MAHAMANA

STUDENT LAW JOURNAL

(A Peer-Reviewed Journal)

MAHAMANA STUDENT LAW JOURNAL

Cite This Issue
as
MSLJ Vol.01 No.01 (2021)

The *Mahamana Student Law Journal* (*MSLJ*) is published bi-annually by the Faculty of Law, Banaras Hindu University. The Articles and other contributions for possible publication are welcomed by the Faculty. Students and Research Scholars should address to the Editor-in-Chief, *Mahamana Student Law Journal*, Faculty of Law, Banaras Hindu University, Varanasi - 221005, India, and e-mail to <*dean.lawschool.bhu@gmail.com*>, or <*dean.lawschool@bhu.ac.in*>. Views expressed in the Articles, published in this Journal, are those of the respective contributors and do not necessarily reflect the views of the Board of Editors of the *Mahamana Student Law Journal*.

In spite of our best care and caution, errors and omissions may creep in, for which our patrons will please bear with us and any discrepancy noticed may kindly be brought to our knowlede which will improve our Journal. Further, it is to be noted that the Journal is published with the understanding that Authors, Editors, Printers and Publishers are not responsible for any damages or loss accruing to any body. The piety of plagiarism of the published articles is fully upon the authors.

In exchange for *the Mahamana Student Law Journal*, the Law School, Banaras Hindu University would appreciate receiving Journals, Books and monographs, etc. which can be of interest to Indian specialists and readers.

© Law School, B.H.U., Varanasi- 221005

Printed by Dee Gee Printers, Varanasi-221010, INDIA.

MAHAMANA
STUDENT LAW JOURNAL

Pandit Madan Mohan Malaviya Ji

(The Founder of Banaras Hindu University)



(25.12.1861 - 12.11.1946)

"It is my earnest hope and prayer, that this centre of life and light, which is coming into existence, will produce students who will not only be intellectually equal to the best of their fellow students in other parts of the world, but will also live a noble life, love their country and be loyal to the Supreme Ruler."

- Madan Mohan Malaviya

MAHAMANA
STUDENT LAW JOURNAL

EDITORIAL COMMITTEE

Prof. Ali Mehdi	**Editor-in-Chief, Head & Dean**
Prof. D. K. Mishra	**Executive Editor**
Prof. G. P. Sahoo	**Student Advisor**
Prof. C.P. Upadhyay	Senior Article Editor
Prof. P.K. Singh	Senior Article Editor
Prof. V.S. Mishra	Senior Article Editor
Prof. R.K. Murali	Senior Article Editor
Prof. A.K. Pandey	Senior Article Editor
Prof. Ajendra Srivastava	Senior Article Editor
Prof. Ajay Kumar	Senior Article Editor
Prof. S.K. Gupta	Senior Article Editor
Prof. Bibha Tripathi	Managing Editor
Prof. M.K. Padhy	Managing Editor
Prof. J.P. Rai	Managing Editor
Prof. R.K. Patel	Managing Editor
Dr. R. K. Singh	Associate Editor
Dr. V.K. Saroj	Associate Editor
Dr. K.M. Tripathi	Associate Editor
Dr. Raju Majhi	Associate Editor
Dr. V.K. Pathak	Assistant Editor
Dr. Adesh Kumar	Assistant Editor
Dr. N.K. Mishra	Assistant Editor

काशी हिन्दू विश्वविद्यालय
BANARAS HINDU UNIVERSITY

सुधीर कुमार जैन
कुलपति
Sudhir K. Jain
Vice Chancellor

April 29, 2022



MESSAGE

For more than a century, the Banaras Hindu University has played a vital role in healthy and holistic development of its students and promotion of quality research. It gives me immense pleasure that as part of its role to develop thoughts and opportunity of discussion on critical issues, Faculty of Law, BHU is releasing the maiden issue of the Mahamana Student Law Journal (MSLJ). The journal is yet another attempt of the Faculty of Law to promote the objectives and aspirations of the University to encourage research and scholarship and to disseminate knowledge. The journal offers platform to students of law to present their opinions on contemporary legal and social issues. I am aware that the Faculty of Law has already been publishing a highly reputed Banaras Law Journal (BLJ) since 1965. Hence, the vast experience of the Faculty in maintaining the academic quality of BLJ shall enable the Editorial team of the MSLJ in maintaining the standard.

I congratulate the contributors and wish the Editorial team all success in their endeavor and I wish that the journal would flourish and attain great heights.

(Sudhir K. Jain)

Banaras Hindu University, Varanasi, 221005, U.P., India
Phone: +91-542-2368935, 2368359 | E-mail: vc@bhu.ac.in | Website: www.bhu.ac.in

काशी हिन्दू विश्वविद्यालय
BANARAS HINDU UNIVERSITY
AN INSTITUTION OF NATIONAL IMPORTANCE ESTABLISHED BY AN ACT OF PARLIAMENT

Prof. Ali Mehdi
Head & Dean

April 30, 2022



From Dean's desk

I am extremely delighted in introducing Mahamana Student Law Journal (MSLJ) a platform for the students of Faculty of Law for publication of their articles and papers. Faculty of Law a Century old institution has been a place of learning and research in the discipline of law. It materializes the vision of Bharat Ratna Pandit Madan Mohan Malaviya Ji to inculcate discipline and knowledge of law (*dharma*) in the students. Faculty has the reputation of publishing Banaras Law Journal containing research articles and papers of the professors across the world, judges and senior advocates. In this galaxy of authors students of the faculty had no place to contribute their knowledge on contemporary legal issues. The Faculty, therefore, decided to create space for the students to exhibit their opinion based on their perception of various matters and responses under the law. The first volume of this journal contains articles on diversified issues like Constitution, Criminal Law, Environment, Information Technology and alternative modes of settlement of disputes that substantiate the interest of the students in learning and making their opinion.

I sincerely wish and fervently hope that such academic exercise shall transform the opinion of young law students in published form and thus bring it in the public domain. It would also reflect the endevour of the Faculty of Law in achieving and effectuating the vision towards development of legal education in the country.

(ALI MEHDI)

MAHAMANA
STUDENT LAW JOURNAL

Vol. 01 **No. 1** **Jan - June 2021**

ARBITRATION AS THE FUTURE OF CLIMATE CHANGE DISPUTES
ANANT VIJAY 11

RIGHT TO LIFE OF A DISEASED PERSON BEYOND RECOVERY AND THE CHALLENGES IN INDIAN LAWS
ANUSHRI THAKUR 20

CRIMINAL PSYCHOLOGY: THE UNTOUCHED SIDE OF SERIAL KILLING
SUCHARITA MISHRA 30

CRIMINALIZED INDIAN POLITICS: SYNERGY BETWEEN POLITICIANS AND CRIMINALS
ADITYA SINGH 41

EVOLUTION AND DEVELOPMENT OF JUVENILE JUSTICE SYSTEM IN INDIA
NEELESH KUMAR 52

WOMEN CRIMINALITY IN INDIA: CAUSES AND PREVENTIVE MEASURES
SUSHIL KUMAR 63

ENVIRONMENTAL LAW: ENFORCEMENT ISSUES IN INDIA
ABHIJEET KUMAR MALL 74

AADHAAR *VIS-À-VIS* PRIVACY: AN APPRAISAL
NIVEDITA KUSHWAHA 85

BLOCKCHAIN AND E-GOVERNANCE: MEETING CITIZENS NEED IN DIGITAL CONTEXT
BHAVANA CHATURVEDI
AYUSH MITTAL 96

E-GOVERNANCE IN INDIA: A STUDY IN LEGAL PERSPECTIVE
AJAY KUMAR YADAV 116

IT RULES 2021 AND ITS EFFECT ON SOCIAL MEDIA INTERMEDIARIES
ABHISHEK SAHU 128

PEGASUS : A FUTURE OF NO PRIVACY
AYUSHI UPADHYAY 139

"NOT SO PETTY": UTILITY MODELS PATENT PROTECTION FOR INCREMENTAL INNOVATIONS
MAYANK TYAGI 150

COMPARATIVE ANALYSIS OF LAND ACQUISITION ACTS IN INDIA
MADAN MOHAN SHAHI 160

■

ARBITRATION AS THE FUTURE OF CLIMATE CHANGE DISPUTES

ANANT VIJAY*

ABSTRACT : Climate Change has emerged as one of the most pressing issues being faced by the world today. In a jurisprudential sense, it has emerged as a challenge to environmental law. While there has been strong statutory protection offered both globally and nationally, the traditional courts have inherently struggled with ensuring their sound implementation while deciding on environmental disputes. It is in this regard, that the exploration of alternate dispute resolution methods for ensuring environmental protection deems necessary. Arbitration in specific, has the potential to cater to the needs of the vast climate change related laws, treaties, agreements, protocols and more. The paper will throw light on how arbitration is ideally suited to resolve climate change disputes over litigation, what steps could be taken in order to make arbitration more climate-change friendly and what steps have already been taken. Finally, we will jump in the Indian scenario and try to understand the foreseeable future.

KEY WORDS : Arbitration, Climate Change, Environmental Dispute Resolution.

I. INTRODUCTION

Climate Change can be referred to as a change in the usual weather found at a place. It could be in relation to a change in the temperature, pressure, humidity, rainfall or wind of a particular place. While it is a natural process, in the last couple of centuries, what we have seen is an increasingly fast-paced occurrence in the change of the global climate, attributed to

* LL.B. (Hons), Semester III, Law School, BHU; anantvj2801@gmail.com

man-made causes that have fundamentally been detrimental to the environment. Consequently, it has called for the enactment of public policies and legislations focused towards correcting this occurrence and absorbing its effects. One of the major causes of climate change include heavy industrialization and urbanization, and thus the sectors linked to these causes like energy, construction, minerals, etc. have faced the brunt of these new policies and legislations. Naturally, this has resulted in the evolution of new kinds of disputes within the category of environmental disputes, i.e. 'climate-change disputes'[1].

Arbitration as an alternate dispute resolution mechanism is widely known for its efficiency. Due to its principle of party autonomy, it is increasingly being preferred in contracts between multinational corporations. In fact, most construction disputes today are largely dominated by arbitration clauses incorporated within bulky contracts so as to avoid the complexity of litigation. Therefore, it would only be fair to see arbitration as the future for dispute resolution in those sectors that are likely to be affected by the implementation of climate change policies.

i) WHAT IS A CLIMATE CHANGE DISPUTE?

In November 2019, the Commission on Arbitration and ADR of the International Chamber of Commerce (the "ICC") published a report that examines the role of arbitration and ADR in the resolution of international disputes related to climate change (the "Report"). It defined 'climate-change disputes' as 'any dispute arising out of or in relation to the effect of climate change and climate change policy, the United Nations Framework Convention on Climate Change ("UNFCCC") or the Paris Agreement'[2].

The report figures out three types of climate change disputes that are commonly found in international arbitration -

a. Disputes arising out of specific transition, adaptation, or mitigation contracts - These contracts are entered in order to meet specific climate change goals or commitments. A good example would be, a contract on building solar panels for reducing carbon emissions.

b. Disputes arising from contracts whose performance has been impacted by mitigation – These disputes arise when contractual

1. The IPCC Special Report, Global Warming of 1.5ÚC (October, 2018).
2. ICC Commission Report: *Resolving Climate Change Related Disputes through Arbitration and ADR* (November, 2019).

performance of one or more of the parties is affected by their response to changes in national laws and regulations, or the environmental impacts of climate change itself. For example, a contract on eco-friendly fuel supplied to a car manufacturer, disrupted by natural disaster, ultimately affecting the business of the car manufacturer, as a result of which, a dispute arises.

c. Disputes arising from environmental issues – There are general contracts concerning environmental issues which specifically ask to submit their dispute to arbitration once it arises.

The report as a whole tried to provide guidance and suggestions to better resolve climate-change disputes. It sheds light on the fact that the regular warnings issued by the Intergovernmental Panel on Climate Change (IPCC) will give rise to new investments and thus, new disputes. Since, arbitration is the future in those sectors that are likely to be affected by the implementation of climate change policies, it becomes of great concern that nearly 70% of the new arbitration cases in ICC in the year 2018, were accounted by climate-change driven transitions, with nearly 40% being accounted by construction, energy and engineering sectors alone.

ii) CLIMATE CHANGE IN INVESTMENT DISPUTES

The arbitration cases in ICC solely concern themselves with contractual disputes, while there is another much less talked about side in international arbitration. Investment arbitration disputes become significant for the study of climate change as they provide a bilateral view on global mitigation trends. In general, these Bilateral Investment Treaties or BITs lack concern for environmental protection. However, this trend seems to be shifting.

The promising Netherland Model BIT[3] contains two features in this regard. First, that it contains the investors duty to comply with domestic environmental laws, and second, that it contains provisions for appointing members of the tribunal with prior expertise in environmental law. However, not all obligations are imposed on investors. The very recent, Singapore-Indonesian BIT 2021[4] expressly provides for the state's right to regulate to achieve environmental protection without this constituting a treaty breach, including the modification of laws that might adversely affect an investor.

---

3. The Netherlands Model Investment Agreement, 2019.
4. Agreement b/w the Govt. of the Republic of Singapore & the Govt. of the Republic of Indonesia, March 2019.

Of course, states also have general obligations as a part of their public policy to protect the environment, which is two-fold. It could be in the form of a state action[5] by taking proactive measures like incentivizing clean energy, or it could be in the form of state inaction[6] by not complying with its treaty obligation, which ultimately results in loss for the investor.

II. WHY ARBITRATION?

Despite the well-known advantages that arbitration offers like a neutral forum, cross-border recognition, enforcement of arbitral awards, party autonomy and suitability to different conditions, arbitration is increasingly being preferred in climate change disputes for a variety of other reasons.

The most prominent reason of all is the ability of the parties to choose arbitrators and experts with appropriate scientific and environment-related expertise. Often in litigation, the judges do not possess the scientific understanding to understand complex matters related to the environment, whereas arbitration provides the unique opportunity to parties to appoint arbitrators of their own choice. Thus, they carry an advantage over litigation in the sense that they offer special attention on environmental issues like climate change. Arbitration also offers the ability to expedite proceedings and apply interim and conservatory measures particularly in cases involving irreversible damage to the environment. Thus, it can give not only extra but also timely focus on issues involving environmental degradation.

In addition to that, parties to an arbitral proceeding can choose any specific environmental statute or legislation for the adjudication of the substance of the dispute. This convenience is absent in court proceedings, where the parties have to depend upon the wisdom of the judges.

In arbitration, there can be preservation of confidentiality of parties or their disclosure having the parties and public interest in mind. This becomes increasingly important in climate change disputes as often they require greater transparency than commercial disputes, when they concern the public at large.

Finally, it cannot be denied that arbitral rules are flexible enough that they can be applied in any case. The ability to customize the process, proceed efficiently and maintain confidentiality, hallmark the advantage

5. *Spanish Renewable Energy Cases* 2007.
6. *Peter.A.Allard (Canada) v. Government of Canada* 2016 PCA.

and suitability of arbitration for climate change-related disputes, especially in the global pandemic. Courts all around are overburdened with cases and therefore more flexible and immediate options which may be crucial for resolving climate-related disputes are required. Climate change and environment-related disputes invariably have an international dimension and therefore the inherent flexibility, an option of choosing a neutral forum, neutral venue and internationalism of the arbitral process make commercial arbitration an ideal dispute resolution method for climate-related disputes.

III. MAKING ARBITRATION 'CLIMATE-CHANGE' FRIENDLY?

Having understood the procedural advantages that arbitration offers in climate change disputes, we shall now look at some of the ways in which various parties and stakeholders to a dispute or to an issue pertaining to the dispute, can adopt an eco-friendly approach towards their dispute resolution strategy.

As previously understood, scientific expertise can be provided through the appointment of arbitrators with relevant expertise, party-appointed experts, tribunal-appointed experts and via expert determination on climate change. However, to bring the expertise into legal sanctions, parties and arbitrators need to have solid drafting skills. This is to establish a sync between the legal issues and environmental issues.

The parties also need to follow certain case management techniques like the introduction of expedited procedures, emergency proceedings, interim measures and other reliefs at appropriate times[7]. At any given time in a dispute, environmental commitments of states and non-state actors are at stake, and to ensure that they are not compromised with, timely interventions by courts become necessary.

The parties can include international climate change commitments and policies in the applicable law governing the dispute as well. A recent example would be the Netherlands Model BIT which has therein referred to the importance of the Paris Agreement 2015.

Nothing can be emphasized more than the importance of making the hearings and awards of these disputes' public. This can be done with the help of the procedural flexibility available in arbitration. However, sensitive information or any other information which the party considers discreet

7. Appendix IV, ICC Arbitration Rules.

may not be disclosed as per the discretion of the tribunal. Of course, when we are talking of public interest, it should be assumed that there are stakeholders to the dispute other than the parties themselves. These groups can also be addressed in the arbitral proceedings through joinders and consolidating them together, while respecting the efficiency, consent and due process of the proceedings.

Often in climate change disputes, we see inequity among the parties due to either of the parties being financially weak. Arbitration provides the opportunity to correct this where parties can navigate the management of costs as per their requirements. Thus, a party who may be financially strong can pay the advance payments or it can be paid through an arrangement made by the tribunal.

Finally, the arbitral tribunal should stress not only on the implementation of their award, but also other treaties and agreements that are equally important to curb major environmental issues.

Potential steps by ICC

As we have already learnt, ADR and arbitration are frequently adopted in commercial contracts concerning energy, land use, urban and infrastructure which comprise the majority of the ICC disputes. With the inflow of investment in the mitigation industry, new regulatory risks and investment strategies will emerge, whose disputes will be resolved by arbitration. Mitigation and adaptation, and systems transition as a whole, may cause ICC Arbitration to take proactive measures to develop an ecosystem for handling climate-change disputes[8].

One such measure was the Campaign for Greener Arbitration[9] introduced in 2019. It aimed to reduce the carbon footprint in international arbitrations. This campaign runs on a set of protocols with the goal of developing practical steps which could be implemented to accomplish the Campaign's Guiding Principles. It has suggested a set of green protocols which should be followed by all the pillars of international arbitration -

a. For proceedings : Eco-friendly methods in proceedings should

8. Kirsten Odynski, "The Role of ICC Arbitration in Resolving Climate Change Disputes" *White and Case*, Jan. 29, 2020.
9. Chetna Alagh and Sejal Makkad, "Arbitration and Climate: Steps Taken by Arbitration Associations to Curb Global Warming" *The Daily Guardian*, Apr. 30, 2021.

be adopted like conducting online/remote proceedings. Unlike litigation which adopted the virtual mode for proceedings only amidst the global pandemic, arbitration has naturally been accommodative of online proceedings. Major international arbitral institutions like the Singapore International Arbitration Center ("SIAC")[10] have embedded the option in their rules. Some of the advantages of having remote proceedings include less carbon emissions due to minimal travel, less paperwork, etc.

b. For law firms/services : Same strategies also need to be adopted by legal professionals. Firms and independent practitioners may adopt eco-friendly transportation use and digitally signed documents as much as possible. Firms can even adopt an eco policy, which can be looked over by the green ambassadors.

c. For arbitrators : Independent arbitrators can reduce travel, energy emissions and integrate the conduct of proceedings with other green protocols.

d. For institutions : Institutional representatives are required to guide both internal and external operations of the firm and parties so that remote proceedings can be arranged. These representatives will work according to the rules of these institutions, so naturally the provision of greener rules are a must.

e. For venue/seat : The venues can use technological platforms to promote digital representations of cases and file sharing so that the paper works can be reduced and travel is less. However, the usage of e-mails and energy consumption will thus be more.

IV. THE INDIAN SCENARIO

With increasing industrialization, environmental protection has increasingly become an important issue for lawmakers to address. While there are statutes, rules and notifications dealing with the same, their implementation in litigation has been a cause of concern for a while. To fill this space, arbitration can be a way forward. Therefore, parties in a commercial arrangement typically allocate environmental risk in their contract. Traditionally, Indian environmental law has been identified by courts and ordinary litigation. However, a landmark development in this area was in 2010 when the National Green Tribunal was constituted which has, to some extent, reduced the burden of cases on the courts.

10. SIAC International Arbitration Rules 2016.

Arbitration as a way of dispute resolution mechanism is relatively new in India. It has gained momentum only in the last six years. Therefore, the use of arbitration for the resolution of environmental disputes is a far-fetched dream. However, considering the arguments we have learnt in favour of arbitration as a probable solution to such complex disputes, there is much merit in adopting the same. Since any change in this direction will be a policy decision, it is wise to point out the international recognition given to arbitration by various institutions, scholars and agreements.

For instance, Article 14 (2) of the United Nations Framework Convention on Climate Change expressly provides arbitration as a means for resolution of interstate disputes arising out of the breach of its provisions "in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration". This was again stated in Article 24 of the Paris Agreement on 12th December 2015[11]. The importance of arbitration has been reiterated time to time, as in the 21st Conference of Parties[12] (COP21) to UNFCCC held in Paris, wherein the historic Paris Agreement 2015 was signed, COP22 held in Morocco, 2016 and COP23 held in Germany, 2017. Where arbitral institutions are concerned, it's not only the ICC that works as an inspiration for Indian arbitral institutions. The American Arbitration Association (AAA) expressly lists environmental disputes and specializes in it at the same time. The ICC apart from its annual reports, formed a task force on "Arbitration of Climate Change Related Disputes[13]" to explore how ICC arbitration can be used to tackle climate change-related disputes. Apart from these, we have the Stockholm Chamber of Commerce ("SCC"), the London Court of International Arbitration ("LCIA"), the Korean Commercial Arbitration Board ("KCAB") and the China International Economic and Trade Arbitration Commission, who provide for the reimbursement of costs or expenses reasonably incurred by arbitrators, which include the cost of carbon offsetting their flights to and from case-related proceedings.

---

11. Art. 14(1) of the UNFCCC / Art. 24 of the Paris Agreement (by incorporation: "The provisions of Article 14 of the Convention on settlement of disputes shall apply mutatis mutandis to this Agreement").
12. Formal Meeting UNFCCC Parties (Conference of Parties) (COP) held every year to assess progress in dealing with climate change.
13. ICC's Commission on Arbitration and ADR, Report: *Arbitration of Climate Change Related Disputes* (April, 2019)

The International Bar Association (IBA) in its annual report[14] of 2014 expressly recommended institutions to develop rules and expertise specific to the resolution of environmental disputes to adapt arbitration for climate change disputes. David Riwkin, President of IBA even went to the extent to say that 'international arbitration should similarly play a critical role like it played in Ancient Greece, in developing the legal framework of the post COP21 world'. He says that 'the affected populations, particularly in environmental disputes, should be able to participate in the arbitral process, provided the terms of the arbitration agreement or the rules used clearly encompass their rights and protections'. Clearly, he has taken a very ambitious approach, from which the reality at present might differ. Still, it's not a viable argument to ignore arbitration as a means for resolution of climate-change disputes any longer.

V. CONCLUSION

With the world entering a pandemic, arbitration has emerged as a reliable option for commercial arrangements to facilitate resolution of their disputes. Its procedure is efficient, flexible and adaptive; and its multi dimensionsional base allows it to be relevant for the future. One of the most alarming issues that concern the near future is climate change, and while it has received its fair share of attention and development at the global level, the changes that follow them have their own legal repercussions. The fight against climate change is to continue for the next few decades. Naturally, it would mean the creation of more contractual and investment disputes, and maybe even the evolution of new kinds of disputes. It is this space which arbitration shall supposedly fill.

■

14. IBA's Climate Change Justice and Human Right Task Force, Report: *Achieving Justice and Human Rights in an Era of Climate Disruption* (2014).

RIGHT TO LIFE OF A DISEASED PERSON BEYOND RECOVERY AND THE CHALLENGES IN INDIAN LAWS

*ANUSHRI THAKUR**

ABSTRACT : Life of human being is precious not for its animal existence but for the dignity and sanctity attached to it. The important question here is, whether the right to live with dignity extends to having a dignified death. This article argues that the 'right to life' and 'right to die' are fundamental rights which are intertwined with each other. Hence, 'right to live' with human dignity includes such right until the end of the natural life of a person to ensure a dignified death. This is in contrast to an unnatural death before the normal course of life gets over. The article also deliberates upon the scope of the term 'dignified death', especially in the context of the ongoing pandemic; and what comes next after the legalisation of passive euthanasia.

KEY WORDS : Right to Life, Right to Privacy, Active euthanasia, Passive euthanasia, Persistent Vegetative State (PVS).

I. INTRODUCTION

India is predominantly a religious country and so human life is considered to be a divine gift attracting care and caution to the level best to the people rendering the person with dignified status. It has nobility in itself not for the biological structure but the attributes attached to it that make it significant and respectful. Article 21 of the Indian constitution guarantees that no person shall be deprived of life or personal liberty except according to procedure established by law. Over a century back Field, J. in

* BA LL.B. (Hons), Semester V, Law School, BHU, Varanasi; anushrithakur2001@gmail.com

Munn v *Illinois*[1], observed that the term life as here used, meant something more is meant than animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which the life is enjoyed…the deprivation not only of life but of whatever God has given to everyone with life, for its growth and enjoyment is prohibited by the provisions in question.

In *Maneka Gandhi* v. *Union of India*[2] the Supreme Court gave a meaningful dimension to Art. 21, the court held that the 'right to live' does not merely mean the physical existence of a human being, rather it also includes in its ambit the 'right to live with human dignity'. This was further expanded in the Francis Coralie case[3], where the court held that the 'right to live' includes living with all basic necessities, i.e., provisions like adequate nutrition, clothing, and shelter as well as facilities which allow a person to enjoy his/her life through activities like reading, writing, expressing oneself through different means, mixing up in the society that we live in etc.

Recently through a landmark verdict[4] known as the Common Cause case in 2018, the SC legalised passive euthanasia and approved the 'living will' to provide terminally ill patients or those in persistent vegetative state (PVS), a dignified exit by refusing medical treatment or life support, expanding the right to life to incorporate the right to die with dignity. The verdict was delivered by a constitutional bench comprising of Chief Justice Deepak Misra and Justices A.K. Sikri, A.M Khanwilkar, D.Y. Chandrachud and Ashok Bhushan. During the judgement, Justice D.Y. Chandrachud gave concept of 'Right to live with dignity under the Indian Constitution'. According to Justice Chandrachud, "This judgement would help people in finding substance and balance in the relationship between life, morality and the experience of dying".

As an outcome of this verdict, many people can be saved from mental and physical agony, distress, etc., thus this judgement is considered to be progressive and humane as it gave utmost importance to human life. The verdict also lays down a broad legal framework for protecting the dignity of terminally- ill patients or people in a position of persistent vegetative state (PVS), with no hope for cure or recovery.[5] Detailed deliberations on

1. 94 US 113 (1876)
2. AIR 1978 SC 597
3. *Francis Coralie Mullin* v. *Union Territory of Delhi* (1981) AIR 746.
4. Common cause (A Regd Society) UOI, AIR 2018 SC. 1665.
5. Editorial, "Death with Dignity: On SC's verdict on euthanasia and living wills", *The Hindu*, March 10, 2018.

passive euthanasia have been discussed below including how the right to live with dignity evolved under the Indian constitution, its various aspects and the emerging trends and issues.

II. RIGHT TO LIFE OF A DISEASED PERSON

The decision of the SC that the fundamental right to a "meaningful existence" includes a person's choice to die without suffering emanated from the 2018 *Common Cause* v. *UOI*[6] case which has evolved through several judgements on this subject in the past. Passive Euthanasia in India was recognized for the first time by a two judges' bench in *Aruna Shanbaug* v. *Union of India*[7] case in 2011. The debate around the ethics of euthanasia or what is also known as 'Mercy Killing' gained prominence in India as a result of this case. Aruna Shanbaug was a nurse in K.E.M hospital in Mumbai who spent 42 years in a vegetative state after being brutally assaulted by a sweeper after her night shift. In 2011, a journalist- activist Pinky Varani filed a writ petition under Art. 32 before the SC seeking the legalization of Euthanasia so that Aruna's suffering could be put to rest by withdrawing the life support system, on which she was kept in the hospital. After forming a medical board to consider the circumstances and establishing the next of kin, the court ultimately denied the petition for Euthanasia in Shanbaug's case, but it did however, legalise passive euthanasia in the country. The court, in the same case also made a distinction between Active and Passive Euthanasia. Prior to Aruna Shanbaug's case, the SC formulated an opinion on the legality of suicide in the cases mentioned below:

a. P. Rathinam v. UOI[8]**:** In this case the SC held that, criminal penalties for suicide violate the constitutional right to life by subjugating a particular person to double punishment. It was specifically argued that women who take such a big step; i.e., of attempting to commit suicide after abuse cannot be criminally penalised on top of that for their suicide attempt as it would be further traumatizing for them. Thus, the case debated the constitutionality of Section 309 of IPC and struck down this proviso. The right to die was included within the right to live with dignity for the first time, through this case.

b. Gian Kaur v. State of Punjab[9]**:** In this case, a five-judge

6. *Supra Note 4.*
7. *Aruna Ramchandra Shanbaug* v. *Union of India* (2011) 4 SCC 454.
8. AIR 1994 SC 1844.
9. 1996 AIR 946.

constitutional bench held that the "right to life" is inherently inconsistent with the "right to die" as is death with life. In furtherance to, the right to life which includes, "right to live with human dignity" would mean the existence of such a right up to the natural end of life, not including unnatural extinction of life that curtails the natural life span. Thus, the constitutionality of Section 309 of the I.P.C., which makes "attempt to suicide" an offence, was upheld, overruling the judgement given in P. Rathinam's case.

i. Common Cause Case (2018)

As mentioned earlier, the landmark judgement delivered on the 9th March, 2018 recognized the right to live with dignity, through the legalization of passive euthanasia and execution of a 'living will' of persons suffering from chronic terminal diseases and likely to go into PVS. The verdict is the latest in a string of boosts for individual freedoms by the apex court. Through this judgement it was decided that a person is empowered to make a 'living will', a document prepared by a person in healthy state of mind under which he can specify in advance whether he would like to opt for life support, if he slips into PVS due to a terminal medical condition in the future. The person concerned can also authorise, through their own will, any relative or friend to decide in consultation with the medical experts when to pull the plug. However, to prevent potential misuse of the provision of 'living will' by relatives eyeing the property and wealth of patients, the SC has laid stringent guidelines for the administration of passive euthanasia, including the involvement of multiple medical boards and judicial officers. Considering the sensitivities attached to life and death in Indian society, testing the legality of the idea posed a complex medical, philosophical, constitutional and religious problem for the bench, which made delivering a judgement on this matter a more difficult and sensitive issue. By suggesting that the right to die should now be considered a part of right to life as well as right to privacy, this judgement has opened up the debate for the decriminalization of suicide once again.

The answers to pertinent questions such as, what is 'mercy killing' and how can one differentiate it from killing, should one consider the mental state of a person who is asking for death, how to distinguish a person who has lost the will to live from a person who cannot live; keep evolving as societies evolve and place importance on certain ideals over others. This is evident from the cases discussed above and in order to understand what led to the inclusion of 'right to die with dignity' within the 'right to life', it is important to look at various aspects deliberated in the Common Cause case in detail.

a. Matter of Life and Privacy: The judgement paves the way for decriminalizing suicide as it suggests that the 'right to die' is an intrinsic part of 'right to life' and 'right to privacy', citing the 'Mental Healthcare Act (2017)' as the first step, in this direction. It recognizes that sometimes people go through so much mental trauma and poverty that they cannot lead a "meaningful existence".

b. State's Failure: An important question posed by the SC during the hearing was whether the citizens should be denied the right to die with human dignity, when the state fails to guarantee the right of healthcare to all?

c. Stressed Finances and Facilities: It is often seen that the poor cannot afford expensive healthcare in our country, thus in order to protect their families and loved ones, they are forced to sell their family's property and endanger their future. The SC thus, also questioned the fairness of limited lifesaving facilities being blocked by the patients who cannot recover and have already reached a Persistent Vegetative State (PVS).

d. Euthanasia already in practice in some sects: The SC in this judgement, also mentioned that many sects and religions already follow the practice of Euthanasia such as Buddhism and Jainism though on the other hand sects like Hinduism, Islam and Christianity are against it. The SC also found that Euthanasia was allowed on a limited or partial level through the medical regulations' council since 2002, and thus, it made more sense to legalise Euthanasia with safeguards in India.

e. The Safeguards: Mandatory provisions such as double medical board, involving judicial magistrate or collector, to implement euthanasia and living will were attached by the courts so, that a proper check can be kept on misuse of the provision.

f. ***Active Euthanasia***: Active Euthanasia or assisted suicide though, allowed in many western countries remains to be illegal or a crime and can be made legal only through legislative action. [10]

II. LIMITATIONS OF COMMON CAUSE JUDGEMENT (2018)

While delivering this judgement, the SC held that the right to die is an intrinsic facet of the right to life under Article 21 of the Indian Constitution.

