https://www.sfgate.com/business/article/Phishing-expedition-at-heart-of-AT-T-hacking-2470290.php> accessed 26 April 2020.

[482] M. Ladan, 'Web Services: Security Challenges' [2011] IEEE World Congress on Internet Security.

[483] Shazia W. Khan, 'Cyber Security Issues And Challenges In E-Commerce' [2019] SSRN Electronic Journal. See also Davar Pishva, 'Internet Of Things: Security And Privacy Issues And Possible Solution' (*Icact.org*, 2016) <http://icact.org/upload/2016/0275/20160275_finalpaper.pdf> accessed 26 April 2020.

[484] B. Parno, 'Challenges In Securing Vehicular Networks. In: Workshop On Hot Topics In Networks' (*Conferences.sigcomm.org*, 2005) <http://conferences.sigcomm.org/hotnets/2005/papers/parno.pdf> accessed 26 April 2020. ; I. Sumra, 'Classification Of Attacks In Vehicular Ad Hoc Network' [2013] Information.

(HTTP)[485]. DDoS threat from IoT can be predicted to only rise as time passes by[486]. Unlike DoS threats which are produced in a precise way from a single server/computer to flood a target, DDoS has an integrated and cohesive effect of vast compromised devices. Blocking becomes tremendously tough once it takes place because each element that is compromised contains a unique IP address.[487] Smurfing and TCPSYN flooding are most popular techniques of attack. In the former, an ICMP (Internet Control Message Protocol) echo requests are launched to a particular network's broadcast address. As a result of spoofing with the to-be victims address, each host present in network to the victim, unintentionally becoming an agent. "Fraggle" uses the smurf idea but uses UDP echo instead. In TCP SYN flooding, a flood of spoofed TCPSYN packets are sent, asking for establishing a connection with the to-be victim and every phony request causes a futile tying of resources by the victim, resources that could be utilized for requests by valid and legitimate clients instead. While TCP SYN efforts to drain the PC's memory, ICMP smurf attack concentrates on wearing the network bandwidth.[488] There are various tools employed in carrying out DDoS threats. Trin00, installable on Solaris or Linux; Tribe Flood Network, that generates both smurf and TCP SYN flood; Tribe Flood Network 2000, that is deployable on pretty much all UNIX shades and even Windows to generate a ICMP, TCP SYN or UDP flood and Stacheldraht integrates features of both Trin00 and Tribe Flood Network usually targets systems using Solaris or Linux. Various tools continue to be invented to execute DDoS threats.[489] Network and Application layer attacks are two ways to launch DDoS. The interface of the tools can be command line, like shaft or graphical user interface, like Xoic. But on attack rate dynamics, the tools can generate continuous and variable attack rate. The tools support many operating systems. The handler code or an agent can be a threat to windows, Unix, Solaris or Linux. Tools can also be IRC and Agent-Handler based[490]. The later can use encryption between client handler or handler-agent and the former can have encryption at private Protocol. The tools can be used to congest at the link or at end-point levels.[491] Reliability on the network, its performance and satisfaction are all hampered by DDoS in addition to its security, thereby ruining the end user expectations significantly. These attacks provide an effective disguise for more malevolent attacks as the services being monopolized by illegitimate users can be clandestine users, misfeasors or masquerades.[492]

III. SECTION-2: MANAGEMENT THROUGH LEGAL, TECHNICAL AND POLICY INITIATIVES

Failure of existing, seemingly adequate solutions tests all approaches and their understanding taken to vindicate risks up until now.[493] Maybe security concerns are past just hardware and software systems,[494] and need legal and policy initiatives[495] to face challenges brought by- the internet itself; by internet under the scenario of IoT, and those of IoT's itself. While traditional security measures can solve the first set of issues, second and third require individual characteristics to be considered and new solutions altogether, respectively.[496]

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[485] Ramneek Puri (2003, August); http://www.sans.org/reading-room/whitepapers/malicious/bots-botnet -overview-1299.

[486] Brian Donohue, 'Beware The Thingbot! (*Blog.kaspersky.com*, 2014) <https://blog.kaspersky.com/beware-the-thingbot/.> accessed 26 April 2020.

[487] Davar Pishva (n. 27)

[488] C. Bolz, 'Safely Train Security Engineers Regarding The Dangers Presented By Denial Of Service Attacks | Proceedings Of The 5Th Conference On Information Technology Education' (*Dl.acm.org*, 2004) <https://dl.acm.org/doi/10.1145/1029533.1029551> accessed 26 April 2020.

[489] Paul J Criscuolo, 'Distributed Denial Of Service: Trin00, Tribe Flood Network, Tribe Flood Network 2000, And Stacheldraht CIAC-2319' (*Apps.dtic.mil*, 2000) <https://apps.dtic.mil/docs/citations/ADA396999> accessed 26 April 2020.

[490] Stephen Specht and another, 'Distributed Denial Of Service: Taxonomies Of Attacks, Tools And Countermeasures' (*Citeseerx.ist.psu.edu*, 2004) <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.133.4566> accessed 26 April 2020.

[491] Harjeet Kaur and others, 'Characterization And Comparison Of Distributed Denial Of Service Attack Tools', *International Conference on Green Computing and Internet of Things* (IEEE 2015).

[492] Nisreen Innab and Aziza Alamri, 'The Impact Of Ddos On E-Commerce' (*Semanticscholar.org*, 2018) <https://www.semanticscholar.org/paper/The-Impact-of-DDoS-on-E-commerce-Innab-Alamri/e6ffd4ffff23d7d51c0c5c42180eefde7663afc9> accessed 26 April 2020.

[493] Anthony Grieco, 'Why Poor Cyber Hygiene Invites Risk' (*Dark Reading*, 2016) <https://www.darkreading.com/attacks-breaches/why-poor-cyber-hygiene-invites-risk/a/d-id/1327235> accessed 26 April 2020..; Joint Task Force Transformation Initiative, 'Security And Privacy Controls For Federal Information Systems And Organizations' (*CSRC*, 2013) <https://csrc.nist.gov/publications/detail/sp/800-53/rev-4/final> accessed 26 April 2020. Richard Starnes, 'Cybersecurity Recruitment In Crisis' <https://www.csoonline.com/article/3075293/cybersecurity-recruitment-in-crisis.html> accessed 26 April 2020.

[494] I. Fiyanyi, 'Curbing Cyber-Crime And Enhancing E-Commerce Security With Digital Forensics' (*Arxiv.org*, 2016) <https://arxiv.org/pdf/1610.08369> accessed 26 April 2020.

[495] Peter C. Chapin, Christian Skalka and X. Sean Wang, 'Authorization In Trust Management' (2008) 40 ACM Computing Surveys. Adam Jolly, *The Secure Online Business* (Kogan Page 2003).

[496] Sridipta Misra (n. 8)

1. Technical Initiatives

Their technical management within IoT, involves, firstly, endlessly and promptly discovering connecting/disconnecting devices and their type without overwhelming the network with needless enquiries- a process made tricky by cheap gadgets and devices networking via bridge servers. Any weak link in security chain may compromise both individual devices and the chain as not all devices have minimum safety like fire alarms.[497] Secondly, skillfully analyzing threats posed by and against the device, both individually and especially when utilized in an interconnected atmosphere.[498] While IoT is itself projected to produce "self-sustaining autonomous systems"[499], various 'smart' tools like CLAI;[500] IoT security architectures and collaboration frameworks like Vulcan, are being developed.[501] Combating these cybersecurity threats involve many approaches and techniques- Vulnerability Scanners that check for security vulnerabilities[502]; Intrusion Prevention and detection Systems that detect and prevent unauthorized access;[503]; Anomaly based system that analyze input stream and can classify behaviors as malicious[504]; Data Mining Methods which offer an outline for web application attacks[505]; IDS solutions that are ontology based[506]; encryption to secure information that is stored and its transmission; Secure Socket Layer to prevent message forgery, eavesdropping, or tampering during data transportation between communicating applications; Secure Hypertext Transfer Protocol to make HTTP more safe; Trust Seals Programs to offer guarantee about Web business policies and practices over the Web interface, like TRUSTe, Web Trust and BBB Online, that audit the sites and allow display of their seal if disclosure and privacy policies meet particular standards[507]; Digital Signature Digital signature that is unique and capable of authentication and verification; Secure Electronic Transaction (SET) that enables all party payment security, card holder authenticity and interoperability among applications among different platforms and operating systems[508]; Privacy Policy Statements to increase consumer trust; Digital Certificate whose authenticity is only confirmed in a specific way; Multi-Factor, two-Factor authentications and two step verification; antivirus and firewall software's and regular Data Backup.[509]

For phishing, pre-emptive domain name registration and "holding period" for new registrations to combat domains that are named deceptively do not combat impersonation by phishers of the sites. Spoof-reporting email address, monitoring nature of questions to customers, "bounced" email messages, call volumes, use of images as in company logos and artwork and launching "honeypots", Email filters to fight spam, anti-spam filters that are signature based may stop spams from getting to a user, heuristic filters is partially effective the danger of speciously hindering genuine emails still persists. In addition, from the perspective of customers, URL and IP verification before information is entered, SSL Certificate Internet security measures, using password managers and anti-virus with phishing protection.[510]

However, most techniques and tools are signature based, where the attack's syntactic representation is still sustained, and

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[497] Hongwen Zhang, 'How To Disinfect And Secure The Internet Of Things' (2016) 2016 Network Security.

[498] Davar Pishva (n. 27)

[499] Deendayal Choudhary, 'Internet Of Things-Changing The Game' (2015) 4 IJSTR.

[500] Eran Kahana (*Scholarship.law.umn.edu*, 2018) <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1444&context=mjlst> accessed 26 April 2020.

[501] long chen and Shervin Erfani, 'A Note On Security Management Of The Internet Of Things - IEEE Conference Publication' (*Ieeexplore.ieee.org*, 2017) <https://ieeexplore.ieee.org/document/7946616> accessed 26 April 2020.; Joseph Bruce and Glenn Fink, 'Shopping For Danger: E-Commerce Techniques Applied To Collaboration In Cyber Security', *International Collaboration Technologies and Systems* (US Department of Energy Office of Scientific and Technical Information 2012) <https://www.osti.gov/biblio/1051197-shopping-danger-commerce-techniques-applied-collaboration-cyber-security> accessed 26 April 2020.

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[505] Xiao-Feng Wang and others, 'Data Mining Methods For Anomaly Detection Of HTTP Request Exploitations' (Springer, 2005).

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[508] Peter C. Chapin (n. 39)

[509] Ajay Kushwaha, 'Issues, Challenges And Prevention Techniques For E-Commerce Businesses' (*Gujaratresearchsociety.in*, 2019) <http://www.gujaratresearchsociety.in/index.php/JGRS/article/view/2118> accessed 26 April 2020.

[510] Shreya Suman, Renu Pandit and Neha Srivastava, 'Cyber Crimes And Phishing Attacks' (2014) 2 IJRITCC.

all that is needed to bypass is a minor alteration of this representation. Having a system which allows for catering for variations for a specific attack by using a composed abstraction is a true challenge. The techniques are also only reactive and prevention takes place only if the system recognizes any threat signatures. Having proactive systems for prevention is the next challenge.

In behavior-based and non-signature based IDS's operating in application layer, a slight aberration resulting from training data generates large number of false positive and negative results. Systems that can spot zero-day threats/attacks by drastically minimizing these deceptive rates are lacking. Furthermore, IDS's and the statistical methods that underpin them to provide network layer solutions are ineffective in the application layer as they neglect the inputs contextual nature and concentrate more on its character distribution. Next, security systems that are learning based also suffer with high false positives. The learning process is also time consuming because it needs to be recurring with each change in application logic.

The available solutions use nascent (reasonably but probably not sufficiently effective) detection apparatuses. Absence of a practical system that applies semantic analysis to protocols/data presents a major task of applying semantic web techniques to web application security. Coming to ontologies, research shows that they are ineffective for intrusion detection.[511] Majority of DDoS prevention and detection apparatuses need vast improvements.[512] Traditional and contemporary solutions, for instance- cannot distinguish between legitimate and attack packets;[513] drastically diminish the chances of attacker being caught;[514] elude existing defense systems because they are dynamic;[515] Do not work in the case of already infected devices;[516] suffer from lack of real-time application;[517] compromise on computational power and increases complexity while tackling big data-sets;[518] highly Scalable;[519] do not produce better results unless systems are used across various service providers and data-sets are given carefully;[520] give high false positives in eccentric traffic circumstances and to gigantic variations in network traffic behavior;[521] be highly inefficient and inaccurate in big data-sets;[522] are either still in their nascent stage of development and/or not yet tried and tested in the evolving world of DDoS

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[511] Abdul Razzaq and Ali Hur, 'Cyber Security: Threats, Reasons, Challenges, Methodologies And State Of The Art Solutions For Industrial Applications - IEEE Conference Publication' (*Ieeexplore.ieee.org*, 2013) <https://ieeexplore.ieee.org/document/6513420/> accessed 26 April 2020.

[512] Ankur Lohachab and Bidhan Karambir, 'Critical Analysis Of Ddos—An Emerging Security Threat Over Iot Networks' (2018) 3 Journal of Communications and Information Networks.

[513] Jelena Mirkovic and Peter Reiher, 'A Taxonomy Of Ddos Attack And Ddos Defense Mechanisms' (2004) 34 ACM SIGCOMM Computer Communication Review. See also William R Cheswick and Steven M Bellovin, *Firewalls And Internet Security* (Addison-Wesley 1998) for firewalls; Y Bai and H Kobayashi, 'Intrusion Detection Systems: Technology And Development', *International Conference on Advanced Information Networking and Applications* (IEEE 2003) for Intrusion Detection Systems and access control lists in routers

[514] B. Harris and R. Hunt, 'TCP/IP Security Threats And Attack Methods' (1999) 22 Computer Communications. (For IP spoofing)

[515] G. Carl and others, 'Denial-Of-Service Attack-Detection Techniques' (2006) 10 IEEE Internet Computing.

[516] Chen Cao and others, 'Hey, You, Keep Away From My Device: Remotely Implanting A Virus Expeller To Defeat Mirai On Iot Devices' (*NASA/ADS*, 2017) <http://adsabs.harvard.edu/abs/2017arXiv170605779C> accessed 27 April 2020 (For Remote Insertion of Virus Expeller)

[517] J.A. Jerkins, 'Motivating A Market Or Regulatory Solution To Iot Insecurity With The Mirai Botnet Code - IEEE Conference Publication' (*Ieeexplore.ieee.org*, 2017) <https://ieeexplore.ieee.org/document/7868464/> accessed 27 April 2020. (For Code Modification)

[518] Omar Y. Al-Jarrah and others, 'Data Randomization And Cluster-Based Partitioning For Botnet Intrusion Detection' (2016) 46 IEEE Transactions on Cybernetics. (For Machine Learning Based Traffic-Intrusion Detection System that is built on RDPLM)

[519] Natarajan Venkatachalam and R. Anitha, 'A Multi-Feature Approach To Detect Stegobot: A Covert Multimedia Social Network Botnet' (2016) 76 Multimedia Tools and Applications. (For Analysis of Social Networking Accounts); see also V. Natarajan, and S. Sheen, 'Detection Of Stegobot | Proceedings Of The First International Conference On Security Of Internet Of Things' (*Dl.acm.org*, 2012) <https://dl.acm.org/doi/10.1145/2490428.2490433> accessed 27 April 2020. (For Image Entropy Analysis[519] to detect Stego-bots)

[520] Christian Dietz and others, 'How To Achieve Early Botnet Detection At The Provider Level?' (*Springer*, 2016). (For Behavioural Study of DNS Registrations to deal with the growing threat of botnets)

[521] David Zhao and others, 'Botnet Detection Based On Traffic Behavior Analysis And Flow Intervals' (2013) 39 Computers & Security. (For Traffic Behavioural Analysis)

[522] A. J. Alzahrani and A. Ghorbani, 'SMS Mobile Botnet Detection Using A Multi-Agent System | Proceedings Of The 1St International Workshop On Agents And Cybersecurity' (*Dl.acm.org*, 2014) <https://dl.acm.org/doi/10.1145/2602945.2602950> accessed 27 April 2020. (For Signature and Anomaly Based SMS Mobile Botnet Detection)

attacks and may thus only be theoretically effective.[523] Given that traffic threshold may contrast for every application, the solutions and their mechanisms do not cater to this.[524]

2. Legal and Policy Initiatives

Generally, establishing effective policy and legal measures for these threats have been tough because of geopolitical and jurisdictional issues. Countries differ in terms of development and cyber security/crime laws. Universal enforcement measures progress difficultly in the presence of different cultural, political, moral and constitutional convictions among nations, and anonymity causes investigative and prosecution issues. A complex structure of policy and legal enforcement would require public asset sharing by government and the private entities like infrastructure, and company protection which are very hard to achieve given lack of solid international co-operation. While the co-operation is only moving forward, it currently lacks force because of the diversity in stages of preparedness of nations in cyber threat combat. When it comes to jurisdictional issues, the issue of attribution is a big problem. However, legal and policy initiatives have an important role to play because without guidelines on grouping, design and assemblage of smart communities and homes, proprietary standards thrive, forming unusually dynamic networks where security cannot be promised and privacy can be compromised[525]. Their absence can also evolve tiny problems into something dangerous; practices like quick release in markets and cost minimization that are not prohibited but imply security deficiencies, at least by design.[526] Assuming that improving software would be more cost effective than developing external defenses, the need would be to find means by which developers may be stimulated to observe secure design standards and actively innovate. One different way of doing this was found to be suing vendors for negligently forming unreasonable risk of harm, which would aid in preventing and reducing harm by malicious code and DDoS, for example.[527] The presence of a comprehensive legal and policy framework will increase consumer confidence in online businesses. Laws that make these threats illegal like The Computer Misuse Act 1990 that makes DDoS, supply, making or obtaining booter services to facilitate such attacks illegal, do exist and so do establishments like APWG phishing attack repository of e-mail fraud and phishing activity. However, what not all nations might not have laws and regulations on these specific threats and the implied absence of strict penalties. Also, developing e-policies to smooth the diffusion of ecommerce to rural areas and boost partnerships, investments with many stakeholders outside their borders is necessary in addition to a mass of soft resources like establishing national policies on information sector. Threats being of a cross-bordered nature, require jurisdictional hurdles and policy approaches to be more flexible and this includes provisions and policy practices that cover[528]:

- Extradition, restitution remedies to victims;
- National and state-law provisions for co-operation, information sharing and joint investigative practices with foreign enforcement agencies;
- Skill development and training courses for law enforcement agencies, especially for underdeveloped nations;
- Secondary liability on parties like financial and technology institutions and ISPs for their adaption to dynamicity of these threats;
- Right balance between fundamental, human rights and law enforcement interests; and
- Consumer education and awareness programs.