---

10. Dhananjay Mahapatra and Amit Anand Chaudhary, "Right to live includes right to die: SC", *Times of India*, March 10, 2018.

Though, the judgement is very significant, it is still fraught with several issues. Firstly, the SC has laid down a procedure that is even more cumbersome than the one currently in force. After, the Aruna Shanbaug judgement, every time passive euthanasia was to be implemented, permission of the High Court was required. Consequently, passive euthanasia was invoked in only one case. With, the recent judgement passive euthanasia is even more difficult to give effect to, as the procedure prescribed involves execution of the directive in presence of two witnesses, authentication by a judicial magistrate, permission from two medical boards and a jurisdictional collector.

Secondly, this decision is criticised by various religious groups that claim that the right to life is in the hands of the God, and so should be the right to die, and allowing withdrawal of treatments comes in way of such right as it may lead to the death of a person suffering from a terminal illness. This viewpoint is a hurdle in the way of accepting this judgement wholeheartedly.

Further, there are many issues which remain unaddressed in this judgement, such as recognition of the capacities of the minors to give advance directives and access to proper healthcare facilities.

III. DIFFERENCE BETWEEN ACTIVE AND PASSIVE EUTHANASIA?

On analysis of Aruna Shanbaug and Common cause cases it is clear that, the difference between active and passive euthanasia has primarily evolved through the judicial pronouncements.

In 2002, Common Cause, a registered society had written to the Ministers of Law and Justice, Health and Family Welfare, and the office of Company Affairs, also addressing the state governments, on the issue of the 'right to live with dignity'. In 2005, Common Cause approached the SC under Art. 32, praying for the declaration that the right to die with dignity is a fundamental right under Art. 21. It also prayed to the court to issue directions to the Union Government to allow terminally ill patients to execute 'living will' for appropriate action for the patients who are in a dying state and are admitted to hospitals. As, an alternative, Common Cause sought some guidelines from the court on this issue, and the appointment of an expert committee which comprised of lawyers, doctors and social scientists to determine the aspect of executing living wills. The Common Cause argued that the terminally ill patients or those suffering from chronic diseases that have reached an irreversible stage must not be subjected to

cruel medical treatments as, their body has already been suffering a lot. Thus, in such difficult conditions if they are denied the right to die in a dignified manner this, could extend their suffering and can also cause a great amount of pain or agony to their relatives. It repeatedly prayed to the court to let such persons die with human dignity by letting them have their own 'living will', however, this plea got rejected. Subsequently in 2018, 'the right to die with human dignity' has been legalised, through the *Common Cause* case as mentioned above.

Though, the Apex Court's rulings logistically dictate that the right declared in Common Cause gets extended to "active" euthanasia in carefully examined circumstances, the judges and commentators also recognise that in the context of euthanasia, there is no legal difference between deliberately doing (active) and "not doing or stopping to do" (passive) something that leads to death. The inherent contradictions in active and passive euthanasia are the inevitable outcome of the lack of a comprehensive and elaborate legal framework. As Justice D.Y Chandrachud notes that "the meeting point between bio- ethics and law does not lie on a straight course" and these complex issues cannot be addressed without the legislation and regulation of active euthanasia. By emphatically erring on the side of self- determination and recognising passive euthanasia with certain safeguards as a fundamental right, the Common Cause case has signalled that the difference between active and passive euthanasia is by and large a theoretical debate. Whether, termed as "dignified death" or a "bodily autonomy", there is no reasonable basis for negating the right of a patient whose circumstances warrant conditions where they need to exercise its assistance. Euthanasia, thus has always been a tricky act or provision of law, while some treat it to be completely immoral and against the will of God, there are others who see it as an act of ending indefinite suffering and consider it as the most benevolent act and almost a charitable one as well.

The pronouncement of the landmark *Common Cause* case in 2018 by the SC has formally legalised the concept of "right to die with human dignity" in India. The judgement allows, a particular patient to die with dignity and self- respect. This judgement is also laudable because it also helps in freeing those who are close to the patient from the guilt of taking away their life support- systems. Thus, we can also say that this judgement is a logical conclusion of series of judgements that the courts have given, expanding the definition of right to life to encompass the right to dignity and privacy.[11]

11. Dhvani Mehta, Pinky Anand, Sushila Rao, "Is active euthanasia the next step?", *The Hindu*, March 16, 2018.

IV. IS RIGHT TO PRIVACY RELATED TO THE RIGHT TO DIE?

Relying on a recent, nine- judge bench verdict making 'right to privacy' an intrinsic part of right to life under article 21 of the Constitution of India, a five judge SC bench in *Common Cause* case ruled that right to die with dignity was an important component or ingredient of right to privacy as death fundamentally affects the human life. Justice D.Y Chandrachud underlined the inseparable connection between 'right to die' and 'right to privacy' as well as an individual's rights and autonomy to take decisions regarding their lives. The bench also said that "Decisions relating to death, like those relating to birth, sex and marriage, are protected by the constitution by virtue of right to privacy".

Justice Chandrachud, in the judgement added that "Life and death are inseparable. Every moment our body undergoes change… life is not disconnected from death. Dying is a part of the process of living." [5] Dignity in death has a sense of realism that permeates the right to life. It has a basic connect with the autonomy of the individual and the right to self-determination.

It is evident from the above discussion that the detailed analysis of the SC judgement in *Common Cause* case makes us understand that the 'right to die with human dignity' and the 'right' to commit suicide' are the two provisions that are very much essential for the existence of a human being as they can also be considered in support of Art. 14, 15 and 21. The article 14 and 15 both are related to Right to Equality, whereas Art. 21, talks about the Right to life and personal liberty. Thus, by legalising passive euthanasia and the right to commit suicide, this 2018 judgement proved to be a milestone in the history of law.[12]

V. EMERGING TRENDS AND ISSUES DURING THE COVID- 19 PANDEMIC

We have all witnessed horrid and disturbing scenes of undignified disposal of bodies during the Covid period which has shaken the conscience of civil society. The Former Union Minister, Mr. Ashwini Kumar who happens to be a senior advocate of the supreme court also highlighted this problem in a letter addressed to the SC and requested to take Suo- moto cognizance of various news reports and articles relating to the undignified treatment and disposal of the bodies of the COVID-19 patients, saying

12. Dhananjay Mahapatra, "Right to die tied to right to privacy", *Times of India*, March 10, 2018.

that such acts amounted to a "grave infraction of the citizen's right to die with dignity and self- respect.

Mr. Kumar said the fundamental right to die with dignity also embraces the right to decent burial or cremation of a dead body, as the right to live with dignity also includes the right to proper burial of a human body, that has been given a certain amount of respect and care among their loved ones during the time they were alive. He also, referred to a recent report of an elderly patient in Madhya Pradesh who was being "chained" to a hospital bed. This tragic and completely inhumane sight of a COVID-19 patient being chained to a bed in a hospital in Madhya Pradesh and another sight in Puducherry of a dead body being thrown in a pit for burial have shocked the conscience of people. These instances inflicted a sense of guilt in the civil society as to how any person can be treated in such a manner, even when he/she is no more? These horrifying incidents in the recent pasts make us remind that "dignity" of an individual is a core-constitutional value in the hierarchy of non-negotiable constitutional rights. Mr. Kumar highlighted the unacceptable violation of right to die with dignity, by citing examples of situations, where reported piling up of bodies in hospitals and at cremation centres is taking place because of the non- availability of cremation/ burial grounds and the reported non- functioning of electric crematoriums in the capital as well as other cities and states. In his letter to the SC, he also requested to take a Suo- moto action so that the infraction of human dignity, even in such difficult times can be stopped.

VI. CONCLUSION

Dr Jack Kevorkian, famous American pathologist and proponent of the right of the terminally ill patient has aptly observed that, *"for those who are facing a terminal illness, who are in irremediable pain and suffering, wish to exercise their right to die with dignity, a system should be made available to them."* [13]

The importance and sanctity of human life should be preserved at all costs, but does this mean that a life is more valuable if it comes at the cost of giving more pain and agony to a person? Undoubtedly, a human life is very precious and not be toyed with, there are times when a person

13. Dignath Raj Sehgal, "Does Right to life include Right to die?", *Ipleaders*, *available at* https://blog.ipleaders.in/does-right-to-life-include-right-to-die May 13, 2019.

wants to live but he is not able to do so. There are stages in case of a terminally ill patients when he goes in a complete vegetative state and the recovery from this stage becomes almost irreversible, which is referred as 'Persistent Vegetative State' or (PVS). In such state it should be only the right of the person concerned to decide whether he wants to continue his/ her life with so much of pain or wants to be free from such pain and suffering. This kind of a will called a "living will", was not recognised by the courts in earlier cases particularly in Gian Kaur V State of Punjab, and Aruna Shanbaug, though the courts at some level realised that the right to life that has been mentioned in the Art. 21 of the Indian Constitution should also include the provision of "right to die with human dignity" Any respectable person's life cannot continue without dignity; thus, dignity is an integral part of a human life and it should be guaranteed even after death. In the recent time of COVID-19 pandemic, we have witnessed horrifying scenes of floating bodies in the rivers, treating dead bodies with disrespect and piling them one over the another. In this background, the 2018 judgement of the SC in *Common Cause* case becomes very significant as it upheld the right to die with dignity as an integral part of right to life under Article 21 of the Constitution of India and paved the way for passive euthanasia. Though the judgment is fraught with many issues such as cumbersome procedure, recognition of the capacities of minors etc which need to be addressed in order to ensure smooth implementation, it provides an opportunity to draft comprehensive legislation with full recognition of the right to dignified death. In totality it is a landmark verdict that frees people's loved ones from the guilt of taking difficult and painful decisions and also relieves the doctors of the fear of being tried for culpable homicide.

■

CRIMINAL PSYCHOLOGY: THE UNTOUCHED SIDE OF SERIAL KILLING

*SUCHARITA MISHRA**

ABSTRACT : People have always been concerned whether serial killing is only a crime or a mental illness. To classify serial killers, a lot of research has been done. This article gives a framework for classification of crime and psychological disorders, using cases, previous research and publications. The key findings of the study are offenders are incorrectly labelled, resulting in confusion and doubt. The general public decides one's behaviour to be an indication of psychopathic tendencies; although these two are very distinct viewpoints.

KEY WORDS : Crime, Psychological disorder, Serial Killing, Society, Trauma.

I. INTRODUCTION

Mind of a serial killer has always been intriguing space for a lot of people who find planned killing and true crime fascinating. These piqued attentions have led to debates such as whether serial killing is a crime or a mental condition per se psychological disorder. Defining crime has always been a tough job for the scholars. Legally, crime is an act forbidden by law, and someone who commits a crime is a criminal. But, since sometimes mere disobedience of law is not a crime, per se disobedience of civil law. So, crime would mean more than just disobedience of law or an act against law. There are various perspectives to view crime; the *consensus view*, the *conflict view* and the *interactionist view*.[1] But to define psychological

* BA LL.B.(Hons), Semester III, Law School, BHU, Varanasi; sucharitamishra2002@gmail.com

1. Arun M. Bacchav, "*Criminal Psychology"*, 240 (Chandralok Prakashan, Kanpur, 2012).

disorder one has to understand what psychology is, it is defined as "the study of individual qualities such as perception, memory, thinking, learning, intelligence, creativity, and personality."[2] Now psychological disorder stands for "...a syndrome characterized by a clinically significant disturbance in an individual's cognitive, emotion regulation, or behaviour that reflects a dysfunction in the psychological, biological, or developmental process underlying mental functioning. Mental disorders are usually associated with significant distress in social, occupational, or other important activities."[3]

II. CRIME AND PSYCHOPATHS

The development of new perspectives on crime is ongoing, different perspectives are there to define the reasons of crime. The three most important but not the best approaches are discussed here. But before moving forward lets understand what a crime really is? Crime, unlike torts, is not just a wrong committed against an individual, but also a wrong committed against society or a public wrong, and includes offences such as murder, rape, and theft etc. to name a few. It is a case between the perpetrator and the state, rather than a dispute between two parties. A definition of crime establishes the subject matter of criminology and establishes the boundaries of what constitutes criminological activity. As a result, a humanistic criminology can only be established if a properly humanistic definition of crime is employed as the starting point. The most widely recognised definition of crime is *"an act capable of being followed by criminal procedures,"* which allows for a broad classification of the term because the only common aspect of crime is that it has been defined as such in past legal proceedings.[4]

The various perspectives leading to crime-

i. The Consensus View- According to consensus theories, laws and rules are made by a community process that uses rational reasoning to determine which actions should be classified as deviant and/or criminal in order to protect society from harm. Emile Durkheim, a French sociologist and criminologist, said in his book The Division of Labour, published in

2. *Ibid.*
3. American Psychiatric Association, "*Diagnostic and statistical manual of mental disorders*", (APA, United States 2013 5th edn.).
4. Rukhman Singh, "Concept of Crimes", *available at*: http:// www.legalservicesindia.com/article/2456/Concept-of-Crime.html (last visited 18th October 2021).

1893, that "the totality of beliefs and sentiments common to the average members of a society becomes a defined system with a life of its own." The communal or creative conscience is a concept that has been used to describe it." This collective or creative conscience serves as the foundation for laws and norms based on shared values and beliefs in a society.[5]

ii. The Conflict View- It claims that society is best viewed as a collection of competing varied groups—professional bodies, unions, students, industrialists, and so on—rather than as a single integrated one. These groups are at odds on a number of levels, as a result of society's unequal distribution of wealth and power; some people are impoverished and dissatisfied, while others are affluent and powerful. This disparity in power distribution creates a conflict-filled social environment, which, it is said, encourages crime.[6]

iii. The Interactionist View- "Social groups create deviance by making the rules that infraction constitutes deviance, and by applying those rules to particular people, and labelling them as outsiders. From this point of view, deviance is not a quality of the act the person commits, but rather a consequence of the application by others to the rule and sanctions to an 'offender'. "The deviant one is one to whom the label has successfully been applied; the deviant behaviour is behaviour that people so label."- HOWARD BECKER. The concept of crime, according to the interactionist viewpoint, reflects the preferences and ideas of people who wield social power in a specific legal jurisdiction.[7]

Before understanding how a psychological disorder encourages criminal behaviour, we should wrap our heads around the term criminal behaviour. By Andrew and Bonta (1988), four broad definitions of illegal behaviour that fit within these dimensions were proposed. Legal criminal behaviour refers to actions that are prohibited by the state and punishable under the law, moral criminal behaviour refers to actions that violate the norms of religion and morality and are believed to be punishable by a supreme spiritual being. Social criminal behaviour refers to actions that

---

5. "Consensus Theory in Criminology: Definition & Examples", *available at:* https://study.com/academy/lesson/consensus-theory-definition-lesson.html (last visited 18th October 2021).
6. *Supra* note 2 at 239.
7. Interactionist view, *available at*: https://openoregon.pressbooks.pub/ccj230/chapter/1-4-who-and-how-do-we-determine-what-becomes-a-law (last visited: October 18th 2021).

violate the norms of custom and tradition and are punishable by a community; and Psychological criminal behaviour refers to actions that violate the norms of custom and tradition and are punishable by a community.[8] The long-established link between mental illness and criminality has sparked a lot of discussion. The popular view is that people with mental illnesses are more prone to commit violent crimes, while the truth is that people with mental illnesses are often the victims of violent crimes who later become perpetrators.[9] There are several common characteristics of mental disorders which will be discussed later in this article.

III. SERIAL KILLER: WHO, HOW AND WHY

Similar to other criminology related terms for serial killer too, there's always been a fair discussion about the definition, but in general, being the rarest form of homicide[10], it is defined as "Someone who murders three or more people, usually for abnormal psychological enjoyment, over a period of more than a month and with a large gap between them. While most jurisdictions set a three-murder threshold, some authorities raise it to four or lower it to two."[11] Since we have an outline of who are serial killers let's move our attention to why someone becomes a serial killer. There are a variety of reasons why someone could choose violence. Some of the factors leading to a violent or destructive character are:

i. Childhood Trauma- Many serial killers experienced childhood trauma such as physical or sexual abuse, as well as emotionally distant or absent parents. Trauma is the only constant theme in most killers' biographies. As a result of the trauma, they suppress their emotional responses. They never learn how to respond appropriately to trauma or develop other emotions, which makes it difficult for them to empathise with others.[12] Personal traumas can influence one's behaviour. Consider

8. *Supra* note 2 at 241
9. Ghiasi N, Azhar Y, Singh J. "*Psychiatric Illness and Criminality*", *available at:* https://www.ncbi.nlm.nih.gov/books/NBK537064/ (Updated Apr 30, 2021).
10. A homicide occurs when someone kills another person, regardless of purpose or other circumstances surrounding the act. In some situations, such as self-defense or the state-sanctioned execution of certain convicted offenders.
11. Serial Killer, *available at*: https://en.wikipedia.org/wiki/Serial_killer (last visited: 18th October 2021).
12. *Ibid.*

the case of El Paso, Texas murderer Richard "The Night Stalker" Ramirez. Ramirez had a troubled childhood, receiving harsh beatings from his father. He was found guilty of murdering 13 people in San Francisco and Los Angeles.

Not all children with trauma and dysfunctional family become serial killers and not all serial killer have traumas. But there is indeed a connection between them.

ii. Dysfunctional Family- The absence of a father figure is a recurrent topic among young male criminals. Lone parent families, particularly those headed by a single mother, may see their children disciplined less harshly, leading to higher levels of deviance because they are less likely to consider the long-term implications of their behaviour. Furthermore, it has been hypothesised that the absence of a male role model or father figure increases a child's likelihood of interacting with delinquent classmates, making them more inclined to engage in deviant behaviour owing to peer pressure. Another explanation is that, as a result of social learning theory, kids copy their peers' delinquent behaviour.[13] Both serial killers Ottis Toole and Henry Lee Lucas, who are suspected of killing hundreds of people, were abused physically and psychologically. They were forced to dress up as little girls and were then beaten.[14] The upbringing and past can affect one's future in every possible way.

Apart from these two factors there are various other elements which lead to the development of serial killers, like sense of power/control, a desire to belong, loneliness, low self-esteem, sexually sadistic and violent pornography, Satanism, parent-child relationships, and neurodevelopmental problems[15] etc. If we look at the case of Mary Bell, also known as 'The Tyneside Strangler', we can observe all these above mentioned factors in her early life. She lived her life without a father in an inner suburb of Newcastle in England. Her mother had Mary at a young age and worked

---

13. Does a Dysfunctional Family Increase the Risk of Criminality?, *available at:* https://www.ukessays.com/essays/criminology/does-a-dysfunctional-family-increase-the-risk-of-criminality.php (last visited October 19, 2021).
14. Merry weather, "Serial Killers Who Had the Childhood From Hell. The Talko", *available at:* https://www.thetalko.com/15-serial-killers-who-had-the-childhood-from-hell (Updated June 20, 2016).
15. "The Development of Serial Killers: A Grounded Theory Study" (2018). Masters Theses. 3720, *available at:* https://thekeep.eiu.edu/theses/3720 (last visited: October 20, 2021)

as sadomasochistic prostitute. She often brought her clients to her home and used to perform sexual activities in the same room Mary slept. Her mother even tried to kill her several times. All these had great impact on Mary. She remained lonely in her school and showed violent behaviour, engaging in fights with other children. Her self-esteem went down until she found her first victim, a four year old boy, killing him made her feel a sense of authority and power. An 'M' drawn with a knife was also found on her victim's body. She had a troubled childhood but was released from the prison with the gift of anonymity and without any major charges even though she knew what she was doing still enjoyed doing it in her full sense.

Although serial killers are vicious being with not so normal mind and behaviour, there are still some early signs common in almost each serial killer. These traits and warning signs are:

i. **Lack of Empathy:** It's hard to be sympathetic to someone while still committing planned homicide. It's not that these people do not empathize for everyone; they just do not empathize with their victim. They neither feel their pain, nor respond to their cries.[16]

ii. **Lack of Remorse:** Many serial killers do not feel bad for what they do. In their eyes, their deeds are justifiable. They don't feel guilt. Although some serial killers do not agree with this, Jeffery Dahmer admitted feeling bad for what he did but he just couldn't stop himself.[17]

iii. **Grandiosity:** The majority of serial killers like bragging about their successes. Many of them believe that they are above the law and that they are wiser than everyone else. This is a technique for serial killers to relive their atrocities and prolong the anguish they have caused, as well as to demonstrate their cunning and ability to elude capture.[18]

iv. **Narcissism:** Most serial killers are fascinated with how they're regarded by the press, police, and the general public, which is why they'll try to control how their tale is told. After being captured, serial killers frequently confess to ensure that their names are linked to the crimes they committed. What matters to them is that their name is inscribed in genuine criminal history.[19]

---

16. Signs of a Serial Killer: 11 Common Serial Killer Traits, *available at:* https://serialkillershop.com/blogs/true-crime/serial-killer-traits (last visited: October 21, 2021).
17. *Ibid.*
18. *Ibid.*
19. *Ibid.*

v. **Superficial Charm:** Serial killers are well aware that charisma and charm go hand in hand with manipulation. They understand that charming someone makes the other person feel at ease in their presence, making them more vulnerable. Despite the fact that Charles Manson was not physically attractive; he possessed enough charisma to persuade a large group of individuals to kill for him.[20]

vi. **Addictive Nature:** Things get dangerous when addictive personalities combine with traits like emotional shallowness, lack of empathy, and narcissism. Some serial killers have even admitted to being addicted to the practise.[21]

vii. **Manipulation:** Once serial killers have gained the trust of their potential victims, it becomes easier for them to lure them into vulnerable situations that they would not have allowed themselves to be drawn into in normal circumstances.[22]

Criminals or one can say serial killers to be specific, are living among us incorrectly labelled as persons with mental illness in disguise to reduce their punishment. The public's opinion of mental patients as dangerous people is often based on the media's portrayal of criminals as "insane" people. But let's look at some case comparisons to prove otherwise.

IV. UNDERSTANDING CASES

Let's look at the example of notorious serial killer *TED BUNDY.*

"I just liked to kill, I wanted to kill."- TED BUNDY.

Ted Bundy's killings got more structured and systematic over time. He used to break into homes and target women while they slept when he first started in Utah. He'd then assault them with a blunt weapon and frequently sexually assault them with other objects. Ted spent more time planning his attacks as his rape sheet expanded. Ted later revealed in interviews that killing women was more of a possession for him than a source of lust. He enjoyed rapping them because it allowed him total control over their bodies. Killing became a matter of possession as well. He'd

---

20. Signs of a Serial Killer: 11 Common Serial Killer Traits, *available at*: https://serialkillershop.com/blogs/true-crime/serial-killer-traits (last visited: October 21, 2021).
21. *Ibid.*
22. *Ibid.*

have their lives in his hands, and then their bodies during his necrophilia rituals.[23]

"I think society deserves to be protected from me and others like me." – TED BUNDY[24]

Ted left a path of dread wherever he went in the 1970s. He'd put on a fake leg cast or an arm sling and fumble with whatever he was carrying to entice his victim to come forward and assist him. He grabbed the most of them and strangled them to death from there. Ted would then engage in sexual activity with the corpse until it had degraded to the point where it could no longer be done. Ted made the aforementioned remark to psychologist James Dobson the day before his electric chair execution on January 24, 1989. According to Ted's statement, he was well aware of the gravity of his actions.[25]

He was well aware of the acts he was doing as well as the consequences of his acts, thus committed Murder, attempt to murder, aggravated kidnapping and burglary. He was given death penalty. After his death in 1989, a group of psychologists in 2007 after a descriptive case study concluded that he was suffering from ASPD (antisocial personality disorder). But as he accepted and stated "I just liked to kill, I Wanted to kill".[26] It is undeniable that he was fully aware of what he was doing and committed those heinous atrocities.

Taking another example of *RAMAN RAGHAV*-

Raman Raghav has long been regarded as one of India's most important criminal figures. His insensibility and terrifying story, on the other hand, preceded his fame. Mumbai, a city known for its inability to sleep, was put to bed early. Slum dwellers that had no qualms about sleeping on the streets were obliged to seek shelter. Mumbai cops, who had the upper hand in snatching the underworld by the throat, felt pressed for time when

---

23. 10 Chilling Confessions from the Brutal Killer Ted Bundy, *available at:* https://backpackerverse.com/ted-bundy-killer-confessions (last visited: October 21, 2021).
24. *Supra* note 24.
25. *Ibid.*
26. So, Exactly Which Mental Health Disorders Did Ted Bundy Have, Anyway?, *available at:* https://www.womenshealthmag.com/life/a27346043/ted-bundy-mental-health-disorders-antisocial-behavior-personality (last visited: October 21, 2021).

it came to solving the strange murder cases led by Raman Raghav.[27] Many people dubbed him as "*India's Jack the Ripper*." Raman was interviewed by members of the Special Medical Board on five occasions, each lasting around two hours. The following was the examination report: "I don't have any information regarding my childhood. There is no reliable information about mental illness in his family. He didn't have much of a formal education."[28]

Raman's first murder spree occurred in the dark of night, when he struck 19 homeless persons with huge, blunt weapons while they were deep sleeping. Among the nineteen victims, ten were badly hurt and nine died. Raman was a homeless man who had lived on the streets for a long time. All of this happened in the Eastern Suburbs of Mumbai between 1965 and 1966. Raman had previously been convicted of a crime and sentenced to five years in prison. Because there was insufficient evidence that he was the one who attacked those nineteen homeless people, he was let go in 1966.[29]

Even after he was caught and interrogation began, he refused to speak to the authorities or provide any information. Raman had made it abundantly obvious to the cops that no amount of torture would persuade him to speak... He demanded a hot chicken curry lunch in exchange for opening his mouth.[30]

As a result, the accused was referred to the Mumbai Police Surgeon, who examined him from June 28 to July 23, 1969, and determined, "He is neither insane nor mentally handicapped, as the accuser claims."He has a good memory, average intelligence, and is aware of the nature and purpose of his actions. He isn't insane and is aware of the nature and aim of the proceedings against him."[31] And hence was held liable for the committed crimes.

Moving on to our last example- ***ANDREI CHIKATILO***

27. Raman Raghav: Pshyco Killer who Demanded Chicken Curry to Open Mouth about his 41 committed Murder, *available at:* https:// www.thesocians.com/post/raman-raghav-pshyco-killer-who-demanded-chicken-curry-to-open-mouth-about-his-41-committed-murder (last visited: October 21, 2021).
28. Raman Raghav*, available at*: https://en.wikipedia.org/wiki/Raman_Raghav (last visited: October 22, 2021).
29. *Supra* note 28.
30. *Ibid*.
31. *Supra* note 29.

"I know I have to be destroyed, I understand. I was a mistake of nature." - ANDREI CHIKATILO[32].

Chikatilo, also known as *Rostov Ripper* and the *forest strip killer* and *the red ripper,* was a prolific Russian "vampirist"-type cannibalistic, pedophilic, ephebophilic, necrophilic, and hebephilic serial killer, brief spree killer, and enucleator who committed fifty-two murders in a span of twelve years (1978-1990)[33]. Chikatilo's first victim was a nine year old girl named Yelena. He admitted, after her murder he understood that the only way he could reach arousal and climax was by stabbing and slashing the victim to death. He was an impotent sadist who could only gain sexual stimulation by seeing his victims suffer. Chikatilo added that before killing the victims, he would bind their hands behind their backs using a length of rope. He would normally inflict a slew of knife wounds on the victim, starting with shallow chest wounds before moving on to larger stab and slash wounds.[34]

"When I used my knife, it brought psychological relief."- ANDREI CHIKATILO.

He writhed on his victims' bodies while stabbing them with his knife until he attained climax, then proceeded to eviscerate. As he inflicted the knife cuts and eviscerations on his victims, Chikatilo became expert at dodging the spurts of blood from their bodies. He also stated, *"Victims' 'cries, the blood and the agony gave me relaxation and a certain pleasure'."* Chikatilo further stated that he had tasted the blood of his victims on numerous occasions. He also admitted to using his teeth to tear at victims' genitalia, lips, nipples, and tongues. He admits to chewing on the removed uterus and testicles of his female and male victims. Chikatilo admitted to sucking the nipples and tongues of some of his victims[35].

Chikatilo was sent to the Serbsky Institute in Moscow for a 60-day psychiatric evaluation to see if he was mentally capable of standing trial.

---

32. 'I Was Like a Crazed Wolf ' : Andrei Chikatilo looks like a harmless schoolteacher. But 53 murders make him the most horrible serial killer Russia—perhaps the world—has ever seen, *available at:* https://www.latimes.com/archives/la-xpm-1992-04-28-mn-966-story.html (last visited: October 21, 2021).
33. Andrei Chikatilo, *available at:* https://criminalminds.fandom.com/wiki/Andrei_Chikatilo (last visited: October 21, 2021)
34. Andrei Chikatilo*, available at:* https://en.wikipedia.org/wiki/Andrei_Chikatilo (last visited: October 21, 2021).
35. *Ibid.*

He was fit to stand trial despite having borderline personality disorder with sadistic elements. He was described as abnormal but essentially sane by the Russians. He had no prospect of avoiding the death penalty by being sent to a mental institution[36]. He realised what he was doing was wrong, that he was murdering people. However, this does not imply that he regrets his actions. He only cared about himself, he felt sorry only for himself.

Analysing all these examples we can conclude that they were disturbed yet in their complete senses for the knowledge of their actions and were held liable for what they've done. Labelling all the serial killers with a psychological dysfunction is same as giving them a second opportunity to commit the same wrong again and again.

V. CONCLUSION

To conclude this article I would like to state that it has been, it is and will always be an individual's choice. Your actions always have repercussions. Even though the past life has not been easy it's always you, who has to decide your future. The inaccurate categorization of all criminals as persons with mental illness is an important factor in the false equivalence of psychiatric disease and criminality. The general public perceives behavioural and conduct issues as symptoms of a psychological ailment, leading to the mistaken public assumption that criminality is synonymous with psychiatric illness. The high rates of reported mental illness in jail and prison populations are mostly owing to criminals being falsely diagnosed with psychiatric disorders. These results are often the product of societal circumstances rather than extensive medical and mental evaluation and diagnosis. Antisocial personality disorder (ASPD) is one such diagnosis that is applied haphazardly to many people in prison. As a result, it's debatable if ASPD is a psychological disorder or simply a society moral judgement. The term is increasingly being used to portray criminals as psychiatric patients. To avoid criminals using the cover of mental conditions to avoid criminal punishment, physicians must ensure that diagnoses of personality disorders such as ASPD are made only when distinctive traits arise in infancy and adolescence.[37]

■

36. *Supra* note 33.
37. Psychiatric Illness and Criminality, *available at:* https://www.ncbi.nlm.nih.gov/books/NBK537064 (last visited October 22, 2021).

CRIMINALIZED INDIAN POLITICS: SYNERGY BETWEEN POLITICIANS AND CRIMINALS

ADITYA SINGH*

ABSTRACT : In a versatile and diversified country like India, the smooth functioning of democracy has its drawbacks because electoral democracy in India is a developing phenomenon. Nowadays election has become a playground for all the political parties and the plinth of the political throne is determined through it. Without any doubt, one can say that criminalization in political representation is an increasing trend currently in India. This impious nexus between the representatives and criminal elements seriously poses a lot of challenges on various fronts. Current state of affairs is such that the feasibility of securing the conviction of culprits in serious criminal offences have become increasingly implausible because the candidates taking help and support of criminals during the elections, in return, the anti-social and criminal elements seek their help if elected when they are in difficulty at the hands of law-enforcement agencies. The situation has since then taken a worse turn.

KEY WORDS : Criminalisation, Elections, Legislature, Judiciary, Disqualification.

I. INTRODUCTION

"The political parties refuse to wake up from deep slumber… The nation continues to wait, and is losing patience. Cleansing the polluted stream of politics is obviously not one of the immediate pressing concerns of the legislative branch of government." -Supreme Court of India[1]

---

* BA LL.B. (Hons), Semester III, Law School, BHU, Varanasi; adityasingh1382000@gmail.com

1. Press Trust of India, "Decriminalisation of Indian politics: Supreme Court says political parties refusing to wake up from 'deep slumber", *Firstpost,* August 10,

Criminals, these days, have been seized with the idea that if they can get others elected with their muscle power, why should they not seek election to the respective legislatures? A lot of them have had contested as candidates and quite a number of them have been elected to represent the public. Interestingly, some of them have even been known to occupy ministerial chairs. This has resulted in bad governance and made the citizens unhappy with its deteriorating quality.

To curb this menace, various laws and judgements have been laid down but they have been of no use. The principal cause for this non-usefulness of such enactments is found to be the lack of their enforcement. The uncertainty of the penalty for breaking such laws has also been a point of contention leading to the rise in the number of criminals contesting the elections. The political system is not in a mood to alter the laws or itself. The fundamental question that comes to the mind of the citizens, essentially the voters, is "When the law enforcement agencies would take effective measures to safeguard their interests?"

This paper tries to explain how criminalisation in the representation of India is developing, additionally, it examines the indispensable factors that advertise and promote this trend and its repercussions. Also, it demonstrates the magnitude and impact of the criminalisation of politics on the democratic process and recalls the efforts made by the concerned agencies to examine this peril and the consequences. Subsequently, it also explores some of the attainable remedies for this burgeoning political trend.

II. THE CONCEPTION

A novel political culture had been slowly knitted into the floors of Indian politics. This novel culture is the increasing vogue of criminalisation of politics, i.e., persons with criminal records or those having been convicted are setting foot into politics and becoming part of law-making agencies. One can consider it as the trend of representatives or political parties sponsoring the nexus with criminals. In this political course, persons having criminal backgrounds slip into politics, and become a unit of law-making authorities. This, on the whole, works in two reciprocal courses of action: the representatives condescend to criminals as they need muscle and money

---

2021, *available at* https://www.firstpost.com/india/decriminalisation-of-indian-politics-supreme-court-says-political-parties-refusing-to-wake-up-from-deep-slumber-9877681.html (last visited on October 25, 2021)

power and in return, criminals are provided with political protection. Politicians get everything they need to win the elections; they use criminals in every possible way such as booth capturing, proxy voting, violence incitation, bribing, rigging, and even planned killings of other candidates or party members. The criminals act as a capital power to the representatives connected with them. When these connections get elected, they manipulate the state machinery to protect the criminals. With politicians and ministers having their backs, criminals expand their domain of activities.

At present time, it is noticeable that this fashion is maturing. Earlier criminals only served the politicians in exchange for protection and they seldom contest in elections. In the present scenario, the situation is something else as a large number of criminals are not only jumping into the electoral fray, they are also winning their respective seats and securing a position in administrative set up, and becoming their own legal custodian. A man who is aware of a little administrative work, knows that once a law-breaker becomes a legislator or a minister, all criminal proceedings, or one may say all legal proceedings against him are remitted to pigeonholes where they lie slumbering. There are known past criminals who have become legislators who are being defended by party leaders. "A stage has now been reached where the politicians openly boast their criminal connections. A Bihar minister openly stated in the legislative assembly that he patronized and would continue to patronize gangsters to fight and win elections is a pointer to the growing phenomena where the criminal background has become an invisible requisite to win elections."[2] Notwithstanding a number of push and efforts to curb this menace and the demand of the whole country to cleanse the criminals from slipping into public life, the approach has converted only to the worse. Criminals are getting more involved in elections nowadays because of their desire to harvest maximum benefits for themselves instead of working for their master i.e., politicians. This fashion of criminalisation is so unrestrained and repeating today that it has become a conspicuous feature of the Indian political scenario. It doesn't matter how illegal or illegitimate it appears from far; it is an accomplished political standard or norm in a number of political pockets at present. Since there is no trace of reduction of this trend from the Indian political scene, it is continuously mushrooming in every election conducted.

Hence the most happening question is whether the fascinating elections

2. B.P.C. Bose and M.V.S. Rao, "*CRIMINALISATION OF POLITICS : NEED FOR FUNDAMENTAL REFORM" The Indian Journal of Political Science* 66 (2005)

in democracy can be done away with or be improvised so as to desist the criminalisation of politics. If there is any cure available for anarchy, it is democracy; and election, through which the yielder of legislative or political power is determined, is the most important pillar of democracy. In a democracy, doing away with the election is not the solution to the problem. Another perplexing concern that arises is whether the level of education and development have any correspondence with increasing criminality in Indian politics so far. Unexpectedly, there is none, between the pattern of increasing criminalisation in Indian politics and the higher rate of education and development. At present, we can find an impressive number of decently educated representatives who are elected, both at the central and state levels, and have been charged with criminal offences. From gram panchayat to state legislature and even to the parliament, in all levels disregarding any parameter criminalised politics is a ubiquitous phenomenon. It has been in news since National Election Watch (NEW) and Association of Democratic Reforms (ADR) published a report regarding assembly elections in Assam, Kerala, Puducherry, Tamil Nadu and West Bengal in which 1,157 out of 6,318 candidates have been found to have criminal cases registered against them.[3]

III. FACTORS RESPONSIBLE

This culture of criminals contesting in elections and entering in the state legislature as well as in parliament is not just an India-specific phenomenon, it is happening in many countries and in a number of developed countries too. Albeit varying in degrees but it is a mushrooming political facet in several countries and it is wrong to assume that it is found only in India. It is clear that criminalisation in politics is deep-rooted in Indian politics and there are some observable factors responsible for this increasing vogue.

First, Indian democracy is a numeric play where parties winning the maximum votes acquire the power and it is needless to say that winning elections at any cost is the sole target of political parties. Parties knowingly provide the ticket to the candidates having criminal records or backgrounds

3. PTI, "Assembly Elections | 18% declared criminal cases against themselves in four states, UT: ADR" *The Hindu*, APRIL 01, 2021, *available at* https://www.thehindu.com/elections/assembly-elections-18-declared-criminal-cases-against-themselves-in-four-states-ut-adr/article34214750.ece (last visited on October 26, 2021)

just to maximise their winning numbers. Absence of values like 'service to the nation' and 'political will' among political parties and negligible efforts to curb this menace is visible. Now, frequent changes in the alliance of parties and a trend of coalition politics are observed because of the instability of governments and politicians changing their political parties during or after elections. Funds and black money are directed from the underworld and mafia to tempt elected representatives, and in this way, criminals are entailed in Indian politics. This 'horse trading' is practised in state assemblies and even in parliament. Many elected candidates are not even sure about whether they will be a part of the ruling party alliance or not. Hence it becomes extremely important for them to increase their winnability by any method and this paves the way for the infusion of criminals into politics.

Secondly, elections in India are highly corrupted which is one of the causes for this anarchy, elections are quite expensive in India, not from the view of money spent in holding them but from the view of money spent by candidates to win the elections. Candidates require huge amounts of money which they take in the form of funds and donations, by taking help from big entrepreneurs, businessmen and rich persons, and when they are elected as representatives, they have to return whatever they had collected. In this way, corruption is bred and germinated in politics. Politicians maintain their relationship with criminals as they have to win upcoming elections. Even, there are candidates who have a misperception about the real purpose of politics, they consider it as a way to earn tons of money in misbelief as the state exchequer is on their cusp. The driving motive behind entering politics is the ballooning of wealth, power and status in a short span of time. As a matter of fact, people have built up a negative perception towards politics as a profession and this psychology keeps good people away from taking politics as an ideal full-time activity. Hence, thugs are incited to overtake the political system. There are times when people feel disintegrated from government and expect less from it, therefore some politicians feel rarely responsible towards the public and that's where criminals are encouraged to acquire political power.

Thirdly, India is a diversified country and is divided on the basis of a number of aspects and Indian politics is based on those divisions. Criminals take advantage of such divisions and portray themselves as the saviour of their respective religion, caste, creed and community and jump into elections. They give hate and inflammatory speeches in the name of religion, caste, etc. to provoke people's mind and gain them as loyal supporters. People do not scrutinise the educational and behavioural background of candidates

instead they are more biased towards the religion, caste, ethnicity, linguistic lineage and community to which the candidate belongs.

Finally, we have to accept that the slow working of the Indian judiciary is also a blameworthy factor in the ongoing trend that has been clearly visible in the Indian political system. Article 11 of the Universal Declaration of Human Rights states, "Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence,"[4] which is strictly followed by the Indian judiciary. Using this lacuna, a number of persons charged with criminal offences freely contest in elections. Also, powerful criminals having loads of money, pay the best lawyers to delay the judgement for years. A number of committees or commissions have been set up by various governments to examine and formulate a method to curb out this menace from Indian politics. Law Commission of India, Election Commission of India, Vohra Committee, Dinesh Goswami Committee etc., have given their recommendations which are continuously put underground making them immaterial.

A Study reveals that was collected to show the percentage of the winners of the elections that took place in 2009, 2014 and 2019, who declared their criminal cases against themselves.[5]

IV. POSSIBLE CONSEQUENCES OF THIS GROWING POLITICAL TREND

1. This trend can generate a loss of trust between the public and government which causes degradation of accountability and transparency in the government.

2. Unaccountability brings a democratic deficit along with a declining spirit of democracy in the country.

3. Electoral democracy is losing its legitimacy as electorates are being purchased in consecutive elections and candidates are not voted on the basis of merit.

4. As a number of criminals are being elected continuously not only

---

4. The Universal Declaration of Human Rights (UDHR), 1948, art. 11

5. Association for Democratic Reforms, "Analysis of Criminal Background, Financial, Education, Gender and other details of Winners" (June, 2020), *available at* https://adrindia.org/content/lok-sabha-elections-2019-analysis-criminal-background-financial-education-gender-and-other (last visited on October 26, 2021)

politics is getting criminalised, crime is also being politicised. Some political parties feel no shame in backing criminals and even use investigating agencies to witch-hunt their political rivals.

It hinders the political interest of diligent, deserving and dedicated candidates. Even worse can happen if the political system gets orchestrated by criminals and a severe vacuum will be created for competent and dedicated persons. The absolute necessity of politics in a democratic system would get defaced and the entire system will be tantamount to total erosion.

V. WHAT THE INDIAN CONSTITUTION AND THE SUPREME COURT SAY?

Indian constitution doesn't provide any specific provision as to what charges or inabilities under which a person can be disqualified from contesting elections for the Parliament, State Legislative Assembly, or any other law-making bodies.

The Representation of People Act 1951 however**,** provides the criteria for *disqualification* of a person contesting in the election to the legislature or parliament. According to section 8(3)[6] of the act which states "disqualification on conviction for certain offences, according to which an individual punished with a jail term of more than two years cannot stand in an election for six years after the jail term has ended". There is no such provision in the act that bar individuals from contesting elections who have not been convicted in certain criminal cases which are pending against them; hence the disqualification of these contestants depends on their conviction.

In February 2020, the Supreme Court of India has issued an order directing the political parties to disclose information regarding the criminal background of their contestants for Lok Sabha and Assembly elections and publish it with the rationale for making them field such candidates with a criminal record. This order was an answer to the contempt petition filed regarding the disobedience shown by political parties to a 2018 Constitution Bench judgement (*Public Interest Foundation v. Union of India*[7]) which

---

6. The Representation of the People Act, 1951 (Act 43 OF 1951) sec. 8 (3) [A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub-section (2)] shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.]
7. Writ Petition (Civil) no. 536 of 2011

was to publish all criminal details about their contestants for public awareness on their respective websites and electronic as well as print media. Supreme Court passed this order by exercising its powers under Articles 129[8] and 142[9] of the Indian Constitution which deals with contempt power and enforcement of decrees and orders of the Supreme Court. The order highlights that the information published must include the nature of offences charged against candidates, charges framed against them, case number, the court concerned, etc. Moreover, the political parties are directed to put forward an explanation as to why contestants with pending criminal cases are selected in the first place therefore, the candidates 'mere winnability in elections'[10] should not be the sole reason for handing over tickets to the candidates.

Supreme Court of India passed some directives regarding "Approval of High Court for withdrawing criminal cases against MPs/MLAs" while hearing a pending Public Interest Litigation seeking setting up of fast-track for cases against legislators. The directives were:

1. To inquire into the withdrawals that whether they are pending or disposed of since last year or before.
2. Chief Justice of High Courts to constitute Special Courts for monitoring of the leads in criminal cases against current and former legislators.
3. The Judicial Officers appointed to preside over the Central Bureau of Investigation Courts or Special Courts involving prosecution of MLAs or MPs must not be transferred until any further orders.
4. The High Courts have to furnish the details regarding posting of Judges and an account of pending and disposed cases before the respective Judges.

Section 321 of the Code of Criminal Procedure, 1973 states "the public prosecutor or assistant public prosecutor may, with the consent of the court, withdraw from the prosecution of a case at any time before the judgment is pronounced". Several states or state governments have withdrawn criminal cases against legislators before elections. The directives

---

8. The Constitution of India, art. 129
9. *Id*., art. 142
10. PRAMOD KUMAR, "*SC: Winnability alone can't dictate candidates' choice*", *The Asian Age*, February 14, 2020, *available at* https://www.asianage.com/india/all-india/140220/sc-winnability-alone-cant-dictate-candidates-choice.html (last visited on October 27, 2021)

from the Supreme Court will notably clip the powers of the state governments as the apex court has conveyed grave concern over the criminalisation of politics.

Some landmark decisions regarding Decriminalisation of Politics are:

* *Association for Democratic Reforms (ADR) v. Union of India*[11], Supreme Court mandated the publication of information regarding criminal antecedents, personal assets and educational qualification of the contestants.
* *People's Union for Civil Liberties (PUCL) v. Union of India*[12], in this case, Supreme Court acknowledged negative voting as a constitutional right of voters and gave a directive to Government for the provision of 'NOTA' option in EVMs.
* *Lily Thomas v. Union of India*[13], Supreme Court struck down section 8(4) of the Representation of People Act as unconstitutional as it allowed convicted lawmakers a three-month transition period to file appeals in a higher court and to get a stay on the conviction and sentence.
* *Lok Prahari v. Union of India*[14] , the Supreme Court's directive on information disclosure paved the way for future constitutional interventions in funding the regime of political parties, including the scheme of electoral bonds.

VI. PRACTICAL MEASURES TO CURB THIS POLITICAL TREND

What can be practicable measures to deter this menacing threat in Indian politics?

1. Significant roles can be played by the Supreme Court and the Election Commission of India to curb this trend. In this regard, the Election Commission of India has taken a plausible step to add a column of information for conviction or acquittal of any criminal offence in past; any accusations punishable with imprisonment for two years or more in the form of affidavit in the nomination paper of the candidates. And if any candidate furnishes wrong information, he should be liable to be punished. Moreover, it was a commendable effort by the Supreme

11. 2000 (57) DRJ 82
12. (2013) 10 S.C.C. 1
13. (2013) 3 SCC (Civ) 678
14. W.P.(C) No. 000784 / 2015

Court of India to issue a directive for candidates to furnish an affidavit while filling the nomination form indicating their criminal records, assets and education.[15]

2. In this era of the internet, information technology and social media; the fourth pillar of democracy i.e., *media* has a lot to contribute in this aspect. A vigilant and fearless media is required in a democracy to educate the population about idiosyncrasies about elections and democracy. An independent and vibrant media is needed produce an impact of magnitude beyond any measure to curb this perilous trend, as many media houses are owned by big corporate houses which are connected to political parties.
3. At present 'first past the post' is followed in the electoral system which encourages the contestants to spend a humongous amount of money in every succeeding election. The electoral reform which is pending for a long time must be taken up.[16] Steps should be taken to reduce humongous election expenditure which is one of the main causes of corruption in elections. Simultaneous conduction of state and parliamentary election, reduction of campaigns in the elections, allowing a candidate to contest from one constituency only and strict conformation to election code of conduct should be effectively implemented to minimize the election expenditure.
4. New and more stringent laws can be passed through the parliamentary procedure to assist the committees in stifling this trend. Judicial activism by the Indian judiciary can also be unfolded diligently to combat this trend. RTI (Right to Information) can be consummately utilised to take out information regarding candidates, political parties, election expenditure, source of income, fulfilment of manifestos etc.

What is apposite is to provide the support that looks at the whole person, not just their mental health needs or holistic approach, to be precise, from all quarters in society. It's not prudent to say that only criminals and politicians are responsible for this Indian political menace. Actually, both criminals and politicians are part and products of society and the allies in the society are equally accountable for any consequences from nebulous politics. Enforcing stringent laws alone is not going to alleviate this nefarious problem unless each person of the country contributes with responsibility

15. *Supra* note 7
16. Subhash C. Kashyap, *Our Constitution* 321-22 (National Book Trust, New Delhi, 2021st edn., 2021).

towards constructing a well-ordered society. When all civil society organizations, state machinery, and individuals will act accountable towards each other sincerely then only criminalisation of politics be annihilated.

VII. CONCLUSION

Indian electoral process is being mocked by criminalisation of politics and is actually derailing the Indian democracy and this rapid deterioration in the standard of Indian politics is not a good sign for Indian democracy. Today, people have developed a great despise towards politics that they can't distinguish between a genuine and an honest representative and the dishonest conmen. It is an undeniable truth that a significant number of contestants having been criminally charged win elections easily and hold powerful ministerial berths. Now, law breakers are being elected as law makers and this illegitimate process has snowballed in Indian politics with diluted manifestations. It will not be at par to hold only politicians and criminals responsible for this dreadful trend; in fact, the existing electoral system, constitutional laws, state machinery, political parties, politicians, and voters are all indebted for this. There are several sufficient ways to cleanse this clutter and what is right away required is a strong political will and a vigilant public. Although the contention that democracy in India is an experimenting journey and incessant political trends such as criminalisation of politics shouldn't be allowed to prosper further. If this trend is not ceased, it will ultimately encumber the already unsettled nation building process in India. The bureaucratic system and the business as well, together with the civil societies and the news and social media, are being reined and dominated by the political system. Hence, we are in dire need of a governance system that is unshackled by the 'criminal infestation.' The Indians need to fight this issue, as it has been rightly said by Mahatma Gandhi that in order to solve a problem, we need to confront the real issue.

■

EVOLUTION AND DEVELOPMENT OF JUVENILE JUSTICE SYSTEM IN INDIA

NEELESH KUMAR*

ABSTRACT : *"Juvenile justice is probably the area that's the most ripe for reform, in the nice liberal sense of the word, simply because there's no getting around the fact that a teenage brain is not an adult brain.*

--ROBERT SAPOLSKY

"Lets figure out ways of keeping our children out of the juvenile justice system and in the classroom so that they thrive. Because if you are in the juvenile justice system, the chances of going into the adult penal system are greatly increased."

...VALERIE JARRET

In India, we consider children like a God, a gift from heaven and they are golden assets of a nation. Where the nation would go lies in the hands of its supreme assets; but due to indifferences in our society in all spheres, these future stake-holders could not be brought up properly, which leads to child delinquency. Child delinquency is a worldwide phenomenon and an alarmingly growing cause of concern for every society all over the world. So, to curb juvenile delinquencies at its initial stage we need to protect, care and retribute them whenever they commit crimes instead of sending them to jail. Countries all over the world have developed Juvenile Justice System to deal with and protect their young offenders. While in India, the scene has changed a lot; child delinquencies have been attracting attention and are being discussed on various platforms.

KEY WORDS : Juvenile, Delinquency, Plea bargaining, Rehabilitation and criminal law.

---

* BA LL.B.(Hons), Semester III, Law School, BHU, Varanasi; neeleshniranjan441@gmial.com

I. INTRODUCTION

Children, adults and old people all are the members of the society. If society lacks law and order and comprises of perpetrators, the children living there are immature enough to get motivated by the wrong acts. Social space and surroundings of a child provoke his actions. There are various factors which lead to the inclusion of children into a puddle of criminal activities. The main factor may be attributed to immaturity of a child. The criminal acts are not the result of fully developed brain; they could not distinguish properly between right and wrong.

Children who have been exposed to drugs and alcohol, or are victims of violence and abuse, or belong to poverty are more likely to commit crimes. House environment also matters; if the parents have poor parenting skills, abuse the child or any other family member, or single parents who left their child unsupervised for a long time, etc., these factors may also have serious implications for child delinquency. There are some external factors also like influence of news, movies, web series, social media and lack of qualitative education. Various phases like abandonment, neglect, destitution, social deviance and truancy are also the cause of child delinquency.

Children from poor background not necessarily commit crime and those from rich background are not necessarily law-abiding citizens. However, it is not wrong that poverty deprives a bulk of child population from an equitable share of socio-culture and economic development. The children are rendered vulnerable to social maladjustment and their eventual induction into criminogenic culture[1]. There is a separate adjudicating and treatment mechanism for persons below the age of 18 years who have committed an offence. The majority of the juveniles have no families and relatives. They have migrated into different regions where they could earn livelihood. They are making their own independent decision and are little adults. Juvenile

Justice aims at converting these 'little adults' into children. Is it possible to do so? Dr. Yug Mohit Chaudhary,[2] who saw juvenile in the Mumbai

1. Dr. Heera Singh, A critical Analysis of existing law relating to prostitution 4-5 (Social welfare vol. XXXVII No. 3 June 1990).
2. He was appointed as Duty counsel under the Maharashtra State, Project rules 1993 to visit Mumbai Central Prison and under-trail prison in Mumbai.

Central Prison and in the observation home, Dongri, Mumbai, says, " Juvenile whilst in jail behave like adults imitating the other prisoners, but once shifted to the observation home, within a few days, a child then comes to the fore, shouting and playing and fighting with their peers, doing all the things that a child is expected to do. They suddenly turn impish. They even look younger."

II. HISTORICAL EVOLUTION OF JUVENILE JUSTICE IN INDIA

The term 'juvenile' emerged from the Latin word *'Juvenis'* which means young. Thus, juvenile justice means a justice system for young.

This differential treatment is not a recent phenomenon for juvenile rather we can trace its origin in the Code of Hammurabi in 2277 B.C. which prescribed special care to disowned children and to those who eloped from their homes.

Historically, the concept of juvenile justice was derived from a belief that problems of juvenile delinquency in abnormal situations are not amenable to the resolution within the framework of traditional process of criminal law[3]. As the time passed, the need was felt to provide the specialized and preventive treatment services like rehabilitation, socialization through schools and religious bodies, community support and harmonizing impersonal state for the juvenile delinquents, besides catering the needs of young offenders. This system had been adopted in India from Western countries. The first such legislation for the juvenile justice was The Apprentices Act, 1850[4], followed by Indian Penal Code, 1860[5], Reformatory School Act, 1857, Code of Criminal Procedure, 1898[6]. All these Acts were made keeping in mind that the young offenders should be treated differently from adult offenders. From the beginning of 20th century, some states had enacted acts relating to children with the help of respective High Courts. The Madras Children Act 1920 was enacted for the very first time in India, followed by Bengal and Bombay in 1922 and 1924 respectively but Bombay Children

---

Between 2003 to 2005, he through the legal intervention shifted to the Observation Home 80 juveniles who had been denied the protection of juvenile legislation and unlawfully incarcerated in prison.

3. Vedkumari, The Juvenile Justice in India: from welfare to rights 1 New Delhi: OUP.
4. The Apprentices Act, 1850 (Act 19 of 1850).
5. The Indian Penal Code, 1860 (Act 45 of 1860), ss. 82, 83, 317 and 361. It provides a special treatment for children of immature understanding

Act became the first to function. These Acts brought within its ambit, 2 categories of children, viz., a.) Youthful offenders, and b.) Destitute and neglected children. These categories were to be handled by juvenile courts. Throughout the 20th century, juvenile from all over the world, were treated under the *welfarism* mode.

i) The Children Protection Act 1960[7]

Our constitution had provided some provisions for the protection, care and development of children under fundamental rights and Directive Principles of State Policies. To protect children from exploitation, article 39(f) of the constitution reads that: "That childhood and youth are protected against moral and material abandonment."

Indian government accordingly passed this Act to provide care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children. However, it was limited to only Union territories and there were more acts for states[8]. This act stated that a child is a boy below 16 years of age and a girl below 18 years of age.[9]

It provided three tier institutions – Observation Home, Children's home for neglected children, and a special school for delinquent children.

ii) Juvenile Justice Act 1986[10]

It was enacted to provide uniformity of Children Acts of various states. It came up as per the standard of protection of United Nations Declaration of the Child 1959. One year before the enactment of this Act, the United Nation's General Assembly adopted the *United Nations' Standard Minimum Rules* for the administration of Juvenile Justice[11], then the word "juvenile" was used for the very first time in international law.

Before the passing of this act, different states had not only enacted Child Act, the provisions mentioned in those acts also varied and the definition of "Child" was not in uniformity[12].

---

6. The Code of Criminal Procedure, 1898 (Act 5 of 1898), s. 29 (b). It restricted the jurisdiction of ordinary courts in the trials of juvenile delinquents.
7. The Children Protection Act, 1960 (Act 60 of 1960).
8. See for more of these Acts S. N. Jain (ed.) Child and the law, 41-63(1973), Indian law institute.
9. Supra note 8, Sec. 2(e).
10. Juvenile Justice Act, 1986 (Act 53 of 1986).
11. Known as Beijing rules.
12. *Sheela Barse* vs. *Union of India* : (1986) 3 SCC; (1986) SCC (Cri) 352; 1986 Cri LJ 1736 (SC).

iii. Juvenile Justice Act, 2000[13]

The juvenile justice systems of 1986 were found to be not much effective in 1990s with several flaws and gaps in legal provisions and the efforts of governmental and non-governmental agencies in rehabilitation, treatment and care of such children. Therefore, to rationalize and modernize the approach towards juvenile justice, the Juvenile Justice (Care and Protection of the Children) Act, 2000 was enacted, keeping in mind the provisions of the India Constitution and International statute and obligations. This act incorporated some additional inputs given by the Interim Report of Working Group of Ministry of Social Justice and Empowerment (2001-02) and these additional inputs became operational 1 April, 2001.

It also increased the upper age of boy to 18. One of the provisions specified that a "National level Advisory Board" had to be constituted to advice central and state governments as well as voluntary organization on juvenile justice.

iv) Juvenile Justice Act, 2015 [14]

At this time, our country was in an urgent need of reform the existing Juvenile justice system because there has been a steep increase in crime committed by juveniles between the age of 16 to 18 and they were very well aware of the fact that they were under the prescribed age so this age was the gateway for them from exempting the criminal prosecution. The need was, therefore, realized to provide for a bit deterrent punishment to inject the feeling of fear in the mind of criminals. Furthermore, NIRBHAYA RAPE CASE had caused utter dismay, concern and outrage amongst the people against the then juvenile justice system. Because a gruesome act of injecting an iron rod into the vagina of girl had done by none other than a juvenile of 17 years old and he was found guilty of 3 years of imprisonment in a reform home as per Section 15 of JJ Act 2000 while other co-accused were awarded with death sentence. In the light of this gruesome and brutal gang rape, a bill was introduced in Parliament by Maneka Gandhi on 12 August 2015. This bill adopted the concept of Huge Convention and Inter-country Adoption, 1993. This bill was implemented into Juvenile Justice (Care and Protection of Children) Act, 2015. One of the most appreciable

---

13. Juvenile Justice (Care and Protection of the Children) Act, 2000 (Act 56 of 2000).
14. Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016).

provision is of minimizing the juveniles' age from 18 to 16, who are engaged in heinous crime. One of the most criticized features was introduction of *Judicial Waiver System* according to which it was allowed to treat and punish juveniles, under certain conditions, as an adult in the criminal justice system. Juvenile Justice Boards were set up in each district of India.

Recently Government of India has passed the Juvenile Justice (Care and Protection) Amendment Act 2021 to empower and strengthen the provisions of protection and adoption of children.

III. MEANING OF A JUVENILE AND DELINQUENCY

Simply, it means a child who is young, teenager, adolescent or underage; the one who is childish and immature in knowing the nature of his act. A juvenile can be defined as a child who has not attained a certain age at which he can be treated as an adult and not be held liable for his criminal act or omission. So, juvenile is a child who is alleged to have committed an act which is in violation of law of that country and such act can be declared as an offence. In India, there was no uniformity and consistency regarding the age limit of juvenile delinquents until the passing of The Children Act, 1960.

It is defined as "a boy who has not completed age of 16 years and in case of a girl 18 years of age."[15] But this age variation was removed from the definition in the Act of 2000 while discharging international obligation. According to new law, age limit for both male and female who were indulged in conflict with law had been fixed at 18 years. And professional definition reads that: A juvenile in conflict with law under the Juvenile Justice (Care & Protection) Act, 2000 is "a juvenile who is alleged to have committed an offence but has not completed 18 years of age on the date of commission of said offence. Section 2(35) of Act of

2015 defines it as "juvenile means a child below the age of 18 years."

i) What is delinquency?

Delinquency means an unacceptable and unwelcomed act or omission of a juvenile which is morally and lawful wrong, to which no society would permit. The juvenile delinquent means "a child is trying or pretending to act like a grown up or adult". According to social workers "delinquency

15. Supra note 10, sec. 2(h).

consisted of socially unaccepted acts". While a psychiatrist suggests that "delinquent behaviour is activity which deviates from the normal". A lawyer would say "juvenile delinquency is what the law says it is".

IV. JUVENILE DELINQUENCY AND LAWS IN INDIA

i) Constitutional provisions for juveniles

Our paramount, legal parchment and our fundamental law is the Constitution which became operative since 26th January 1950, it provides a progressive part on the privileges of the child. Prior to it, there were odds and ends enactment by the various state governments governing the child's care and protection and child's work. The Constitution inserted few provisions managing the child freedom, vocation advancement obligatory and free training and restriction of their working in plants, mines and risky business. These articles have been provided under Part III and Part IV of the Constitution. Article 32 keeps a watchful eye on the Fundamental rights of a person from being violated by state by providing 5 kinds of writs[16] to them. A high court can also give the same protection to not only Fundamental rights but also to legal or constitutional rights under Article 226. Equity is the prime object guaranteed by the Constitution that has evolved from time to time in various cases at the Apex court. Some provisions related to juvenile include – Right to free and compulsory education for all children between the age of 6 to 14, Right not to be employed in any hazardous place or activity till the age of 14, Right to be protected from being abused and stopped from entering into an occupation which is unsuited to his age, strength and health, Right to equal opportunities and facilities to develop in a healthy manner and protection against exploitation of childhood and youth, Right to early childhood care and education till the age of 6.

Besides, children have also those rights which are available to male and female adults. It includes right to equality, right against discrimination, right to personal liberty or due process of law, right not to be trafficked and forced into child labour, right of minorities for protection from social justice, right of weaker sections from social injustice and exploitation, right to receive good nutrition and good health standard.

---

16. The Constitution of India, Art. 32 – (Right to Constitutional Remedies): It is a fundamental right, which states that individuals have the right to approach the Supreme Court seeking enforcement of other fundamental rights recognised by the Constitution. The writs issued may include habeas corpus, mandamus, prohibition, certiorari and quo-warranto.

ii) Legal provisions

Indian Penal Code provides various provisions for the protection and rehabilitation of children and juveniles.

Section 82 immunes a child from any kind of criminal liability under the age of 7 years. It gives full immunity against the crime on the basis of doli incapax because a child is not able to distinguish between right and wrong and thus can't form necessary mens rea. Age of discretion differs from country to country and from time to time. In English legal system, it was fixed at 12 years earlier at the time of the formation of IPC. But it was reduced to 7 yrs. Later on, Children and Young Persons Act, 1933[17] was implemented which enhanced the age of discretion to 8yrs[18].

Most European countries have fixed the age of criminal liability at between 13 to 15. Like France (13), Finland (15), Poland (13), Italy (14) and Germany (14). However, age of discretion in India, i.e., 7 years seems to be low for criminal responsibility and it requires to be increased.

Section 83 gives partial immunity because the mental capacity of all children between the age group of 7-12 years of age is believed to be unequal; mens rea can be formed in some cases depending upon the maturity of the child.

Section 317 also protects the rights of the children against their parents or guardians. When parents abandon their child then they can be held liable. This section reads that-

"Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both".

Section 361 ensures the child's rights and safety because they are not capable in doing so itself. According to this section- "Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without

---

17. The Children and Young Persons Act, 1933 (23 & 24 Geo.5 c.12)
18. Id, [It raised the minimum age for execution to eighteen, raised the age of criminal responsibility from seven to eight] available at: https://amp.en.google-info.in/14385112/1/children-and-youngpersons-act-1933.html (visited on October 17, 2021).

the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

V. CAUSES OF JUVENILE DELINQUENCIES

Juvenile delinquency means breaking of law by a young person who has not sufficient understanding of his act like adults. Because they are still immature and not able to act or think like an adult so they are very much prone to commit a mistake. Childs can break law due to various reasons and there are lots of number which could be the factors behind juvenile delinquencies. Lack of moral and social training, lack of education and knowledge, lack of communication, mental health risk, lack of finances, broken family and many more can be added to the list. Some children are abandoned when they are in great need of love and caress of their loved ones and family members and they later on become delinquents.