A policy that fits all instances will never exist, but policy based on some deep considerations will help. It must- reflecting an inclusive, open and transparent process, support global interoperability, address dynamic environment and of

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[523] See Shing-Han Li and others, 'A Network Behavior-Based Botnet Detection Mechanism Using PSO And K-Means' (2015) 6 ACM Transactions on Management Information Systems; Y. Lu and M. Wang, 'An Easy Defense Mechanism Against Botnet-Based DDos Flooding Attack Originated In SDN Environment Using Sflow | Proceedings Of The 11Th International Conference On Future Internet Technologies' (*Dl.acm.org*, 2016) <https://dl.acm.org/citation.cfm?id=2935674> accessed 27 April 2020; Jonghoon Kwon and others, 'Psybog: A Scalable Botnet Detection Method For Large-Scale DNS Traffic' (2016) 97 Computer Networks; J. Liu and others, 'FL-GUARD | Proceedings Of The 2017 International Conference On Cryptography, Security And Privacy' (*Dl.acm.org*, 2017) <https://dl.acm.org/doi/10.1145/3058060.3058074> accessed 27 April 2020. (For Particle Swarm Optimization and K-means; S-Flow Technology; Power Spectrum Analysis; and Floodlight-Based Guard System respectively)

[524] Narmeen Zakaria Bawany, Jawwad A. Shamsi and Khaled Salah, 'Ddos Attack Detection And Mitigation Using SDN: Methods, Practices, And Solutions' (2017) 42 Arabian Journal for Science and Engineering.

[525] I.F. Akyildiz and others, 'A Survey On Sensor Networks' (2002) 40 IEEE Communications Magazine.

[526]'Igniting Growth In Consumer Technology' (*Accenture*, 2016) <https://www.accenture.com/_acnmedia/PDF3/Accenture-Igniting-Growth-in-ConsumerTechnology.pdf> accessed 11 May 2020.

[527] Jennifer A. Chandler, 'Security In Cyberspace: Combatting Distributed Denial Of Service Attacks' (*Papers.ssrn.com*, 2004) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=596667> accessed 27 April 2020.

[528] Fawzia Cassim, 'Addressing The Spectre Of Phishing: Are Adequate Measures In Place To Protect Victims Of Phishing?' (*Uir.unisa.ac.za*, 2012) <http://uir.unisa.ac.za/handle/10500/21723> accessed 27 April 2020.

information sharing, adequately define roles of stakeholders, embraces standards developed globally, be measured by given metrics and be consistent with human and fundamental rights and do impact assessment reviews. Monolithic solutions should be avoided as far as possible because of their tendency to be larger than issues they seek to solve and they immunize proportionality, the use proper effective assessment, and impact on rights.[529] The IoT ecosystem depends on educated end-users in a game changing way. It might be simple initially, but given that ever growing operational environment, the risks are magnified.[530] Law enforcement lacks resources on these two threats- investigation and prosecution are very costly. Especially with the presence of dual criminality doctrine that prevents extradition.[531] The cases are also mostly never reported by victims, and the ones that are, leave the victims "very dissatisfied" with response.[532] Legislators choose to focus on harder penalties and specialized laws instead of training for enforcement agents and increasing resources, which do not deter crimes that already have perhaps have a 15 year sentence. Phishers, also, do not believe they will be caught and strict laws will perhaps lead to 'false guilty pleas', sophisticated criminals cover their tracks much better and longer sentences will be disproportionate to those who actually get caught. Most phishing laws need proof of a measurable loss to victim and so take effect after the harm has happened.[533] It will be too late by the time the victim realizes and reports it. The integrity of the internet is threatened. Within the governance spear, security program management is at the forefront[534]. Static security agendas will be taken down by complex IoT questions. Policies need to begin with business impact analysis, that will fix problem of a resource-famished IoT appliance not being able to adopt a policy while describing sensitive data encryption.[535] In addition to confidentiality, availability and integrity, even power and resource constraints should be taken into consideration[536]. Then, a threat analysis followed by vulnerability assessment to determine vulnerabilities being used by threats to reach which specific assets. Then, finally, action-oriented policy reports to prevent assets being actually compromised. These policies must be followed and monitored to make users aware of their existence and for their effective use.[537] There is a "positive relationship between "sense and practice" of security policies and user knowledge of policy monitoring."[538] Security programs are significant because after the governance structure dictates what needs to be done, security program will outline how's of it and so.[539]

IV. CONCLUSION

In this digital era, e-commerce continues to transform way business is conducted globally, as a proficient network for both inter and intra-organizational commercial processes. Business model and cybersecurity have a heightened importance in the success of an online business, because the users of internet are not only possible suppliers or customers but also likely severe security threats. Phishing and DDoS are the two main cybersecurity threats analyzed in this work. While Information asymmetry, layers of technology existing in association, financial, time, and personnel constraints are rampant, they are embellished by increase in the malware measure and incoherence in existing solutions. The incoherence not only plagues the technical solutions, but also when it comes to policy and legal solutions because there are diverse matters that require co-operation of various actors. However, the many advancements in the willingness of these various

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[529] Shradha Jain (n. 10)

[530] Eran Kahana, 'Rise Of The Intelligent Information Brokers: Role Of Computational Law Applications In Administering The Dynamic Cybersecurity Threat Surface In IOT' (*Scholarship.law.umn.edu*, 2018) <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1444&context=mjlst> accessed 27 April 2020.

[531] Amalie Weber, 'The Council Of Europe's Convention On Cybercrime' (*Paperity.org*, 2003) <https://paperity.org/p/81615709/the-council-of-europes-convention-on-cybercrime> accessed 27 April 2020.

[532] Federal Trade Commission Identity Theft Program Report (*Ftc.gov*, 2020) <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-identity-theft-program/synovatereport.pdf> accessed 27 April 2020.

[533] Declan McCullagh, 'Season Over For 'Phishing'?' (*CNET*, 2004) <https://www.cnet.com/news/season-over-for-phishing/> accessed 27 April 2020; Neal Kumar Katyal, 'Criminal Law In Cyberspace' [2001] SSRN Electronic Journal.

[534] Yan Chen, K. (Ram) Ramamurthy and Kuang-Wei Wen, 'Impacts Of Comprehensive Information Security Programs On Information Security Culture' (2015) 55 Journal of Computer Information Systems.; Information security governance. Information Security Technical Report.

[535] Avinash W. Kadam, 'Information Security Policy Development And Implementation' (2007) 16 Information Systems Security.

[536] 'Powering The Internet Of Things.', , *ISLPED* (ACM 2014) <https://dl.acm.org/doi/10.1145/2627369.2631644> accessed 11 May 2020.

[537] Yan Chen (n. 78)

[538]Yan Chen (n. 78)

[539] Allen Harper, 'The Impact Of Consumer Security Awareness On Adopting The Internet Of Things: A Correlational Study' (PhD, Capella University 2016).

actors to co-operate to solve the issues posed by these specific security threats, including consumer education, shows promise in the battle against these cybersecurity issues.

THE CONTINUED CRISIS OF CENTRE-STATE FINANCIAL RELATIONS IN INDIA

MANIKANDA PRABHU J[540]

Finance' is the lifeline for any human activity and government is no exception. For any form of government to perform its functions, needs finance and a system for its management. In a country like India, with vast geography, huge and diversified population and more importantly with a three-tier government with Centre, State, and Local governments, it is a challenging job to manage the finances and run the government efficiently. To tackle these aforesaid hindrances, the Constitution of India has provided with a considerable portion spread over Articles 268 to 293. There has been a tussle between the Centre and many States' specifically in the distribution of finances and the Finance Commission reports thereto. Finance Commission is a Constitutional body formed for every lustrum to suggest on the Centre-State financial relations and tax devolution to States'. The immediate trigger for this article is firstly, the 'Terms of Reference' for the Fifteenth Finance Commission indicated that it will use 2011 population census as opposed to the 1971 population census data and it introduced performance-based incentives for States' on fertility rates affecting the interests of Southern States especially, Kerala and Tamil Nadu. And, secondly, the coronavirus pandemic has scathed the issue further, because the Centre has decided to not honour its obligation to compensate the States' for the implementation of GST. Thus, there is an immediate need for the search of a constitutional answer for the problems persisting in the Centre-State financial relations and also opens up further discussions on Cooperative and Competitive federalism and such other, especially in financial matters.

I. INTRODUCTION

In a federal structure, the relationship and coordination between one tier of government and the other are of immense significance. The effective governance of a country depends upon the financial ability and stability it possesses. In simple words, 'money' is the essential ingredient of good governance.[541] Thus, the financial relationship between the tiers of the governments is a *sine qua non*-requirement for the health of this quasi-federal system. The Constitution of India has a clear scheme of Centre-State financial relations, which ranges from the demarcation of taxing powers between center and state to the establishment of a Finance Commission.[542] In a modern welfare state, both the Centre and States have a vast number of functions to perform with resources being very limited. The main source of monetary resource for any government is 'taxes' and other collection from the people such as cess, fees, borrowings etc. It is also for a fact that less than 2% of the Indian population pay income tax.[543] The taxing source for the government is small, and it is at this juncture the intergovernmental fiscal relations gains significance. It is projected to facilitate the Centre-States to carry out their responsibilities to the people in the most effective manner.[544] Owing to the ongoing coronavirus pandemic, the finances of both the Centre and State governments are in a precarious position. Yet the Centre has upper hand in mobilizing funds, and the States look forward to aids from the former. Even the measure of borrowing above the 3% limit of Gross State Domestic Product has come with tall conditions to be fulfilled by States. The conflict here arises at different levels and forms, between the centre and the states on the powers and responsibilities. Just a few years ago, the issue of the amount of tax devolution reached the limelight after the political leaders of states like Kerala, Tamil Nadu, Karnataka and Andhra Pradesh expressed their solidarity in opposing the 'Terms of Reference' published by the Fifteenth finance commission[545],

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[540]B. Com.LL. B(Hons.), 4th Tamil Nadu National Law University

[541]M.P. Jain, *Indian Constitutional Law* 643 (Justice Jasti Chelameshwar and Justice Dama Seshadri eds. Lexis Nexis, 8th ed. 2018).

[542] INDIA CONST., art. 280.

[543] Why income tax payers in India are a small and shrinking breed, *available at* //economictimes.indiatimes.com/articleshow/56929550.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Last Updated Feb 02, 2017).

[544] Inter-State Council, Report of the Punchhi Commission on Centre-State Relations, Volume III - Centre-State Financial Relations and Planning 1.2.01(March, 2010).

[545] DMK leader Stalin asks 10 non-BJP states to oppose Centre's new terms for sharing funds with states, *available at* https://scroll.in/latest/872820/dmk-leader-stalin-asks-10-non-bjp-states-to-unite-against-centres-finance-commission-clause (Last Updated Mar 21, 2018) ; Finance Commissions terms of reference a huge threat to India's federal structure: Thomas Isaac, *available at* http://www.newindianexpress.com/states/kerala/2018/apr/11/finance-commissions-terms-of-reference-a-huge-threat-to-indias-federal-structure-thomas-isaac-1799767.html (Last Updated Apr 11, 2018) ; 15th Finance Commission: Progressive states will lose heavily, says Naidu, *available at* //economictimes.indiatimes.com/articleshow/64061986.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Last Updated May 07, 2018).

which indicated the using of 2011 population census as opposed to the 1971 population census data, and it introduced performance-based incentives for States' on fertility rates affecting the interests of the South Indian states.[546] Similar protests by various stakeholders cannot be forgotten in the context of the introduction of Goods and Services Tax (*hereinafter referred* 'GST'). But it must be borne in mind that the effect and efficacy of the GST are outside the purview of the scope of this article. This article concerns with the issues and challenges in the centre-state financial relationship from a constitutional prism, for this endeavour, the issue with 'Terms of Reference' of the Fifteenth finance commission will be elaborately discussed, and the recent breakdown in GST compensation mechanism will be used as a striking illustration to suggest that gaps in the larger scheme of fiscal federalism.

II. THE PROBLEMS IN INDIAN FISCAL FEDERALISM

This Chapter intends to portray some of the past and present problems in the Centre-State financial relations, which poses a serious threat to the foundation of Indian Fiscal Federalism.

1. Constitutional Scheme

In the Indian Constitution, the legislative powers including taxation of the Centre and the States are demarcated, List I and List II with the exclusion of List III contains legislative entries on taxes.[547] The significant taxes assigned to the Centre include taxes on income other than agriculture, custom and excise duties excepting those on liquor, estate duty, terminal tax, corporation tax etc., and such for the State includes taxes on agricultural income, taxes on land and buildings, land revenue, duty on liquor etc. The division of legislative entries between the three lists have to carry a rationale *i.e.* the Centre should have control over topics of national importance such as defense and foreign relations, the States should have control over topics of regional importance such as agriculture, health and sanitation, and both the Centre and States should have control over subjects of both national and regional importance.

2. Taxation powers and Functional responsibilities

The aforesaid being on the paper, but there exists an askew between the powers given to the States and the responsibilities they possess, in clear terms, the Centre have high revenue and the States though burdened with functional responsibilities have a low revenue. Highlighting on the same lines, the First Administrative Reforms Commission has pressed on a greater financial play area for the States by realigning the institutions like 'Planning Commission of India' and the 'Finance Commission'.[548] Later the Sarkaria Commission on Centre-State relations encompassed many of the problems of the States concerning financial matters like the need for autonomy of States, the symmetry of powers and responsibilities, pay revision of the Central governments and many others.[549] The Constitutional solution for this deadlock is an institution for recommending on inter-governmental transfers *i.e.* 'Finance Commission'.[550]

3. Vertical Fiscal Imbalance

Continuing on the previous point, it is very evident that there exists a vertical fiscal imbalance between center-state; the obvious reason is that the sizeable and buoyant sources of revenue are held in the hands of the Centre but the heavier obligations lie with the states.[551] It is inferred that this idea of strong centralization in fiscal matters can be attributed to the Colonial British era, and this trend continued until the States raised their concerns over the imbalance. The 80th Constitutional amendment in the year 2000 implemented the Tenth Finance Commission's recommendation to simplify the tax structures by pooling and sharing all the taxes between states and the center, this was a relief for the States. But some stakeholder is skeptical, such as Finance Minister of Kerala, Mr. T.M. Thomas Issac, the amendment was aimed to solve the vertical fiscal imbalance between Centre and States but the surrounding factors like the cess and such other being outside the scope of the divisible pool, then by the implementation of Value-added taxes and now by the implementation of Goods and Services Tax, the Fiscal Responsibility and Budget Management Act and the State Acts thereto by creating one scale of targets for all the states irrespective of their capacity, *i.e.* 'fiscal discipline'[552], have only contributed to the already existing wide imbalance.[553] Also, more importantly, the gap in tax devolution has been in rising since the Eleventh Finance Commission, and this means that the shareable pool for intergovernmental transfers is

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[546] "Terms of Reference' of the Fifteenth Finance Commission, *available at* https://fincomindia.nic.in/ShowPDFContent.aspx (Last Visited 22-04-2019).
[547] INDIA CONST, art. 246, sch. VII.
[548] *Supra* note 543 at 2.7.01.
[549] Inter-State Council, Report of the Sarkaria Commission – Chapter X Financial Relations (October 1987).
[550] INDIA CONST, art. 246.
[551] T M Thomas Isaac, R Mohan, Lekha Chakraborty, "Challenges to Indian Fiscal Federalism" EPW Vol. LIV No. 9 33 (2019).
[552] Fiscal Responsibility and Budget Management Act, 2003 (Act no. 39 of 2003), Objects and Purposes.
[553] *Supra* note 549 at 573.

shrinking.[554] The concern that the States should be given more play area concerning fiscal matters has been conveniently overlooked by the Centre, and the responsibilities of the State' are indispensable which directly affect the people much. Thus, it can be said that the present Centre-State financial relationship is undermining the role of States and the Local governments thereto after the 73rd and 74th Constitutional amendments in the Indian federal fiscal structure.