Also, various researches have shown that hostile domestic environment or under ineffective parenting care and protection is one of the major factors in developing juvenile delinquencies. In the same way, children who belong to broken and dysfunctional families have shown a higher tendency of delinquency. Some abuse and psychiatric disorder conditions can also lead to law in-abiding behaviour.

During the Parliamentary debate over the Juvenile Justice bill in 2015, Congress MP Shashi Tharoor pointed, "How a majority of children in conflict with law come from illiterate and poor families." These children are being punished instead of given education and sending them into reformative schools. Beside it, he also criticized the bill by putting a narration that this bill violated the United Nations Standard Minimum Rules for the administration of Juvenile Justice, 1985 as well as Beijing Rules.

Some Suggestions may be forwarded as :

By empirical analysis, it can be said that the problem of juvenile delinquency is still prevalent in the society but some developments are also taking place for the effective treatment of those who under some worse situations become delinquents. The habits and moral values learnt in childhood leave permanent impression on the child for the rest of his life. Children's activities and their companionship have to be watched cautiously by family and school teachers. Social environment and peer group or friend circle of children can lead a child to Juvenile delinquent so there must be a close eye on it by parents. School teachers can also try to know the

psychology of the students like their interest, potential, motive, aptitude and attitude, etc. School authority can arrange parent-teacher meeting as usually happens in almost in all schools and they should give a report to their parents if it finds something unwanted in the behaviour and nature of the child. School authority can also teach about "Adolescent behaviour" and "Juvenile Delinquency". Schools must also provide counselling of the child at regular periods.

In case of juvenile delinquents, Juvenile justice administration has been the part of judicial processes and children are kept in Observation Homes during their whole trial which takes place at Juvenile courts that are located separately. For trial, delinquents are brought to such courts, and face the community. Seeing others or feeling of being seen by others which the delinquent child do not wish to have it for itself, it is better the trial is conducted in the Observation Home. So, to resolve this issue one thing can be added in the list that juvenile courts should be established near the Observation Home, this would serve the purpose of serving delinquent child from being affected psychologically. Juvenile police should not wear uniform because the juvenile delinquents have made some concepts of it so as not to affect delinquents by seeing the police in dress.

VI. CONCLUSION

From the above discussion we can conclude that the main purpose behind Juvenile Justice Systems is to try children who commit crime in different ways and in separate courts and not to be treated or punished in the same way as adult are. Laws for juvenile are made with particular intent that these laws would correct them in all possible way. The country has introduced several separate legislations for juvenile offender from time to time whenever the surge in child delinquencies has increased for them requiring care and protection. Juvenile who are in conflict of law and need great care and rehabilitation and whose inquiries are pending, are to be kept separately in observation homes. This segregation of children protects them from the influence of adult criminals. The child who is misguided is perceived as a violent juvenile criminal by the society itself. This is all because juvenile crimes are more noticeable by the society, these crimes are happening on the crowded streets where abandoned or orphaned child attempt to survive by doing some acts that society doesn't permit to anyone. It has been shown that children who are indulged in crimes are come from poor and illiterate families so Juvenile justice system endeavours to provide

them proper education in all possible way instead of punishing them and putting them into bars. These adolescent children are not criminals and culprits by birth and have no past record in crime, actually they are some defects and casualties of society. This casualty can be wiped out completely at the beginning level if a unique way of treating them and care is taken both at home and school. We should not call them as "Delinquent" and "Criminal" rather some good steps must be taken to give them an extent of correction and their mistakes whether mentally or socially in their lives are to be conveyed to their takes note.

■

WOMEN CRIMINALITY IN INDIA: CAUSES AND PREVENTIVE MEASURES

*SUSHIL KUMAR**

ABSTRACT : Crime is increasing day by day in modern society. Due to the changing socio-cultural dimensions, the participation of women in crimes is also increasing. They are indulging in criminal acts just like men. But the Indian socio-cultural structure does not allow most of the crimes of women to come to light, due to which the legislature is not able to make any strict laws to prevent it. In this article author will discuss about the crime committed by women in India and cause of criminality as well as preventive measures of female criminality.

KEY WORDS : Society, Crime, female criminality

I. INTRODUCTION

Crime and criminal both have become the focus of attention in the present society. Crime is increasing at rapid rate. In India, crime has been considered a male behaviour. But today the former notion is proved wrong. Women, like men, suffer from tensions, frustration, jealousy enmity and hatred, which motivate them to criminality. They indulge in all sorts of crimes. The changing social norms and values as well as the impact of other cultural patterns culminating in the complexity of life are largely responsible for this change.

Female criminality is indeed a serious social problem; it may be considered a crucial problem because of its impact on family, upbringing of children and the overall fabric of society.

As women's roles have changed and become more open to opportunities and tensions associated with the male-role, their criminal activities will be transformed in kind and degrees.

---

* Research Scholar, Law School, BHU, Varanasi; skchaudharyalld11@gmail.com

The predominant factors which are found to determine criminal tendencies in Indian women are economic insecurity, social deprivation and emotional disturbances. Besides, family and domestic quarrels and destitution may also significantly affect the criminality of women.[1] Social environment and deviance are highly relevant to the subject of criminality. Migration from rural areas to urban areas and the in-balance in their adjustment to city life may also result in an increase of crime in cities. It is obvious now that female criminals do not form an isolated group from the normal population.[2]

We have seen the image of women in various media as the preservers of social norms, traditions, customs, morality and family cohesiveness. But today, Westernized Indian culture, industrialization and urbanization have contributed in increasing crime rate among women.

The increasing crime rate among females in recent years has drawn the attention of author. An earlier Indian study on criminals has concentrated on male criminality.[3] Within the past few decades, professional interest in female criminality has increased along with interest in the general topic of women.[4]

The present study is a study of women who have been arrested for crime. The term 'undertrial criminal' is applied to a person whose trial has begun.[5]

Human history shows that women are the building blocks of a given family and culture. In India in particular, women are regarded as safeguarding societal values, customs, traditions, moral activities and the cohesion of family life. In today's environment a woman has accepted additional obligation to mark her identity and to nurture her family.[6] It is therefore regrettable to see that the achievement of women in the social, educational, economical and political climate of India is now being extended

---

1. Dr.Smriti A. Bhosle, '*Female Crime in India: And Theoretical Perspective of Crime', (*Kalpaz Publication, Delhi, 2009), pp.16-17
2. Ibid
3. Ram, Ahuja, *'Female offender in India'* (Meenakshi Prakashan, Meerut,2969),pp.131-32
4. N.R.M.,Menon, '*Legal Aid in the criminal Proceedings*', (Social Defence, Vol. XIII, No.50), p.16
5. Supra Note 02
6. Alana van Gundy, '*female crime and theory'* (Toylor and Francis, France, 1st ed. 2014), p. 15

to crime. In India, female crime is on the rise. The issue has reached an alarming level, which has contributed to more criminal activity. Theoretically, female crime was declared to be complicated; less known and easily regulated. The social climate leads significantly to the criminalization of women.[7]

In the backdrop of development and social change, the concept of criminality is a recent phenomenon in both developed and developing countries. Criminality among women is result of various socio-economic, cultural and environmental factors. These factors are associated with rapid urbanization, westernization and industrialization.[8] In recent times on account of increasing rate of women criminality, it has drawn the attention of psychologists, sociologists and criminologist both at national and international level. It not only has given a strong blow to our social and cultural heritage but also affected the very structure of Indian society.

II. CAUSES OF FEMALE CRIMINALITY A THEORETICAL EXPLANATION

The reasons based on the biological thought propounded by the early criminals were unfounded and did not apply to women in India.

i) Psychological theory

Women who are not passive and satisfied with their traditional roles as mothers and wives are unfairly accommodated. Maladjusted women refuse or fail to imbibe the values associated with the role in society[9]. Female victims display emotional instability, insecurity, rejection or frustration. They must have faced harsh life situations, disappointment in love and a large number of unfortunate experiences, which generally made it difficult for them to face the realities of life. Stress is on average higher for women than men, mainly due to blocked opportunities and conflicting messages of motherhood versus work. Women of lower social status experience more stress on average than women of higher social status.[10]

---

7. E. Durkhiem, ' *Rules Of Sociological Method: And Selected Texts On Sociology And Its Method*', (Simon and Schuster, 2014) , pp.211.
8. R.M., Bilmoria,*'Female Criminality:An Empirical study in Andhra Pradesh.*'(Eastern Book Company, Lucknow, 1987) ,pp.25-34
9. Otto Pollak, *The Criminality of Women*,'(University of Pennsylvania Press, Baltimore, MD, US, 1950).pp.158
10. Ibid

Women are afraid to express anger because it can alienate those around them. So they suppress anger and most women cope by turning anger into guilt, failure and sadness. Women suppress their feelings until it eventually explodes into deadly violence. Women experiencing extremes of stress are more likely to have outbursts than men with episodes of extreme uncontrolled violence. Situations that cause constant stress and isolation, coupled with poor coping skills and an overly controlling personality, lead to violence.[11]

ii) Sociological theory

During the last few decades a number of articles on the sociological approach have come to the fore. This approach emphasizes how social factors make a women criminal. Women in India have to face inequality at every stage of life in spite of so much development and awareness. Equality for women is not practiced as stated in the Constitution of India. Due to facing inequality, women miss out on most of the life opportunities which in turn affect their financial independence and thus lower their economic status.[12] Women in our society are always expected to understand and adjust according to the world around them. This unequal status of women in the society due to social oppression and economic dependence on men and the state needs to be addressed. In most ways, crimes committed by women are considered the ultimate outward manifestation of internal medical imbalance or social instability.[13]

iii) Feminist Theory

When women achieve social equality, they will extend their emancipation to illegal activities as well. With greater access, there will come more opportunities for crime; especially financial and white-collar crimes such as fraud and embezzlement.[14] Women have a lot of options that they didn't have before. Participation of women in terrorist activities, trafficking, violence, communal riots etc. They were seen to defy all available theories and tendencies of crime, adopting unconventional tendencies of crime, as most of these crimes are structural immorality and

---

11. O.,Pollak, '*The criminality of women. Philadelphia*' (University of Pennsylvania Press,1950)
12. Supra note 08
13. Ram Ahuja, '*Criminology*,' (Rawat, Jaipur, 2000), pp.161

problems of ethnic affinity. These explanations do not explain the crime situation in India despite the fact that there is a women's liberation movement in our country. This movement is confined to urban areas whereas in our society a large number of women criminals come from rural areas where women never talk of equal rights with men and there is no break of gender inequality.[15]

Apart from the above theories, there is a deep social stigma in India of treating a girl child as a burden. This stigma compels women to kill their girl child in the womb or after birth or to abandon or sell. It compels women to commit crimes for dowry or family honour. Forces women to drag their daughters into the world of prostitution or get married at an early age. The victim in turn, living in the denial and cruel environment established by him, becomes a staunch criminal. This position involves a mixture of all the above principles.[16]

III. FEMALE CRIMINALITY IN INDIA

Human history shows that women are the building blocks of a given family and culture. In India in particular, women are regarded as safeguarding societal values, customs, traditions, moral activities and the cohesion of family life. In today's environment a woman has accepted additional obligation to mark her identity and to nurture her family. It is therefore regrettable to see that the achievement of women in the social, educational, economical and political climate of India is now being extended to crime. In India, female crimes are on the rise. The issue has reached an alarming level, which has contributed to more criminal activity. Theoretically, female crime was declared to be complicated; less known and easily regulated. The social climate leads significantly to the criminalization of women.[17]

The severity of the task is enhanced by the accessible crime statistics from the Bureau of National Crime Reports (NCRB). Although woman

---

14. https://www.sciencedirect.com/topics/social-sciences/feminist-theory (accessed on 12-10-2021)
15. Ashley, Rossman. '*Feminist Theory in Sociology*.' (ThoughtCo, Feb. 16, 2021, thoughtco.com/feminist-theory-3026624).
16. Ibid
17. J.K. Pattanaik and N.N. Mishra, '*Social change and Female Criminality in India'*,(social change : sep. 2001: Vol.31 No.3), pp. 103-110

offenders appear to be a minority, they only constitute 6.3% of criminals found guilty of IPC crimes (NCRB Crime Study 2009). The Indian Crime Figures indicate that the number of women detained in 2003 was 1.51.675 for illegal conduct, shot up at 1.54.635 in 2007. Interestingly enough, the essence of their criminality is also being steadily transformed - from milder crimes such as opium dealing and adultery to abominable murder crimes. 3439 women were imprisoned in 2005 for murder; 3812 in 2007 and 4007 in 2009, rising from 5.4% in 2005 to 6% in 2007 and 6.4% in 2009 (NCRB figures).

As per data provided by NCRB Female Persons Arrested under IPC Crimes in India 2016 were 193241. As per data provided by NCRB Female Persons Arrested under IPC Crimes in only Metropolitan Cities – 2019 were 23,919.The National Crime Records Bureau (NCRB) has released it's in its Prison Statistics Report for 2019, and it showcases the ever-worsening plight of women prisoners. As per the data, 19,913 were female prisoners.[18]

Out of about 1,300 prisons, there are 31 women's jails in 15 States/ Union Territories (UTs) including Rajasthan, Tamil Nadu, Kerala, Andhra Pradesh, Bihar, Gujarat, Delhi, Karnataka Maharashtra, Mizoram, Odisha, Punjab, Telangana, Uttar Pradesh and West Bengal. The state of West Bengal has the highest occupancy rate (142.04%) in its women jail followed by Maharashtra (138.55%) and Bihar (112.5%).[19]

The social climate also plays a significant role in the development of woman offenders in India. Here, the patriarchal society has much else to deal with. The female criminals have lost confidence in the social structure, says Counsellor Anchal Bhagat[20]. The destiny of women is secured, and instead of civil privileges and prerogatives they endure injustice.[21] In most parts of India there is social discrimination from birth to last breath. Bhagat listed a very popular illustration in her work regarding the perpetrator,

---

18. NCRB Report (2019) available at : https://ncrb.gov.in
19. Ibid
20. https://www.legalserviceindia.com/legal/article-5184-female-criminality-another-dark-side-of-patriarchy.html (accessed on 20-09-2021)
21. "Women and Criminality: The Women as Victim, Offender, and Practitioner | Office of Justice Programs,"*available at*: https://www.ojp.gov/ncjrs/virtual-library/abstracts/women-and-criminality-women-victim-offender-and-practitioner (last visited August 14, 2021).

Phoolan Devi[22], who was turned victim. Her tale as an aggressor continues with the rule that would not offer her justice.[23] Phoolan Devi denied justice, who later became a politician, had been renowned bandit queen. She had nevertheless made numerous rivals and was assassinated in her brief full-life battle. Bhagat's example concludes that women like Phoolan Devi are likely to use drastic law-making measures, as persuasive reasons such as a loss of economic freedom, an acknowledgment of community and to achieve a respectable place in society. She further stresses that courts ought to look for factors and compelling motives for a woman to conduct this particular offence before determining proceedings.

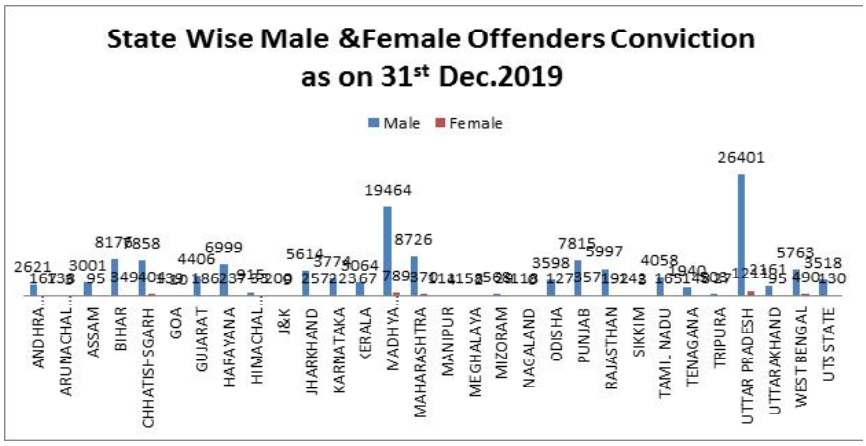
IV. DATA ANALYSIS

To understand the rise in female criminality, it is necessary to look beyond the statistics of crime committed by a female in comparison to the total crime in the year. When we observe the data, it seems too smart to be very small or insignificant. However, when actual figures are referred to, one can understand the difference. Below is a detailed table of women arrested in different states under Indian Penal Code and SLL during 2018 and 2019.

As per NCRB Report(2019)- A total of 4,74,639 criminals were imprisoned in various crimes at the end of the year 2019, which included 4,54,883 males and 19,729 females. In all these imprisoned criminals, 14,4,125 criminals were convicted, 33,0487 were undertrial and 3,483 were prisoners. Uttar Pradesh has recorded the highest number of imprisoned criminals 1,01,030, followed by Madhya Pradesh (44,410) and Bihar (39,800) with 21.3%, 9.4%, 8.4%.

22. 57 (1995) DLT 154 Available at : https://en.wikipedia.org/wiki/Phoolan_Devi (accessed on 14-10-21).
23. Supra Note 20

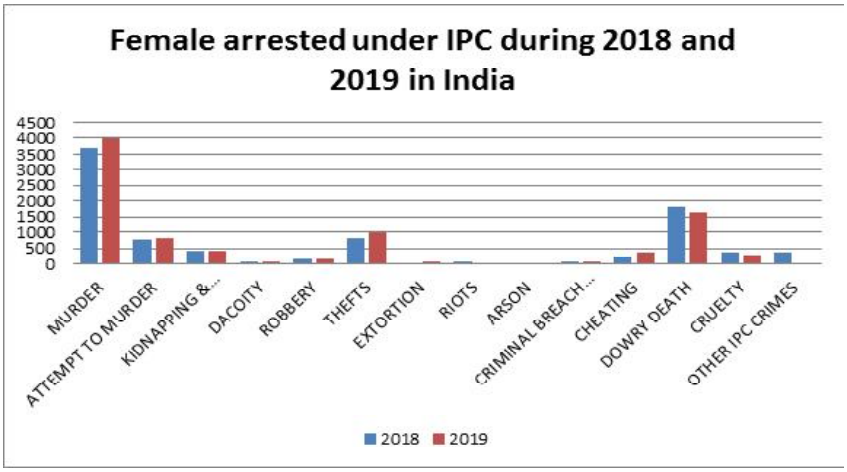
Table-1.1



Source- NCRB Report, 2018&2019*

At the end of the year 2019, a total of 1,44,125 Indian convicts were imprisoned in various jails of the country. In which 1,37,946 were males and 6,179 females were included. The highest number of convicted criminals in Uttar Pradesh was 72612; Madhya Pradesh was second place with 20253 convicted criminals. And the same Maharashtra was at the third place with 9096 convicted criminals. In which the number of female convicted criminals were 1211, 789, and 370 respectively (Table-1.1).

Table-1.2



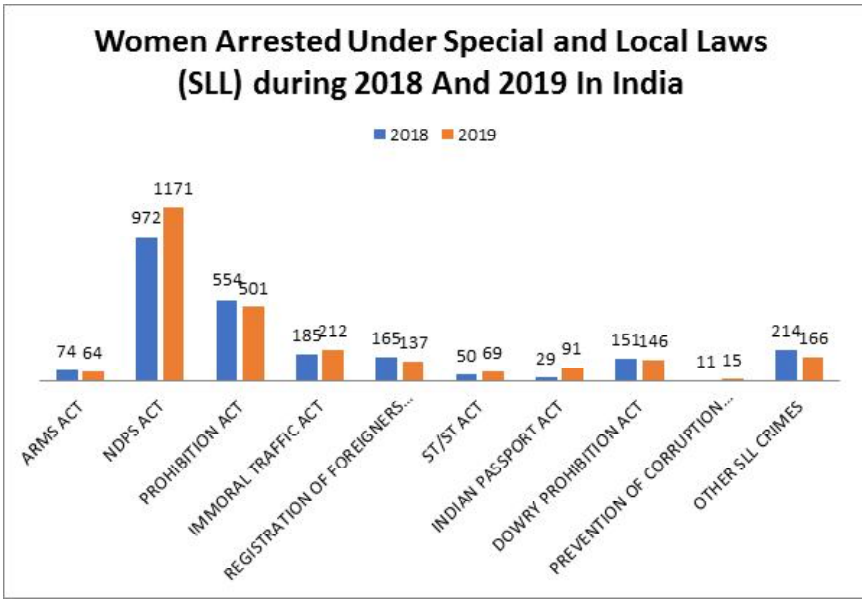
Source- NCRB Report, 2018 & 2019**

* Available at : https://ncrb.gov.in

** Ibid

According to table 1.2 author has discussed crime committed by women in IPC. The total number of women arrested under the IPC in the year 2018 and 2019 are 10049 and 10524 respectively, in which most of the women arrested in murder cases are 3672, and 4006 respectively, followed by dowry murder whose number is 1821 and 1633. And women have been also arrested other offences as follow- Thefts 817, 1005, Attempt To Murder 773, 799, Kidnapping And Abduction 560, 577, Rape, 431, 427, Cruelty By Husband Or Relatives Of Husband 357, 310, Cheating 258, 355, etc.

Table-1.3



Source – NCRB Report 2018 & 2019

According to table 1.3 author has discussed crime committed by women in SLL. The total number of women arrested under the SLL in the year 2018 and 2019 are 3023 and 3016 respectively, in which most of the women arrested in NDPS Act are 972, and 1171 respectively, followed by Excise Act whose number is 554 and 501. And women have been also arrested for other offences as follow- Prohibition Act 284, 190, Registration Of Foreigners Act 260, 226, Immoral Traffic (Prevention) Act 185, 212, etc.

From the above data it is known that the tendency of women to commit crimes is increasing day by day and they are capable of committing

all kinds of crimes, Whether it is a heinous crime or a petty crime. The tendency to commit all these crimes is very harmful in the social penetration of women; Where women were the savior of the society, now they are presenting out as the eaters of the society like *Shabnam case*[24] and *Renuka Bai case*[25]. It is known from the above discussion that the most heinous crimes are being committed by women like as in 2019, 4006 women arrested in murder case, 1633 in dowry death, 577 in kidnapping and abduction, etc.

V. PREVENTIVE STRATEGY FOR CRIMINALIZATION OF WOMEN

The following strategies may be more appropriate in the present times to control the rate and trend of female crime in India:

* Reformation and rehabilitation of female prisoners should be the basic and primary aim of our punishment system, through this overall change become possible.
* Whatever crime women are committed, they are human beings, and therefore humanitarian approach is required in treating female undertrials and convicts both in the prison and outside.
* Steps should be taken to establish women jails in different states wherever it is required so that better treatment can be provided to them.
* Awareness and attitudinal change is essential for the female criminals in order to bring them back to the society. So, media can play a constructive and positive role in this direction to create mass awareness campaign among women criminals through different programmes.

VI. CONCLUSION

Women have a great contribution in the development of the society, without them the development of the society cannot be imagined. Today, where one more women are making a new identity in the society by contributing in every area of the society, on the other hand women absorbed in the modernity of the society are also committing various types of crimes like theft, dacoity, murder etc. The data given by the author

---

24. *Shabnam* v. *Union Of India And Anr (2015, SCC online, SC 484)*
25. *Renuka Bai Alias Rinku Alias Ratan* v. *State Of Maharashtra* Appeal (crl.) 722 of 2005

shows those women are capable of committing all kinds of crimes and she is committing all kinds of crimes like men, whether it is a simple crime or a heinous crime. Due to which there has been a decrease in the respect of women in the society and people of the society have started looking at women with hatred. The crime committed by women is causing a lot of damage to the society. Due to which there is a need to improve the situation of criminalization of women in the society. Using the above guidelines suggested by the author and also teaching them morality, can be kept away from criminalization in the society. Due to which the society can women develops with higher pace and women get respect in the society.

■

ENVIRONMENTAL LAW: ENFORCEMENT ISSUES IN INDIA

*ABHIJEET KUMAR MALL**

ABSTRACT : Environmental law is a normative system that provides for the protection of the environment and takes into account the effects of human activities on the natural environment. It also focuses on the concept of sustainable development and ensures environmental justice through fair treatment and people participation in development. Implementation and compliance with environmental laws, regulations and directives. Various socio-political and economic factors that have contributed to environmental deterioration need to be regulated to stop further deterioration. There is no shortage of environmental protection laws in India, but compliance has been satisfactory. The Constitutional obligation, as well as other environmental laws, must be enforced effectively and efficiently. In India, the judiciary has played an important and praiseworthy role in the development of environmental jurisprudence. Taking care of and controlling for long-term development to be possible, environmental protection is vital. This article is focuses on India's environmental law framework in a globalised era, with a singular focus on sustainable development.

KEY WORDS : Environmental Law, Constitutional obligations, socio-political, compliance, global era.

I. INTRODUCTION

The Environmental Protection Act accommodates a developing relationship of the monetary utilization of natural assets and their consequences for human existence. Development, which inevitably has a broader perspective, must be sustainable and include not only social,

* Research Scholar, Law School, BHU, Varanasi; abhimall02@gmail.com

economic and distributive components but also ecological dimension[1] faced the problem of resource degradation and pollution in India, despite having put in place a range of regulatory instruments in "But the law doesn't work if it works as a whole". The judiciary, which has been an observer of environmental expropriation for more than two decades, has recently taken on a proactive role as a public educator, policymaker, super administrator and more generally, amicus environment

The whirlwind of laws, remiss implementation and decisive legal oversight have converged into a solitary authorization polarity one connection addressed by the disabled formal administrative hardware comprised of environmental protection agencies, backwoods administrations, and state offices the other comprises of an impromptu casual resident and a court-driven requirement system. The Supreme Court held that: "If the simple passing of natural security laws were to guarantee a clean and pollution-free environment, then, at that point, India may be the most un-dirtied country on the planet. However, that isn't so 200 focal and state laws that arrangement undoubtedly somewhat with natural security, either straightforwardly or in a roundabout way."

Einstein remarked once : "The climate is all that I am not."In this sense, the region encompassing the earth can mean for all intents and purposes anything nearby. Segment 2 of the "Environment (Protection) Act of 1986 characterizes the climate as water, air and land and the interrelationship that exists between water, air and land. also, the earth and individuals, other living things, plants, microorganisms and properties". In spite of the development of environmental law as a part of law, does exclude a remarkable and unambiguous arrangement of rules, yet is made out of laws drawn from an assortment of sources including ecological law, misdeed, carelessness, infringement, rule in Ryland v. Fletcher, Urban and Rural Planning Legislation, Land Law, Consumer Protection, Health Legislation, and so on environmental statute basically comprises of the previously mentioned hypothesizes and principal essential qualities for reestablishing harmony and amicability in the climate of the earth In request to shield law and order, there should be a harmony between justices, equity, human rights, freedoms and obligation. It is recommended that the breakdown of the planet's life emotionally supportive networks is advancing at a particularly

1. G.S. Tiwari, "Sustainable Development as a Socio Economic growth Strategy expanding horizons of environmental law in India" in Manoj Sinha, *et al.* (eds.), *Environmental Law and Enforcement: The Contemporary Challenges* 40 (2016).

fast rate, and has effectively cut so profoundly into the delicate texture of the normal world, that no customary response is adequate to adapt to it An arrangement of environment enactment to punish polluters, moderate scant assets, and lead society into a better approach for life is implied by the regular response. It is contended that such a response is horribly deficient considering the extent of the issues we face, and that the law plays no huge part to play in tending to or settling the few environmental emergencies we defy.

II. INDIAN COURTS & LEGISLATIVE FRAMEWORK: A BRIEF OVERVIEW

The Stockholm Declaration of 1972 was arguably the first significant worldwide initiative to maintain and safeguard the human environment. States were obligated to implement legislative steps to keep up and better on the climate because of this Declaration. As a result, in 1976, parliament has introduced two articles under Indian Constitution, Article 48A and 51A, Article 48A of the Indian Constitution provided that state, "to strive to conserve and develop the environment, as well as to safeguard the country's forests and animals". Similarly, Article 51A, clause (g), set a liability for every citizen of India, "to conserve and develop the natural environment, including forests, lakes, rivers, and animals, as well as to exhibit compassion for living beings". The combined impact of Articles 48A and 51A (g) appears to be that both the 'State' and the 'people' are now bound by the Constitution to conserve, perceive, protect, and enhance the environment. Every generation owes it to future generations to develop and protect the nation's natural resources to the best of their ability. Both Articles 48A and 51A (g) contain the word "protect and improve," which appears to imply intentional government action to enhance the condition of the environment rather than just maintain it in its deteriorated state, there are numerous statutes,[2] on the subject, like the Water (Prevention and Control of Pollution) Act, 1974,the Water (Prevention and Control of Pollution) Cess Act, (1977), the Air (Prevention and Control of Pollution) Act, (1981), the Environment (Protection) Act, (1986), the Water (Prevention and Control of Pollution) Cess Act, (1977), the Air (Prevention and Control of Pollution) Act, 1981. The Environment (Protection) Act, (1986), Public Liability Insurance Act, 1991, the Wildlife (Protection) Act, (1972), the Forest (Conservation) Act, (1980).

2. *see* The Indian Forest Act, 1927; The Factories Act, 1948; The Atomic Energy Act, 1962.

In the Ganga pollution case, the authority holders of certain tanneries near Kanpur were releasing their effluents from their industrial facilities in Ganga while not placing in essential treatment plants. The Supreme Court ruled that the economic capacity of the tanneries should be seen as inadequate while forcing them to establish primary processing plants. water pollution control. It is a question of raising money from those whose activities are polluting and who should bear the costs of maintaining and operating these organizations.The Water (Prevention and the management of Pollution) Cess Act, 1977 means to require an arrangement of a cess on water devoured by people conveying industry and local specialists to improve the assets of the Central Board and furthermore the State Boards genuine for the bar and control of water pollution. The thing is to comprehend cash from those whose exercises cause contamination and who should bear the costs of the support and running of such Boards. The businesses might secure a discount on the degree of 25% on the off chance that they found a treatment plant for sewerage or exchange profluent.

In Delhi, the public transport system in general as well as the buses associated with taxis operate with a methane fuel mode according to the indications provided by the Court of Cassation. Initially, there was a lot of resistance from the bus and taxi operators. Methane is not only ecological but also economical. Noise is considered wasted air under the air law. Sound becomes noise when it causes discomfort or irritation. The Environment (Protection) Act, 1986 has been issued to ensure the protection and improvement of the level of the environment and to prevent the prevailing and mitigating environmental pollution. The act was born as an immediate consequence of the Bhopal gas tragedy. The term "climate" has been illustrated "to incorporate water, air and land, and therefore the relationship between and between water, air and land and people, different living animals, plants, miniature creatures and properties." The definition is broad enough to include within its scope all living animals, as well as miniature plants and living things and their relationships with water, air and land. The Liability Insurance Act of 1991 was passed by Parliament to provide liability insurance with the aim of providing prompt assistance to those injured in an accident while handling hazardous materials and related matters. The law provides liability insurance for facilities handling hazardous chemicals to provide minimum compensation to victims (other than workers) through the debt collector's decision process. Because it is limited to limited remedies, such insurance will be based on the idea of "no-fault" liability.

The National Environmental Appellate Authority Act 1997 was

enacted to provide for the establishment of a National Environmental charm Authority to listen to appeals regarding restrictions in areas wherever Associate in Nursing trade, an operation or method can't be dispensed or may be carried out below bound safeguard conditions under the Environmental Protection Act 1986. when the creation of the Authority, no civil court or different authority will be competent to hear an appeal on matters that the Authority is permitted by law. It is clear that this law was drafted with the aim of quickly doing justice to environmental concerns..The Wild Life (Protection) Act of 1972 was designed to ensure that wild animals, birds, and plants were protected. The Act makes it illegal to hunt animals and birds that are included in the schedules. Picking, uprooting, damaging, destroying, or destroying any designated plant from any forest is likewise prohibited by the Act. The State Animals Advisory Board is mandated by the Act to advise the State Government on the production of approaches for the safeguarding and preservation of untamed wildlife and indicated plants, just as the determination of spots to be assigned as safe-havens, public parks, and other secured regions. The Act is overseen by a Director of Wildlife Preservation, who is assisted by Assistant Directors, and a Chief Wildlife Warden, who is assisted by other staff. The Forest (Conservation) Act of 1986 was enacted to prevent forest destruction. The Act stipulates that no forest destruction or non-forest use of forestland is authorized without prior consent from the Central Government. Forest conservation includes both the preservation and protection of existing forests as well as reforestation. To replace the disappearing trees, reforestation should continue. It's a process that's ongoing and interwoven.[3]

III. DEVELOPMENT OF ENVIRONMENTAL JURISPRUDENCE THROUGH JUDICIARY

A person's right to a pollution-free environment is enshrined in the country's basic law. India's Constitution protects a basic right to life and personal liberty under Article 21. The right to life and personal liberty has been construed by the Supreme Court to include the right to a healthy environment.[4] The Court has ruled in a number of decisions that the right to a clean environment, safe drinking water, and a pollution-free environment is part of the right to life mandate.

---

3. *Anupama Minerals* v. *Union of India & Others*, (AIR 1986 A.P. 225).
4. *Rural Litigation and Entitlement Kendra, Dehradun* v. *State of U.P.* (AIR 1988 SC 1037).

In the case of *Tajmahal,* the Supreme Court ruled that Taj Trapezium (TTZ) coal and coke companies that damaged Taj should either switch to either gaseous gasoline or be moved out of the TTZ. The Supreme Court again asked the Forestry Department to protect the trees planted around the Taj as below:

> The Divisional Forest Officer in Agra has been requested to make an earnest move to guarantee that the plants are furnished with water... The Union Government is requested to dispense the cash right away, without sitting tight for the U.P. Government to present a proposition dependent on a duplicate of the report. Subsidizing might be masterminded later with the Uttar Pradesh government, regardless, the official is to guarantee that plants don't wilt because of an absence of accounts.

Dehradun Valley Case,[5] all things considered, careless and dangerous limestone mining in the Mussoorie Hill scope of the Himalaya had upset the valley's hydrological framework, with diggers impacting out the slopes with explosive and gathering limestone from huge number of sections of land. The Supreme Court called for an end to the limestone mining activity on the slopes, saying: "This will undoubtedly create inconvenience for them, but it is a price that must be paid to protect and safeguard the rights of the people. people to live in a healthy environment. environment with minimal disturbance of the ecological balance". The Supreme Court repeated the observations expressed in Wadehra's case[6] in *Almitra H.Patel* v. *Union of India*.[7] The historic city of Delhi, India's capital, is one of the world's most polluted cities. The memorable city of Delhi, India's capital, is one of the world's most polluted urban communities.

The organizations responsible for pollution the executives and environmental conservation have neglected to give occupants of Delhi a perfect and sound climate. It is difficult to inhale since the air is so unsanitary. Respiratory pollutions and throat diseases are turning out to be more normal in Delhi. The River Yamuna, which gives most of the nation's drinking water, fills in as a free unloading ground for untreated sewage and modern trash. Besides air and water contamination, the city is basically a

---

5. *Rural Litigation & Entitlement Kendra* v. *Slate of U.P.*, (AIR 1985 SC 652); see also (AIR 1988 SC 2187)
6. *Dr. B.L Wadehra* v. *Union of India*, AIR 1996 SC 2969.
7. AIR 2000 SC 1256

landfill. Trash spread around Delhi is a customary event. The court requested the specialists to make all vital moves to decrease pollution and protect the climate at the earliest opportunity.

Sri Ram Food and Fertilizer Case.[8] A massive leak of Oleum Gas harmed a great number of people in that case24, both workers and the general public. The Supreme Court held that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm is caused to any person as a result of an accident in the operation of such hazardous or inherently dangerous activity resulting in the escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are harmed by the accident, with no exceptions.

Subba Rao v. *State of Himachal Pradesh*[9] . The Supreme Court requested the conclusion of a bone manufacturing plant that was sullying the climate with its solid smell and making individuals' lives hopeless. It's not possible for anyone to create again to the detriment of the general's wellbeing. The Supreme Court requested the suspension of mining exercises inside a two-kilometer range of the traveler objections of Badkhal and Suraj Kund to ensure the climate and manage pollution nearby.

'Sustainable development' refers to development that satisfies current demands without endangering future generations' capacity to satisfy their own.

IV. ENVIRONMENTAL DOCTRINES AND PRINCIPLES DEVELOPED BY THE INDIAN COURTS

Court principles have made a major contribution to India's environmental jurisprudence. The method for incorporating decisions taken at foreign conventions and conferences into the Indian legal system is outlined in Article 253 of the Indian Constitution. The creation and implementation of environmental concepts in the judicial process are significant milestones in India's environmental law development.

i. Doctrine of Public Trust

The Indian legal system is largely based on common law, and its jurisprudence incorporates the public trust theory. Natural resources are guarded by the state, and they are available to the people for their pleasure by nature, and they cannot be converted into private property.The state

8. *M.C. Mehta* v. *Union of India*, (AIR 1987 SC 1086).
9. AIR 1989 SC 171

has a legal obligation to safeguard natural resources. For the first time in India, the Supreme Court applied this theory to an environmental concern in *M.C. Mehta* v. *Kamal Nath.*[10] . Without precedent for India, the Supreme Court applied this theory to a environmental issue. As per the Supreme Court, the public trust teaching depends on the reason that a few assets, like air, ocean waters, and woodlands, are of such huge importance to individuals in general that making them a subject of private proprietorship would be totally baseless.

ii. Doctrine of Sustainable Development

Nowadays, pollution and destruction of the environment is a significant issue. As a social institution, the judiciary has a vital role to play in resolving this issue. Industrialization and financial stability are essential for a society's growth. However, industrialization is incompatible with the notion of environmental preservation. These are two opposing interests, and reconciling them is a key issue for a country's legal system. In several pronouncements, the judiciary has stated that forcing companies to stop producing will have negative consequences for the country's economic and social conditions. Unemployment and poverty may engulf the country, causing it to degenerate and disintegrate. Polluting industries, on the other hand, jeopardize environmental stability. As a result, the judiciary concluded that the pollution limit should be set within the environment's long-term capability.

The Supreme Court said in *Vellore Citizens Welfare Forum* v. *Union of India*[11] that the conventional notion that growth and environment are mutually exclusive is no longer acceptable, and that sustainable development is the solution. Sustainable development refers to meeting present-day requirements without jeopardizing future generations' needs. Sustainable development is a notion that seeks to strike a balance between environment and development.

iii. Polluter Pays Principle

As countries progressed toward industrialization, they were confronted with the difficult task of adequately compensating victims of pollution and environmental risks. The idea that the polluter must pay for the harm he does was developed early in Europe, when the continent was plagued by a new specter: unparalleled pollution.

---

10. (1997) 1 SCC 388
11. AIR 1996 SC 2715

iv. Precautionary Principle

The precautionary principle expresses that if any activity or task has a likely danger of hurting general society or the climate, and the individual who is making that move knows about that danger, and that activity or undertaking is destructive without any logical means the weight of confirmation is on the people who are making that move to demonstrate that it isn't unsafe. At the point when logical review focuses to risk, the prudent standard expresses that there is a social commitment to protect general society from any damage. These safeguards can be eased if the individual taking action can show that there will be no damage as a result of their actions. The Karnataka High Court acknowledged the precautionary concept as part of the Constitutional responsibility for environmental preservation and enhancement in *Vijayanagar Education Trust* v. *Karnataka State Pollution Control Board, Karnataka*[12]. The court cited the *Nayudu* cases [13], which said that if it is determined that there are unknown and non-negligible risks, the developer bears the burden of proving the project's benign character.

V. PROBLEMS AND CHALLENGES

The current liability framework in India does not appear to be designed or administered in a way that adequately punishes individuals guilty for environmental degradation or deters future violations, according to the status of the environment in India. The main reasons are-

* There must be a real threat of non-enforcement, and punishments must be appropriate.
* Data gathering and a robust regulatory agency monitoring capability are required.
* To prevent corruption and other malpractices, there must be transparency and responsibility among the authorities. In India,
* Environmental concerns have traditionally been dealt with on a lighter scale by the legal, institutional, political, financial, bureaucratic, and cultural system.

---

12. AIR 2002 Kant 123
13 *Andhra Pradesh Pollution Control Board* v. *MV Nayudu,* (AIR 1999 SC 812).

* The most important concerns that have arisen in the present liability framework that are hurting the efficacy of India's existing enforcement apparatus.

i. There is no policy on environmental compliance and prosecution. When it comes to environmental cases, there is no impartial authority. The courts have the ability to impose penalties and fines, not the Pollution Control Boards. These are merely regulatory agencies for the aim of ensuring compliance.
ii. Punitive provisions are ineffective as well. Just levying a massive fine isn't enough. Without a deterrent element among the general population, punishment will not function.
iii. Even delays in the administration of justice by courts hamper environmental litigation.
iv. Individuals, organizations, and society as a whole fail to comply with environmental rules.
v. The National Green Tribunal Act of 2010 does not completely resolve the situation. It exclusively addresses civil remedies, not criminal penalties. Despite its limited authority, legal recourse is not a suitable instrument for safeguarding the quality of the environment.

VI. CONCLUSION

Environmental justice for all aspects of the environment is required on an equitable basis in the era of sustainable development. Actions against the environment, whether direct or indirect, by humans or other species require rigorous restrictions. In the name of development, humans are destroying the environment. We must establish a balance between economic progress and environmental protection. The existing liability framework is incapable of dealing with the magnitude of environmental harm that India is already experiencing and will likely face in the near future. Environmental policy is covered by more than 200 federal and state laws. The more legislation there is, the more difficult it is to enforce. For effective enforcement, there is a need for a comprehensive and integrated environmental protection law. It is not sufficient to adopt legislation. Everyone in society must have a good attitude in order for these laws to be enforced effectively and efficiently. The Pollution Control Boards' powers are insufficient to prevent pollution. The Boards do not have the authority

to penalize offenders, but they can bring legal action against them in court, which defeats the aim and intent of the Environmental Laws by prolonging the time it takes to resolve cases. As a result, it is critical that the Boards be given additional authority. The Environmental Protection Laws have not provided the expected outcomes.

As a result, the Environment Courts must be established in order to ensure the efficient and effective implementation of these laws. The Environment Courts will comprise of one appointed authority and two specialized experts in the fields of ecological science and biology. These courts ought to have the option to utilize synopsis techniques to speed up the goal of cases. To start, such courts might exist at the state and public levels, with the chance of resulting extension to the area level dependent on need. To avoid protracted litigation, the restrictions should be limited to a single appeal. The Supreme Court of India has played an important role in directing administrative bodies to take the required actions to improve the environment on a regular basis. We need social awareness from the ground up, not legislation from the top down. There is no rule that functions well unless the relationship is voluntary. To educate people about environmental concerns, free slide shows in regional languages should be shown in cinemas and on television. Environment studies must also be established a compulsory topic at school and college levels in a graded system, as mandated by the Supreme Court of India, in order to promote public awareness.

■

AADHAAR *VIS-À-VIS* PRIVACY: AN APPRAISAL

NIVEDITA KUSHWAHA*

ABSTRACT : Aadhaar is a 12-digit unique identity number issued to all Indian residents based on their biometric and demographic data. The data is collected by the Unique Identification Authority of India (hereinafter referred to UIDAI), a statutory established in January 2009 by the Government of India. Aadhaar is the world's largest biometric ID system, hundreds of millions of Indians were enrolled into the biometric database, with successive governments creating pressure by making it compulsory for social benefits. Even after the Supreme Court verdict in 2018, it stays a should have for welfare. This research talks about the dangers lurking in such expansive digital ID projects. For example, how Aadhaar excludes people entitled by right from welfare when made compulsory. On the technology side, the perils of using biometrics and the dangers arising from centralized databases? Who has access to all data concerning privacy, and how can it be used against us?

KEY WORDS : UIDAI; Privacy; Aadhaar; Social welfare; Coercion.

I. INTRODUCTION

World Bank Chief Economist Paul Romer described Aadhaar as "the most sophisticated ID programme in the world"[1]. Aadhaar considered as a proof of residence and not a proof of Citizenship, Aadhaar does not itself grant any rights to domicile in India. In June 2017 the Home Ministry clarified that Aadhaar is not a valid identification document for Indians travelling to Nepal and Bhutan. On 3 March 2016 a money bill was introduced in the Parliament to give legislative backing to Aadhaar. On 11

* Research Scholar, Law School, BHU, Varanasi; niveditakushwaha1@gmail.com

March 2016 the Aadhaar Act, 2016[1] was passed in the Lok Sabha. Aadhaar is subject of several rulings by the Supreme Court of India. On 23 September 2013 the Supreme Court issued an interim order saying that "no person should suffer for not getting Aadhaar, adding that the government cannot deny a service to a resident who does not possess Aadhaar, as it is voluntary and not mandatory. On 24 August, 2017[2] the Indian Supreme court delivered a landmark verdict in, affirming the right to privacy as a fundamental right, overruling previous judgement on the issue. Despite the validity of Aadhaar being challenged in the court, the Central Government has pushed citizens to link their Aadhaar numbers with a host of services, including mobile sim cards, bank accounts, the Employee Provident Fund, and a large number of welfare Schemes including the Mahatma Gandhi National Rural Employment Guarantee Act, the Public Distribution System, and an old age pensions etc.

In order to make Aadhaar accessible to often undocumented poorer citizens, obtaining an Aadhaar card does not require significant documentation, with multiple options available. In theory, the use of biometric facilities should reduce or eliminate duplication but in practicality, it is different. The detailed personal information being collected is of extremely high importance to an individual. However, once collected, it is not being treated with the required sensitivity for privacy concerns, major financial transactions are linked with information collected. Data leaks are a gold mine for criminals who now use sophisticated hackers. UIDAI confirms more than 200 governments websites were publicly displaying confidential Aadhaar data; though removed now, the data leaked cannot be scrubbed from hacker's databases. The cases show that monitoring agency is not able to keep secrecy of information and there is person who is having multiple or fake aadhaar card. Another issue is whether making aadhaar full proof document and mandatory is viable in the India what about nomadic people and forest dweller who doesn't have any place of residence and they are not aware of it. Traits captured by biometric systems may change with age, environment, disease, stress, occupational factors, socio- cultural aspects of the situation in which data submission takes place, changes in human interface with the system and, significantly, even intentional alterations. This would be so particularly of the poor engaged in labour-intensive occupations such as farming where hands are put to rough use

1. The Aadhaar (Targeted Delivery of Financial and other Subsidies, benefits and services) Act, 2016 (Act No 18 of 2016)
2. Justice K.S. Puttaswamy (Retd.) v Union of India, AIR 2017 SC 4161

causing weathering of finger and hand prints. Recently, it has also been shown that the three "accepted truths" about iris biometrics involving pupil dilation, by wearing non-cosmetic prescription contact lenses, by time lapse between enrolment and verification and by cross-sensor operation and that all these factors significantly alter the matching done to identify an individual uniquely. In October 2010, R. Ramkumar, an economist at the Tata Institute of Social Sciences, wrote in an editorial for The Hindu that the project being implemented without any cost- benefit or feasibility studies to ensure whether the project would meet its stipulated goals. He also pointed out that the Government was obscuring the security aspects of Aadhaar and focusing on the Social benefit schemes[3].

UIDAI[4] functioned since 28 January 2009, as an attached office of the planning commission (now NITI Aayog) and Nandan Nilekani, former Chairman of Infosys, was appointed Chairman. It was created with the objective to issue Unique Identification Numbers (UID), named as "Aadhaar" to all residents of India that is (a) robust enough to eliminate duplicate and fake identities, and (b) can be verified and authenticated in an easy, cost-effective way. The vision of UIDAI is to empower residents of India with a unique identity and a digital platform to authenticate anytime, anywhere.

II. PRIVACY : CONCEPT AND MEANING

Privacy per se is an undisputed right of an individual comprehensively bonded with his/her life. Privacy becomes matter of controversy when it is mishandled or intrude illegitimately by erroneous individual. Privacy is a fundamental human rights recognized in the Article 12 of United Nation Declaration of Human Rights. Article 17 of International Convention On Civil and Political Rights, "and in many other international and regional treaties. Privacy underpins human dignity and other key values such as freedom of association and freedom of speech. It has become one of the most important human rights issues of the modern age. Warren and Brandeis

---

3. R. Ramkumar, "What the UID conceals", *THE HINDU*, available at December 17 2016 https://www.thehindu.com/opinion/lead/What-the-UID-conceals/article15786909.ece, retrieved on 30 October 2017
4. UIDAI, available at: https://uidai.gov.in/about-uidai/unique-identification-authority-of-india.html, retrieved on 17 July 2018 Quoted in Subrata Mukherjee and Sushila Ramaswamy, *"A History of Political Thought-Plato to Marx"*, 111 (2006)

defined Privacy as the 'right to be let alone' a phrase adopted from Judge Thomas Cooley's famous treaties on torts in 1880. Cooley's right to be let alone was, in fact a way of explaining that attempted physical touching was a tort injury; he was not defining a right to privacy. Warren and Brandeis's use of the phrase was consistent with the purpose of their article to demonstrate that many of the elements of a right to privacy existed within the common law.

III. PHILOSOPHICAL ASPECT OF PRIVACY

Aristotle's differentiation of public and private sphere in a state is one of the earliest philosophical discussion regarding privacy. His attitude seems 'privacy friendly' when he describes his ideal man in the following way:

He is not fond of talking…It is of no concern of his that he should be praised, or that others should be blamed. He does not speak evil of others, even of his enemies, unless it be to them-selves. His carriage is sedate, his voice deep, his speech measured; he is not given to hurry, for he is concerned about only a few things; he is not prone to vehemence, for he thinks nothing very important. A shrill voice and hasty steps come to a man through care… He bears the accidents of life with dignity and grace, making the best of his circumstances, like a skillful general who marshals his limited forces with all the strategy of war, He is his own best friend, and takes delight in privacy whereas the man of no virtue or ability is his own worst enemy, and is afraid of solitude.[5]

In state of nature John Locke[6] said, nobody had exclusive rights to the earth and other natural resources. People had common control over the property. However, each person had a right to his own person and right to self- preservation. Another example of a distinction between public and private in philosophical literature is evident from John Stuart Mill's on Liberty[7], he asserted his famous 'Harm Principle' and said that the only purpose for which power can be rightly exercised over any member of a civilized community against his will, is to prevent harm to others. Mill said that the Individual is sovereign over himself, over his own body and mind.

5. Quoted in Subrata Mukherjee and Sushila Ramaswamy, *"A History of Political Thought-Plato to Marx"*, 111 (2006).
6. John Locke, "The Second Treaties of Civil Government". Cited in Judith Wagner DeCew, *In Pursuit of privacy*, 10 (1997)
7. https://en.wikipedia.org/wiki/John_Stuart_Mill#Freedom_of_speech

Privacy concerns relating to the Aadhaar project have been the subject of much heated debate recently. Positions taken by the government and UIDAI on these issues have been ambiguous. The finance minister, while getting the Aadhaar bill passed as a money bill, announced that "the government presupposes privacy as a fundamental right" and claimed that the bill has tightened privacy provision. However, neither the government nor the UIDAI makes it clear what precisely are the privacy concerns that are being addressed, what precisely are the methods being deployed, and why the resulting proposal is secure. The UIDAI does describe the security measures it has put in place, but does not provide an analysis of the measures with respect to perceived threat levels and potential privacy breaches. This has resulted in an overall confusion about the impact on privacy engendered by the Aadhaar project. On the other hand, several civil society activists and social commentators (*Arun 2016[8]; Mehta 2017[9]; Jayaram 2015[10]; Vombatkere 2016[11]; Duggal 2011[12]; Dréze 2016[13]*) have expressed concerns about the weak privacy provisions in the Aadhaar project and the bill. The gist of most criticisms has been that the use of biometrics and a unique identification number (UIN), storage of biometric and demographic data, and authentication trails in a central repository are necessarily unsafe.

---

8. Chinmayi, Arun, "Privacy is a fundamental right", *THE HINDU,* 18 march 2016, https://www.thehindu.com/opinion/lead/lead-article-on-aadhaar-bill-by-chinmayi-arun-privacy-is-a-fundamental-right/article8366413.ece retrieved on 23 August 2017
9. Mehta Pratap Bhanu, "Privacy after Aadhaar"*, INDIAN EXPRESS*, 26 March 2016, https://indianexpress.com/article/opinion/columns/privacy-after-aadhaar-money-bill-rajya-sabha-upa/, retrieved on 17 June 2017
10. Jayaram Malvika, "Aadhaar debate: Privacy is not an elitist concern it's the only way to secure equality", 15 August 2015, https://scroll.in/article/748043/aadhaar-debate-privacy-is-not-an-elitist-concern-its-the-only-way-to-secure-equality, retrieved on 4 March 2017
11. Vombatkere, Sudhir, "How Aadhaar Neglects Personal Privacyand National Security", *MAINSTREAM*, 20 March 2016, http://www.mainstreamweekly.net/article6283.html, retrieved on 16 February 2019
12. Duggal Pavan, "Does the UID project infringe on privacy?" 3 August 2011, http://www.mainstreamweekly.net/article6283.html, retrieved on 24 September 2017
13. Dreze Jean, "The Aadhaar coup", *THE HINDU*, 15 March 2016, https://www.thehindu.com/opinion/lead/jean-dreze-on-aadhaar-mass-surveillance-data-collection/article8352912.ece, retrieved on 9 October 2017

However, whether breach of privacy is inevitable and whether there may exist technological and legal provisions which can make Aadhaar safe, are important questions that have not been adequately addressed. We note that some crucial lacunae in the identification and authentication processes of Aadhaar have been pointed out by Centre for Internet & Society, which also makes several important suggestions[14], including implementation of recommendations of Shah (Planning Commission 2012) and Sinha (Lok Sabha Secretariat 2012) committees. Despite these, thorough analyses of the possible ways in which privacy can be breached, and possible counter measures both from technological and legal perspectives, remain missing.

IV. POSSIBLE WAYS OF BREACH OF PRIVACY

The various ways in which the privacy of an individual can be compromised in a setting such as in Aadhaar[15].

(a) Correlation of Identities Across Domains: It may become possible to track an individual's activities across multiple domains of service Authentication User Agencies (hereinafter referred to AUAs) using their global Aadhaar IDs which are valid across these domains. This would lead to identification without consent.

(b) Identity Theft: This may happen through leakage of biometric and demographic data, either from the central repository, or from a point of sale or enrolment device.

(c) Identification Without Consent Using Aadhaar Data: There may be unauthorised use of biometrics to illegally identify people. Such violations may include identifying people by inappropriate matching of fingerprint or iris scans or facial photographs stored in the Aadhaar database, or using the demographic data to identify people without their consent and beyond legal provisions. Individuals may be tracked or put under surveillance without proper authorisation or legal sanction using the authentication and identification records and trails in the Aadhaar database, or in one or more AUA's databases. Such records will typically also contain information on

14. Centre for Internet & Society, "List of Recommendations on the Aadhaar Bill,2016- letter submitted to the Members of Parliament", 16 March 2016, https://cis-india.org/internet-governance/blog/list-of-recommendations-on-the-aadhaar-bill-2016, retrieved on 15 December 2017

15. Khera Reetika, "Aadhaar Failures: A Tragedy of Errors", *Economic & Political Weekly*, Vol. 54, Issue no. 14, 6 April 2019, https://www.epw.in/engage/article/aadhaar-failures-food-services-welfare, retrieved on 10 May 2019

the precise location, time, and context of the authentication or identifi cation and the services availed.

V. REQUIREMENT FOR PRIVACY PROTECTION

In view of the above, effective privacy protection not only requires protecting the Aadhaar system from external attacks but from internal attacks as well. This requires strong guarantees on securing the data, logs and the transaction trails in the Aadhaar and the AUA systems. Specifically, one requires that:

(a) UIDAI cannot be trusted against possible system hacks, insider leaks, and tampering of authentication records and audit trails. Indeed, the identity verification and authentication providing applications running on UIDAI computer systems should be trustworthy even when the UIDAI systems and the network cannot be trusted.

(b) Manual inspection of user data, authentication records, and audit trails should not be allowed. In special cases of properly authorised investigations, such inspections may only be possible through pre-approved, audited, and provably tamper-proof computer programmes, and an accurate tamper-proof record of the entire investigation and digitally signed authorisation chain must be maintained at all times.

(c) The enrolment agencies and the enrolment devices cannot be trusted from data privacy and security points of view; neither can the POS devices and various AUAs, whether government or private, be trusted for data protection.

(d) AUAs cannot be trusted with biometric and demographic data; neither can they be trusted with sensitive user data of private nature (for example, medical and immunisation records, etc). All provisions of data privacy and security that apply to UIDAI must also apply to the AUAs. Strong legal and policy frameworks are required to ensure this.

(e) It should not be possible to correlate identities across application domains, except on suitably anonymized data through pre-approved, audited, and provably tamper-proof computer programs for carrying out data analysis.

Thus, we see that authentication is implemented in Aadhaar via the mechanisms of passwords and biometric information. However, in the usage of biometrics, we believe there is an implicit confusion between the concepts of identity verification and authentication. In the above usage, biometric information is used for authentication relying on the unstated assumption that this information is private. However, we argue that biometric data is

public: for instance, people's fi ngerprints can be lifted without their consent from a variety of objects that they may touch and their iris data may be picked up by high resolution, directional cameras from a distance. Even DNA information can be obtained from the objects that users may touch[16]. Hence, fraudulent presentation of biometric data for authentication, without conscious participation by a user, is a definite possibility[17].

VI. PERSONAL DATA INFORMATION WITHOUT CONSENT

The Aadhaar number is at the heart of the Aadhaar scheme and is one of the biggest causes of concern. Recall that the Aadhaar number is a single unique identifier that must function across multiple domains. Given that the Aadhaar number must necessarily be disclosed for obtaining services, it becomes publicly available, not only electronically but also often in human readable forms as well, thereby increasing the risk that service providers and other interested parties may be able to profile users across multiple service domains. Once the Aadhaar number of an individual is inevitably known, that individual may be identified without consent across domains, leading to multiple breaches in privacy.

Another worrisome issue is that of identity theft, and its potential for damage now increases manifold. As an illustrative example, let us consider the United States (US) Social Security Number. The primary difference between Aadhaar and SSN is that the SSN does not have any biometric identifier attached and it does not support authentication. The SSN associated with a person provides a single interface to the person's dealings with a vast number of public and private bodies, very similar to how the usage of the Aadhaar number is being envisaged. While this facilitates use of administrative data for useful data analytics, the ease of obtaining the SSN from across public and private databases also results in extremely high number of identity theft cases in the US[18].

---

16. Houck Max & Houck Lucy, "What is touch DNA?" 8 August 2008, https://www.scientificamerican.com/article/experts-touch-dna-jonbenet-ramsey/ retrieved on 28 September 2021
17. Akhtar Zahid, "Security of Multimodal Biometric Systems against Spoof Attacks," Ph.D. thesis, Dept. of Electrical and Electronic Engineering, University of Cagliari, http://prag.diee.unica.it/sites/default/files/Akhtar_PhD2012.pdf, retrieved on 25 April 2020
18. Yadav Anumeha, "Despite the Comparisions, India's Aadhaar project is nothing like America's Social Security Number", 20 December 2016, https://scroll.in/article/823570/despite-the-comparisons-indias-aadhaar-project-is-nothing-like-americas-social-security-number, retrieved on 5 January 2018

The UIDAI does acknowledge the possibility of breach of privacy that can arise due to the use of a single identifier across multiple domains and recommends that the AUAs should use only domain specific identifiers in their dealings with people. Examples of domain specifi identifiers are bank account numbers, passport numbers, driving license numbers, ration card numbers, etc. The UIDAI mandates that the AUAs should maintain a mapping between their domain specific identifiers and the global Aadhaar numbers at their back end. The UIDAI does not maintain any such mapping and assumes that there cannot be any breach of privacy from the UIDAI because the mappings are unidirectional. This, however, does not fully mitigate the risks and, the possibility of leakage of the Aadhaar number from an AUA—either from the database, or during "know your customer" (KYC) processes, or even during availing services—cannot be ruled out. In particular, there appear to be no safeguards or even guidelines, either technical or legal, on how the Aadhaar number should be maintained and used by various AUAs in a cryptographically secure way, and how to prevent the Aadhaar number of an individual from becoming public. With such weak provisions, identification without consent and correlation of identities across application domains without approval remain as real possibilities. Additionally, since the Aadhaar number is supposed to be valid for life, it cannot easily be revoked in case of an identity theft or if the Aadhaar number is compromised in any other way.

Linking individuals across domains with a global identifier for legitimate data analysis and the possible loss of privacy because of the correlation of identity across domains such a global identifier facilitates are conflicting requirements. An alternative and more principled strategy to resolve the conflict would be for the UIDAI to issue different local identifiers (different Aadhaar numbers) for different domains, but to cryptographically embed in to all local identifiers a unique "master identifier." Several alternatives are possible. One may design the identifiers so that no linking across domains is possible at all and it is impossible to isolate the global signature from any of the local identifiers. The linking then becomes unidirectional, but in the reverse direction to what UIDAI has currently suggested. Alternatively, one may allow limited linking across domains, either bi-directional or even uni-directional, The London School of Economics and Political Science (LSE 2005) identity report actually suggests such a scheme[19]. Correlation

19. The London School of Economics and Political Science, "The Identity Project: An Assessment of the UK Identity Cards Bill and its Implications", June

across multiple domains using the master identifier, through cryptographically secure and pre-approved data analytics software, will always be possible in such a scheme. Sufficiently strong cryptographic measures should be used to embed the master identifier in to the local ones to prevent against possible external correlation attacks. Also, a major shift in the policy framework is necessary to reverse the direction of linking.

VIII. A COERCIVE APPROACH OF THE AADHAAR

It is about choicelessness, destruction of the idea of consent and the state assuming power over the body and data of every person which it then allows corporate interest to use. What has coercion done? It has forced people to get on to the database, without consent without an opt-out provision, where failures of the biometric system or 'Aadhaar mismatch' system have to be borne by individuals, where there is no liability when the system falsely accepts or rejects any person, part with their biometrics which is then managed and handled by companies of dubious provenance and with no recourse when biometrics fail[20]

In March 2011, Rajanish Dass[21] claimed that even if enrolment was voluntary, it was being made mandatory by indirect means. He pointed out that essential schemes like the National Food Security Act, 2013 was being linked to the UIDAI. He also stated that the feasibility of a project of this size had not been studied and raised concerns about the quality of the biometric data being collected.

VIII. TRANSPARENCY AND ACCOUNTABILITY

Certain provisions of the Aadhaar Act and subsequent regulations also raise concerns regarding transparency and accountability. The law prevents anyone other than the UIDAI from approaching the courts in case of a breach or violation of the law. It also fails to set up an adequate or effective grievance redressal system. The ICCPR requires countries to

2005, https://eprints.lse.ac.uk/684/1/identityreport.pdf, retrieved on 10 September 2020

20. Ramanathan Usha, "Coercion and Silence are Integral Parts of the Aadhaar Project", *THE WIRE*, 16 May 2016, https://thewire.in/economy/coercion-aadhaar-project-ushar, retrieved on 6 August 2017

21. Dass Rajanish, "Unique Identification for Indians: A Divine Dream or a Miscalculated Heroism?", *IIM AHMEDABAD,* March 2011, https://journals.sagepub.com/doi/abs/10.1177/0256090920110101, retrieved on 12 November 2017

ensure that anyone whose rights or freedoms are violated has an effective remedy. Aadhaar regulations allow the government to deactivate an Aadhaar number for various reasons including for "any other case requiring deactivation as deemed appropriate" by the UIDAI, leaving the broad wording open to misuse. Also, the government is not required to give any prior notice before deactivating an Aadhaar number, which could violate natural justice principles and also put access to essential services at risk. Aadhaar does not allow anyone enrolled under it to opt out or withdrawn. Aadhaar regulations do not require the authorities to inform an Aadhaar number holder if their information has been shared or used without their knowledge or consent[22].

IX. CONCLUSION

We have analysed the Aadhaar from the points of view of privacy and security, and have pointed out some technical weaknesses and possible remedies. Thus, though there are serious privacy concerns at present, we believe that Aadhaar can be made safe from a technology perspective with due diligence. The legal framework, however, needs to be more specific and requires significant strengthening. Perhaps the single-most important specific question that begs answering is who should have the right to verify the identity of an individual, and under what circumstances? Above all, we believe that the Aadhaar project requires informed and comprehensive policy debates, covering all angles, to realize its full effectiveness without causing the kind of privacy concerns and disruptions that have been reported. "It is ironic that a 12-digit number aimed to end corruption and help the poor has become the very reason many have been deprived of fundamental rights," said Meenakshi Ganguly[23], South Asia Director at Human Rights Watch. "There are legitimate concerns about privacy, surveillance, or just misuse of personal information, and the government should address these problems instead of coercing people to enroll and link existing services to Aadhaar".