4. Horizontal Fiscal Imbalance and Gap-filling Approach

Like Vertical imbalance (Centre to States), there exists a horizontal fiscal imbalance (States to States), this arises from the fundamental reason that each State has a particular potential to raise the revenue and correspondingly, its expenditures.[555] Any ideal Centre should strive to strike horizontal equity across the States for quality development of the country as a whole. This 'horizontal equity' justification is acceptable, but this same justification cannot be used to the utmost detriment of a particular State. Every State has their responsibilities; at least they must be able to spend to their people the money which that State has contributed. The Finance Commission of India in determining the amount of Central transfers to the States has adopted the 'Gap-filling approach' in India.[556] It essentially means that the revenue deficits incurred by the States will be compensated by proportionately by the Centre through their grants-in-aid.[557] But this approach contends that more developed States will have surpluses rather developing and least-developed States will have no surplus[558], but this is merely theoretical. In India, to name a few states which have both high Gross Domestic Product and Human Development Index are Maharashtra, Kerala, Tamil Nadu, Gujarat by a casual analysis of their respective Budgets, it is clear that there cannot be a surplus. Another viewpoint expressed is that this approach creates complacency among the States.[559] Thus, the gap-filling approach does not help mitigate the revenue deficit problem of the States. The major flaw would be the heavy reliance placed on the grants-in-aid, but a situation would lean towards the tax devolution, this is because of the high level of subjectivity in discretionary grants. The ideal solution would only be to increase the individual States' revenue generation capacity gradually, including with the assistance of the Centre and developmental institutions.

III. CONSTITUTIONAL CRISIS IN THE CENTRE-STATE FINANCIAL RELATIONSHIP

This chapter attempts to analyze the niche problem in the Indian fiscal federalism from a different viewpoint *i.e.* the Co-operative federalism.

1. Terms of Reference' to the Fifteenth Finance Commission

The Finance Commission is constituted under Article 280 of the Constitution of India for five years. It is constitutionally obligated to make the recommendations on the subjects stated in Article 280 (2) (a) and (b), and the matters referred to it by the President of India.[560] The Presidential reference to the Finance Commission is called 'Terms of Reference'.[561] The terms of reference of the Fifteenth Finance Commission for the period 2020 -2025 (Hereinafter referred as 'ToR') is problematic from many respects, and specifically, affects the interests of the Southern States'. Though the reference and final output may not always be on the same tone, it is urged that the ToR has failed to strike an optimum balance amongst the States'. Firstly, the major point of the contest which raised the concerns of the political leaders of the some States[562] is that it indicates the use of 2011 Census population figures as against the 1971 Census, but as the Southern States are quite successful in implementing the National Population Policy, 1977 it is disadvantageous for such States. This move of the Centre and Finance Commission has been supported by experts like C.K. Rangarajan and D.K. Srivastava, they urged that it is a global practice in economics to use the latest data.[563] But this can be countered on various counts, firstly, the other fiscal jurisdictions which the scholars have quoted are both economically and politically different from India, the concerns we as a Nation and individually as State possess are peculiar to a province in Canada or a canton in Swiss

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[554] *Id*. at 36.

[555] Government of India, Central Transfers to States in India: Rewarding Performance While Ensuring Equity 4 (NITI Aayog 2017).

[556] Finance Commission – A Historical perspective, *available at* https://fincomindia.nic.in/ShowContent.aspx?uid1=2&uid2=1&uid3=0&uid4=0 (Last Visited 22-04-2019).

[557] *Supra* note 549 at 10.8.42.

[558] *Ibid.*

[559] Gap -filling approach to grants-in-aid: Proven instrument of equalisation transfer, *available at* https://www.thehindubusinessline.com/2003/12/04/stories/2003120400030800.htm (Last Updated Dec 04, 2003); *Supra* note 9 at 10.8.45

[560] INDIA CONST., art. 280 (2) (c).

[561] *Supra* note 555.

[562] *Supra* note 544.

[563] Balancing Conflicting Claims, available at https://www.thehindu.com/opinion/lead/balancing-conflicting-claims/article23930522.ece (Last Updated May 19, 2018).

Confederation. Secondly, as the horizontal equity measures by the Centre and Finance Commission already working in its framework, even by using the 1971 population figures the populous States with low GDP will still be benefiting. Thirdly, till the existence of the Planning Commission of India, the application of 'Gadgil-Mukherjee' formula for the transfers under Article 275 also consisted 'Population' as a major factor thus, it will be like 'double-benefiting' the States which have failed in population control at the cost of the Southern States. Apart from the aforesaid, the ToR also mentions about the control of 'populist measures'[564] indicating the States' policies and schemes. This is a major discouragement for all the States and will only be a measure to push the Central Schemes threatening the very idea of Federalism. This ToR reflects the skeptical attitude of the Centre in fiscally empowering the States, and this has stronger repercussions like the regeneration of the local governments in India, non-incentivizing potentially performing States and misuse of the discretionary grants power of the Centre.

2. Cooperative Federalism

The idea of Cooperative federalism has always been the foundation of India, a federal country with unitary bias.[565] This essentially means that all the tiers of the government *i.e.* Centre, States and the Local governments in India coordinate and cooperate in addressing the general concerns. Healthy cooperative federalism would mean the utmost tax devolution to the States and Local Governments thereto; this provides the States to progress. But the Centre is hesitant in providing enough fiscal space to the States to fulfil the responsibilities to the people. In fiscal affairs, since Independence, a trajectory of the attitude of the Centre shows the imbalance of powers to the detriment of many States; this can be better understood from the previous part on ToR. The *a priori* on this regard should be understood symmetrically, in fiscal affairs the cooperative federalism has been heavily degenerated by the Centre and this has led to two movements in the form of federalism. Firstly, Cooperative nature has transformed into an Organic form by reducing the fiscal space of the States and high centralization of fiscal affairs. On the other hand, the Centre is consciously moving towards Competitive federalism[566], but here the position of the Centre is self-contradictory. If the Centre wants to imbibe a Competitive pattern then it must be the position favorable to some States as they are potential and quite well-performing but it is not the case the contrary is the position because it is the name of Competitive federalism imposes Organic federalism in the country.

3. Inter-state inequalities

The real issue sprouted as already mentioned with the ToR of the Fifteenth Finance Commission.[567] It is an undeniable fact that the Inter-State inequalities persist, the Eleventh Finance Commission report very particularly cornered it down, observed that the inequality among the Southern and Western States to that of the Northern States is drastic and since the era of economic reforms the Southern and Western States have attracted many private investments.[568] The fact that the horizontal equity must be achieved is never contested but such equity at the utmost disadvantage some States is claimed to be an injustice. Another side of the coin is the huge regional disparity between the States is not only tax devolution but also the discretionary grants. Since the 1977 Population policy, some other States have tremendously controlled their population but States like Uttar Pradesh and Bihar have increased the population proportionately. This is because of several factors and population control measures taken by the Central government and various other state governments. To put it empirically, by using the 2011 population figures, Andhra Pradesh will be losing around 24,000 crores, Kerala by 20,000, Tamil Nadu by 22,000 crores but on the other hand, Uttar Pradesh and Rajasthan will be gaining 35,000 and 25,000 crores respectively (figures approximately).[569] In the divisible pool of taxes for intergovernmental transfers, the States like Uttar Pradesh and Bihar will be gaining disproportionately to the exclusion of some other States. Thus, it is well agreed that the inequalities amongst the States must reduce, but achieving this at the detriment of some other States would be an injustice.

4. GST Compensation crisis

This is the most recent macro-economic issue and federal issue which the Country is facing owing to the Coronavirus pandemic. It is a common knowledge that the Country was in some form of standstill for more than four months, with the economy falling at historic levels. This GST compensation crisis cannot be viewed in isolation, even though its immediate cause was un-disputably the ongoing pandemic. This is an extension of the various problems in the Centre-State financial

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[564] *Supra* note 545.
[565] S.R. Bommai v. Union of India, AIR 1994 SC 1918.
[566] *Supra* note 555.
[567] *Supra* note 546.
[568] Planning Commission of India, Eleventh Five-Year Plan 2007-2012 Volume I - Inclusive Growth 140; *Supra* note 4 at 3.10.
[569] V. Bhaskar, "Challenges before the Fifteenth Finance Commission" EPW Vol. 53 no. 10 (2018); Why South Indian states are objecting to Finance Commission's mandate, *available at* https://www.livemint.com/Politics/YeTLbFIBK7aq5k4SqrnUMP/Why-South-India-states-are-objecting-to-Finance-Commissions.html (Last Updated March 30, 2018).

relationship, especially in the post-GST era. Here, the attempt is only to argue a case that there are fundamental gaps in the fiscal federal structure, and GST compensation issue is only used as an illustrative tool to support the argument. In the GST regime, both the Centre and States have given up their power to levy certain indirect taxes in return for the uniform and collective levy through the GST Council.[570] By Section 18 of The Constitution (One Hundred and First Amendment) Act, 2016 and Goods and Services Tax (Compensation to States) Act, 2017, the Centre is mandated to compensate the States for their revenue loss due to the implementation of GST regime for five years. The proceeds of a Cess under Section 9 of the Act, the States will be compensated proportionate to their revenue loss, subject to Section 3 of the Act. Owing to the pandemic, there was a drastic fall in the GST collection (Y-o-Y), consequently also the compensation cess. The Central Government has shaken hands off the issue, by giving two options to the States, both of which are like borrowing by the States. This presents a hybrid problem in not only the Constitutional and statutory scheme of GST regime but also the larger issues of the efficacy of the 14 per cent projected growth, voting pattern in GST Council and the effects on States' revenue generation capacity.

IV. CONCLUSION

The significance of effective fiscal machinery is immense. Optimistically, in this seven decades, there has not been a promulgation financial emergency, the way we recovered from the 1991 crisis and management of the 2008 international crisis is itself a great financial success and shows that the existing fiscal problems in India are not irreparable and if rectified, we shall move in a healthy direction. In the context of the Centre-State financial problems, it is worth quoting K. C. Wheare, an Australian Constitutional expert, "There is and can be no final solution to the allocation of financial resources in a federal system. There can only be adjustments and reallocation in light of changing conditions".[571] There is indeed no straight jacket and static solutions to the financial problems but the most ideal of such reallocation should be practiced, at least at the end, all these aims at the 'welfare' of the people. The author concludes this open-ended discussion in the following manner. Firstly, the Centre-State financial relations involve the Centre, Finance Commission and such other institutions, and the States. But often the States' voices are not reflected properly, and the bigger problem is the centralization attitude which is prevailing in the Indian fiscal federal system. Thus, there exists a deficiency in Indian fiscal federalism, and the existing imbalance itself is the corroboration. Secondly, there are vertical and horizontal imbalances in multiple levels of this federal structure and pertinently, the inequalities amongst the States' are a matter of growing concern. Dr Thomas Issac, Finance Minister, Government of Kerala had observed that "While the centre of gravity of the economy has moved south, the centre of gravity of politics has moved north. I don't know if this balance will change".[572] Though it is difficult to concur in the fullest sense the aforesaid observation, it cannot be slightly ignored. There is some substance of merit in the Minister's proposition. It must also be appreciated that the country as a whole is under-performing in its tax potential, especially the direct tax regime. Besides, the importance of the local government must not be undermined and the development of a country must start from the grass-root level. The domination of the Centre in the GST council must also be relaxed to give way to be able to give voice to the States. *Thirdly*, the ToR only reflects the organic attitude of the Centre, discarding both the cooperative and competitive federalism.

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[570] INDIA CONST, art. 279A.

[571] K.C. Wheare, *Federal Government* 117 (Oxford University Press 1963).

[572] What the south wants in a changing India, *available at* https://www.thehindu.com/news/national/what-the-south-wants-in-a-changing-india/article26231134.ece (Last Updated February 11, 2019).

THE EFFECT OF BREXIT ON ENVIRONMENTAL LAW IN THE UNITED KINGDOM

AYUSH MISHRA [573]

ABSTRACT

The United Kingdom formally left the European Union on 31st January, 2020 at 11pm. This exit of UK from EU (Popularly known as Brexit) has given rise to an avalanche of legal and political challenges across various domains viz. trade, security, policy, international law, bureaucratic relations et cetera. The scope of this paper, however, would be limited to understanding and analyzing the challenges and opportunities that Brexit presents for UK environment law in the immediate future and to its long-term development, given that most of UK's domestic environment law had been majorly influenced by its membership of the European Union. In the interest of certainty in administration, business and governance, the UK Government's policy for the immediate future upon Brexit has been to "roll over" much of the substantive European Union Environment laws. There also exists an implicit acknowledgement of the fact that in the long term, the UK will not only have to frame its own rules and laws, but will also have to work meticulously to replicate the EU environmental architecture that would be consistent with those newly formed laws and regulations. However, this mammoth task does open up a Pandora's box of legal anomalies, dichotomies and complexities. This paper attempts to discuss exactly such probable challenges in the domain of environment law for UK.

I. UNDERSTANDING THE INFLUENCE OF EUROPEAN UNION ENVIRONMENT LAW ON THE DOMESTIC LAW OF UNITED KINGDOM

The policy and national law of the United Kingdom, much like other European Union Member States has been under heavy influence of the environment legislations of the EU for over three decades. This membership has not only impacted the substance of the environment law of UK, but has also caused extensive alterations in the character and style.[574] For instance, before the membership of EU, the UK environment law (although it was present right from the 19th century) did not explicitly specify its policy goals and it left it to the discretion of the government. The law had in place comprehensive strict procedural requirements (say to obtain a license for mining) but the regulatory bodies often had all the discretion to set the thresholds of limits of various standards (like pollution, emission, waste treatment, toxic effluents standards etc.). This determination had to happen in agreement with the policy guidelines prepared by the government and under the framework of the national environment law. However, upon becoming a member of the EU, these fundamental characteristics of the UK environmental legislation were substantially altered by the requirement of implementing the specified standards under the EU Environment law. This meant removal of discretion of national regulatory bodies and permeation of EU policy goals, EU standard emission rates and EU target obligations into the UK environmental law. To illustrate this, one can take the example of consumable water standards. For a good amount of time, UK maintained its standard for drinking water in national law to be of providing "wholesome water"[575]. At the ground level, the authorities distributing water would use WHO and other international standards to give a favourable and relaxed meaning to the term "wholesome water". However, post 1980, the national law of UK now incorporates the Drinking water Directive of EC[576] and implements strict standards for drinking water as laid out in the EU directive.[577] What one needs to understand here is that, as time passed by, these new characteristics and attributes of the EU law become so embedded in the national law of UK, that it is highly improbable for any return to the pre-membership style of law.

II. DECODING THE EUROPEAN UNION (WITHDRAWAL) ACT OF 2018

1. THE ROLLING OVER OF EU LAW IN UK

To avoid uncertainty in regulation, the Government has framed its policy in such a manner that, to the extent possible, EU laws would be "rolled-over" upon Brexit. Therefore, it can be affirmatively said that much of the substance of the national environmental legislation would not be subjected to an immediate change. To provide various stakeholders and

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[573] Advocate at Hon'ble High Court of Allahabad and an alumnus of the NALSAR University of Law, Hyderabad, India.

[574] Macrory, R., Law, E.: Shifting discretions and the new formalism. In: Lomas, O. (ed.) Frontiers of Environmental Law, pp. 8–23. Chancery Law, London (1991).

[575] §115 Public Health Act, 1936.

[576] [1998] OJ L 330/32.