■

---

22. Mansi Thapliyal, "India: Identification Project Threaten Rights", *HUMAN RIGHTS WATCH*, January 13, 2018, https://www.hrw.org/news/2018/01/13/india-identification-project-threatens-rights , retrieved on 23 June 2021
23. ibid.

BLOCKCHAIN AND E-GOVERNANCE: MEETING CITIZENS NEED IN DIGITAL CONTEXT

BHAVANA CHATURVEDI*
AYUSH MITTAL**

"*The great growling engine of change is Technology.*"

- Alvin Toffler

ABSTRACT : Blockchain technology has demonstrated its feasibility and relevance in e-commerce. Simple, convenient and effective interaction between the government and the citizens has become a common expectation in the digital world. The blockchain technology is harbinger of a new era of e-governance to accomplish high esteemed goal of welfare state chaperoning corruption free nation. Additionally, the ways how blockchain technology will cater to the needs of the citizenry needs to be explored. It is in this context that the paper argues that the smart regulatory hands off approach should be adopted in India for future innovative contributions of blockchain for financial services, land registry, voting, taxation, healthcare, etc., and towards enhanced and inclusive participation of citizens. Further, the findings of the paper provide support for blockchain technology to advance its foot towards transforming India into a corruption free and accountable government with transparent cloak offering better services. This paper brings out intricacies of governance in India in the present scenario and how blockchain technology can be used to create a balance between effective administration and transparency.

KEY WORDS : Blockchain, E-governance, Public Distribution System, Information Technology Act, 2000, healthcare.

I. INTRODUCTION

"Virtually all the economic growth that has occurred since the

* LL.M (One Year) Law School, BHU; bhvna.chaturvedi@gmail.com
** LL.M (One year) Law School, BHU; a_13yush@gmail.com

eighteenth century is ultimately attributable to innovation"[1]. 'Innovation is the basis for progress and evolution in all areas of human endeavour'.[2] Man evolved gradually from leading a nomadic life to organized and purposeful living. The craving for better and efficient mode never dies, leading to more innovations. Blockchain is the fruit of such creativity and synthesis.

"The blockchain is an incorruptible digital ledger of economic transactions that can be configured not only to record financial transactions but practically everything of value."[3] Technically, blockchain is a database system that is based on Distributed Ledger Technology (DLT), replicated over a peer-to-peer[4] network where validation is made by consensus mechanism[5] and not by a trusted intermediary and transactions could be made between two or more nodes[6]. It is a shared and immutable ledger of decentralized nature. Thus, it defines a democratized system in true essence as it is open for everyone to participate. Supplementing this, transparency of action makes every stakeholder accountable for his conduct. Thus, blockchain can revolutionize e-governance by attending to the demands of citizens in the digital context.

With the rapid expansion of the Internet and digitization, Governments all over the world were compelled to initiate steps involving Information

---

1. Baumol, W. J. (2002). *The free-market innovation machine: Analyzing the growth miracles of capitalism*. Princeton University Press.
2. Granstrand, O. (2005). Innovation and intellectual property rights. In *The Oxford handbook of innovation*.
3. Tapscott, D., & Tapscott, A. (2016). *Blockchain revolution: how the technology behind bitcoin is changing money, business, and the world*. Penguin.
4. A computer network designed to allow sharing of certain files and folders with everybody or with selected users.
5. Consensus algorithms provide for convergence towards a single, unchangeable ledger version. This require actors on the network to decide on the content that is stored on the blockchain, taking into account the fact that some actors may be unreliable or malicious. Proof-of-Work, Proof-of-Stake and Proof-of-Authority are among the most popular consensus algorithms.
6. A node is a computer running specific software that allows the machine to access and connect information pieces to other nodes. That node stores a copy of the ledger in blockchains, and information is relayed from the peer node until it is distributed to all network nodes.

Technology (IT) in all governmental processes and introduce a new form of administration by way of e-governance. India also stepped into the world of e-government and has lately accelerated the growth in the field of e-government but with the minimal outcome.

The present research paper strongly propounds to establish firm roots of blockchain in the governance of our nation by explicitly analyzing the two fields, Healthcare sector and the Supply Chain Management (SCM) in Public Distribution System (PDS), as they primarily affect the citizens of our nation. The objective of this paper is to understand the basics of blockchain in simple terms and establish a link between e-governance and blockchain by explaining the practical application of blockchain in the fields of Healthcare and PDS. Additionally, we will analyze the validity of this concept under the *IT Act, 2000* and advance an argument and scope for future research that blockchain will help India in becoming a pioneer of the world by governing through IT.

II. CONCEPTIONS OF BLOCKCHAIN

Blockchain technology has been in vogue since the past decade. Blockchain technology originated from the white paper '*Bitcoin: A peer-to-peer Electronic Cash System*'[7] published in 2008 under pseudonym name of Satoshi Nakamoto. The introduction of Bitcoin was based upon a database of distributive nature which was identified as 'blockchain'.

Blockchain is referred to as the 'new Internet' or 'Internet of value'. Blockchain aims to anchor innovative solutions in multiple business and life domains.[8] Blockchain, in essence, is a distributed public ledger which records every transaction in the chain of blocks. With every transaction, blocks are added in the previous block. Hence, increasing the length of the chain. Essential features of the blockchain technology are user security and ledger consistency to ensure that the technology uses asymmetric cryptography and distributed consensus algorithms.[9]

Every block in a blockchain is time-stamped including the time-stamp

7. Nakamoto, S., & Bitcoin, A. (2008). A peer-to-peer electronic cash system. *Bitcoin.–URL: https://bitcoin. org/bitcoin. pdf, 4*.
8. Cortese, A. (2016). Blockchain technology ushers in "the internet of value".
9. Zheng, Z., Xie, S., Dai, H., Chen, X., & Wang, H. (2017, June). An overview of blockchain technology: Architecture, consensus, and future trends. In *2017 IEEE international congress on big data (BigData congress) (pp. 557-564). IEEE.*

of the previous block. Each transaction is recorded in a block, and every such block is arranged chronologically forming a chain of blocks. Each block will have its distinct hash value as well as contains the previous block's hash value. Thus, reinforcing the validity of one before, ensuring immutability of the transaction. The block only has one parent block, and its first block of the blockchain is called a genesis block that has no parent block.[10]

Ethereum is an open-source, blockchain-based public service computing platform that allows developers to create and execute decentralized applications. It was proposed in late 2013 by Vitalik Buterin in a white paper.[11] It employs blockchain technology to enable smart contracts and cryptocurrency trading without third parties anonymously.[12] Smart contracts are programmable contracts that are capable of automatically executing credible transactions between mutually distrusted agents when it satisfies pre-defined conditions, without an intermediary. A smart contract differs from the traditional contract in the way that it minimizes trust and human intervention for the execution of contracts.

III. BLOCKCHAIN IN E-GOVERNANCE IS THE MEANS TO ACHIEVE GOOD GOVERNANCE

The World Bank (1991) defines 'governance' as: "how power is exercised in the management of a country's resources for economic and social development (p.1)". Governance refers to mechanisms capacity to organize strategies and address societal issues in a dynamic context.[13] The word governance originates from a Greek word, *kubernáo* meaning "to steer". The concept of governance has two-fold dimensions, one, related to the form of government, and another relates to the efficiency of government, standing on the pillars of accountability, transparency and corruption-free government. The right to life under *Article 21* of the *Indian*

10. Zheng, Z., Xie, S., Dai, H., Chen, X., & Wang, H. (2017, June). An overview of blockchain technology: Architecture, consensus, and future trends. In *2017 IEEE international congress on big data (BigData congress) (pp. 557-564). IEEE.*
11. Buterin, V. A Next-Generation Smart Contract and Decentralized Application Platform. *Whitepaper.* https://whitepaper.io/coin/ethereum
12. Marr, B. (2018). Blockchain: a very short history of ethereum everyone should read. *Forbes Magazine Online. February, 2.*
13. Pierre, J. (Ed.). (2000). *Debating governance: Authority, steering, and democracy*. OUP Oxford.

Constitution includes all those rights which are essential for the dignified enjoyment of life,[14] extends to all that gives meaning to a man's life.[15] Unless the citizens get good governance, it is not possible to have a dignified and civilized life.[16]

In the journey from *laissez-faire* to welfare nation, governments have been mushrooming, becoming more centralized, remote and opaque for the citizens. Further, uneconomic nature and poor customer service by the centralized model compelled governments to adopt e-governance. The Indian government took the remarkable stride into e-government through the National e-Governance Plan in 2006 through which 31 government services were supplied online. To give more thrust, the Indian government initiated a revolutionary scheme 'Digital India' to usher into a new galaxy of technology. India ranked 78 out of 180 countries in global corruption index, 2018[17] and India jumped 11 places to 96 in 2018 in the UN's E-Government index.[18] It is an indication of efficient and productive footsteps of information technology in governance which is lifting the veil of corruption and meeting demands of citizens in the digital context. The problem of lack of transparency stands still even after making efforts in this direction like putrefaction of state institutions, an increase in the number of intermediaries, bureaucracy and modernization of services and amenities.[19]

Blockchain may be the modus operandi for revolutionizing the e-governance sector. The dawn of e-governance has opened up new possibilities for better governance by enhancing information and service delivery quality, citizen engagement, new services and expanding the global information system by making government more accountable, responsive and effective.[20] It is also called as 'SMART' governance, which stands

14. Mohini Jain v State of Karnataka, (1992)3SCC 666,679-680: See also Bandhua Mukti Morcha v Union of India, (1984)3SCC 161,183.
15. Ram Sharan Autyanuprasi v Union of India, AIR 1989 SC 549,552: See also Olga Tellis v Bombay Municipal Corp., AIR 1986 SC 180,193-94.
16. GobardhanLal v State of UP, (2000) 2 AWC 1515: MANU/UP/0316/2000.
17. Index, C. P. (2018). Corruption perception index. *Transparancy International*. https://www.transparency.org/cpi2018
18. United Nations E-Government Survey 2018: Gearing E-Government to Support Transformation Towards Sustainable and Resilient Societies, UN, New York. *https://doi.org/10.18356/d54b9179-en*
19. Credits Blockchain, Blockchain E-Government, *Medium. https://medium.com/@credits/blockchain-e-government-f9f91d744393.*
20. Stoker, G. (1998). Governance as theory: five propositions. *International social science journal, 50(155), 17-28.*

for Simple, Moral, Accountable, Responsive and Transparent governance. E-governance embraces e-voting, e-justice, e-healthcare, e-taxation, e-education and many more leading to efficient governance and reducing the coverage area of a demon named corruption. Transparency is anti-thesis of corruption-free government which the e-governance aspires to achieve.

Return on Investment of the present model of e-governance is meagre, and is not meeting the desires of the citizenry. The present research paper will provide some insight on how government services can be improved through blockchain. The wave of blockchain technology has seemingly endless potential uses in all the fields of e-governance. Moreover, today worldwide government agencies are looking to blockchain to make the infrastructure more accessible, cost-effective, safe, open, and develop trust in the government machinery.[21]

The Indian Government has undertaken two projects regarding the use of blockchain in e-governance. Firstly, IndiaChain that NITI Aayog is developing to minimize bribery, speed up contract compliance, improve transaction transparency and enhance the country's agricultural economy. It aims at implementing a full-fledged blockchain infrastructure to complement IndiaStack[22].[23] Secondly, the project by National Cyber Security Coordinator in which IIT Kanpur has been engaged to develop indigenous blockchain architecture to be used in e-governance.[24]

Many states have started fully-fledged and pilot projects to implement blockchain technology in e-governance like UP has invested in using blockchain for land registry and power-sharing. Similarly, MP has also

---

21. Lions, T., Courcelas, L., & Timsit, K. (2018). Blockchain for Government and Public Services. In *European Union Blockchain Observatory & Forum.*
22. IndiaStack is a collection of APIs that enables governments, companies, start-ups, and entrepreneurs to use a specific digital infrastructure to tackle India's tough problems and provide presence-less, paperless, and cashless service.
23. What is IndiaChain: a blockchain system that could soon be the heart of governance in India?, BI India Bureau, Business Insider. *https://www.businessinsider.in/what-is-indiachain-a-blockchain-system-that could-soon-be-the-heart-of-governance-in-india/articleshow/64676670.cms*
24. (June 2018). Development of National Blockchain and Demonstrate two Strategic Applications, *R&D Newsletter IIT Kanpur, 6 (3), 3.*

ventured to use blockchain technology in the land registry.[25]

IV. TWO BASIC NEEDS OF CITIZENS IN THE CRADLE OF BLOCKCHAIN

i) Healthcare

The WHO Constitution[26] envisages *"...the highest attainable standard of health as a fundamental right of every human being*." and it casts a legal duty on all the states to ensure health for all without discrimination on race, religion, economic or social condition. Supreme Court of India also has emphasized the constitutional obligation of the government to make appropriate health policies as the right to health is an integral part of the right to life.[27] The Parliament endorsed the National Health Policy in 1983.[28] To address the lack of medical coverage in rural areas, a major initiative was taken by the government in the form of National Rural Health Mission in 2005.[29] Apart from these, many healthcare schemes were launched by central and state governments. However, the pool of projects failed to realize the much-awaited goal of equality and efficiency in the healthcare delivery system. The benefits of new technological development in the healthcare sector could not percolate evenly with the growth of the economy. Government has moulded its policies to achieve the highest goal of health and improved life expectancy, reduce maternity and child mortality and, increased fertility. Despite these developments, it lacks behind in several national and global health indicators. NITI Aayog generated health indicator which reflects extensive variation in overall performance of the states. Hence, to improve the healthcare delivery system these gaps and discrepancies have to be bridged.

India has been committing enormous resources for providing healthcare to every citizen. However, uncoordinated, inequitable and suboptimal allocation of resources due to asymmetricity in information

25. NASSCOM Avasant India Blockchain Report 2019, Executive Summary 13. *https://avasant.com/nasscom-avasant-india-blockchain-report-2019/#download*
26. W.H.O. Const. 1946, Preamble.
27. *State of Punjab* v *Mohinder Singh Chawla*, 1997, 2 SCC 83.
28. Duggal, R. (2001). Evolution of health policy in India. *Centre for Enquiry into Health and Allied Themes. http://www.cehat.org/go/uploads/Publications/a147.pdf*.
29. Duggal, R. (2001). Evolution of health policy in India. *Centre for Enquiry into Health and Allied Themes. http://www.cehat.org/go/uploads/Publications/a147.pdf*.

dissemination and percolation jeopardizes the efforts.[30] Thus, to utilize the resources at an optimal level, adequate and efficient reconciliation of medical data has to be made by the healthcare stakeholders. Furthermore, there is no defined list of places where data or its order of entry could be found in that there are no standard workflows for storing data.[31] Cross-institutional exchange of medical records has remained complicated and hindered by obstacles such as record confidentiality, data privacy, lack of resources and device compatibility due to infrastructure and semantic discrepancies between programs belonging to different stakeholders; thus, costing money and lives. In light of these obstacles, this paper introduces a conceptual blockchain model for greater integration of healthcare services in the Indian context.

ii) Present mechanism of Healthcare service

The structure of healthcare services in India is based upon the hierarchy of primary, secondary and tertiary healthcare services. The share of dependency upon the healthcare services is imbalanced as rural population depends upon primary services and urban population depends upon secondary and tertiary services. Typically, when a person visits a Primary Healthcare Centre, he gets only basic treatment facility due to inexperienced doctors. Patients are treated and send back or referred to higher healthcare service, and this process is repeated. No standard procedure is followed at any stage to maintain patients' record for further treatment or future references. Therefore, the patient is treated as a new case at every stage. It is repeated at every stage leading to avoidable loss of resources due to several duplications at different stages. Even, the Government also doesn't get any reliable data to deal with likely medical emergencies or to implement targeted Healthcare programs.

iii) Proposed Architecture

A patient travels through a hierarchy of health centres of hybrid nature, and generally, the present issue is influenced by past occurrences. We propose the use of Ethereum blockchain with smart contracts for storage and retrieval of medical records.[32] Data collected are stored in the cloud,

---

30. Garrett, L. (2007). The challenge of global health. *Foreign affairs*, 14-38.
31. Halamka, J. D., Lippman, A., & Ekblaw, A. (2017). The potential for blockchain to transform electronic health records. *Harvard Business Review*, 3(3), 2-5.
32. Wood, G. (2014). Ethereum: A secure decentralised generalised transaction ledger. *Ethereum project yellow paper, 151*(2014), 1-32. https://gavwood.com/paper.pdf

and only pointers related to data are retained in the blockchain ledger[33], smart contracts are designed to accumulate data differences as hashed pointers on to the blockchain. It has instructions of assembling data references linked to Aadhaar and data retrieval from external cloud storage on authentication.

Assumptions- the author proposes cloud computing Software as a Service platform which should be:

I) User-friendly;

II) Secure;

III) Connectivity with other healthcare centres to share data;

IV) Operable by numerous operators;

V) The platform should be sturdy;

VI) All the healthcare centers have internet connectivity;

VII) In the standard format the healthcare centre should be able to collect data;

VIII) The government will control the cloud technology in which data will be stored;

IX) The new medical records generated after implementation of the proposed model and not the existing fragmented medical records will be stored;

X) The patient has registered unique Aadhaar number.

The mechanism is based upon the following data:

1) Aadhaar: Aadhaar number[34] can be used as an identity and will be used as a key for accessing the data upon biometric authentication.

2) Healthcare service provider: Apart from providing treatment, they will function to upload and retrieve medical data of the patient through biometric authentication.

---

33. Zyskind, G., & Nathan, O. (2015, May). Decentralizing privacy: Using blockchain to protect personal data. In *2015 IEEE Security and Privacy Workshops* (pp. 180-184). IEEE.

34. Provided under Aadhaar (Targeted Delivery of Financial and Other subsidies, Benefits and Services) Act, 2016.

3) Smart contracts: It has two-layered action:

a. Registration contract:- It maps Aadhaar number to their Ethereum address equivalent to a public key. Coding is done to circumvent any forgery.

b. History contact:- It stores, cumulatively, the pointers of all the medical records linked with one public key in the cloud. It also incorporates the modus operandi to be used for retrieval of a record from the data storage cloud.

4) Data storage: Cloud computing technologies will be used to archive these bulky data in a portable, highly available, stable and autonomous storage environment.

iv) Working

For understanding the mechanism of the proposed blockchain architecture, let us consider an example of Ms Y visiting the hospital for availing the medical facility is being taken. So, when Ms Y visits any Primary Health-care Centre. Firstly, her biometric impression will be taken, and upon authentication, the registration contract will be activated. The Registration contract is mapped to biometric identification which is simultaneously linked to history contract in the blockchain. Considering Ms Y is paying a visit to any healthcare centre for the first time after the implementation of the blockchain, a new Ethereum address will be generated. On completion of the examination, Ms Y's health record will be generated, either in an unstructured[35], semi-structured[36] or structured form[37]. The health record will be sent to the blockchain, which will be redirected to the cloud for storage, and blockchain will only store the pointer. The blockchain will link with patient's public key with the pointer. So, when Ms Y visits any medical facility, she will be granted access to the existing address key authentication by her biometric identification provided that address key is linked to her Aadhaar.

35. This would comprise of handwritten prescriptions, notes, etc.
36. These include medical reports, health instrument logs, etc.
37. These are generated in the form of systematic electronic health records.

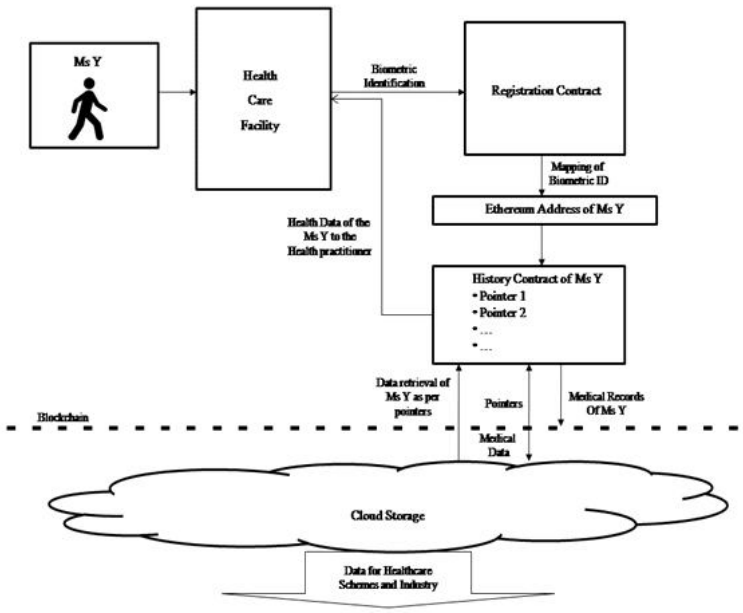


Figure 1: Conceptual working model for use of blockchain in Health-care Services[38]

One of the unique features of the history contract is that it will maintain a series of all the pointers of the record which is generated with each subsequent medical checkup. It means that the last history contract will contain all the pointers which were generated before this transaction. All the data stored in the cloud can be retrieved or accessed in future through the unique biometric identification. Another unique feature is that the actual identification of patients is not known to the Central Agency, which maintains the cloud. The government can utilize this database to frame its policies regarding a specific area or people or disease. Hence, stringent rules and regulations are required to keep a check on any unethical use of medical data to maintain the trust of the citizens in the government.

38. Dhagarra, D., Goswami, M., Sarma, P. R. S., & Choudhury, A. (2019). Big Data and blockchain supported conceptual model for enhanced healthcare coverage. *Business Process Management Journal*, Figure 6.

iv) Outcomes

The paper arguments in favour of a blockchain-based model of healthcare services, which will lead to judicious and efficacious utilization of resources by the government. It will generate value for the universal health system and help citizens to make informed choices regarding the selection of treatment facility keeping in mind the complexity of the issue. Further, blockchain-based medical record stage and analysis mode ensures security and safety of the personal health records by restricting unneeded access using biometric identification. The vast database of medical records can act as a reservoir for researchers, government, pharma and insurance companies. The interoperability between various healthcare services will ensure systematic and fruitful work.

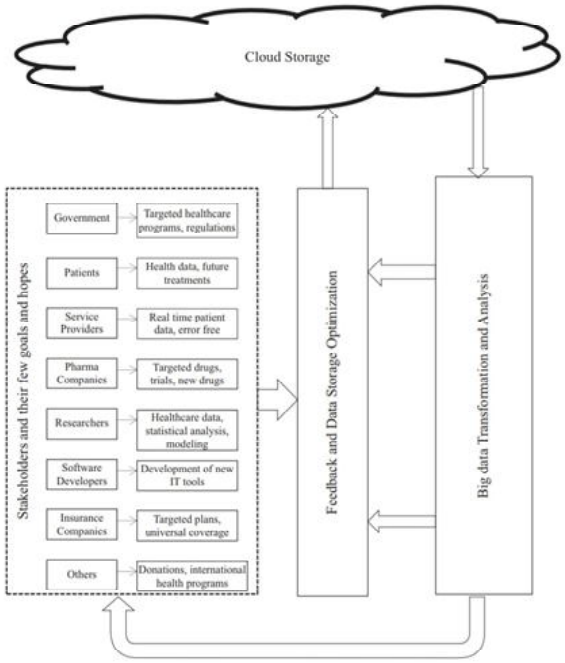


Figure 2:- Stakeholders and their few goals and hopes.[39]

Public Distribution System (PDS)

The paradigm shift from *laissez-faire* to welfare nation has compelled

39. Dhagarra, D., Goswami, M., Sarma, P. R. S., & Choudhury, A. (2019). Big Data and blockchain supported conceptual model for enhanced healthcare coverage. *Business Process Management Journal*, Figure 8.

the Government to strengthen the PDS system, introduced by Britishers in 1939 for systematic public distribution of grains. The Ministry of Consumer Affairs and Public Distribution governs the Food and Public Department which functions to procure store and distribute essential grains required for maintaining the requisite nutrition level to the underprivileged and underserved section of the society.

The Government launched the Targeted Public Distribution System (TPDS) in 1997 with an emphasis on the vulnerable. *The Public Distribution System (Control) Order 2001*[40], which was notified under the *Essential Commodities Act, 1955*[41], was issued to control and manage the working of TPDS. *The National Food Securities Act, 2013*, was enacted on the basis of existing TPDS model. The Food Security Act makes provision for providing subsidy to the Food Corporation of India for TPDS.

There was a drastic change in the management of the TDPS by the release of following two notifications in 2015 –

a) *The Cash Transfer of Food Subsidy Rules*[42] by which the State Governments are given the discretion to shift to transfer cash in the bank account of the beneficiary instead of supplying food grains;

b) *The Food Security (Assistance to State Governments) Rules*[43] in which all the State Governments which run FPS have to digitize them and install Point of Sale (PoS) machines to authenticate the beneficiary.

One hundred nineteen crore Aadhaar cards had been provided as of December 2017, representing 98 per cent of the population. With the

---

40. The Public Distribution System (Control) Order, 2001, Department of Food and Public Distribution, *http://dfpd.nic.in/?q=node/104*

41. The Essential Commodities Act, 1955, Department of Consumer Affairs, Food and Public Distribution, *http://consumeraffairs.nic.in/consumer/sites/default/files/userfiles/ecact1955.pdf*

42. The Cash Transfer of Food Subsidy Rules, 2015, Ministry of Consumer Affairs, Food and Public Distribution, September3,2015. *http://dfpd.nic.in/writereaddata/Portal/News/32_1_cash.pdf*

43. The Food Security (Assistance to States) Rules, 2015, Ministry of Consumer Affairs, Food and Public Distribution,August17,2015. *http://dfpd.nic.in/fgAvAHcAcgBpAHQAZQByAGUAYQBkAGQAYQB0AGEALwBQAG8AcgB0AGEAbAAvAE0AYQBnAGEAegBpAG4AZQAvAEQAbwBjAHUAbQBlAG4AdAAvAA==/1_135_1_Food-Security.pdf.*

introduction of latest technology of Aadhaar and biometrics, the system would be streamlined and various unwanted nuisances and corruptions which has crept in the system would be eliminated like:

a) The stock given for PDS is replaced with inferior quality products by the corrupt officials.

b) Bogus/fake ration cards are made to sell the products in the black market.

c) Inadequate supervision and lack of accountability have allowed intermediaries to consume the products without any fear of law.

d) Poor inclusion and exclusion mechanism has led the have nots to be excluded and the haves to be included.

e) Lack of awareness and knowledge about the scheme.

f) A large number of leakages.

The government tried to curtail and end these issues by the introduction of Aadhaar which was also infiltrated, and the corrupt officials managed to use this world-class initiative by the government for their selfish use and staged a scam of 2 Lakh tonnes of food grains in the state of UP[44].

From the data given in Lok Sabha,[45] we can conclude that as most of the states and UTs have achieved digitization of ration-cards, computerized their supply chain and allocation of food-grains the process can be made more streamlined and the leakages can be plugged by the introduction of a new, better and secure technology like blockchain.

PDS is a social policy of the government with the objectives of:

a) Providing underserved with the desired amount of nutrients.

b) Regulating the price of the grains to not affect the income of farmers due to surplus production;

c) It is showing the government's stance on using the taxpayers' money for an appropriate cause.

d) It is helping the Government to achieve its aim of becoming a socialist nation.

---

44. Sircar, S. Whistleblower alleges senior officials planned UP Aadhaar-Ration Scam. *The Quint*. *https://www.thequint.com/news/india/aadhaar-ration-scam-uttar-pradesh-whistleblower*

45. Unstarred Q. No. 1464, Lok Sabha, Ministry of Consumer Affairs, Food and Public Distribution, Answered On July 25, 2017. *http://164.100.47.194/Loksabha/Questions/QResult15.aspx?qref=54720&lsno=16*

I) Improving PDS using blockchain technology

The vast scale and bulk of PDS is the reason for its poor management. Hence, the Supply Chain Management (SCM) of PDS is considered to be the primary concern area for improving the delivery system & curbing the menace of leakages and black marketing. To improve the SCM, the blockchain can be readily implemented. Even for multi-tier supply networks, like, TPDS, blockchain technology has been considered very useful for the sub-supplier transparency problem[46] and to stop leakages, black marketing and replacing food grains with inferior quality food grains.[47] The distributed digital ledger, i.e., the blockchain technology is visible and is an immutable record of physical origins,[48] which creates an environment of trust as tracing back of provenance, and authentic logistics information is possible now.[49]

A prototype for adoption of blockchain for TPDS has been proposed in which the author reformed the procurement and distribution system of PDS using the blockchain.[50] He gave a list of data which has to be predetermined before registering in the PDS:-

a) email b) username c) password d) place

The author would like to bring to notice that the author did not consider the notification[51] by which Aadhaar and biometrics verification was made mandatory to receive subsidized food grains. So, instead of collecting these data, the author suggests that the existing system of Aadhaar and biometrics

---

46. Francisco, K., & Swanson, D. (2018). The supply chain has no clothes: Technology adoption of blockchain for supply chain transparency. *Logistics*, 2(1), 2.
47. Toyoda, K., Mathiopoulos, P. T., Sasase, I., & Ohtsuki, T. (2017). A novel blockchain-based product ownership management system (POMS) for anti-counterfeits in the post supply chain. *IEEE access*, 5, 17465-17477.
48. Sultan, K., Ruhi, U., & Lakhani, R. (2018). Conceptualizing blockchains: characteristics & applications. *arXiv preprint arXiv:1806.03693.*
49. Cole, R., Stevenson, M., & Aitken, J. (2019). Blockchain technology: implications for operations and supply chain management. *Supply Chain Management: An International Journal*, 24(4), 469-483.
50. Prabhu, Shreekanth & Chauhan, Devendra & Ranjan, Ayushi. (2018). Blockchain Prototype for E-Governance Chapter-1. *ResearchGate. https:// www.researchgate.net/publication/325545523. D.O.I 10.13140/ RG.2.2.10710.14408*.
51 S.O. 371 (E), Gazette of India, Ministry of Consumer Affairs, Food and Public Distribution, February 8, 2017, *http://egazette.nic.in/WriteReadData/2017/ 174131.pdf*

verification is sufficient and the only requirement is to transfer the Aadhaar data from centralized server to the blockchain network for accessing it using blockchain and for effective implementation of smart contracts. Thus, instead of any data, we would stick to Aadhaar validation for distribution of ration.

Further, the author provides a list of assumptions which has to be made to implement the technology. Firstly, the food stock has been added by the central government. Secondly, the state government has received the allocated budget by the central government assuming that customers, i.e., the beneficiaries have paid the central government for the scheme and the central government has subsequently added money in their account. Thirdly, Fair Price Shops (FPS) are registered and installed physically and they registered themselves on the blockchain network. Fourthly, time lost in transportation is assumed, and the state government will approve the transaction once it receives the consignment and the same will be the scenario in the transaction between the state government and FPS. Fifthly, the virtual currency is the currency which is transferred for cash/money transfers. The prototype requires each transaction of food grains at every step to be recorded in the blockchain. The first transaction is, between the central government and state government. The second transaction is between the state government and the FPS. The final transaction is between the FPS and the beneficiaries. The money flow has to be recorded in the blockchain. For reducing leakages and any corruption, the author has suggested eliminating the role of FPS in money flow, and the transfer should be between the state government and the central government with the budget allocated to it. The beneficiary has to pay the amount directly to the central government upon confirmation of receiving of food grains. By the elimination of role of the FPS in payment mechanism, there will be the lesser role of the intermediaries and the black marketers.

V. LEGAL FRAMEWORK

"Law is the only tool that society has to tame and channel science and technology."[52]

- Howard T. Markey

In the last decade, blockchain got unpredictable buzz because its

52. Markey, & Howard T. (1984). Jurisprudence or Juriscience Provocative early critique of law's deference to science. *William & Mary Law Review*, 25, 525–543.

presence-less, paper-less and decentralized nature, apart from all the fruits. In the one hand, it is helpful in the development of the economy. On the other hand, it creates trouble for the jurists because of its ability to cross jurisdictional boundaries as the nodes on a blockchain can be located anywhere in the world. Thus, there arose a need for the regulatory framework as this can pose several complex jurisdictional issues and jurisdiction being the prime concern when we discuss the legal aspects of any matter.[53] Even the limitation of the size of blockchain and working rate of only seven transactions per second are an obstacle for the fast-moving economies. It is a master ledger and hence, is one glaring point of vulnerability. There are multiple ways to breach security doors like the 51% majority needed to control the transactions, selfish mining by the miners, sending wrong information and many other concerns. The proposed solution for information governance can serve as a site to mine personal data.

Many countries welcomed blockchain by open hands and made it fit into the legal jar of legislature either by direct or indirect laws. Countries that often come up in this context are China, the USA, Singapore, Dubai, UK, Switzerland, Liechtenstein, Malta and Estonia. Liechtenstein, one of the first countries to enact *The Blockchain Act* which sets out to provide "confidence in digital transactions" by defining token types and "trusted technologies". Likewise, two blockchain-related laws, known as the Malta Digital Innovation Authority Act (MDIAAct) and the Innovative Technology Arrangement and Services Act (ITAS Act), were passed in Malta, also known as crypto-island. The MDIAAct focuses on certifying the blockchain and setting industry standards, while the ITAS Act focuses on creating public ledgers and restricting the introduction of new blockchains.[54]

The technically advanced nation, the USA, adopted a similar approach as it would in case of any other innovation, i.e., the blockchain industry should be regulated first, then only business will follow. Apart from its use in cryptocurrencies, USA leveraged it to apply to public services also. The state of Delaware and Illinois announced the Blockchain Initiative in 2016 and 2017 respectively. Other American states are also following their

---

53. McKinlay, J., Pithouse, D., McGonagle, J., & Sanders, J. (2018). Blockchain: background, challenges and legal issues. *https://www.dlapiper.com/en/denmark/insights/publications/2017/06/blockchain-background-challenges-legal-issues/*

54. Yafimava, D. (2019). Blockchain and the law: regulations around the world (2019). *https://openledger.info/insights/blockchain-law-regulations/*

footprints.[55]

Switzerland, rather than drafting bespoke laws primarily for the blockchain incorporated the technology within existing legislation. The paper propounds to do the same, i.e., indirect legislation on blockchain technology until the technology is flawless and is made suitable to meet the unique needs and requirements in the Indian circumstances. Quoting Frank H. Easterwood[56], the author suggest that at present there is no need for any specific law of blockchain to govern all the aspects related to it until the technology is fully ripened. Till then it can be governed by the general laws of the land.

The concept of blockchain and e-governance can be governed under CHAPTER III of the *IT Act, 2000*. The IT Act provides legal protection by electronic data sharing or other electronic means for transfers and correspondence. It also involves incorporating alternatives to paper-based correspondence and information storage approaches to promote online document filing for government agencies.

Section 4 of the Act legalizes electronic records, and, the block being the storehouse of records can be equated with e-records as blocks hold a complete record of the transaction. Hence, qualify for electronic records under Section 29A of the *Indian Penal Code, 1860*. Thus, all the provisions relating to *IT Act* dealing with *IPC* may also be applied to the blockchain. Further, the proposed model of healthcare and PDS in this paper revolves around storage of data which can be used for framing and executing government's policies which flows from Section 6 of the IT Act. Similarly, Section 6-A of the IT Act can govern the supply chain management in PDS to offer better services through electronic means using blockchain technology. From the discussion about the blockchain model, it is clear that the model is based upon e-record. Thus, Section 7 of the IT Act can provide validity to the retention of e-records in electronic form on blockchain infrastructure if required by any law.

Section 10-A of the IT Act provides legality to the contracts formed through electronic means, and smart contract can be one of them as it is done in e-form or through an e-record. Thus, it could be held legally and hence, enforced by law upon breach.

---

55. Yafimava, D. (2019). Blockchain and the law: regulations around the world (2019). *https://openledger.info/insights/blockchain-law-regulations/*
56. Easterbrook, F. H. (1996). Cyberspace and the Law of the Horse. *U. Chi. Legal F.*, 207.

Section 75 of the IT Act may be used to answer the problem of jurisdiction for blockchain as it provides that if the computer, computer system or computer network is located in India, then the *IT Act* shall apply to any offence or contravention committed outside India.

For punishment, Section 66 of the IT Act makes provision for imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or both for doing any act under Section 43 of the IT Act either dishonestly or fraudulently. These provisions may also be applied for any contravention relating to blockchain and may be used to impose penalties or provide compensation.

From the above discussion, we conclude that a body can be governed under the law made for different organs of the body. Hence, the blockchain technology could be regulated under the *IT Act, 2000* or *IPC* instead of framing a new set of laws for it when the future of technology is uncertain, and the technology suffers from various defects.

VI. CONCLUSION

Blockchain is a relatively new and innovative technology. It is a very crucial part of the fourth industrial revolution. Despite issues such as security, scalability, and complexity of blockchain, the blockchain technology is capable of proving to be boon for the humanity by becoming the mode of better governance through e-governance which will cater to the needs of the people.

From the study of various research papers and the other sources, we can conclude that the world-class initiatives in India of digitizing the data by Aadhaar and biometrics validation for receiving of subsidized health services and food-grains can be made better, secure and defect-free by the introduction of blockchain for the same. The immutable, visible and decentralized data in the blockchain resulting into a unified ecosystem creates an environment of trust and faith between the government and the beneficiaries, who are an underserved, underprivileged and neglected class of society, and, are at the weaker side of the bargain. Even, governments all over the world have started to adopt blockchain by framing various laws, rules and regulations for governing the same.

The characteristics of blockchain make it appealing universally, but there are specific challenges or hurdles which need to be addressed before it can bloom to its full potential. With the introduction of blockchain in governance, the government have to make people aware and impart

knowledge to citizenry about blockchain by utilizing various state machinery like panchayats, and municipalities so that the targeted citizens, i.e., the 'have nots' receive the benefit rather than the 'haves'.

The biggest impediment in adopting blockchain is India's digitization ladder which can be climbed by digital literacy and infrastructure. India lags in both aspects. Even cases[57] for deciding constitutionality of crypto-currency is pending before the Supreme Court of India. However, if appropriately applied with rules, blockchain can radiate its energy in a conducive and harmonious environment. In this paper, it is propounded that a different set of law is not required at present to govern the blockchain. Instead, a regulatory outlook is needed to define the ambit and prevent mishandling of the blockchain technology.

■

57. Siddharth Dalmia & Anr. Vs. Union of India & Ors. Writ Petition(s) (Civil) No(s). 337/2018.

E-GOVERNANCE IN INDIA: A STUDY IN LEGAL PERSPECTIVE

*AJAY KUMAR YADAV**

ABSTRACT : Individual participation in the governing process is vital to the genuine definition of democracy. However, due to the enormous population, active citizen participation in the governance process is impossible. E-Governance makes it possible through an online public feedback system. Information and Communication Technology is one of the most important characteristics of our age and playing important and indispensable role. As we know that the court system and administration of justice is very complicated in our country. To overcome of these challenges, it is imperative for the court administration, to use the tool of information and communication technology effectively and to resolve the disputes and minimizing the pendency. E-governance uses electronic medium to support and motivate the administration also. Therefore the purpose of e-governance is analogous to the objectives of good governance. In this paper, the author deals with the concept of e-governance with special reference to administration of justice.

KEY WORDS : E-Governance; ICT, National E-Governance Plan, Court Administration, Judiciary.

I. INTRODUCTION

i) E- Governance

E- Governance is nothing but the use of internet technology as a platform for exchanging the information, providing services, transacting

* Research Scholar, Law School, BHU, Varanasi; ajayyadavbhu.07@gmail.com

with citizens, business, and other things of the government. It provides a sound strategy to strengthen the overall governance it does not only improve the accountability, transparency, and efficiency of the government process but also facilitate the sustainable and inclusive growth. It is the application of information and communication Technology to transform the efficiency, effectiveness, transparency and accountability of information within the government and other agencies and to empower the citizens through the access and use of such information. It is all about how government business and citizens interaction an ongoing basis. The system of e-governance is supported by five pillars[1]:

1- Computer.

2-Connectivity.

3-Content.

4-Consumer.

5-Confidence building.

In fact, e-governance is a step of the government towards creating a smoother interface between government, citizen and business for SMART (Simple, Moral, Accountable, Responsive and Transparent) governance

ii) Types of Interactions in E-Governance:

The mission to improve service delivery through the use of ICTs in governments usually focuses on four main scopes. These are[2]:

1. G2C (Government-to-Citizens): This emphases primarily on the developing user-friendly one-stop centers of service for easy access to high quality government facilities and information.

2. G2B (Government-to-Business): This targets to facilitate and enhance the proficiency of business transactions between the government and the private sector by cultivating communications and connectivity between the two parties.

3. G2G (Government-to-Government): This is an inter-governmental exertion that aims to improve communication and effectiveness of services

---

1. Luigi Lepore, Lara Borrello, and Federico Alvino *"ICT and Judicial Administration: A Model for the Classification of E-Justice Innovations"*339 (Springer-Verlag Berlin Heidelberg 2012).
2. C Balaji Viswanath "A Descriptive Study on E-Governance " Vol.4,No.1, *International Journal of Computational Science and Information Technology (IJCSITY)* 68 (2016).

between federal, state and local governments in the functioning of day-to-day administration.

4. Intra-government: This targets to leverage ICT to reduce costs and improve the quality of administration and management within government organization.

iii) Good Governance:

For the last couple of decades the notion of good governance has been a popular discourse among the intellectuals, politicians, aid agents, development workers, and administrators. International development agencies such as the World Bank, the United Nations Development Program (UNDP - United Nations Development Programs), the Asian Development Bank (ADB) and others use a functional approach to describe good governance, focusing on various factors to promote efficiency and effectiveness in the administration. Accordingly UNDP[3] identified three bases of good governance: Economic, participatory and administrative. The United Nations Development Programs (UNDP) highlighted good governance as the good exercise of a nation's affairs at all levels. It prescribed that governance is good when it subscribes to nine characteristics, which are: Participation, Strategic Vision, Rule of Law, Transparency, Consensus Orientation, Equity Building, Effectiveness & Efficiency and Accountability. It ensures that corruption is reduced, the opinions of minorities are taken into account and that the opinions of the most vulnerable in society are received in decision-making. It is also approachable to the present and future needs of society. The UNESCAP (UN Economic & Social Commission for Asia and the Pacific) identifies eight values of good governance. These are: Accountable, Participatory, Transparent, Consensus oriented, Responsive, Follows the rule of law, Effective and efficient and Equitable and inclusive[4].

iv) Differences between E-Governance and E-Government:

Both the terms usually seems synonymous but there is a difference between e-governance and e-government[5].

3. United Nations Development Programme.
4. Madhu Bala, Deepak Verma "Governance to Good Governance through e-Governance: A critical review of Concept, Model, Initiatives & Challenges in India" Vol. 8 Issue 10, *International Journal of Management, IT & Engineering* 256 (2018).
5. Driss Kettani, Michael Gurstein, Asmae El Mahdi, "Good governance and e-government: applying a formal outcome analysis methodology in a developing world context" *Int. J. Electronic Governance* 33 (2009).

I. E-governance is a portion of e-government. E-Governance does not comes alone. This e-governance deals with all regulations and policies to control the services provided by the e- government. However, the e-government is an electronic government, which should be controlled by the e-governance.

II. E-Government is a organization whereas e-governance is a functionality.

III. E-Government means the application of ICT in government processes, as a tool to make better government. E-Governance, on the other hand, denotes the use of ICT in transforming and supporting functions and structures of the system.

IV. E-Government is a one-way protocol but e-governance is a two-way protocol (government to citizen and vice versa).

v) Advantages of E-Governance:

The advantages/benefits of e-governance are as follows[6]:

Frequency: Technology makes communication faster. Internet, cellphones have enabled instant transmission of high volumes of data all over the world.

Less expenditures: A lot of Government spending goes towards the cost of buying stationery for official purposes. Letters and written records consume a lot of writing materials. However, replacing them with cellphones and the internet can save crores of money in expenses every year.

Transparency: The use of e-governance helps in making all functions of the government transparent. All the Governmental information can be uploaded onto the internet. The citizen's access specifically accesses whichever information they want, whenever they want it, at their suitability. However, for this to work the Government has to ensure that all data has to be made public and uploaded to the Government information forums on the internet.

Responsibility or accountability: Transparency unswervingly relates to accountability. Once the functions of the government are available, we can hold them accountable for their actions.

---

6. Advantages and Disadvantages of E-Governance, Available at: https://www.legalwiz.in/blog/advantages-and-disadvantages-of-e-governance (visited on June7,2021).

II- E-GOVERNANCE IN INDIA

India is a nation of different culture, custom, language, geology and the money related condition of individuals. In this country, there are various individuals who are underneath the negligible financial benchmarks. This incorporates country and urban poor, ladies in rustic regions, road youngsters, individual of impeded stations and individuals living in less undeveloped regions. The vulnerability of these segments of society has expanded with globalization and this segment is inclined to turn into significantly more minimized, monetarily and socially. As indicated by researchers, India is a creating country with incredible potential for a rapid turn of events. In any case, it has gone through the effect of a political emergency. These occasions seriously influenced India's development just as they have pushed India back by numerous years. E-Governance/ICT drives play a massive part in the improvement of improving availability, reducing down expenses, diminishing defilement, stretching out help and expanded admittance to un-served bunches in India.

Evolution of e-governance in India could be traced back to 1970. Before it, initially, e-governance emerged in the field of economic, defense, monitoring, planning and the improvement of IT for census, election, tax administration, etc. In 1977, India established the department of electronics, followed by NIC. It had made a great effort to link all the district headquarters in the decade of the eighties. In 1987, with the launch of the national satellite based computer (NICNET).the e-governance gained the momentum. Furthermore, during the 90s it came in flow. There have been several initiatives regarding e-governance, namely, Gyandoot, E-Seva, N-logue, Digital Locker, and Digital India. E-Governance is a big challenge and opportunity to bring the services to all the citizens. There are many issues regarding the implementation of e governance. For example-technical issues, privacy issues, social issues, infrastructure, accessibility, economic issues, literacy issues Legal issues etc. The parliament of India has passed its first cyber law in 2000 i.e. The Information Technology Act, 2000[7].

India has a decent situation in carrying out ICT in Asia. India is connected with the majority of the countries of the world. With the reception of e- administration development and correspondence innovation, India's travel industry is improved. Moreover, the consistent changes occurring in the broadcast communications industry in India which emphatically influence

7. Nagaraja K "E-Governance in India: Issues and Challenges" Vol. 7, *The International organization of scientific research(IOSR)* 50-54(2016).

in scale development of the nation and offer better types of assistance and lower costs for clients. The public authority is likewise giving speculation motivations as far as assessment concessions and foundation of e-zones for ICT-based industries In India. There are agencies such as India National ICT Council and projects such as e-government initiatives which are accountable for spearheading, devising and implementing E-governance. The successive establishment of the National Informatics Centre (NIC) in 1976 with the financial help of the United Nations Development Program (UNDP) was a major step to execute e-Governance in India. After that numerous e-Governance initiatives launched at both national and state levels. These projects were implemented to make progress to address major problems related to government service.

On the basis of the advice of the Second Administrative Reforms Commission, the Government of India devised a National e-Governance Plan (NeGP) in 2006. The NeGP was initiated with a vision of "Make all Government services accessible to the common man in his area, through a common service delivery channel and guarantee efficiency, transparency and reliability of such services at reasonable costs to meet the basic needs of the common people (NeGP, 2006). Afterwards an array of projects were implemented. Reviewing the academic studies, it has been found that there is a hot debate related to e-governance as it does not provide a clear agreement on the requirement to have bureaucratic system change with the use of ICT. Many theorists stated that e-Governance led revolution has a good impact on government organizations because they aid to achieve better governance by lessening cost, better dissemination of information, supporting better involvement and interaction and efficient delivery of services. Other groups of researchers argued about the importance of transforming the existing model of government bureaucracy. Some researchers raise concern about the impact of information and communication technology applications and bring changes to government processes. Studies have shown that E governance has potential to bring vivid changes or transform government institutions rather than automate or reform organizational structures.

i) Legal Framework:

The Information Technology Act of 2000 was enacted by parliament to "...provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce," which requires the use of alternative solutions to paper-based mechanisms of communication and

information storage, to enable electronic filing of documents with Government agencies, and to amend the Indian Penal Code, the India Evidence Act, 1872, the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto." As a result, this Act is mainly concerned with electronic commerce, electronic governance and electronic records.

The Act contains the provisions on digital signatures and electronic record authentication, legal recognition of digital signatures and electronic records, electronic record retention, attribution, acknowledgement, and dispatch of electronic records, electronic record security, Certifying Authority regulation, and the Cyber Regulation Appellate Tribunal, among other things. A more inclusive legal framework is required to allow the execution of e-Government projects at various levels across the country. Chapter III of this Act (Section 4-10) deals with e -governance[8].

I. Any matter which is available in electronic form and the law requires it to be in written, printed or typewritten, the electronic form shall be legally valid (sec. 4).

II. Any information or other matters shall also be authenticated by means of affixing electronic signature (sec. 5).

III. The use of electronic record and electronic signature in the government and its agencies shall have the same effect as law provides regarding other matters (sec. 6).

IV. The appropriate government may for the efficient delivery of services to public authorize the electronic means (section 6A).

V. Any document record, information retained in electronic form shall be valid (sec. 7).

VI. Any law which provides the rule for the audit of document, shall also apply to electronic records (7 A).

VII. If any rule, regulation, notification, order, byelaw.is published in electronic gazette, it shall be deemed that this publication satisfied the rule made regarding the publication of official gazette (sec. 8).

VIII. The provisions of section 6, 7, 8 shall not confer a right upon a person to insist the government or other bodies to make, create, any document in electronic form (sec. 9).

---

8. E-governance in India: Concept, Initiatives and Issues, *Available at:* https://www.insightsonindia.com/2014/11/23/e-governance-india-concept-initiatives-issues/ (visited on July 3,2021).

IX. The central government has the power to make the rule for the purposes of this Act (sec.10).

X. A contract formed through electronic means shall be valid and enforceable (section 10 A).

ii) National E-Governance Policy:

National e-Governance Plan (NeGP) is the very ambitious initiative by the government of India to link e-Governance systems throughout the country and create a nation-wide network for electronic delivery of government services. It consist of 27 mission mode projects (MMP), which are further classified in state, central or integrated projects. NeGP "mission mode" denotes that projects have obviously defined objectives, scopes, and implementation timelines and milestones, as well as measurable outcomes and service levels. Central MMPs include Immigration, Visa and Foreigners Registration & Tracking, Income Tax, Banking and National Citizen Database. State MMPs include Road Transport, Employment Exchange and Land Records. Integrated MMPs include National e-governance Service Delivery Gateway (NSDG), e-procurement and EDI (Electronic Data Interchange) for e-trade. All the state governments can also define five MMPs particularly to its individual needs. The NeGP infrastructure is reliant upon the development of State Wide Area Networks(SWAN) to be connected to form a nation-wide network, State Data Centers (SDC) to consolidate services, applications and infrastructure, and common service centers (CSC) for end user access. The goals of the e-Governance plan are to increase the efficiency of service delivery, empower citizens by providing information, and create an environment of transparency. It aims to make the government more accessible to citizens and businesses alike and foster a more open atmosphere. The Indian government approved NeGP in May 2006 as recommendations of the Second Administrative Reforms Commission. NeGP is administered through the Department of Information Technology of the Indian Ministry of Communications and Information Technology[9].

iii) Issues in Implementation of E-Governance:

There are many obstacles to executing E-governance policies[10].

9. National e-Governance Plan, *Available at:* https://www.meity.gov.in/divisions/national-e-governance-plan (Visited on July 3, 2021).

10. Bhor Singh Yadav, Pandey A.C. and Raza S.K. "Implementation of IT-based services in Rural India" Vol. 1, Issue 1, *Journal of High Performance Computing,* 8 (2010).

These include insufficiency of funds, infrastructural problems, scarce manpower, citizen enthusiasm, data accumulation, legal framework readiness, and maintenance. According to National Association of Software and Service Companies (NASSCOM) report, e-governance in India is considered as a rapidly growing section with three southern states namely Andhra Pradesh, Karnataka, and Tamil Nadu which made significant progress. Experts recommend that in order to get desired benefits, the government must take several proactive steps to address the operational, economic, personnel, planning and implementation issues, which are the hold-ups to effective application of e-governance. Advanced technologies requires novel way of thinking about service and business process design, new ways of working, the development of new skills, the use of old skills more effectively and a more flexible approach to working patterns and practices. It is important to design such employee-oriented Human Resource strategies as would allow the organization to prepare employees for change and also support them to absorb rather than adsorb the changed systems. There are also cultural obstacles which refer to values, beliefs, mind-set, practices and customs of people. These hindrances have major challenges to install new systems.

Cultural barriers exist at employee level, officers' level and political level. Changing from being an organization to become 'E-Organization' greatly impacts organization structure and management styles as it results into re-distribution of power and control. It also changes the alignment of the organization. Companies adopting e- governance must develop customer orientation which understand the requirements of the user, explore new ways of presenting information to meet customer needs; design feedback mechanisms; manage customer relationships; streamline processes; develop good communication process, organize information, work more flexibly; make better decisions, coordinate activities, focus on major issues in the context of personnel which include doing job analysis again to reduce job responsibilities and other job dimensions of various jobs affected by the change.

Organizations also concentrates on redesigning the recruitment and selection process according to changing manpower needs, the identification of competencies of technological environment to facilitate all employees to operate efficiently in a fully electronic working environment, developing a performance management program that would integrate changes in job responsibilities and requirements and which is development oriented, educating employees about their new legal and corporate responsibilities

and obligations, developing knowledge workforces capable of multitasking. Companies must evolve an environment that would encourage any positive behavior exhibited by employees, and focus on better management of efforts between various government agencies as it will affect program effectiveness and efficiency. Additionally, effective implementation requires changes in decision making processes, involving quicker decision mechanisms, changes in organization structure making it matter and higher delegation of authority. It is essential to incorporate the new vision with the structure, culture and strategies of the organization.

iv) E-Governance and its use In Legal Administration:

Delays in court procedures are observed as potential sources of problems to much arbitration and settlements of legal cases now-a-days in India. Corrupt officials and greedy lawyers may instead of speeding up, actually can cause administrative delays in which they have no effect on outcomes but transfer apparent responsibility for decision from elected political officials to agencies or courts. So reformation in administrative procedure in the form of promoting e-government can provide a net benefit to citizens. The developing countries like India is also focusing on E-Governance activities in providing public services. Developing countries usually face the problem of having insufficient infrastructure in fulfilling the needs of providing citizen centric or user centric e-services in various domains such as Judiciary Administration. SaaS (Software as a Service) of Cloud computing model has a potential to offer solutions in the form of automated user oriented legal case management system while addressing the capital expenditure and it's Return on Investment. It provides service oriented access to end users without compromising on security. It reduces total cost of ownership, facilitates easy deployment and maintenance services by standardizing services and increases end user satisfaction levels. When properly applied to the development of E-Governance Applications, SaaS based Cloud computing architecture models can transform the nation into an Information Society[11].

It is not very uncommon to countries of modern democracies to deal with complex legal systems, as modern societies are becoming more complicated societies. India is no exception for this situation. The primary duty of courts of justice is, precisely, to dispense justice. The end of justice,

11. T. G. K. Vasista, "SaaS Based E-Court Applications in E-Governance in India "*Available at:* https://www.researchgate.net/publication/341725837(Visited on June 8, 2021).

however, may easily be subverted in a judicial system punctuated with delays in the processing of cases filed in court and marked by congested court dockets. The harm that delay poses to the administration of justice is grave and in some instances, irreparable. The problem of docket congestion is seriously disabling and affects all facets of the judicial process. The Indian judiciary is facing mounting pressures to reform its apparatus. Even the judiciary itself has come to recognize that change need to be brought is long overdue. A rudimentary estimation of about three years is required to clear the current backlog of cases in High courts. While technocrat herald that the problem of enormous backlog of cases can be tackled by achieving the speedier delivery of justice using ICT, however the rural penetration of courts in India is found extremely low, which significantly limits access to justice for the many citizens living far beyond the district courts of city centers. It is believed that the e-government initiatives will continue to transform the nature of India's bureaucracy and enhance the quality of government services and can play a central role in judicial reform efforts. Union Ministry for Law and Justice, has proposed for India a centrally funded and administered National Judicial Technology Program. Such a program aims to use ICT in the courtrooms to free the legal system of "historical inefficiencies". It is important to note that ICT intervention and use must be seen as an enabler of a sound national level judicial reform strategy. It is also important to look at how basic infrastructure such as civil courts in rural areas must be in place before the use of ICT can facilitate access to justice for individuals who remain peripheral to the legal system. A well-functioning judicial system is required to keep up with the demands of modern democratic society. It is unquestionable that technology can play an influential role in ensuring that the relationship between citizens and the government is strong and communicative, But how ICT can be used to see that cases are filed and judgments are delivered more quickly to improve efficiency and rationalize resources is needed to be explored by complementing it with the basis of national level judicial reform strategy or policy. (E.g. with supporting articles of the constitution).

III CONCLUSION

The use of Information and Communication Technology in the government functioning brings the concept of e-governance. E-governance is a tool to accomplish good governance. It focus in bringing the improvements in the service delivery, dissemination of information, partnership, efficiency and accountability. The use of Information and

Communication technology in judicial administration may contribute to the most efficient way of catching the justice. The Government of India has taken various initiative to computerize the court administration. The Common man can also have access for this information and thereby posed the confidence in them about the Indian court administration (i.e. the main objective of e-governance). However people from rural area still have problem due to poor internet connectivity. They are not so literate to handle the electronic gadgets to seek the information of their cases. They are the sufferer of digital divide. More accessibility to internet and computers or mobiles and their awareness would be of great help to them. The ICT enabled services have created hope of getting speedy justice from courts and other quasi-judicial bodies. It is improving the quality of organization and effectiveness by moving the judiciary away from the current paper based approach and by connecting the nation's lawyers and judicial system online. ICT facilitates distant learning and will enable lawyers and judges to keep up to date not only with national le-gal matters but worldwide legal developments so that the Nigerian judiciary can learn from other nation's experiences. Till today this system has been proved to be very effective and favorable to judicial system. However, many challenges still remain as ICT is not at a very sound stage in India.

■

IT RULES 2021 AND ITS EFFECT ON SOCIAL MEDIA INTERMEDIARIES

ABHISHEK SAHU*

ABSTRACT : Information Technology Rule, 2021 passed on 25th February 2021 since then it has sparked the debate about the Right to privacy, Freedom of speech, and expression, and is the government going to decide now what will their pupils watch. It deals with modern world problem like fake news, online abuse, online sexual exploitation, etc., and try to fix the liabilities upon the intermediaries. The present article tries to explore every aspect of this rule which is affecting or will affect the functioning of the social media in the country but the vagueness of certain provisions and excessive liability on the intermediaries and the narrow definitions put this rule under scrutiny and need to revise certain provision.

KEY WORDS : Social media intermediaries, Significant social media intermediaries, Privacy policy, User agreement, Grievance Redressal Mechanism.

I. INTRODUCTION

The world is living in the age of the internet from buying groceries online to selling shares in just one click is truly a miraculous feat achieved by mankind just like this another boon given by the internet is social media. Distance doesn't matter anymore it is just a number now people of different religion, caste, creed, language is interacting with each other and sharing their ideas and belief. But just like any other thing social media has also two faces one which shows us a bright future and the second is pitch dark. Online bullying, Cybercrimes, financial frauds, sexual exploitation, are some examples of many evils that prevailed in the present time. Countries around

* LL.B. (Hons), Semester V, Law School, BHU, Varanasi; abhishek.undaunted@gmail.com

the globe are trying to develop a legal framework to set the liabilities on the people who commit these crimes. India also took a big step two decades ago by passing an IT Act 2000 but that act and some other rules passed in the last two decades were not sufficient to tackle the prevalent problems. That's why the present Indian government introduced new IT Rules 2021 which try to address the current scenario but like any other law, it has its triumphs and shortcomings below in the article author tries to address every aspect of the IT Rule 2021 which concern social media intermediaries.[1]

II. HISTORY OF SOCIAL MEDIA IN INDIA

India saw the first glimpse of social media in 2004 when the Orkut was launched by Google for the public. Orkut become very famous in India despite limited technological or educational advancement at that time. Google in 2007 launches Orkut in six different Indian languages i.e., Hindi, Bengali, Marathi, Tamil, Kannada, and Telugu and within six years after its launch i.e., in 2010 Orkut had almost 19millions active users in India.[2] Then Facebook launched publicly in 2006 and it took the world by storm by 2010 it had almost 24million active users in India and it beat the Orkut and become the most famous and used social media platform and its streak continues to date. During the same time frame many other social media platforms like Twitter, Instagram, WhatsApp, etc launch and become popular among every age group very rapidly.[3]

The last decade saw the tremendous technological advancement every person has smartphones in their hand with a fast internet connection and can access social media at their fingertips that's the reason Facebook, Instagram, and WhatsApp have the highest number of active users in India and presently India is the second-largest overall social media consumer in the world with the 639million active users.[4]

---

1. IT Rules 2021.
2. Venkat Ananth, "The rise, fall and subsequent death of Orkut", The Mint, 30 Sep 2014, *available at:* https://www.livemint.com/Consumer/zAYIirsyDYC2ZVcNxGkXcJ/The-rise-fall-and-subsequent-death-of-Orkut.html (visited on October 23, 2021).
3. Ibid.
4. Number of social network users in selected countries in 2021 and 2026, *available at:* https://www.statista.com/statistics/278341/number-of-social-network-users-in-selected-countries/ (visited on October 23, 2021).

III. EFFECT OF IT RULES 2021 ON SOCIAL MEDIA INTERMEDIARIES

(i) Publishing Rules, Policy and User Agreement-:

According to new IT rules, social media intermediaries and significant social media intermediaries has to publish their rules and regulation, Privacy Policy, and the User Agreement on their website or their application such that it is noticeable to the users every time they use the intermediary platform.[5] These rules, Privacy Policy, and User Agreement must specifically mention that their platform would not be used by the users to host, display, upload, modify, publish, transmit, store, update or share any information that belongs to some other person to which user has no right, or is defamatory to someone, or pornographic in nature, or discriminate racially, sexually or religiously or is harmful to the child, or infringes any copyright or trademark, or violates any law, or transmit any fake news of any kind, or threaten national security, or contain any virus.[6]

In new IT Rules, the Intermediaries must send their user's constant reminders that if they don't follow their policies or rules and regulation then they have the right to terminate the user account or to remove the information posted by that user. It means that users will be getting a mail every year at least once from every social media platform where they have ever registered even just for fun and not using it currently.[7]

(ii) Removal of content or information from Intermediaries computer resources-:

Intermediaries on whose platform the information is stored, or published when received an order from the court which has jurisdiction in the matter or from the government or any competent government agency under clause (b) of sub-section (3) of section 79 of the IT Act then the intermediaries have to remove that information if that information is-:

- Threat to the sovereignty and integrity of India.
- The danger for the security of the State.
- Can harm friendly relations with foreign States.
- Threat to public order.
- Against decency or morality.
- about contempt of court, defamation, or incitement to an offense.

5. Rule 3(1)(a) IT Rules, 2021.
6. Rule 3(1)(b) IT Rules, 2021.
7. Rule 3(1)(c) IT Rules, 2021.

· Against any law for the time being in force.[8]

Some of these terms are vague and don't paint a clear picture on certain issues like decency and morality or defamation. Something immoral for someone can be fine by many others and the same goes for the defamation it gives a lot of power in the hand of the executive. So, it is very necessary to make a precise and clear guideline that helps the authority to take its course with precision.

If such information is get published or stored by the intermediaries then they have to remove that information within thirty-six hours after receiving the order from the court or the government or any competent government agency. Removal of such information after receiving an order or voluntarily or under grievance redressal mechanism does not amount to the violation of clauses (a) or (b) of sub-section (2) of section 79 of the IT Act.[9] Any such information which is removed by the intermediaries after receiving the notice from the courts, or government, or any other competent government authority or voluntarily upon violation of their policy or by grievance redressal mechanism must be kept by the intermediaries as evidence without any alteration for at least one hundred and eighty days or as demanded by the court or other government agency who are lawfully authorized.[10]

These rules might not affect the big players like Facebook, Twitter, or WhatsApp but they will put the extra financial burden on the small intermediaries because they have to develop their infrastructure even more to store the information which was asked by the authorities and have to hire the more manpower to maintain that infrastructure. Holding such information for a long time might cause a data leak which is a threat to the privacy of the user.