[577] The latest standards are reflected in Water Supply Regulation 2016/614.

businesses with utmost certainty upon Brexit[578], the Government White Paper (GWP) had stated in 2017 that it would be ensured by the Great Repeal Bill that the entire corpus of the prevailing EU environment law continues to be in effect in national domain. To fulfil this objective, the concept of "retained European Union law" has been introduced by the European Union (Withdrawal) Act 2018 (hereinafter referred to as the EUWA), by virtue of which, any European Union regulation or decision that was addressed to United Kingdom and which was in operation prior to the exit date of UK from EU, will still continue to be a component of national UK law. In a similar manner, any UK law that implemented EU directives and was derived from EU would continue to be operative. Additionally, the principle of supremacy of EU law would apply to any law made prior to the Brexit.[579] In a situation of conflict between the pre-existing UK law and any EU environment regulation executed before the date the exit, the latter shall prevail. However, this supremacy principle is only limited to laws made before the exit date,[580] thereby providing for the possibility that the parliament may amend legislations in times to come (although such changes would be subject to the agreement between UK and EU). As for the long-term goal, the GWP had stated that post Brexit, the government will eventually have the opportunity to make an outcome-oriented frame of legislation that would help them achieve their goal of improving environment within the lifespan of a generation.[581] Owing to the fact that only the national legislation will continue to have effect post Brexit, the EU directives would lack any independent legal status in the eyes of law. This step is potentially problematic because in situations where the UK legislature has not accurately transposed a specific directive into its domestic law, the courts now would lack any authority to interpret such law in light of the directive. Moreover, unless there has been a particular case on the same issue before Brexit in either the national court of UK or the Court of Justice of EU, the application of the 'direct effect' doctrine would not be possible as the EUWA states that all rights that arouse from EU directives will fail to have effect post Brexit, unless they were specifically endorsed and recognized by the CJEU or any domestic UK court prior to the date of exit.[582]

2. ACCLIMATIZING THE RETAINED AND ROLLER OVER LAW IN DOMESTIC LAW

The EUWA has made provisions for the rolling over of EU environmental laws in the immediate post-Brexit timeline. However, it is important to note that not all laws would be amenable to a swift roll over. Cases in point could be EU regulation of chemicals (REACH)[583] and EU emission trading regime for greenhouse gases[584] wherein the substantive law is so intricately and inseparably wrapped together with the European Union legislations and directives that a mere roll over would not be possible unless and until specific arrangements are made with the European Union. Another issue in the regard stems from the fact that a huge number of domestic environment laws in UK incorporate cross-references to European Union Law. For instance, a waste battery has been defined by the Environmental Permitting Regulation,2016 as having the same meaning laid down in Art. 3(7) of the EU Batteries Directive and excludes waste which does not find mention in Art. 2(2) of the same directive.[585] However, it must be noted that merely because no directive will have any legal standing in post Brexit UK, it does not mean that the cross-references to definitions in European Union legislations cannot be continued in domestic law. Sustaining this system would exactly be like having a reference to a definition in an international document (for instance the OECD definitions). Having said this, there does exist a need to amend such laws that lay down any requirement for UK to consult or notify the European Commission as no such requirement could be sustained post Brexit. These references could be substituted with consultation requirement with another body, for instance the Secretary of State. Therefore, we see that even in the substance of most of the laws remain unchanged, there will still have to be numerous detailed amendments that would focus on technical aspects of law to enable the retained EU law to operate post Brexit. To comprehend things in perspective, it can be noted that the government in 2017 stated that there are close to 850 legislations that dealt with environment, food and rural affairs would require amendment. Out of these 850, around 210 legislations were concerning environment law.[586] Now to make such detailed amendments in a time bound manner, at such a large scale and without over-burdening the parliament, the EUWA confers broad powers to

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[578] Department for Exiting the European Union: Legislating for the United Kingdom's Withdrawal from the European Union. Cm 9446. HM Government, London (2017).
[579] §5(2) of EUWA.
[580] §5(1) of EUWA.
[581] *Supra* n.577.
[582] §4(2) of EUWA.
[583] Regulation 1907/2006/EC.
[584] Directive 2003/87/EC and 96/61/EC [2003] OJ L 275/32.
[585] Regulation 2 of Environmental Permitting Regulation, 2016.
[586] The total number of environmental regulations would be higher than this as this number does not include legislations that fall out of the ambit of Department of Environment, Food and Rural Affairs.

make regulations considered '*appropriate to prevent, remedy or mitigate—(a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU.*'[587] "Deficiency" is further explained to comprise any European Union law which has been retained and has no pragmatic utility with respect to UK or the law is partially or in its entirety redundant. Obviously, the scope of such wide discretions caused unrest in the parliament and therefore it was assured that only such failure or deficiency could be amended that arose out of Brexit and not any failure or deficiency or inconvenience that the ruling government is not in favour of.[588] Moreover, another hurdle in the amendment process was that these refences were present not only in national regulations but also national legislations and an act of the parliament can only be amendment by another act of the parliament and not some regulatory authority. However, owing to the peculiar situation and in the absence of such mammoth amount of parliamentary time to amend such a large number of acts, Section 8 of the EUWA (*Henry VIII clause*[589]) permitted the regulations to override not only other regulations but also the national legislations. Although limited in their scope, comparable powers have previously been given by legislations. In this case, because of the potential scale of amendments and the wide spread of such powers, many political concerns were raised. However, UK Environmental Law Association has conducted a recent study according to which the number of legislations that require amendment are much less than the number of regulations that would require changes (17 out of 29 acts required no change and in the rest 12 there were 6 mandatory changes and 30 advisable ones).[590]

3. Binding Authority of the Court of Justice of the European Union

Another conundrum that remains post Brexit is related to the legal standing of the rulings of the CJEU. It is now clear that Neither CJEU's decisions will be binding upon UK courts post Brexit, nor will the UK courts retain their power to make references to the Court of Justice of EU. However, in cases where the CJEU is dealing with or interpreting any particular phrase of term that also finds mention in the corpus of the retained EU law, the national courts in those cases have regard to such ruling but will not be bound by them. To further maintain regulatory certainty, the EUWA provides that the lower courts would still be bound by the rulings of CJEU made before the day of exit, and to incorporate flexibility in this system, the act provides only the Supreme Court with the power to depart from such rulings. This departure, the act maintains, must be consistent with UK's own tradition of scarcely deviating from its former rulings.[591] For instance, the CJEU in *People over Wind & Sweetman vs Collite*,[592] held that when one is to assess the potential environmental impacts of a project under the Habitats Directive[593], one cannot take into account the mitigation measures. This decision of CJEU is in stark contradistinction to UK's domestic court's decisions on the same point. Upon Brexit, the lower courts would still be bound by this decision of the CJEU by virtue of the EUWA and only the Supreme Court will have the power to depart from this ruling. The legislature would also in this respect be equipped with the power to even change such laws and this power will only be subject to the withdrawal agreement between the UK and EU.

III. INCORPORATING GENERAL ENVIRONMENTAL PRINCIPLES IN NATIONAL LAW

The EUWA provides that if some principles of EU law were identified as general principles by the CJEU prior to the date of exit, then the retained EU law would be interpreted in light of such "retained general principles of EU environment law". Having said this, the act explicitly excludes the Charter of Fundamental Rights from domestic UK law and makes extinct the right to claim any damage under the rule of *Francovich* upon Brexit. Moreover, the environmental Principles laid down in Article 191 of Treaty on the Functioning of the European Union will not be considered general environmental law principles. Such principles are usually present in the preambles of the various directives and therefore might get excluded because only the substance of such directives would be transposed to internal UK law. However, this would not result in complete exclusion of such principles as *firstly*, the retained EU law would include these directives and these directives would inevitable include their preambles and *secondly*, as mentioned in the previous section, the decisions of the CJEU which deal with the interpretation of such principles would still continue to have binding effect upon the lower courts by virtue of the EUWA. UK domestic laws have not commonly incorporated these general principles and after the exclusion of the authority of CJEU, these principles will not play any role in judicial review cases of UK where the

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[587] §8(1) EUWA.
[588] For instance, the government cannot use this power to amend the strict requirements of the Habitats Directive ([1992] OJ L 206/7) which is a big hurdle in the eyes of the government.
[589] Under the Statute of Proclamations 1539, extensive powers were conferred upon Henry VIII and this clause is named after him.
[590] UK Environmental Law Association: Brexit, Henry VIII Clauses and Environmental Law. UKELA, London (2017)
[591] [2010] UKSC 28.
[592] EU:C: 2018:244.
[593] Regulations 2017/1012.

decisions of the public bodies or the government are challenged.[594] Nevertheless, some general principles like the precautionary principle have been put to use by government enforcers in peculiar water abstraction license matters.[595] Upon realizing the usefulness of these general principles post Brexit, the government in 2018 released a consultation paper on the role of these principles in domestic governance post Brexit.[596] The paper argued that it would be in the interest of UK to root their environmental policy and regulations in a clearly demarcated set of governing principles.[597] However, the paper wantonly left crucial questions open for discussion, for instance, which environmental principles are to be inducted into national policy and should these principles be laid down in mere policy statements and regulations or should be included in parliament legislations? Upon the conclusion of the consultation, few environmental NGOs initiated an amendment to include the EU general principles into the body of UK law and this was passed by the House of Lords. Recognizing the political support behind the cause, the government brought in a counter amendment that was soon supported by the House of Commons.[598] This new amendment laid down that the general principles be inducted in the laws, but at the same time it conferred upon the government a certain discretion via-a-vis the role that they would occupy in times to come. The EUWA lays down that within six months of the act coming into force, the government has to publish an environment bill[599] which must include some general principles like the precautionary principle, polluters pay principle, sustainable development principle etc. There is also space for other principles to be added in future[600], like the one being suggested currently: The Non-Regression Principle. §16 does put a dual duty upon the Secretary of State, *firstly*, to present a policy statement vis-à-vis the interpretation and application of the abovementioned principles to the formulation of government policy and secondly to make sure that the ministers place due regard to these general environmental principles in situations that the bill provides for. This, however, does leave substantial leeway for the government and they are expected to fortify these requirements through the parliament in future. Illustratively, there is pressure to cement the phrase "have regard to" because this in its current form does not refer to its indispensability and other NGOs and stakeholders have also argued for the application of these principles not just to the central government but also to all the public bodies that make environment related decisions.

IV. NEED FOR A NEW ENFORCEMENT BODY POST BREXIT

The EC possesses certain enforcement powers (drawn from Article 258 of TFEU) that they use to make sure that the member states follow the EU obligations. Obligations other than environment related ones do not need much enforcement from the EC because their the states themselves have vested legal, and financial interest to follow the EU regulations. However, when it comes to environment protection measures, the states require certain enforcement because of the absence of clear rights and private interest in the environment.[601] Certain conflicting policies of the member states along with economic constraints make the environment really vulnerable at the hands of just the state governments. Internal NGOs and stakeholder groups do have the ability to argue for the protection of environment by the member states but they could not be left alone to deal with this mammoth task. Therefore, the European Commission itself enforces the EU regulations related to environment upon the member states. It also makes sure that the directives of EU are adequately transposed into domestic law of member states. It understands any breach by even a local authority as a breach by that state and a breach by any state is seen as a breach of EU responsibilities. A substantial part of the EUWA deals with the roll over aspect of EU law, but what should be noted here is that upon the exit of UK, the EC will cease to have any supervisory authority over UK. This gap in the governance[602] needs to be addressed and the prima facie alternative that the government suggested is that the National Judiciary and the present judicial review system would be adept to deal with this situation as the courts have now increasingly adopted a liberal stance in environment related matters. However, it is pertinent to note here that any violation was resolved by the EU through discussions and negotiations, but once the

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[594] Macrory, R., Thornton, J.: Environmental principles—will they have a role after Brexit? J. Plann. Environ. Law 2017(9), 907–913 (2017)
[595] *Ibid.*
[596] Department for Environment Food and Rural Affairs: Environmental Principles and Governance After the United Kingdom Leaves the European Union Consultation Document May 2018. DEFRA, London (2018)
[597] *Ibid.*
[598] The House of Lords withdrew their amendment.
[599] §16 of EUWA
[600] *Ibid.*
[601] European Commission: Monitoring the application of European Union law. 2105 Annual Report COM (2016) 463 final
[602] House of Lords European Union Committee: Brexit: environment and climate change 12th report of session 2017–2017 14 Feb. 2017 HL Paper 109. UK Parliament, London (2017)

courts come into the picture, the judicial reviews become resource intensive, time consuming, over-technical and expensive. Owing to this, the total cost rises up (especially when the losing side must pay the legal cost of the winning side).[603] Therefore, it was decided that this method is ill-suited to resolve such environmental issues. To remedy this situation, the new Secretary of State proposed a creation of a new National Independent Body (like the ones created under the Equality Act of 2006) that would replace the role of the EC. However, the issue with this arose with respect to the degree of power allotted to the body. Should it be only an advisory body or should it be empowered enough to take legal action against the government if the latter fails in its obligations? This question created a politically volatile situation, but it was decided in the end (upon the passing of the strengthening amendment by the House of Lords) that the powers of the body must include power to legally proceed against the government and not just passing advisory notices. However, the problems do not end here. §16 of the EUWA empowers the independent body to proceed only against the central government and not against the local governments and public bodies involved.[604] So, either the powers of the commission need to be extended to have such local authorities under their supervision, or they could adopt the model of the EU that a violation by the local body would be considered a violation by the Central Government itself. The UKELA believes that the latter is a better model as it will not allow the central government to circumvent liability by blaming the local administration.[605] Also, because the commission itself would be very selective in its approach and tackle the immediately harmful and pertinent cases, it has been widely suggested that it must deal with the central government only for effective and efficient redressal, even if the central government was not involved in the breach. Another debatable issue here is with respect to the power of the Courts in cases of non-compliance by the government. Erstwhile, if the government did not comply with any judgement of the CJEU, the court could impose financial penalties on the government under Art.259 of TFEU. Although the new national body would attempt to resolve the problems without the need of going to legal corridors, but the fact that there exists this possibility of non-compliance makes the need for such penalty provision eminent. Moreover, if one decides to go ahead with the penalty scheme, there would be a need to ring-fence the amount of penalty in some way otherwise the government could easily recycle it and get it back. However, arguments have also been made with respect to the fact that there is no need for this penalty system because non-compliance with the court orders is in itself the contempt of court and the courts are more the equipped to deal with such contempt. Lastly, the jurisdiction of the new body is also under question as it is just limited to England. Scotland, Northern Ireland and Wales deal with their own environment matters and unless the agreement between UK and EU says otherwise, England will not have the authority to extend the jurisdiction of the new body to such states. A propose solution is to have similar bodies in each state, but then the outcome of it is heavily dependent upon the relationships of the states with England and the current status of such relationship, for instance between UK and Scotland, make it really difficult to see how the states would come to an agreement on this issue.[606]

V. RELATIONSHIP OF UK WITH ENVIRONMENTAL CO-OPERATIVE BODIES OF EUROPEAN UNION

A recent report of the UKELA found that there are 13 official networks and cooperative bodies (like European Chemical Agency and European Environment Agency) and 5 independent bodies (like European Network of Prosecutors for the Environment and EU Forum for Judge of the Environment) that have developed in Europe over the past three decades.[607] Post Brexit, the relationship of UK with these organizations remains a matter of uncertainty. *Firstly*, there are different rules vis-à-vis membership of a non-member state in different organizations. For instance, a non-member state cannot be a member of the European IPPC Bureau[608] while it can be a member of the EEA.[609] However, by continuing to be a member of such bodies, not only will UK have to come to an agreement with the EU for this membership, it will also have to accept the Jurisdiction of the CJEU with respect to the matters/liabilities of the organization. *Secondly*, it is also a question of fact that whether continuing to be a member of such bodies in indeed in the interest of UK? The government white paper (2018) suggests that it is indeed beneficial for UK to continue to be a member of such bodies despite not being a member of the EU. However, it really becomes difficult to be a member with the present rules that often deny

[603] Part 45 of the Civil Procedure Rules.
[604] §16(d) EUWA.
[605] UK Environmental Law Association: UKEL A's response to the environmental principles and governance consultation (July 2018).
[606] Scottish Roundtable on Environment and Climate Change: Environmental Governance in Scotland on the UK's Withdrawal from the EU. Scottish Government, Edinburgh (2018).
[607] UK Environmental Law Association: Brexit and Environmental Law the UK and European Cooperation Bodies. UKELA, London (2017).
[608] [2019] OJ L 126/13.
[609] [2011] OJ C 146/3.

membership rights to the non-member states. Therefore, it is proposed that UK must seek amendment of the applicable and pertinent rules to remain a member, or advocate for an observer status through bureaucratic arrangements. UK will be expected to do this as it has expressed its desire to be a member of the ECA, European Medicines Agency and the European Aviation Safety Agency even in post Brexit world order. However, it will have to extend its acceptance to the rules of these agencies along with sharing the burden of its working cost[610], if at all any final agreement if reached between EU and UK about the membership status of non-EU member states.

VI. UK'S INTERNATIONAL TREATY OBLIGATIONS POST BREXIT

More than 40 international environment treaties have been ratified by the United Kingdom and its commitment to them post Brexit remains a matter of concern. Broadly speaking, these treatises could be classified into three categories. In the first category, there are treatise that were ratified by the UK in their own competence and EU had nothing to do with this ratification. An example of this would be the International Whaling convention of 1946. Obligations from this category of treaties would obviously continue to exist post Brexit. In the second category would come treaties like the ones in fishing domain, wherein the formal treaty was signed and ratified by the EU and it was because of this arrangement that the member states were bound by it. In this category, the UK will have to make its decisions on which treaties it wants to continue and then it would individually ratify it if it intends to be bound by it post Brexit. Nevertheless, most of the treatise fall under the third category, where both the EU and UK had shared competence and they signed in mixed agreements for the treaties. The legal standing of the obligations arising from these treaties is heavily debated. Some authors have argued that UK will not be bound by these treaties post Brexit, unless it individually ratifies them again on its own accord.[611] However, another argument that has dominated the discussion in this respect rejects this analysis and claims that upon Brexit, the competence formerly held by EU gets transferred to UK automatically and now UK assumes competence and is automatically bound to the treaties. Only plain notice to the relevant secretariat notifying that UK has now taken over the responsibilities of the treaty is required and no further ratification is necessary. Perhaps the latter view is more convincing, but the formal position of UK vis-à-vis such bureaucratic and legal technicalities has not been made clear. However, even if we assume that the UK chooses to be bound by all such environment treaties which were formerly ratified by it in any form, the legal complexity surrounding such treaties would still not conclude. Let us take the example of the Basel Convention[612] to understand this conundrum. This convention is restricted to hazardous waste and has been ratified by EU. However, because the enforcement of such conventions is done through EU regulations, sometimes the EU extends the requirements in its regulations. This has been the case here in Basel Convention because the EU regulation on trans-frontier shipments of waste[613] has been extended to both hazardous and non-hazardous waste. Now because the enforcement of international treaties in national domains happens through the regulations of the EU, the member states stay bound to such extended obligations. However, upon Brexit, the future of such extended obligations appears dicey. Though in the immediate future, the EU regulations would be rolled over to UK, the governments could at any point of time amend the domestic law to restrict its obligations under the convention to only the obligations mentioned in the convention. Moreover, the UK before the Brexit had an obligation under the EU directives to reflect its international commitments in its national law. Now, no such requirement exists and owing to the "dualist system" adopted by UK vis-à-vis international law, the domestic courts lack the authority to direct the government to fulfil their legal obligations under international conventions. Though it can be said that recently the national courts have started interpreting their national law in light of such international instruments, this still does not match the enforcement intensity as under the EU law. Post-Brexit, only the international conventions ratified by UK will serve as legitimate constraints on the environmental activity of UK and it will be pertinent to see whether this strengthens or weakens the national courts with respect to enforcing international law from national litigation.[614]

VII. CONCLUSION

In the interest of certainty and legal stability, the Government has framed its policy in such a manner that, to the extent possible, EU laws would be "rolled-over" upon Brexit. However, because the characteristics and attributes of the EU law become so embedded in the national law of UK, it is highly improbable for any return to the pre-membership style of law.

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[610] European Commission: Monitoring the application of European Union law. 2105 Annual Report COM (2016) 463 final

[611] Van de Loo, G., Blocksman, S.: The Impact of Brexit on the EU's International Agreements. Centre for European Policy Studies, Brussels (2017).

[612] Basel Convention of 22 March 1989.

[613] [2006] OJ L 190/1.

[614] [2015] UKSC 16.

Any European Union regulation or decision that was addressed to United Kingdom and which was in operation prior to the exit date of UK from EU, will continue to be a component of national UK law. In a similar manner, any UK law that implemented EU directives and was derived from EU would continue to be operative and the principle of supremacy of EU law would apply to any law made prior to the Brexit. Only the national legislation will continue to have effect post Brexit and therefore the EU directives would lack any independent legal status in the eyes of law. However, it must be noted that merely because no directive will have any legal standing in post Brexit UK, it does not mean that the cross-references to definitions in European Union legislations will not be continued in domestic law. Having said this, there does exist a need to amend such laws that lay down any requirement for UK to consult or notify the European Commission as no such requirement could be sustained post Brexit. Owing to the peculiar situation involved and in the absence of the mammoth amount of parliamentary time required to amend such a large number of acts, §8 of the EUWA (*Henry VIII clause*) permits the regulations to override not only other regulations but also the national legislations. It is also clear that Neither CJEU's decisions will be binding upon UK courts post Brexit, nor will the UK courts retain their power to make references to the Court of Justice of EU. To further maintain regulatory certainty, the EUWA provides that the lower courts would still be bound by the rulings of CJEU made before the day of exit, and to incorporate flexibility in this system, the act provides only the Supreme Court with the power to depart from such rulings. The EUWA also provides that if some principles of EU law were identified as general principles by the CJEU prior to the date of exit, then the retained EU law would be interpreted in light of such "retained general principles of EU environment law" and the retained EU law would include these directives, which will inevitably include their preambles in which such principles are mentioned. However, because UK domestic laws have not commonly incorporated these general principles and now the authority of CJEU stands excluded, these principles will not play any role in judicial review cases of UK where the decisions of the public bodies or the government are challenged. Nevertheless, the EUWA lays down that within six months of the act coming into force, the government has to publish an environment bill which must include some general principles like the precautionary principle, polluters pay principle, sustainable development principle etc. Various NGOs and stakeholders have also argued for the application of these principles not just to the central government but also to all the public bodies that make environment related decisions. Moreover, to fill the governance gap created by the EC not having supervisory powers for enforcement, the Secretary of State has proposed a creation of a new National Independent Body that would replace the role of the EC. It was also decided that the powers of the body must include power to legally proceed against the government and not be limited to just passing advisory notices. It has been widely suggested that the new commission must deal with the central government only and not the local authorities for effective and efficient redressal. The government white paper suggests that it is indeed beneficial for UK to continue to be a member of environmental co-operative bodies of EU despite not being a member of the EU and therefore, it is proposed that UK must seek amendment of the applicable and pertinent rules to remain a member, or advocate for an observer status through bureaucratic arrangements. It is also suggested that upon Brexit, the competence formerly held by EU gets transferred to UK automatically and now UK assumes competence and is automatically bound to the international treaties that it entered along with EU. With respect to extended obligations thrusted from EU, the UK governments could now at any point of time amend the domestic law to restrict its obligations under the convention to only the obligations mentioned in the convention. Post-Brexit, only the international conventions ratified by UK will serve as legitimate constraints on the environmental activity of UK. Brexit has indeed given rise to a Pandora's box of uncharted legal territories and would UK use this as an opportunity to improve its environmental regulation or as a shield to deteriorate its environment law is yet to be discovered.

STATUS OF REFUGEES IN INDIA – THE PRESENT SCENARIO

SONIKA SEKHAR[615] AND MOON MISHRA[616]

I. INTRODUCTION

Subject to certain adverse political and social conditions in a country, the natives of that country have to migrate to another country in order to seek protection. These immigrants are generally called refugees in the host country. On December 3, 1949, the General Assembly of the United Nations (hereinafter UN) passed a resolution to establish the office United Nations Commissioner for Human Rights for the purpose of providing international protection to the refugees and for finding durable solutions to their problems.[617] Article 1(A)(2) of the 1951 Convention defines a refugee as a person who, owing to the well- founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.[618] However, India, not being a signatory to the convention, does not differentiate in its laws in the refugees and other foreign immigrants like economic immigrants, traveler's, tourists, temporary residents etc. Hence, in the absence of a specific law, the determination of a person as refugee happens on the basis of the facts and circumstances of each case on ad hoc basis.[619] There are two categories of refugees, the ones which are recognized by the government as refugees like the refugees of Tibet and Sri Lanka, and the ones which approach the UNHCR office in Delhi, and are recognized as refugees there, e.g. Rohingya Muslims from Myanmar. The refugees, though protected by various means, do indeed face problems which tend to arise due to resentment from the original residents that are citizens of India. Various refugees today are stuck in detention camps that are not up to the mark in terms of safety and hygiene. Further, the Citizenship (Amendment) Act, 2019 has created a grave confusion as to the status of refugees and their position in the country with regard to citizenship.

II. STATUS OF REFUGEES IN INDIA

In India, there is no law specifically for the refugees. However, the International law and the Constitution of India puts the country under an obligation to protect any person escaping persecution. Even though India is not a signatory to the 1951 Convention Relating to the status of Refugees, it cannot deny the basic humanitarian rights to the immigrants, which are preserved by the principles of the International Law, a number of UN Conventions relating to Human Rights that India has signed and the provisions enshrined in her Constitution.

1. RIGHTS PROVIDED BY INTERNATIONAL CONVENTIONS TO REFUGEES IN INDIA

The Constitution of India does not contain any provision which explains the regulation of the International Law in the country. However, Article 253[620] provides the parliament with the power to make laws for giving effect to any treaty, convention or agreement with any country or any decision made at any international conference. However, there is no specific law made by the Indian parliament yet specifying the regulation of any treaty, convention or agreement. On the other hand, Article 73[621], provides the Union with unrestrictive power in relation to any treaty or agreement. Hence, in the absence of any law made by the parliament as per Article 253,[622] the Government of India has the power to conclude any treaty. The Honorable Supreme Court in the case of *Maganbhai Ishwar Bhai Patel v. Union of India*,[623] held that it is the duty of the Legislature, Executive and Judiciary of the country to help in the implementation of a treaty if it is concluded by the Government, provided it is not unconstitutional. Also, Article 51(c)[624] of the Constitution directs the State to foster respect for international law and treaty obligation. The Universal Declaration of Human Rights (hereinafter UDHR) is one of the most pertinent documents in the field of human rights, passed by the United Nations General

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[615] BA-LLB, National Law University, Assam.
[616] BA-LLB, National Law University, Assam.
[617] Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V).
[618] Id.
[619] Pooja, India's Refugee Policy, INDIAN NATIONAL BAR ASSOCIATION (Jan 9, 2020, 4:23 PM), https://www.indianbarassociation.org/indias-refugee-policy/.
[620] INDIA CONST. art. 253.
[621] INDIA CONST. art. 73.
[622] *supra* note 618.
[623] Maganbhai Ishwarbhai Patel v. Union of India, 1969 A.I.R. 783 (India).
[624] INDIA CONST. art. 51(c).

Assembly. In *Chairman, Railway Board v. Chandrima Das*,[625] the Supreme Court of India held that the Constitution guarantees all the fundamental rights mentioned in UDHR, 1948. It also emphasized the importance of UDHR and stated that the jurisprudence of Human Rights, which has international recognition, is based on it. Hence it can be derived that the provisions of UDHR constitutes the principles of International Law and is binding on all States, including India. Its Article 1 identifies that that human rights and fundamental freedoms should be recognized and observed by all member States.[626] Thus, as per UDHR the fundamental freedoms that a refugee is entitled to, includes freedom of thought, conscience and religion as mentioned in Article 18 of the Declaration,[627] freedom of opinion and expression as provided in Article 19 of this Declaration,[628] as well as freedom of peaceful assembly and association as provided in Article 20 of this Declaration.[629] Also it is clearly specified in it Article 13(1) that every person is entitled to freedom of movement and residence within the territory of any state. Article 14 of UDHR clearly states that every person has the right to be provided asylum if he enters a country to seek protection from persecution.[630] Even though India has not signed the 1951 Convention, yet it is bound by the principle of non-refoulement, which is fundamental to the protection of refugees. According to this principle, if a refugee in order to seek protection enters the territories of a country, then that country cannot send him back to his native country where his life or freedom is threatened.[631] The principle of non-refoulement has been expressly stated in several international refugee and human rights instrument and is accepted as a norm of customary international law.[632] In order to understand India's obligations towards refugees, it is pertinent to note certain international conventions that India has signed. International Covenant on Civil and Political Rights is one such convention. It was ratified by India on 10th April 1979. Its Article 13 provides that those refugees who are lawfully residing in State can only be expelled in accordance with the law. However, since there is no law in India with respect to the refugees, the phrase "in accordance with the law" of this provision, it cannot be applied in India. Moreover, its Article 6[633] provides for Right to life, Article 7 provides for medical assistance, protection from any kind of inhuman treatment,[634] whereas Article 8 provides for protection from slavery,[635] Article 9 provides for personal liberty, and protection against illegal and arbitrary arrest, [636]and its Article 14 provides for equality before the courts and tribunal to the refugees.[637] Further, India is signatory to International Covenant on Economic, Social and Cultural Rights. Its Article 1(1) implies that a refugee should be allowed to practice its own culture, social habits and to educate themselves as well as pursue economic activities subject to the reasonable restrictions provided in the instrument.[638] Moreover, Convention of the Rights of the Child was drafted in accordance with the principle of the Charter of the UN. It was ratified by India on 11 December 1992. Its Article 22 specifies that any child seeking refugee should be provided with humanitarian assistance in the enjoyment of applicable rights.[639] Article 22(2) also provides that the host country should also help the child to trace his family members. Some other conventions are Convention on the Prevention and Punishment of the Crime of Genocide according caused Genocide to be a crime under International Law,[640] United Nations Declaration on Territorial Asylum which provides for the principle of non-refoulement etc.[641] Even though there are a number of conventions, agreements and international law principles which enumerates a number of rights and freedoms for the refugees, the standing of India on the obedience of these agreements and principles is unclear in the absence of any specific law

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[625] Chairman, Railway Board v. Chandrima Das, 2000 2 S.C.C. 465 (India).
[626] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.
[627] *Id*.
[628] *Id*.
[629] *Id*.
[630] *Id*.
[631] *Id*.
[632] United Nations High Commissioner for Refugees, *NGO Manual on International and Regional Instruments*, Concerning Refugees and Human Rights, 4(2) European Series, 187, 188 (1998).
[633] International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) [ICCPR].
[634] *Id*.
[635] *Id*.
[636] *Id*.
[637] *Id*.
[638] HUMAN RIGHTS LAW NETWORK, REFUGEE AND THE LAW, 46 (2nd ed., 2011).
[639] *Id*.
[640] *Id*.
[641] *Id*.

regulating the same. However, the consequences of violating the international law are not clearly stated by the UN, which is a possible reason for its violation by the States.

2. CONSTITUTIONAL STATUS OF REFUGEES IN INDIA

In the Constitution of India, 1950, no provision is provided for the refugees specifically. However, the refugees come within the ambit of "aliens" under Indian laws, which means people who are not citizens of India. The term "aliens" includes illegal immigrants, tourists, economic migrants as well as refugees. Certain provisions of the Constitution, namely, Articles 14, 20, 21, 22, 25, 26, 27, 28 and 32, and 226 provides rights to both citizens and non-citizens. In India, the refugees have right to equality (Article 14), which states that the State shall not deny any person equality before law or equal protection of the laws within the territory of India.[642] The phrase "equal protection before law" means that likes should be treated alike, which means that people in the same circumstances should be treated equally. In the case of *NHRC v. Arunachal Pradesh*,[643] the apex court held that the constitutional framework in India signifies right to equality and thus ensures a dignified life to citizens as well as non-citizens. In this case, the Court relied on the principle of non-refoulement and thus directed not to deport the Chakma refugees, who were the ethnic minorities in Bangladesh. However, Rohingya Muslims, which is another ethnic minority facing persecution in Myanmar, were decided to be deported back to their native country by the Supreme Court.[644] Moreover, Article 21 of the Constitution ensuring right to life and personal liberty to every person is also applicable to the refugees.[645] The ambit of this article is widened by the judicial pronouncements over time. In the case of *Bandhua Mukti Morcha v. Union of India*,[646] the apex court held that right to life include right to live with human dignity, free from exploitation and to have equal opportunity. In addition to these, right to shelter[647], right to medical care[648], right of legal aid[649] , right to livelihood,[650],also constitute a part of Article 21 and are thus available for the refugees. However, the ground reality for these refugees is not the same. Although, the Tamil refugees are provided camps in Tamil Nadu by the government, they lack electricity and are a ground of accumulated waste and poor sanitation which blatantly violates their right to live in a healthy environment[651] which is an inherent part of Article 21. Another example is that of the Jumma refugees who escaped religious persecution in Bangladesh and were provided shelter in the Indian states of Mizoram and Tripura temporarily. The ration supply to them in Tripura have been suspended since 1992.[652] This caused approximately 5,000 Jumma refugees to return to the Chittagong Hill Tracts in 1994. The Gujrat High Court, in the case of *Ktaer Abbas Habib Al Qutaifi v. Union of India & Ors*.[653] had recognized the principle of non-refoulement as a part of Article 21 of the Constitution of India however, the same principle was blatantly violated frequently by the Government. Hence, the absence of a uniform law or clear guidelines regarding the refugees can cause injustice to the refugees. Also, in the absence of any strict scrutiny by any international authority, the rights of the refugees are always at a risk of being violated, and thus, in order to secure the rights promised by the Constitution, a strict control by the UN and UNHCR is important.

3. STATUTORY STATUS OF REFUGEES IN INDIA

Various statutes like the Passport (Entry to India) Act 1920, Passport Act 1967, Registration of foreigners Act, 1939, Registration of Foreigners Act, 1939, Foreigners Order, 1948 etc. govern the entry of the foreigners in India. Even though, the judiciary and executive has shown some leniency to some refugees on ad hoc basis, in the absence of a specific law, seeking protecting in India is a hardship for most of the refugees. The Citizenship Act, 1955 defines an "illegal immigrant" as any foreigner who either enters India without a valid passport or travel document or who enters with valid documents

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[642] INDIA CONST. art. 14.
[643] NHRC v. Arunachal Pradesh, 1996 A.I.R. 1234 (India).
[644] Anonymous, I*ndia: 7 Rohingya Deported to Myanmar*, HUMAN RIGHTS WATCH, (Jan. 13, 2020, 9:34 AM), https://www.hrw.org/news/2018/10/04/india-7-rohingya-deported-myanmar.
[645] INDIA CONST. art. 21.
[646] Bandhua Mukti Morcha v. Union of India, (1997) 10 S.C.C. 549 (India).
[647] Chameli Singh v. State of Uttar Pradesh, 1996 (2) S.C.C. 549 (India).
[648] Parmananda Katara v. Union of India, 1989 A.I.R. 2039 (India).
[649] Madhav Hayawandan Rao Haskot v. State of Maharashtra, 1978 A.I.R. 1548 (India).
[650] Olga Tellis v. Bombay Municipal Corporation, 1985 S.C.C. (3) 545 (India).
[651] Rural Litigation and Entitlement Kendra v. State, A.I.R. 1988 S.C. 2187; M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 1086 (India).
[652] South Asia Human Rights Documentation Centre, No Secure Refuge, SAHRDC New Delhi (1994).
[653] Ktaer Abbas Habib Al Qutaifi v. Union of India & Ors., 1999 CRI.L.J. 919 (India).

but remain there beyond a permitted period.[654] Section 3 of the Registration of Foreigner's Act, 1939 requires a foreigner to provide true documents and other information regarding his/her visit to India,[655] while Foreigner's Act 1946 imposes a punishment of maximum five years of imprisonment and fine for violating any term of his visa or exceeding the time limit of his visa.[656] Its Section 14A bars entering the restricted areas without valid documents,[657] while 14B prohibits the use of a forged passport to enter India.[658]Also, Rule 6 of The Passport (Entry into India) Rules, 1950 states that any person who attempts to enter India by using a forged passport or visa shall be subjected to the punishment of imprisonment of maximum of three months, or fine or both.[659] Considering the emergent situation in their native countries, it is natural that the refugees may not have a passport or visa which and thus are qualified as "illegal immigrants" in India. Also, owing to India's uncertain stand on the refugee policies, many of them take the means of entering the country with a forged passport or visa. The UNHCR has directed the States like India, which have not sign the 1951 convention to avail the travel documents to the refugees who were not able to obtain such documents from their native country, in the same way as far as possible, as those States which have signed the conventions unless there is a compelling reason of national security.[660] In August, 2017, the government of India called the Rohingya Muslims "illegal immigrants" and ordered their deportation which also included the 16.500 refugees registered with UNHCR India,[661] despite of the reports of their possible genocide in Myanmar.[662] Section 3(2)(c) of the Foreigner's Act, 1946 gives power to the government to expel the foreigners from India.[663] Also Section 11 of this statute also justifies the use of any force against the foreigners in order to follow the order given under this Act.[664] In a number of cases, the removal of the foreigners by the orders of the government has been upheld by the Supreme Court of India against the principle of non-refoulement.[665] Further, the Citizenship Act, 1955, contains provisions to provide citizenship to the foreigners, including the refugees. However, the scheme of not providing the citizenship to the illegal immigrants, or the foreigners entering or staying in India illegally, is evident in the provisions of this Act. Illegal immigrants cannot claim citizenship by registration[666] and naturalization[667]. Also, the children of the illegal migrants are treated as illegal migrants. It is important to make a distinction between the refugees and other foreign migrants as it puts the refugees at a disadvantageous position. Even though the UNHCR provides guidelines to give leniency to the foreigners entering without travel documents, the Indian Parliament has not provided any clear guidelines for the same. It is important that the statutory provisions regarding the refugees align with the international standards of refugee safeguards and the provisions of Constitution of India.

III. REASONS BEHIND INDIA'S NON-PARTICIPATION IN INTERNATIONAL CONVENTIONS RELATING TO REFUGEES

As a country that is the world's largest liberal democracy and the sixth largest economy, India has been observed, at various instances, to be immensely active in the affairs of the UN. The biggest example of the same was India expressing her determination to become a permanent member of the Security Council which was followed by her candidature for a non-permanent seat for 2021-2022, with the support of fifty-five nations that backed India's candidature.[668] For a country of such vigor and great potential for leadership, it is only expected that India will accept all that is codified across all the conventions and protocols of the UN. Contrary to this expectation, India has, to the surprise of many, refrained from

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[654] Citizenship (Amendment) Act, 2003, No. 6, Acts of Parliament, 2004 (India).
[655] Registration of Foreigner's Act, 1939, No. 16, Acts of Parliament, 1939 (India).
[656] Foreigner's Act 1946, No. 31, Acts of Parliament, 1946 (India).
[657] *Id.*
[658] *Id.*
[659] The Passport (Entry into India) Rules, 1950, No. XXXIV, Acts of Parliament (India).
[660] UN High Commissioner for Refugees (UNHCR), *Note on Travel Documents for Refugees*, EC/SCP/10 30 August 1978 < https://www.unhcr.org/excom/scip/3ae68cce14/note-travel-documents-refugees.html > accessed 15 January 2020.
[661] *supra* note 643.
[662] Anonymous, *Genocide threat for Myanmar's Rohingya Greater than Ever, Investigators Warn Human Rights Council*, U.N. NEWS (Jan. 23, 2020, 12:08 PM), https://news.un.org/en/story/2019/09/1046442.
[663] *supra* note 655.
[664] *Id.*
[665] Hans Muller Nuremberg v. Superintendent Presidency Jail, 1955 (S.C.) A.I.R. 367 (India).
[666] Citizenship Act, 1955, No. 57, Acts of Parliament, 1955 (India).
[667] *Id.*
[668] Anonymous, *Pakistan Among 55 Nations to Back India's Candidature for UN Security Council For 2021-22*, INDIA TODAY (Jan. 25, 2020, 4:25 PM), https://www.indiatoday.in/india/story/nations-endorse-india-candidature-un-security-council-1556359-2019-06-26.

signing, supporting or ratifying either the Convention Relating to the Status of Refugees (1951) or the Refugee Status Protocol (1967), which are the primary documents defining the position of refugees in a country. Such refrain, though seemingly contradictory to India's dedication towards the UN and its objectives, has been a justified reason considering the situation in India. Each reason behind India's non-alignment with the UN in the matters relating to refugees and the indulgence of legislations of her has been explained below. A general study of the international documents regarding refugees that have not been signed by India bring us to the following reasons. Firstly, and most importantly, security is a major concern to a country like India that has witnessed numerous terrorist organizations form in India or enter from outside, resulting in violence, mass murders and so on. There has thus been a constant threat to internal security and this threat only increases with the movement of large numbers of people across the porous borders of India. Hence, the skepticism hinders the nation from signing pro-refugee documents easily. This reason also reflects in India's reserved attitude and weak stance in the Rohingya crisis of Myanmar. Further, India is also known to be the second largest populated nation in the world, with a population of over one billion three-hundred and seventy-three million people. For a country with such a large amount of people but scarce resources especially considering the degradation of environment quality all over the world, it is extremely difficult for India to accommodate more people, even if it is on a humanitarian ground. Such a large number of people implies immense population pressure, a major problem that India has been trying to deal with for decades.

Thus, signing treaties and conventions that make it compulsory to follow rules relating to refugees could make the nation crumble under the pressure of overpopulation. It is also important to note that India is only a developing country. A direct implication of the same is the lack of sufficient amount of resources available to cater to the needs of the people living in the country. India is still struggling to provide food, shelter and employment to the citizens of the country. It is immense pressure to provide the same facilities to large numbers of non-citizens moving in from outside the country as well. For a country that has been unable to effectively look after the people living in the territory for decades, it is almost impossible to believe that India will be able to efficiently provide for all the needs of the refugees as well. It is well known that developing countries face a massive disadvantage to prosperity due to poverty, lack of education, mass unemployment, lack of technological know-how and so on. India, being such a country, has another reason to not be a signatory of the international convention and protocol relating to refugees. The influx of large numbers of refugees for an indefinite period of time invariably puts immense pressure on the local infrastructure as well as the scarce resources available in India that the country does not have enough wealth and technology to multiply. The freedom of movement of refugees into India has allowed a large influx of illegal migrants as well, in the garb of refugees. Such a distinction between a refugee and an illegal migrant has often become extremely difficult to determine in reality and has further added to the population of the country. Fundamental Rights in India are the elementary and core rights, all of which are available to the citizens of the nations.

There are certain fundamental rights that are available only to the citizens and not to the refugees, such as the right to association under Article 19 of the Constitution of India. Such Fundamental Rights are a matter of pride for the citizens of the country as they have received them as perks of their citizenship. These benefits in rights granted by the Constitution are preserved by India, to the satisfaction of the citizens. Such a balance, where refugees are looked after and given various rights but citizens are assured their position as the original residents, needs to be kept by India to avoid resentment. This is another probable reason from the restraint of signing the international documents. Having stated the above reasons, it is important to note that there are innumerable rights that are available to the refugees, as elaborated upon earlier, are more than sufficient to take care of all their needs and requirements and provide them with immense protection. Two of the most important fundamental rights are available to refugees, namely, Right to Equality under Article 14 of the Constitution and Right to Life under Article 21. Further, India requires a certain level of autonomy to deal with sensitive internal matters of the indigenous population that is best understood only by the administration.

The biggest example in this regard is the Bangladesh refugee crisis in 1971 which will be explained in detail in the course of the paper. This crisis arose due to a deadlock between the original residents of certain regions namely Assam, West Bengal, Tripura and Meghalaya and the refugees. This situation arose due to the feeling of dominance of the already economically weak citizens by the refugees whose names were now also being added to the voters list. Such a crisis, though aided massively by the United Nations High Commissioner for Refugees (hereinafter UNHCR), can best be handled by the Government of India itself, without pressure from outside organizations. Also, a popular opinion regarding refugees is that bilateral agreements or relations and not multilateral agreements, should be the basis of the movement of refugees. These add to the reasons in favor of India being a non-signatory of the 1951 Convention.

IV. ANALYSIS OF INDIA'S REFRAIN FROM SIGNING THE CONVENTION RELATING TO THE STATUS OF REFUGEES, 1951

On analysis of the specific provisions of the Refugee Convention of 1951, one can note that there are various reasons why India is not a signatory of the said Convention. The reasons have been clearly explained below. Firstly, the main enforcer of the rights and status of the refugees according to the Convention is the UNHCR. It is important to note that there does exist a great influence of the UNHCR on India and her treatment of refugees. The UNHCR was allowed to function in India since 1981 and has its head office in Delhi, along with a field office in Chennai. It played a crucial role during the independence of Bangladesh in 1971, which had led to a large influx of refugees into India, mainly in Assam, West Bengal, Meghalaya and Tripura. This highlights the fact that India is keen on taking all the required measures on its own to safeguard the well-being of the refugees. For a country that is voluntarily and autonomously adopting the measures that have not been incorporated in other legislations with respect to refugees, a convention is not required to be signed. Secondly, according to Article 3 of the Convention[669], the States are to uniformly apply the provisions to all the refugees irrespective of race, religion or country of origin. These three factors cannot be the grounds for discrimination on application of any of the provisions of the Convention. On extending the application of the said provision to Article 34 of the Convention[670] which urges a quick procedure for citizenship, that is, the naturalization and assimilation of the refugees, there is a clear conflict. The recently passed amendment in India, known as the Citizenship (Amendment) Act[671] has made certain changes in granting citizenship to the refugees. The Act grants citizenship to the refugees of three nations– Afghanistan, Pakistan and Bangladesh who have arrived in India before 2014. Further, as stated in the Act, this grant is limited to those of Hindu, Sikh, Buddhist, Jain, Parsi, and Christian religions. This Act clearly distinguishes on the basis of religion, as Muslims have been left out of this legislation. Further, the Act also discriminates between refugees belonging to Afghanistan, Pakistan and Bangladesh and refugees belonging from the other countries, a major example being Sri Lanka. For a country that has introduced such a law that discriminates on two grounds out of the three mentioned above, adopting the 1951 Convention is not an option as it would not allow such a legislation to come in place. This gives India another reason to refrain from being a signatory of the Convention as it is contradictory to her plans. Thirdly, India already provides for various rights to the refugees that are mentioned in the Convention. Article 25 of the Constitution[672], which allows the freedom to practice, profess and propagate one's religion, is available to the refugees in India. This guaranteed right is broad enough in ambit to cover Article 4 of the Refugee Convention[673], which emphasizes on the right of refugees to practice their religion. Further, the refugees in India also have the right to access the courts for redressal. Hence the principle of Article 16 of the Convention[674], that is allowing access to courts, is already granted by India to the refugees. The principle of refoulment is also applicable to the refugees in India via her own legislations, hence rendering Article 33 of the Convention[675] redundant if the Convention is adopted in a hypothetical situation. Similarly, since the Article 5(d)(iii) of the International Convention on Elimination of All Forms of Racial Discrimination[676] allows the freedom of movement to the refugees in India, Article 26 of the Refugee Convention[677] has already been incorporated in the territory of India. Article 21[678] of the Constitution is available to both citizens and non-citizens of the country, extending to the refugees in India. Article 21 has an extremely wide scope and its expanding horizon includes the right to employment. Hence, Articles 17, 18 and 19 of the Refugee Convention[679], which are relating to employment of the refugees, are already covered by Article 21 of the Constitution. It is also important to note that travel documents have been granted to those people from Tibet to India who have refugee status. This shows that Article 27 and Article 28 of the Convention[680], which prescribes the grant of identity papers and temporary travel documents to those refugees who

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[669] Convention Relating to the Status of Refugees, July 28, 1951, United Nations, Treaty Series, vol. 189, p. 137.
[670] *Id.* at art. 34.
[671] Citizenship (Amendment) Act, 2019, No. 47, Acts of Parliament, 2019 (India).
[672] INDIA CONST. art. 25.
[673] Convention Relating to the Status of Refugees, July 28, 1951, United Nations, Treaty Series, vol. 189, p. 137.
[674] *Id.*
[675] I*d.*
[676] International Convention on Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.
[677] *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137 (entered into force 22 April 1954).
[678] *supra* note 644.
[679] *supra* note 676.
[680] *Id.*

do not have valid travel documents, has been complied with by India. This shows that a majority of rights that are granted by the 1951 convention have been granted in India without the signing of the said convention. India seems to have efficiently implemented most of those keys rights that the convention provides for, thus meeting the objective and purpose of the convention without having to adopt it. The fourth reason behind not signing the Convention is due to Article 10 of the said Convention.[681] Residence of the refugees has been a long-standing problem in India. The main for this is the discontentment the people living in that region where there has been an influx of refugees. India has over time been welcoming to refugees from different countries coming in as a result of wars and disturbances of greater significance in the context of India and more recent than the Second World War. However, the pressure of the refugees on the already burdened India is immense as the resources are scare and the original citizens themselves are competing for opportunities such as employment, commodities and so on. For such a group of people, many of whom are unable to claim the benefits of the resources due to unavailability, having other people enter in large numbers from outside the nation is immensely inconvenient. Hence, many parts of the country, an important one being Assam that has faced the maximum domination from outsiders, are not favorable to the idea of giving residence to refugees. In order to avoid conflicts with the citizens of India and satisfy their needs, the only step that can be taken is refusal to sign the Convention that grants the right of residence to the refugees. The same problem arises with Article 15 of the Convention[682] which grants the right of association. In India this right is applicable only to the citizens. Forming associations is perceived by the citizens to be an opportunity of cultural, economic and social dominance over those who are originally the residents of the particular territory. It is hence clear that the laws in India seem to be aiding the welfare of the refugees. However, certain recent changes in the country may damage this commitment that India has had over the years to protect the rights of refugees. These changes have been discussed in the course of the paper, followed by solutions that can undo the damage that has been created recently.

V. NATIONAL REGISTER OF CITIZENS AND ITS IMPLEMENTATION

The burning issue in India, especially today, is indeed the treatment of refugees and migrants and whether to grant them citizenship and allow them to stay or do the opposite and deport all of the refugees out of the country back to their homelands. To understand the present situation, one must proceed chronologically. The history of the National Register of Citizens (hereinafter NRC) and its position in the current scenario will be elaborated upon in detail for a clear picture of the scenario today. In 1971, India indulged in a war that was massive. Disturbances in East Pakistan, which began years earlier, were culminating into a grave situation with demands for independence from Pakistan, in order to form a separate nation. During this phase of struggle for independence, large crowds of Hindu origin and Bengali ethnicity passed the borders entering India for refuge, in fear of genocide, thus increasing the population of an already overpopulated country and putting immense pressure on Assam, West Bengal, Tripura and Meghalaya. The refugee count increased to a stage where the only option to save the refugees as well as the Indian population in these regions was war. The war consisted of thirteen days of attacks, finally ending with the surrender of the Pakistani forces. Though the war had ended, the influx of refugees from the newly formed Bangladesh had not. A large number of refugees from Bangladesh were still in India, and more people irrespective of religion had entered India in the course of the war as well as after the war had ended. This created an opportunity for large numbers of illegal migrants to enter the country with the status and protection of refugees. This rapid increase in the population of outsiders in the specific territories of India started to cause a lot of conflict, mainly because of the feeling of the citizens of India that they were being dominated. With less employment opportunities and resources from the onset of the country's formation, the people in these territories were now pitched against outsiders as well to access the limited resources available. Due to a strong cultural identity and a keenness on preserving the roots of culture amongst the Indian citizens of Assam, widespread dissatisfaction grew across the whole of Assam that felt overburdened and neglected due to the flooding in of refugees and migrants from Bangladesh. A greater threat arose when these people were being treated at par with them in all aspects, including in the voting for the representatives of Assam. This sparked the Assam Movement, also known as the Assam Agitation, initiated by students and led by the All Assam Students Union and the Assam Gana Sangram Parishad.[683] This struggle for six long years from 1979 to 1985 and saw large-scale protests, involving picketing and many deaths, through massacres and police control, while the protesters called for quick action to remove all the illegal entrants of Bangladesh from Assam. As a result of these determined protests that seemed indefinite, the Illegal Migrants (Determination by Tribunals) Act was passed in

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[681] Id.
[682] Id.
[683] Anonymous, Martyrs of Assam Agitation, GOVERNMENT OF ASSAM (Jan. 25, 2020, 5:47 PM) https://assamaccord.assam.gov.in/information-services/martyrs-of-assam-agitation.

1983 (later struck down in 2005684), followed by the final settlement of the unrest on August 14, 1986 with the Assam Accord. The Assam Accord was an agreement made amongst the All Assam Students Union, the Assam Gana Sangram Parishad, the Centre and the State Government. The demands of the main leaders of the Assam Movement was the disenfranchisement and deportation of all the foreigners. Updating the NRC was also urged for in 1980 which was agreed to be fulfilled. This was the beginning of the matter of the NRC. Accordingly, the demands of the Assam Accord were fulfilled by introducing the Citizenship (Amendment) Act 2005685, incorporating the demands of Assam with a special set of criteria for citizenship, tailormade for Assam's needs. Clause 5 of the Assam Accord686 stated that those people having entered Assam before January 1, 1966, should be regularized and those entering after this date till March 24, 1971 will be governed by the Foreigners Act, 1946 and the Foreigners (Tribunals) Order 1964. After this date, all the foreigners were to be expelled from Assam. In order to incorporate these changes specifically for Assam Section 6A was added to the Citizenship Act, 1955687. Hence all those having entered between January 1, 1966 and March 25, 1971 were to register according to the rules of the Central Government. The date March 25, 1971, was hence the cutoff date of the people from Bangladesh. All those entering after this date were considered to be foreigners sought to be moved out of Assam. This cut-off date was applied in 1999 when the NRC was at the beginning of the process of updating. However, no concrete action was taken for years after 1999. This led to a suit in order to update the NRC and remove the names of the foreigners from the electoral rolls.[688] The Supreme Court in the present case gave a direction in 2013 to the Centre to start updating the NRC and set up an office of the State Coordinator. The updating process of NRC began in 2015, with three lists releasing in 2017, 2018 and 2019. There existed a list of documents that were to be shown to one of the hundreds NRC Seva Kendra's across Assam, that is, at least one document from the fourteen in List A and one more supporting document, if required, from the eight in List B. This was basically to prove the identity of the person and his/her birth before March 25, 1971 (List A). For those born after the said date, descent, that is, either parents or grandparents, who had settled in India before the cut-off date had to be shown via a document from List B. List B also covered two documents prescribed for married women from other countries, out of which one was to be supplied.[689] More than 1.9 million people had been excluded from these lists.[690] This number does not only reflect illegal immigrants but also refugees and some insiders as well. The recourse that could be taken once a person's name was excluded from the NRC is to approach the Foreigner's Tribunal and prove one's citizenship. An appeal within one hundred and twenty days against a decision not in favour of the person could be done in the High Court, further allowing the person to move to the Supreme Court on appeal. Five hundred and twenty-one such tribunals in total[691] were to be functional in order to listen to the grievances of such people. These tribunals are in the process of hearing matters at this point in time as well. In order to implement the NRC and separate the foreigners or "illegal migrants" which includes the refugees having entered India after the cut-off date, various detention centers started being built, the initial foundation of the first center being traced to 2008. With time more of the detention centers are being built currently and there exists a conjecture of this procedure of NRC being applied country wide, known as National Population Register, which will require detention camps in other parts of the country as well. As much as the NRC was the demand of the people of Assam, the problems in its implementation were so vast and perilous that it lost the support of many people of Assam. To the disappointment of these people, out of the enormous number of people left out of the NRC, there were many people who were indeed in Assam before March 25, 1971 but were still excluded from the register. Such were the errors of the register. Many original residents of Assam were declared foreigners by exclusion from the NRC. Those innocent people who did not have the documents mentioned in the list of documents to be provided, due to reasons such as destruction via natural calamity, misplacement, or simply lack of proof due to no means of creating these documents as a result of poverty, were also brutally excluded from the NRC, which became a cause of great concern. Those who had fought on the streets for years, losing their jobs, education, loved ones and parts of their own body, were now stranded in a worse situation – a terrible implementation of what they had wished for. This turned out to be the biggest criticism of the NRC. The documents required to be submitted for proving a person

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[684] Sarbananda Sonowal v. Union of India, A.I.R. 2005 S.C. 2920 (India).
[685] supra note 653.
[686] Assam Accord, 1985, Cl. 5.
[687] *supra* note 665.
[688] Assam Public Works v. Union of India, WP (C) 274/2009 (S.C.) (India).
[689] Anonymous, *what are the Admissible Documents?* GOVERNMENT OF ASSAM (Jan. 27, 2020, 11:30 AM), http://www.nrcassam.nic.in/admin-documents.html.
[690] Manogya Loiwal, *Assam NRC: Foreigners Tribunals set to hear appeals*, INDIA TODAY (Jan. 27, 2020, 3:20 PM), https://www.indiatoday.in/india/story/assam-nrc-foreigners-tribunals-1594975-2019-09-03.
[691] *Id.*

to be a citizen were diverse, requiring the exact spelling of the person without any errors as well as concrete proof and details of entry of the ancestors of the citizens. Such detailed evidence was immensely difficult for the people to gather. Hence, too much authority lies in the hands of the Foreigner's Tribunal to scrutinize this evidence and declare the person either a citizen or stateless. The Human Rights Organization Amnesty has slammed the Foreigner's Tribunal to be arbitrary and biased in decisions. Further, the conditions of these detention camps were reported692 to be extremely poor. Many of these occupants have been detained without a hearing and a decision by the Foreign Tribunals, without even an appointment of a legal representative. Cramped space and rooms accommodating more than double the capacity of the rooms have troubled the people who have been detained. These centers are made in the jail premises, with dormitories that overfill around forty people with a bad stench from the unhygienic washrooms. Females and males have been made to separate, hence splitting families to live on their own. Their lives are no better than those living in jails. There are an inadequate number of staff and professionals like doctors to look after their health complications, be it physical or mental. A big question has been left uncertain is the future of all the people left out of the NRC. There has been no concrete plan made as to whether such people will be deported or not. No agreement with Bangladesh has been made yet on this matter either. Outlining the terrible conditions of the detention camps, forcing these people to live there indefinitely with no clear structure as to the next step is grossly violative of basic humanity. Most of the people who have come from Bangladesh are willing to return to their country according to the wishes of the Assamese, however, have no way of going back due to the stagnancy of decision making by the government. As much as detention camps seemed to be a decent option to satisfy Assam's demands initially, with no care given to ensure that the living conditions are safe, healthy and comfortable and with no plan of action for future, the implementation of the NRC has resulted in a mess of stagnancy in terrible conditions of these refugees and immigrants. From a legal point of view, the right to life and personal liberty, Article 21 of the Constitution, which is applicable to both citizens and non-citizens, must be complied with at all times. Having highlighted the plight of those stuck in these detention centers, it is highly unlikely that this fundamental right available to all is being respected as the quality of life, hygiene conditions, dignity, right to livelihood, medical care and health are being compromised.

VI. CITIZENSHIP AMENDMENT ACT, 2019 AND THE REFUGEES

The Citizenship Act, 1955 provides for the acquisition and determination of the Citizenship of India. The citizenship, under this Act could be acquired by 1) birth, 2) descent, 3) registration and 4) naturalization. However, illegal immigrants have been exempted from acquiring citizenship under this Act. Hence, in order to acquire Indian Citizenship, it is mandatory for a refugee to enter India with valid documents and stay there with legitimate permit under the principal Act. After, residing in India for a considerable period of time, the refugees may apply for citizenship by naturalization. In order to qualify for citizenship by naturalization, it is important that the person is not an illegal immigrant, and that he must have lived in India for at least twelve months continuously and before that period for at least eleven years in the preceding fourteen years. However, citizenship by means of naturalization can be provided only on the satisfaction of the Central Government. On December 12, 2019, the Citizenship Amendment Bill received the assent of the President and became an Act. This Act is relevant in the context of refugees, as it seeks to make illegal immigrants belonging to the Hindu, Sikh, Buddhist, Jain or Parsi community from Afghanistan, Bangladesh or Pakistan, qualified for acquiring Indian Citizenship if they entered India before December 31, 2014.[693] This Act, by the addition of Section 6D in the principal Act, states that from the commencement of this Act, any proceeding pending against such a person in respect of illegal immigration or citizenship shall be closed.[694] Also it excludes the illegal immigrants residing in certain tribal areas of Assam, Meghalaya, Mizoram or Tripura included in the Sixth Schedule to the Constitution, or areas under the "Inner Line" permit, i.e., Arunachal Pradesh, Mizoram and Nagaland.[695] This step is in furtherance of the changes made by the government in the Passport (Entry to India) Act, 1920, and Foreigners Act, 1946, which exempted the aforementioned communities of the aforementioned countries from being penalized for illegally entering or staying in India by using invalid documents.

1. DOES CITIZENSHIP AMENDMENT ACT, 2019, VIOLATE RIGHT TO EQUALITY?

Article 14 of the Constitution of India ensures equality before law and equal protection of the law. As per this Article, laws can only differentiate between two groups of people is there is any reasonable ground for doing the same. In order to pass the test of reasonable classification, two conditions must be fulfilled 1)the classification must be made on

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[692] Anonymous, *Harsh Mander's Full Report to NHRC*, DECCAN HERALD (Jan. 28, 2020, 9:25 PM), https://www.deccanherald.com/national/top-national-stories/harsh-manders-full-report-nhrc-678127.html.

[693] supra note 670.

[694] Id.

[695] Id.

reasonable differentia which distinguishes person or things that are grouped together from others left out of the group; and 2)the differentia must have a rational relation to the object sought to be achieved in question.[696] The differentiation of the illegal immigrants entering from Pakistan, Afghanistan and Bangladesh, and the illegal immigrants of other countries, has been done in order to protect them from religious persecution as provided in the Statement of Object and Reason of the Bill, which became the Act.[697] It is provided that the reason for the enactment of the Act is because these countries have faced severe cross border migration during the partition of India. However, it needs to be understood that unlike Pakistan and Bangladesh, Afghanistan was not a part of undivided India. Also, it is reasoned, that the Constitutions of these three countries provide for State religion, which is a reason for the religious persecution of their minorities. However, the Tamil Refugees[698] and the Rohingya Muslims[699] in Sri Lanka and Myanmar are also subjected to religious persecution. Also, the constitution of both these countries provide for the supremacy of the Buddhist religion. When thousands of recognized Tamil Refugees residing in India for decades are still living in refugee camps, and a number of Rohingya Muslims (including those recognized by UNHCR as refugees) are claimed to be threats to the national security, providing citizenship to the illegal immigrants of the specified six communities of these three countries, may seem an unreasonable classification, especially because the all these three countries have a Muslim majority unlike Sri Lanka and Myanmar, where Buddhists are in majority. Moreover, the people of the six specified communities are classified in one group for the reason that they are minorities in their respective countries. However, there are other minorities in these countries, which are subjected to religious persecution. For example, along with these minorities, Ahmadiyya and Shia communities, which are in minorities in Bangladesh are reported to be subjected to religious persecution.[700] These communities are also subjected to violence due to their religion in Pakistan.[701] The Shia community, being a minority in Afghanistan also face religious persecution there.[702] The reason why these communities are not included in the minorities is still unclear. Another classification that is questionable is the differentiation amongst those illegal immigrants who migrated to India before December 31, 2014, and those who migrated after, as this Act provides citizenship to only those migrants who came to India before the aforesaid date. Also, the reason of the classification of the illegal immigrants on the basis of the place where they took shelter is also unclear.

2. THE IMPACT OF THE IMPLEMENTATION OF THE CITIZENSHIP AMENDMENT ACT, 2019, ON THE ILLEGAL IMMIGRANTS NOT INCLUDED IN THE ACT

The impact of the implementation of the Act will also be adverse. *Firstly*, the implementation of Citizenship Amendment Act, 2019 would mean that the names of the people of the specified six communities of Bangladesh, Pakistan and Afghanistan will be added in the NRC and thus they will cease to be illegal immigrants. Thus, it is implied that the name of any illegal immigrant, who does not belong to these non-Muslim communities as specified in the Act, will not be included in the NRC. *Secondly*, the Ministry of Home Affairs had instructed the States to constitute at least one detention center in each State to detain the detected illegal immigrants until their nationality is recognized.[703] Thus it can be inferred that the non-Muslim illegal immigrants from Bangladesh, Afghanistan and Pakistan, will not be sent to the detention centers, while the other illegal immigrants which includes the Rohingya Muslims from Myanmar, the Shias and Ahmadiyya's from Bangladesh, Afghanistan and Pakistan, the Tamil refugees from Sri Lanka etc., will be kept in these detention centers until an arrangement is made to send them back to their native countries. If it is done accordingly, then

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[696] State of W.B. v. Anwar Ali Sarkar, A.I.R. 1952 S.C. 75 (India).

[697] Statement of Object & Reasons of The Citizenship Amendment Bill, 2019.

[698] Shastri Ramachandran, The Unbearable Nothingness of Being Sri Lankan Hindu, OUTLOOK INDIA (Jan. 28, 2020, 8:54 PM), https ://www.outlookindia.com/website/story/opinion-the-unbearable-nothingness-of-being-sri-lankan-hindu/3442 08.

[699] Anonymous, Genocide threat for Myanmar's Rohingya Greater than Ever, Investigators Warn Human Rights Council. U.N. NEWS (Jan. 23, 2020, 7:40 PM), https://news.un.org/en/story/2019/09/1046442.

[700] Mohshin Habib, Violence Against Non-Muslims Increases in Bangladesh. GATESTONE INSTITUTE INTERNATIONAL POLICY COUNCIL, December 14, 2016, 4:30 A.M. available at https://www.gatestoneinstitute.org/9538/ muslim-hindu-violence-bangladesh (Last accessed on January 28, 2020).

[701] Dipanjan Roy Chaudhury, Pakistan's Institutionalised Discrimination against minority groups: EU Parliamentary Report, THE ECONOMICS TIMES (Jan. 28, 2020, 11:07 PM), https://economictimes.indiatimes com /news /international/world-news/pakistan-institutionalised-discrimination-against-minority-groups-eu-parliament-report/articleshow/69329724.cms.

[702] Srijan Shukla, This is the Shia sect that has faced endless persecution in Pakistan & Afghanistan, THE PRINT (Jan. 29, 2020, 11:04 AM) https://theprint.in/theprint-essential/this-is-the-shia-sect-that-has-faced-endless-persecution-in-pakistan-afghanistan/225412/.

[703] Rahul Tripathi, *States told to set up Detention Centres to Detain Illegal Immigrants*, THE ECONOMIC TIMES (Jan. 29, 2020), https://economictimes.indiatimes.com/news/politics-and-nation/states-told-to-set-up-centres-to-detain-illegal-migrants/articleshow/70426017.cms?from=mdr.

it is implied that most of the citizens in these detention centers will belong to the Muslim community. *Thirdly*, since there is no law to distinguish a refugee from other foreigners, there is no distinction between a refugee who illegally migrated to India for protecting his life and an economic migrant, who entered India via illegal means for his economic gains. This law may result in giving citizenship to all the illegal immigrants, including the refugees, foreigners, travellers, economic migrants of the aforementioned countries belonging to the aforementioned religions. This means that where a Hindu economic migrant can be given citizenship in India, a Muslim facing religious persecution will be kept in detention center or will be deported back. *Fourthly*, National Security was one of the primary reasons why India did not sign the 1951 convention. Also, in the case of *Sarbananda Sonowal v. Union of India*,[704] the Supreme Court recognized the illegal immigrants of Bangladesh, entering the territory to Assam, as external aggression, and thus laid emphasis on the fact that under Article 355, it is the duty of Union to protect the State against external aggression. However, CAA 2019, seeks to provide citizenship to these illegal immigrants of Bangladesh, provided that they belong to the six minority communities specified in the Act. Moreover, this Act implicates that it can be presumed that illegal immigrants of the specified six non-Muslim communities, from Bangladesh, Afghanistan and Pakistan are not a threat to the national security, and thus the legal proceedings against their migration will be closed. However, the illegal immigrants of the people of other religions will still be treated as illegal immigrants and will be subjected to prosecution. This presumption is prima facia non-secular in nature. *Fifthly*, Since the Act also provides a leniency to the illegal immigrants of the aforementioned six communities in terms of the of their period of residence in India from eleven years to five years in the preceding fourteen years,[705] to seek citizenship via naturalization, it may be unjust to the other refugees who have been staying in India for a longer period, especially because, this act also enables the other foreigners of the specified religions of the specified countries to get citizenship in an easier way, when the refugees who migrated in India to seek protection under the same circumstances, and are already at a disadvantageous position, will still have to face hardships.

VII. CONCLUSION AND SUGGESTIONS

Every human being is entitled to live with the basic rights and fundamental freedoms. Refugees are compelled to migrate to another country in order to seek protection from persecution. The status of refugees in the host country is dependent upon its policy regarding refugees. There is no specific policy for refugees in India. A major reason of the same is that refugees are treated as any other foreigner in the country. It is the mandate of Article 14 of the Constitution of India that equals should be treated equally, however, the refugees are already at a disadvantageous position as compared to other foreigners. Hence, treating them with the same statutory standards like other foreigners, is not reasonable. Another, reason of injustice to the refugees is inconsistency in treatment of refugees of different countries. It is important for the country to recognize that that refugees constitute one class, as they all face persecution in their native lands and thus cannot be discriminated on the basis of nationality, religion, race, etc. It is the need of the hour that refugees are made a different class and are specifically defined by the legislature. Guidelines must be given by the Government to facilitate their entry and stay in India as they cannot be treated with the same statutory standards as the other foreigners. In the context of the controversial Citizenship (Amendment) Act, 2019, it is important that the refugees are specifically provided for as a different class altogether and clearly distinguished from the other illegal immigrants. Also, they must not be discriminated on the basis of their nationality and religion. The UN is responsible to ensure that every person is bestowed with the basic rights. However, even after the obligations of the International law principles and International Conventions, many countries bound by them deviate from these principles and break these laws. The primary cause of the same is the absence of any clear guidelines regarding the consequences of breaking these principles. This is the reason why India could order the deportation of the Rohingya Muslims, as against the non-refoulement principle. The denial of basic rights to other refugees like the Tamil refugees of Sri Lanka, or the Jumma refugees of Bangladesh, by the Government of India, was possible because there is no penalty defined by any agency of UN regarding the consequences of violating the International Law. Hence, it is suggested that clear guidelines and penalties or regulators of some sort are specified by the UN, so as to prevent to violation of the International agreements, declarations and treaties. Even though the head office of the UNHCR for India is present in New Delhi, the recognition of refugees is crucial, so that they are provided with the basic human rights. It is important to understand that since Delhi is at a huge distance from the borders of India. Most of the refugees who move to India do not have the means to reach Delhi and thus live devoid of specific recognition. Hence there is a need for the UNHCR to establish branches in every state, which would make it easier for the refugees to approach the agency. In order to tackle the problem of national security that India faces due to the free movement of refugees across the porous borders, background checks for each and every refugee should be done and this data shall lie

[704] supra note 683.
[705] supra note 670.

with the regional office of the UNHCR. Such records will strengthen the security of India. A major problem, as reflected in the elaborate discussion of the Assam Agitation, arises when there are limited resources in a region with a struggle over their usage. The influx of refugees on such territories only increases the pressure on the resources ultimately leading to resentment. There must be a balance struck in such a situation. The original citizens and residents of the country must be given as much opportunity as they had in a situation where there existed no refugees. Along with this, there should not be any deterioration in the quality of life of these refugees. They must also be given adequate protection and opportunities along with their rights. The solution to this conflict lies in two parts, the satisfaction of both of which can eliminate such conflict and protect all the groups of people. Firstly, in order to boost the availability of resources such as subsidized food, clean water, sanitation, employment and so on, there is a requirement of funds. As a developing country, India cannot afford the well-being of all the refugees. The solution in this regard is the provision of funds from the UNHCR for the maintenance and upkeep of the refugees. This will stimulate the development of resources as well as pacify the original residents in the country who will not have to struggle over limited resources. The second part of the solution lies in the distribution of the population of the refugees. To avoid overcrowding in a particular area, a policy must be created by the Government of India where the number of refugees entering the country are distributed in proportion to the size of each state. All the states of India should jointly share the burden of the population so that the resources are sufficient for all living in any given area. A proportional distribution of the refugee population should be implemented such that larger states house a larger number of refugees and smaller states do not have as many complications. Underdeveloped and underequipped areas like Assam should not be overburdened. The NRC gave birth to an evil that has only degraded the living standards of the refugees- the detention centers. These centers must be done away with immediately as they are in clear violation of the right to life guaranteed by the Constitution of India. Further, after the introduction of the amendment to the process of citizenship, clear inequality will be visible as many people of the specified religions will be released from the centers while the others will not, indicating at a violation of the right to equality. There is no dire requirement for detention centers. The impact of such centers on refugees, whether caused inadvertently or not, should necessarily be mitigated. In conclusion, the Citizenship (Amendment) Act, 2019 should be done away with as it will only create complications, as highlighted through the course of the paper. With the implementation of these suggestions, the status of refugees in India will further be protected, resulting in peace and harmony in India, the country of unity in diversity.

WAGE CODE BILL, 2019 –A POSITIVE STEP TOWARDS LABOUR LAW REFORMS?

GARIMA AGRAWAL[706]

ABSTRACT

It is rightly said, "Justice Delayed is Justice Denied". However, "better late than never" seems more of a plausible, convenient and optimistic approach in a country like India, with over and above 40 central and state laws dealing with labor laws and its intricacies. Therefore, reforms in this sector seemed inevitable. As a result, during her 2019 Budget speech, the Finance Minister of India, Nirmala Sitharaman showcased this vision of their government to streamline the umpteen number of labor laws into a set of four codes. This Code on Wages, 2019 is the first in the line amongst the four and is a combination of four existing laws namely, The Payment of Wages Act 1936; The Minimum Wages Act 1948; The Payment of Bonus Act 1965 and The Equal Remuneration Act 1976. The Code has been drafted with an intention to unify all labor laws and remove the complexities, it streamlines all wage and bonus payments. This study is going to make an effort to understand the reasons for having a unified Code, the key highlights of this Code, and the beneficiaries of this Code. Moreover, the challenges and shortcomings entailed in this Code and try answering questions like, how will it affect the interests of workers, the employers and consequently, the economy? Also, it would be interesting to analyze the impact of this Code in a country with a significant casual and informal workforce.

Keywords: *Minimum Wage, Wage Code, Discrimination, Equal Pay, Implementation*

I. INTRODUCTION

Article 43 of the Constitution of India states that, "The State shall endeavor to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities"[707]. Under the Constitution of India, 'Labor' falls under the Concurrent List under the Seventh Schedule[708], meaning that both, the central and the state governments are empowered to make legislations on it. As a forthcoming, labor laws in India became synonymous with complexities. However, the Code, 2019 is a step towards doing away with all the complexities and unifying the labor laws. After receiving the assent of the President in August 2019, the simplification and unification of labor related regulations seems to be on track. This Code is the first amongst the four labor codes which has now become an Act, and has replaced four labor regulations viz. the Payment of Wages Act, 1936; the Minimum Wages Act, 1948; the Payment of Bonus Act, 1965; and the Equal Remuneration Act, 1976. At the first glance, this Code deserves accolades for the simple reason, that it has included all workers be it full time, part time or bestowed with any skill set within its ambit. There has been no distinction made between organized and unorganized sectors. While the Centre will be responsible for making decisions for employments such as Railways and Mines among others, the State Governments will make decisions for all other employments. Let us try understanding the changes entailed in the Code.

II. NEED FOR THE WAGE CODE, 2019

In order to understand the reasons for this Code, it is important to understand the complexities of the present system in India. Equality with respect to remuneration and ease of compliance have been a lacuna for the longest time in the Indian Labor Law. The Code on Wages, 2019 takes into consideration this issue and therefore has specified in various sections for its prohibition[709]. One of the significant reasons for the Code is to promote ease of business and thereby pull more investors to establish industries and henceforth increase employment opportunities. Further the Code aims to uniform the definitions of various significant terms which were defined in a very ambiguous manner and thereby this Code ensures transparency and accountability.

III. KEY HIGHLIGHTS OF THE CODE

Ambit of the term Wages: It is important to understand that there was a need to have a uniform definition of this term and therefore, the same has been sought to achieved in the Code, 2019[710]. "The definition of wages, now, can be understood in three parts - inclusion, specified exclusions and conditions which limit the quantum of exclusions. The

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[707] INDIA CONST. art. 43.
[708] INDIA CONST. Schedule VII, Item 22, 24.
[709] Code on Wages 2019, Section 2(v), 3(1).
[710] Code on Wages 2019, Section 2(y).

definition includes "basic pay, dearness allowance and retaining allowance"[711]. It specifically excludes components such as "statutory bonus, value of house accommodation and utilities (light, water, medical etc.), employer contribution to provident fund/ pension, conveyance allowance/ travelling concession, sum paid to defray special work expenses, house rent allowance, remuneration payable under settlement, gratuity, retrenchment compensation". The point worthy of note is that the exclusions shall not exceed fifty percent of all remunerations.

- **Separate definitions of 'worker' and 'employee'**: The Code provides for separate definitions of 'worker[712]' and 'employee'[713]. The definition of 'employee' is broader than that of 'worker' in the sense that it includes within its ambit the persons carrying out managerial and administrative work apart from manual, unskilled, skilled, technical, operational, clerical or supervisory work.
- **Equal Remuneration:** Consistent with the "Equal Remuneration Act, the Code, inter-alia, includes provisions prohibiting discrimination on grounds of gender (i) with respect to wages by employers, with respect to same work or work of a similar nature done by employees and (ii) with respect to recruitment of employees for same work or work of a similar nature[714]. Further, it is relevant to note that under the Equal Remuneration Act, the definition of remuneration[715] was vague, and included basic wage or salary and any additional emoluments whatsoever payable in cash or kind to a person employed in respect of employment or work done. However, as per the Code, the components that will constitute wages for the purpose of payment" of equal remuneration irrespective of gender, leaving little room for confusion in this regard.
- **Payment of Bonus:** The Code, 2019 adheres to the Payment of Bonus Act by being applicable to establishments that employ at least 20 employees[716] on any day in that accounting year. The employees whose wage do not exceed a specific monthly amount (which shall be notified by the central/state government) shall be entitled to an annual bonus, the minimum of which will be 8.33 percent and maximum shall be 20 percent[717].
- **Minimum wages:** The central government will now be determining a national floor rate for wages. This rate shall be arrived at after taking into consideration the basic standards of living of workers across all geographical areas. "If the minimum and basic wages come out to be higher than the floor wage rate, then, they shall be retained. For their own region, the state governments shall fix the minimum wages which cannot in any scenario be lower than the national floor rate". This code also entails provisions for a review/revision of minimum wages at an interval not exceeding five years[718].
- **Payment of wages:** Earlier under this act, where an establishment had more than 1000 employees, the employer was required to pay the wages to his employee within a period of ten days. Under the Code, however, this stands amended. Now, regardless of the number of employees, the employer is required to pay within a period of seven days from the wage period. In cases of resignation/removal/dismissal, the payment has to be made within two days from the date[719].
- **Gender discrimination:** The code has expressly prohibited for any sort of gender biasness in matters related to recruitment, remuneration and wage distribution in similar nature of work. Similar nature of work is defined as the work which requires same set of skills, experience and efforts[720].

IV. PROVISIONS FOR OFFENCES AND PENALTIES

The Code has provided an impetus for trade unionism by allowing a registered trade union to make complaints for offences under the Code. [721]"The Code provides for a graded penalty system for contraventions under the provisions of the Code[722] Unlike the provisions under the Minimum Wages Act and the Payment of Bonus Act which provide for punishment of imprisonment up to six months, the penal consequences under the Code are relatively lenient and

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[711] Saraswathi Kasturirangan, Tarun Garg & Shubham Goel, *The Code on Wages, 2019: Understanding the key changes to wages, remuneration and bonus*, E.T, (December 21, 2019) https://economictimes.indiatimes.com/small-biz/legal/the-code-on-wages-2019-understanding-the-key-changes-to-wages-remuneration-and-bonus/artiSectioneshow/72913106.cms?from=mdr.
[712] Code on Wages, Section 2(z).
[713] Code on Wages, Section 2(k).
[714] Code on Wages, Section 3.
[715] Equal Remuneration Act 1976, Section 2(g).
[716]Code on Wages, Section 41 (2).
[717]Code on Wages, Section 26 (1).
[718] Code on Wages, Section 8(4).
[719] Code on Wages, Section 17.
[720] Ministry of Labour," The Code on Wages, 2019", PRS (Sept 9,2019).
[721] Code on Wages, Section 52(1).
[722] Code on Wages, Section 54.

only entail punishment with fine. However, the Code penalizes a second conviction within a span of five years from the first conviction with imprisonment. The quantum of fines for contraventions under the Code has seen a significant increase. Additionally, it is to be noted that the offences of non-maintenance or improper maintenance of records and registers in the establishment are punishable only with a fine. Under the Code, the inspector-cum-facilitator is required to afford an opportunity to the employer before initiating prosecution proceedings in cases of first contraventions. This window will benefit contraventions which are non-intentional or due to genuine lack of information on the part of the employer. Exhaustive procedures in relation to compounding of offences have been provided under the Code."

V. WHO ARE THE BENEFICIARIES OF THIS CODE, 2019?

Having brought together various previous legislations under a single Umbrella, the code has expanded the definition of "employer" as well as "employee", resulting in a broad-based applicability of the regulations and is now applicable to employees in both organized and unorganized sectors. Another point of relevance is that the provisions of the Minimum Wages Act and the Payment of Wages Act used to apply only to workers that drew wages below a particular ceiling and were working in scheduled employments. But, under this Code, all employees and employers, establishments are to be included unless specifically exempted.

VI. ANALYSIS & SHORTCOMINGS

As mentioned earlier, this Code on Wages, has made attempts towards having unified definition of *Wages*. However, this definition is rather complex in nature and is unnecessarily long. It calls for determination of floor rates for different geographical areas which in turn makes the concept of a national rate a deceptive ploy to mislead the people. Moreover, on a better perusal of the code, we cannot ignore the confusion created by providing for separate definitions of a worker and employee. This is in spite of the Parliamentary panel's recommendation[723] for a common and comprehensive definition of employee/worker to avoid discrimination between employers and workers for the purpose of minimum wages. With respect to the Offences and Penalties part, the Code has made a credible transformation. There is substantial rationalization and proportionality, and an intent to support the business rather than hampering it. The Code, encourages technology adoption in matters such as mode of payment of wages, inspection procedures, which are aimed at achieving its digitalization goals in governance. While the idea is good, the real challenge is in implementing it. The enforcement mechanism has proved inadequate in the presentation situation and little attention has been paid to this aspect in the Code which widens the scope of coverage.

VII. CONCLUSION

The Code is definitely a positive step towards labor reform and a long awaited one at that. The Code's provisions appear to be exhaustive, however, only the test of time will tell whether the changes introduced by the Code will achieve the objectives that it aims to achieve and solve the concerns that it purports to address. The Code is a well-intentioned piece of legislation which aims to balance the interests of the employer and the employee. Though the Code contains substantial portions of the repealed legislations, it makes a decent attempt to replace their obsolete provisions. The provisions of the Code inspire confidence in the business community, and further clarity can be realized once the subordinate legislations and rules under the Code are in place. It would also be interesting to gauge how the other codes relating to social security, industrial safety and welfare, and industrial relations will interact with the Code of Wages once they are passed. The Central Government is speculated to implement a new set of rules for Code on Wages by September 2020. The draft rules issued by the Union Ministry of Labor on July 7, 2020 is now included in the official gazette.

VIII. SUGGESTIONS

The Code should improve the standard of regulatory authorities so as to ensure proper implementation rather than focusing on already existing enforcement mechanisms. Further, setting a uniform standard legislation for different type of workers which includes daily wage workers, contract workers (who are the prime victim of major labor exploitations) does not give a true resolution of the problem. The researcher therefore suggests a specific and particular legislation differentiating different types of laborers. Moreover, as already stated in the paper, the floor wage set by the central legislation is very archaic in nature and does not follow the international standards or recommendations of any standing committees in previous labor conferences. Every state legislation has been given absolute power to determine the minimum wage rate as per their whims and fancies. Therefore, it is suggested, that a uniform methodology be set to determine the Minimum Wage Rate. This will eliminate any arbitrary decisions taken by the state governments. Lastly, the researcher wants to

[723]Ministry of Labor, Report of the Expert Committee on Determining the Methodology for Fixing the National Minimum Wage, (January2019) https://labour.gov.in/sites/default/files/Commitee_on_Determination_of_Methodology.

conclude by stating that although the Code is one of the most landmark legislations introduced by the current governments, on a closer analysis of the same, the Code has only omitted or diluted the provisions of the archaic existing four laws and a reform is needed for the welfare of the labor.