However, some relief is provided to the intermediaries in case the information is temporarily or for a short period is stored automatically on the intermediary computer resource because of the in-built feature of that computer resource which doesn't involve any human interference and can't be changed by editing the algorithm and thus transmitted to another computer resource. In this case, intermediaries are exempt from the notice which is given by the court or government or by a competent government

8. Rule 3(1)(d) IT Rules, 2021.
9. Rule 3(1)(c) IT Rules, 2021.
10. Rule 3(1)(c) IT Rules, 2021.

agency to host, publish or store the information which is mentioned above.[11]

(iii) Private data storage and safety-:

The social media intermediary must hold on to the information for one hundred and eighty days which they have collected from the user for his registration at their computer resources after the user has withdrawn his registration.[12]

India still lacks for effective Data Protection Law so in this view how valid is this to allow the intermediaries to store the data of the users for one hundred and eighty days even after they delete their account from the intermediaries' platforms. Which law guarantees the safety of this data which is made mandatory by the government to be stored by the intermediaries.[13]

Intermediaries have to provide data to the government within seventy-two hours after receiving an order from the competent authorities which are mentioned above to the government agencies which are lawfully authorized to investigate the cyber security matters. But the order must be in writing and the reason for seeking such information must be mentioned.[14] The intermediaries shall not install or modify their technical configuration knowingly which changes the default functioning of their computer resources which violates any rule of law at that time. However, the intermediary may develop, produce, distribute or employ technological means which will help him to secure the computer resources and the information stored in them.[15] The intermediaries should secure their computer resources and the information stored within by following the reasonable security practices and procedures as prescribed in the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Information) Rules, 2011.[16]

If any cyber security incidence took place, then the intermediaries should share the related information with the Indian Computer Emergency Response Team by the policies and procedures as mentioned in the Information Technology (The Indian Computer Emergency Response Team

11. Rule 3(1)(e) IT Rules, 2021.
12. Rule 3(1)(g) IT Rules, 2021.
13. Rule 3(1)(h) IT Rules, 2021.
14. Rule 3(1)(j) IT Rules, 2021.
15. Rule 3(1)(k) IT Rules, 2021.
16. Rule 3(1)(i) IT Rules, 2021.

and Manner of Performing Functions and Duties) Rules, 2013.[17]

(iv) Grievance Redressal Mechanism-:

Intermediaries shall appoint the grievance officer and publish his name, contact details, and the mechanism by following which the users or the victims can register their grievances that violate any provision of IT Rules 2021 on their website, applications, or both.[18] The grievance officer must acknowledge the complaint of the griever within twenty-four hours and resolve the issue within fifteen days. And the orders received by the intermediaries from the court or the government or any competent government agency also must be acknowledged by the grievance officer. This rule increases the work pressure on Grievance Officer. Earlier they have thirty days to resolve the issue but now the timeline is reduced to fifteen days and they are the ones to deal with the order received from the authorities.[19]

If the intermediaries receive a complaint in connection with the content which exposes the private area of the individual, which exposes an individual in partial or full nudity or which show an individual involved in a sexual act or transmit or publish electronically morphed images of the individual from the victim or someone on behalf of the victim then the intermediaries should take immediate and appropriate action to remove such content within twenty-four hours after receiving a complaint.[20]

(v) Additional due diligence followed by significant social media intermediary-:

In addition to the above-mentioned rule of due diligence, significant social media intermediaries have to follow some additional rule which does not apply to social media intermediaries. And a time limit of three has been given to the significant social media intermediaries to comply with these rules.

(vi) Following are the rule that must be complied with by the Significant Social Media Intermediaries-:

· Appointment of the Chief Compliance Officer who should be the resident of India and he will be responsible for the compliance of the intermediary by all the rules and the regulation made under this act and will

17. Rule 3(1)(l) IT Rules, 2021.
18. Rule 3(2)(a) IT Rules, 2021.
19. Rule 3(2)(b) IT Rules, 2021.
20. Rule 3(2)(c) IT Rules, 2021.

be liable in every proceeding which proceeds against the intermediaries for the non-compliance of the rule of the due diligence which is mentioned above. However, before making them liable they would be given a chance to be heard.[21]

· The recent tussle between Twitter India and the Government of India has many aspects one of which is related to the appointment of the Chief Compliance Officer. Indian government blame Twitter India for non-compliance with the rule of the land and the matter went to Delhi High Court. Recently, the war came to an end when the lawyer representing the Government of India informed the court that Twitter India has appointed the Chief Compliance Officer, and hence there is no violation of IT Rules 2021.[22]

· Other than the Chief Compliance Officer intermediaries should also appoint the Nodal contact person who must be the employee of the intermediary and the resident of India and its job is to coordinate with the law enforcement agencies and comply with the order made by them by the law.[23]

· Redressal Grievance Officer should also be appointed who is the employee of the intermediary and the resident of India whose job is to deal with the Grievance Redressal which is mentioned above.[24]

· Intermediaries have to publish the compliance report monthly which should contain the data of how many complaints were received and how many of them were resolved and the action taken on them and should also mention the communication link or the part of the information which was disabled by them.[25]

· The significant social media intermediaries have to enable the identification of the first originator of the message in case they receive a judicial order passed from the court with authority over the matter or the order passed by the competent government agency under Section 69 as per the Information Technology (Procedure and Safeguards for the interception, monitoring, and decryption of information) Rules, 2009.[26]

---

21. Rule 4(1)(a) IT Rules, 2021.
22. *TWITTER COMMUNICATIONS INDIA PVT. LTD. & ORS.* v. *UNION OF INDIA & ORS.,* Writ Petition(s)(Criminal) No(s). 337/2020.
23. Rule 4(1)(b) IT Rules, 2021.
24. Rule 4(1)(c) IT Rules, 2021.
25. Rule 4(1)(d) IT Rules, 2021.
26. Rule 4(2) IT Rules, 2021.

· Enabling such identification means that the intermediaries that use end-to-end encryption would have to disable it for all of its users whether they have committed any crime or not this poses a serious threat to the privacy of every user. WhatsApp recently went to the Delhi High Court to file a lawsuit against the Government of India that the new IT Rule 2021 violates the fundamental right of privacy of the people.[27]

· However, such order can be passed only to prevent, detect, investigate, prosecute, or punishment an offense related to the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, or public order, or of incitement to an offense relating to the above or in relation with rape, sexually explicit material or child sexual abuse material, punishable with imprisonment for a term of not less than five years.[28]

· If there is no need to pass an order and the appropriate action could be taken by the conventional methods then the order should not be passed. And the intermediaries while compiling with the orders to disclose the first originator should not disclose the content of the messages of the first originator or any other information or information of any other users.

· If the first originator is residing outside of India, then the first person who shares the content for the first time in India will be considered as the first originator.[29]

· Significant social media intermediaries that provide advertising facilities to the people who hold copyright, or an exclusive license or entered into a contract which provides to publicize their product or information only through that particular social media intermediaries by which the product or the information reached more and more people by targeting the specific audience of that information or product and thus provide financial benefits has to be marked advertised, marketed, sponsored, owned, or exclusively controlled as per the case.[30]

· Significant social media intermediaries should use AI technology to remove any unwanted materials on their computer sources like pornography, child sexual abuse, crime against women, or any other material

---

27. *WHATSAPP LLC* v. *COMPETITION COMMISSION OF INDIA & ANR.,* W.P.(C) 4378/2021 & CM 13336/2021.
28. Rule 4(1)(c) IT Rules, 2021.
29. Rule 4(1)(c) IT Rules, 2021.
30. Rule 4(3)(a) &(b) IT Rules, 2021.

which was earlier removed by the intermediaries under clause (d) of sub-rule (1) of rule 3. And should give a warning that such information has been removed by the intermediaries to the user who tries to publish such content or try to access such information.[31]

· However, intermediaries should apply the all necessary and appropriate technical measures to protect the right of free speech of the user and their privacy too. The AI should be under continuous human observation following the mechanism developed by the intermediaries and it should be reviewed periodically.[32]

· AI Technology is not a fully developed tech it's still a work in progress and giving such power in the hand of unfinished technology can be proved dangerous for the right to freedom of speech and expression. Over censorship is not an alien concept in many instances it has been seen AI has to curb the posts or comment which doesn't violate or violate little the policies of the intermediaries.

· AI technology is a self-learning program that uses a vast amount of data to develop itself to facilitate the AI to examine this data intermediary has to develop the infrastructure to hold such a vast amount of data which is very costly and require a lot of manpower.

· AI also is a kind of program which runs on code like any other program and that code is developed by some human and there is a great chance that it has flaws and some biases which will affect the decision-making of the AI and ultimately it will discriminate while censorship. There is no accountability for the mistake which is made by AI and there is a lack of transparency in the code writing of the AI. IT Rules 2021 also didn't shed light on the case of who will be held accountable if the AI done a mistake or does over censorship and what will be the procedure to overturn this mistake.

· Significant social media intermediaries should have a physical address which they should mention on their websites and their mobile applications as well if they have any.[33]

· Significant social media intermediaries should implement the proper grievance redressal mechanism by using which user can register their complaints easily in case if any of the provisions of the rule is violated.

---

31. Rule 4(4) IT Rules, 2021.
32. Ibid.
33. Rule 4(5) IT Rules, 2021.

Such users should be provided with the unique ticket number so they can keep track of their application[34]

· And it is the responsibility of the intermediaries to update complainants on the action they have taken on their complaint and if no action is taken then the reason for it.

· Significant social media should allow their user in India to verify their account voluntarily by using appropriate methods or they can use their registered mobile number to verify their account. And the intermediaries should provide every such account with the symbol or mark which should be visible to all of the other users. Provided that such information should not be used unless the consent is given by the user.[35]

· If a significant social media intermediary removes any information under clause (b) of sub-rule (1) of rule 3 on its own accord, then they should inform the user who has published such information or content why they have removed such information. And should allow the user to challenge the decision taken by the intermediary and request the restoration of such information and it should be decided within a reasonable time.[36]

· The resident Grievance Officer of such intermediaries should make sure that the grievance redressal mechanism should run smoothly. Ministry can ask for information from the intermediaries regarding the removal of information published by the user.[37]

(vii) Compliance with order-:

Ministry can pass an order which requires an intermediary which is not a significant social media intermediary to comply with rule 4 of the IT Rules 2021 if the services of the intermediary are to transmit the information which can harm the sovereignty and integrity of India, security of the State, friendly relations with foreign states or public order. However, a reason to pass such an order must be in writing.

The assessment of the risk will be done on the service provided by the intermediaries whether they provide the services in which users can attract each other or they provide service to publish the content which has a wide range of users and would result in spreading of such information.[38]

---

34. Rule 4(6) IT Rules, 2021.
35. Rule 4(7) IT Rules, 2021.
36. Rule 4(8)(a) & (b) IT Rules, 2021.
37. Rule 3(8)(c) IT Rules, 2021.
38. Rule 6 IT Rules, 2021.

(viii) Non-observance of rules-:

Rule 7 of the IT Rule 2021 clearly states that if the intermediaries violate any rule, then they will be held liable and the appropriate action will be taken against them according to the law. This rule took away the immunity which was provided to the intermediaries by section 79(1) of the IT Act 2000.[39] This rule caused a panic among the intermediaries because not only they would be stopped from functioning in India they can also be held criminally liable for the content posted, published, shared, or edited by any other person.

V. CONCLUSION

The requirement of law to tackle cybercrime is eminent and it should be done promptly but it shouldn't be done at the cost of risking the privacy and security of the people. These laws are promising but still need improvements on many fronts like definitions should be clearer and the privacy of the users should be protected more effectively and the effective data protection law must be enforced. Use of the Artificial Technology for deciding which content or information is violating the policy of the law is not effective because AI work on programming codes and codes can be flawed and AI is a self-learning program and there is no transparency from which data AI is learning and on what code AI is built. End to End encryption is used by the intermediaries to protect the privacy of the user and to find the first originator of the messaged end-to-end encryption has to be disabled for all the users this will be a serious threat to the privacy of the users. We need a law that can guaranty our safety from cybercrime and at the same time protect our privacy and personal data.

■

39. Rule 7 IT Rules, 2021.

PEGASUS : A FUTURE OF NO PRIVACY

AYUSHI UPADHYAY*

"Privacy is not something that I'm merely entitled to, it's an absolute prerequisite"[1]

ABSTRACT : "The article provides a wholesome picture of how humans have become subservient to gadgets and digitalization. The most dangerous weapon in this technological era is spyware; and Pegasus is one such contrivance. This article examines the development, impact and concerns revolving around Pegasus with help of previous reports, publications, cases and statutes. The key finding of this article is focused on how this has emerged as a socio-legal affair in the society. It also comments on the involvement of Indian Government and the need for international awareness. Lastly, it also discusses various legal aspects with the help of case laws."

KEY WORDS : Pegasus, Privacy, Fundamental Right, Technology, Government.

I. INTRODUCTION

It's 21st century already, humans have developed technology in a nick of time and which is still thriving incessantly as one of their finest inventions. The world is fenced by the technological web in which we are gravely entangled. One's life without these gadgets is maddening. From personal to professional, business to travelling, ordering food to getting medical assistance, almost everything is available online, even groceries!

"We all are dependent on technology" – an epiphany felt by almost every individual during this pandemic. But are these platforms safe? It's

* BA LL.B. (Hons) Semester III, Law School, BHU, Varanasi; ayushiupadhyay182002@gmail.com

1. David Shipman, *"Marlon Brando"*, ch.11 (Sphere, 1989).

not only a question but a burning issue, since our reliance on such technology is inexorable and all our information from personal to professional are served on these cyberspaces, we have become most vulnerable to such cyber attacks.

Pegasus Spyware is one such software which has created a global wave in cyber space. It has been regarded as one of the 'most sophisticated tool to attack smart phones' and is even classified as the 'ultimate spyware' by many. Pegasus Spyware is named after the winged horse of Greek mythology. It is a Trojan horse computer virus which can 'travel through air' or sent 'flying through air'. The 'Trojan Spyware Alert' fake error message is a scam that pretends from Microsoft to trick people into thinking that their computer has been crashed or that a virus has been detected'[2]. This spyware can affect both android and iPhone devices.

Pegasus basically functions in three modes. At first a trap link is transmitted to the targeted person's phone which requires only a click for activation, or else it can also self-activate itself, leaving the victim oblivious of its presence, this is called 'zero-click' technology. This function gives Pegasus an upper hand from other malware which requires some or the other way of interaction to get ingrained. Once implanted, it can transfers the most basic information to the attacker including end-to-end encrypted messages, calendar events, passwords, intercept calls, gives control of mic and camera, browsing history, retrieved files and can even track the location of the victim. When entrenched, this malicious spyware is undefeatable.

It is owned by the NSO group, an Israeli firm, engaged in the business of building and selling surveillance software. The shares are divided among the founders Niv Carmi, Shalev Hulio and Omri Lavie (hence, NSO). Though this spyware has recently been discovered but its roots can be traced back to attacks UAE in 2013.

It was is 2016, when the Emirati Human Rights Activist Ahmed Mansoor received a series of SMS(Short Service Message) on his iPhone assuring "new secrets" of torture scenes in the prisons of United Arab Emirates if he clicked on certain URL. Mansoor immediately reached out to the Information Control Research Laboratory on the grounds of suspicion.

---

2. Stelian Pilici, *"Remove Trojan Spyware Alert Scam(Virus Removal Guide)"* , (September 25,2020), *available at:* https://malwaretips.com/blogs/remove-trojan-spyware-alert/ (last visited on October 9, 2021).

After investigation it was transpired that the IP address was linked with NSO group and had Mansoor clicked on the certain URL, the spyware would have been implanted on the spot.

In January 2016, Carmen Aristengui, an investigative journalist in Mexico, started receiving messages with suspicious links after she published an investigation into property owned by former Mexican President Enrique Pena Nieto.[3]

This spyware has affected countries around the world. According to the revelations of Paris based organization Forbidden Stories and Amnesty International, around 50,000 Phone numbers of potential surveillance targets were reported. Some of the past instances are:-

i. December, 2020, Citizen Lab published a report detailing how government had used the Pegasus software to spy on or hack the phones of 36 Al Jazeera journalists.[4]

ii. In 2018, after the killing of Saudi Journalist and critique Jamal Khashoggi, Omar Abdulaziz, another dissident approached the court in Israel by way of filing a lawsuit, claiming that the NSO Group had licensed Pegasus to the Saudi government, which the government used to spy on him.[5]

iii. In Oct, 2019, WhatsApp filed a case suing NSO, claiming that the software operated by the firm had been used to attack its users. WhatsApp has requested the Department of Justice in the United States to launch an investigation.[6]

The Amnesty International filed a case against the NSO group which sought to force the Israel's Defense Ministry to revoke the security export license of the company. This was supported by the New York University of Law. On July 12, 2020 The Amnesty International released its press report stating that A Tel Aviv Court rejected its plea[7]. On this account

---

3. "Microsoft Exchange email hack was caused by China, US says", *The Daily Star*, (July 19, 2021) *available at:*https://www.thedailystar.net/tech-startup/science-gadgets-and-tech/tech-news/news/microsoft-exchange-emai l-hack-was-caused-china-us-says-2133991 (last visited on October 10,2021).
4. *Available at:* https://sflc.in/anatomy-pegasus-spyware (last visited on October 15,2021).
5. *Ibid.*
6. *Ibid.*
7. Amnesty International, *" Israel: Court rejects bid to invoke notorious spyware firm NSO Group's export licence"*, (July 12,2020), *available at* :

Danna Ingleton, action Co-Director of Amnesty Tech said "Today's disgraceful ruling is a cruel blow to people put at risk around the world by NSO Group selling its product to notorious human rights abusers."[8]

II. SCENARIO IN INDIA

Approximately 45 countries WhatsApp users' were affected by Pegasus including Pakistan, France, Canada, Israel, India, Brazil, Singapore, South Africa and Switzerland, reported by the Citizen Lab. The operator was disguised under code-name of "Ganges" (deriving its name from the holy river in India) for targeting India, Pakistan and Bangladesh in the South East Asian region since June 2017. According to First Post report this operation targeted eight telecoms in India, including Airtel, MTNL and Hathway.

Pegasus marked its presence in India way back in late 2019 when it was revealed that WhatsApp of bureaucrats, journalist, activist, politicians who are considered as linchpin was invaded and hacked illegally, inculpating the government. On 20 May, 2019 WhatsApp submitted an incident report to the Indian Computer Emergency Response Team (CERT-IN) stating that it has "identified and fixed vulnerability which could which could have enabled an attacker to insert and execute a code on cellular devices"[9]

On December 11, 2019 in response to Unstarred Question No. 3686 which was asked in the Lok Sabha by Shri Anumula Revanth Reddy, the Hon'ble Minister for Electronics & Information Technology gave the following response:

> "Government had been informed by WhatsApp of a vulnerability affecting some WhatsApp mobile users' through a spyware namely Pegasus. According to WhatsApp, this spyware was developed by an Israel based company NSO Group and it has developed and used Pegasus spyware to attempt to reach mobile phones of a possible of 1400 users' globally that includes 121 users'

---

https://www.amnesty.org/en/latest/news/2020/07/israel-court-notorious-spyware-firm-nso/ (last visited on October 15,2021).

8. *Ibid.*
9. Government of India, *"Withdrawal of WhatsApp security vulnerability warning from CERT-In website*", Ministry of Electronics and Information Technology, Unstarred Question No.-2747, Rajya Sabha, (12 December 2019)

> from India. Some statements have appeared based on reports in media, regarding breach of privacy of Indian citizens on WhatsApp. These attempts to malign the Government of India for the reported breach are completely misleading. The Government is committed to protect the fundamental rights of citizens, including right to privacy. The Government operated strictly as per provisions of law and laid down protocols. There are adequate safeguards to ensure that no innocent citizen is harassed or his privacy is breached[10]"

In July, *the Wire* reported that there were at least 300 Indian Phone numbers in the leaked global list of 50,000 numbers, including the name of a sitting Supreme Court Judge[11]. Some prominent names under the radar of Pegasus includes, Rahul Gandhi (opposition leader of the Congress Party), Pravin Togadia (Former International Working President, VHP), Ashwini Vaishnav (Union Minister for IT and Railways), Abhishek Banerjee(MP from West Bengal and National Secretary of Trinamool Congress), Ashok Lavasa (Former Election Commissioner), MK Venu (The Wire), Late Syed Abdul Rahmaan Geelani (DU Professor and Human Rights Activist), Prashant Kishore(Election Strategist), Jagadeep Chokkhar (Head, Association for Democratic Reforms) , employees of the U.S. Centers for Disease and Prevention, Delhi and the list follows.

Rahul Gandhi on July 19, 2021 tweeted, " *we know that he's been reading – everything on your phone*" implicitly attacking the Government. The Prime Minister was framed by the Opposition Party of "treason", emphatically stating that he compromised national security. The Indian Government was also accused of illegally spying on their neighboring countries, though no evidences were put against it. One peculiar thing was the name of Ashwini Vaishnav of Bhartiya Janta Party (BJP) in the list of potential targets, though he even called it out as an "attempt to malign the Indian democracy". Giving fodder to gossip was Government's refusal to discuss this issue in Parliament albeit its gravity which raised several questions, which included suspicions regarding Government's involvement in the 'spy scandal'.

---

10. *Supra* note 5.
11. The Wire Staff, *"Pegasus Project: 174 Individuals Revealed By The Wire On Snoop List So Far",* (August 4,2021), *available at* : https://thewire.in/rights/project-pegasus-list-of-names-uncovered-spyware-surveillance (last visited on October 19,2021),

This issue is alarming as it brings in the question of national security. Cyber-terrorism is new tool for the modern terrorist, hacking into the Government system of a country and crippling the military is cup of tea if access is provided. Not only can the terrorist group gain control over what is utterly impossible to approach but also makes the nation vulnerable in the international sphere. Paradoxically, success in "war on terror" is likely to make terrorist turn increasingly to unconventional weapons like cyber-terrorism[12].

III. LEGAL ASPECT

The Greek philosopher Aristotle spoke of a division between the public sphere of political affairs and the personal sphere of human life. The dichotomy may provide an early recognition of a "confidential zone on behalf of the citizen".[13] Aristotle's distinction between the public and private realms can be regarded as providing a basis for restricting governmental authority to activities falling within the public realm. On the other hand, activities in the private realm are more appropriately reserved for "private reflection, familial relations and self-determination."[14]

John Stuart Mill in his essay, 'On Liberty' (1859[15]) denoted the need of separating the private zone from public in order to preserve the liberty of citizen.

Even the history is packed with many evidences that calls out for privacy, the right to let alone.

Privacy is a universal right. This right is enshrined in Article 12 of Universal Declaration of Human Right (UDHR), [16]Article 17 if International Covenant on Civil and Political Rights (ICCPR)[17], Article 16 of the

---

12. Gabriel Weimann, *"United States Institute of Peace: Special Report"*, 1200 17th Street NW, Washinton, DC 20036 (2017).
13. Michael C. James, "A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe", *Connecticut Journal of International Law"*,Vol.29, Issue 2, p.no. 261 (Spring 2014).
14. *Ibid.*
15. John Stuart Mill, "*On Liberty (1859)",* p.no.13, (Batoche Books Limited 52 Eby Street South Kitchener, Ontario N2G 3L1 Canada, 2001).
16. The United Nations, 1948, art. 12.
17. International Covenant on Civil and Political Right, 1966, vol.999, art.17.

Convention of the Rights of the Child (CRC)[18], Article 7 and 8 of the Charter of Fundamental Rights of European Union, 2012 which provides for respect for private and family life, home and communication and protection of personal data and its collection for specified legitimate purpose.

On 24th August 2017, overruling the decisions of *M.P Sharma v. Satish Chandra, District Magistrare, Delhi*[19] (constituting 8 judge bench) and *Kharak Singh v. State of Uttar Pradesh*[20](constituting 6 judge bench), unanimously delivered a historic decision in *K.S. Puttasawamy v. Union of India* [21]recognizing Right to Privacy as a fundamental right guaranteed to every individual by the Constitution of India, under Article 21 in particular Part III of the Constitution. In its judgment the Supreme Court clearly mentioned that this issue reaches out to the foundation of a constitutional culture based on the protection of human rights and enables court to revisit the basic principles on which our Constitution has been founded and their consequences for a way of life it seeks to protect. The court has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world.[22] They also overruled the *ADM Jabalpur* [23]case which called for temporary suspension of fundamental rights during the proclamation of emergency and called into question the judicial reasoning in the *Naz Foundation* [24]case that had suggested that the 'minuscule minority' LGBTQ community was not entitled to a right to privacy. This decision has connected out privacy jurisprudence over the years with our international commitments and established out conformity with comparative laws around the world.[25]

Though Right to Privacy is not an absolute right, it is subjected to some restriction, according to a report by mondaq, The Supreme Court was at pains to clarify that the fundamental right to privacy is not absolute

---

18. Convention on Rights of the Child, 1989, vol. 1577, art.16.
19. 1954 AIR 300.
20. 1963 AIR 1295.
21. (2017) 10 SCC 1.
22. *K.S. Puttaswamy v. Union of India,* Supreme Court of India Civil Original Jurisdiction, Writ Petition (Civil) No. 494 of 2012.
23. 1976 AIR 1207, 1976 SCR 172.
24. 2009 SCC Del 1762.
25. Trilegal, "*India; Supreme Court Declares Right to Privacy a Fundamental Right"* , (31st August 2017), *available at* : https://www.mondaq.com/india/privacy-protection/625192/supreme-court-declares-right-to-privacy-a-fundamental-right (last visited on October 19,2021).

and will always be subjected to reasonable restrictions. It held that the State can impose restrictions on the rights to privacy to protect legitimate states interest but it can only to do so by following the three-pronged test summarized below:

(a) Existence of a law that justifies an encroachment on privacy;

(b) A legitimate state aim or need that ensures that the nature or the content of this law falls within the zone of reasonableness and operates to guard against arbitrary state action; or

(c) The means adopted by the state are proportional to the objects and needs sought to be fulfilled by the law.[26]

Section 43 of Information Technology Act (referred as IT Act) provides for the penalty and compensation for damage to computer, computer system if in any case without the permission of the owner or in-charge of computer, computer system or computer network or resource *inter alia* (1) access or secures access to such network or computer; (2) downloads, copies or extracts any data, or database held or stored in any removable storage medium; (3) implants any virus or contaminant; (4) damages or causes to the computer in any way; (4) disrupts or causes disruption; (5) denies or causes denial of access to the authorized person; then such person is punishable for imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.[27]

The Personal Data Protection Bill was introduced on December 11, 2019 by Mr. Ravi Shankar Prasad, Minister of Electronics and Information Technology on Lok Sabha, the bill provided for the "protection of the privacy of individuals relating to personal data, specify the flow and usage of personal data, create a relationship of trust between persons and entities processing the personal data, protect the rights of individuals whose personal data are processed, to create a framework for organizational and technical measures in processing data, laying down norm for social media intermediary, cross-border transfer accountability of entities processing persona data, remedies for unauthorized and harmful processing, and to establish a Data Protection Authority of India for the said purposes and for matters connected therewith or incidental thereto."[28]

---

26. *Supra,* note 24.
27. The Information Technology Act,2000 (Act 21 of 2000), s. 43.
28. The Personal Data Protection Bill, 2019.

Privacy is indispensable for autonomy which shields individual's dignity. Invading someone's privacy is akin to making them a human puppet. One is prone to powerlessness and to the feeling helplessness. Imagine a world without any protection to privacy; it would be as if you are walking on the edge of a cliff tied down to rope which is not under your control. This spyware not only hinders privacy of a person, but at stake is also the liberty. You cannot express anything or act, similar to being kept as a hostage, monitored day and night. It snatches away our Right to Freedom and Speech, yet another Fundamental Right guaranteed by the Constitution.[29]

The Indian Government has launched various schemes and initiatives to enhance national security, some of the vigilant efforts includes:

(1) Cyber Surakshit Bharat Initiative – with an aim to spread cybercrime awareness, this scheme was launched in 2018 which focuses on developing safety measures for Chief Information Security Officers (CISOs) and frontline IT staff of almost all government departments.

(2) National Cyber Security Coordination Centre (NCCC) – it was implemented by Indian Computer Emergency Response Team (CERT-IN) in 2017, it was set up to detect any kind of cyber threat on web traffic, and it even monitors all communications between the Government and Private Service providers.

(3) Cyber Swachhta Kendra- introduced in 2017, it is a part of Government's Digital India Initiative. It functions to annihilate viruses or any infection which might harm the system.

(4) Indian Cyber Crime Coordination Centre (l4C)- the outlay of this project was Rs.415.86 Crores. It protects the system against the misuse from terrorist or extremist attack. Looks into cybercrime throughout the country. This project has several components such as :- National Cybercrime Threat Analytics Unit (TAU) ; National Cybercrime Reporting; Platform for Joint Cybercrime Investigation Team; National Cybercrime Forensic Laboratory (NCFL) Ecosystem; National Cybercrime Training Centre (NCTC); Cybercrime Ecosystem Management Unit; National Cybercrime Research and Innovation Centre.

(5) Computer Emergency Response Team- India (CERT-IN)- formed on 2004, it deals with cyber issues such as hacking and phishing.

---

29. The Constitution of India, art. 19.

Though chances to mouse-trap a huge crowd is very unlikely but prevention is better than cure, therefore one must take some serious measures personally while using any gadget such as avoiding free Wifi services in any public or private places; expunging unnecessary data and enabling remote-wipe feature whenever required; not tapping on any web-link sent through unknown sources; limiting access to your phone through pin, finger-lock, face-lock, whatever is applicable; upgrading your phone whenever necessary and installing VPN could be useful. Multifarious videos explaining how to configure devices securely are available on Commissioner's E-safety website, which is easily accessible.

IV. CONCLUSION

It takes less than five minutes for the attacker to implant the spyware and infect the person's device, without the knowledge of the user. Just how dangerous it would be give your control to a complete stranger without you knowing about it. This is what this malefic spyware does. Now, not only individuals but the "largest democracy" in the world is falling prey to a spyware developed by a private company.

For decades the surveillance agencies has been accused for its clandestine nature of working, sometimes being exposed in the public. The software industry has always claimed their assistance to Government but has failed miserably in attaining public trust. The rate at which this spyware is being used is not only violating human rights across the globe but is quite staggering. This issue should be addressed at the international platform, seeking participation and strenuous efforts from more and more countries.

The functioning of this spyware is *ultra vires* of the principles established in *K.S. Puttasawamy v. Union of India* [30]. The breach of privacy has led to a worldwide rage. It is disheartening to see that the Indian Government has refused to address this issue and has left the questions concerning their involvement and use untouched. Though this issue is pending before the Hon'ble Supreme Court, which has recently formed an Independent Committee of technical experts that will enquire and investigate into this matter thoroughly, stating that Centre cannot always let go of such issues wherever national security is concerned. A bench comprising of Chief Justice NV Ramana and Justices Surya Kant and Hima Kohli stated that there has not been any denial by the Centre regarding

30. *Supra* note 22.

this matter. The Committee will also give recommendations and amendments as and when required. According to the report by *The Indian Express* the bench on selecting the Committee members said, "It would be appropriate to state that in this world of conflicts, it was an extremely uphill task to find and select experts who are free from prejudices, are independent and competent. Rather than relying upon any Government agencies or any, we have constituted the Committee and shortlisted expert members based on bio-data and information collected independently."[31]

As citizens who are open to these vulnerabilities without adequate accountability from the government, we need to start pushing for a surveillance reform and the need for a judicial oversight in our surveillance framework. As of now everything is done by the Executive, including the review or the interception Orders. There is a critical need for judicial oversight of all interception orders like there is in the United Kingdom. The surveillance orders must be reviewed and approved by a judge before it can be enforced.[32]

Since we have unconditionally rooted ourselves to technology and gadgets, it is somewhat unfeasible to imagine life without it. There are manifold prospects of cutting-edge technology but the consequences comes in free, and even a little default can result into adversity. There is a need of awareness among people about their privacy rights, accurate knowledge can help in highlighting the fact that indirectly we are being deprived of freedom of speech and expression, and as rightly said by George Washington, *"If freedom of speech is taken away then dumb and silent we may be led, like a sheep to the slaughter house."*[33] With an ever increasing dependency and screen time, it is very likely that users' like us are more prone to fall for this spyware. Albeit the fact that the Government has launched various schemes keeping in mind safety of the citizens, risks are always susceptible. Demanding accountability from the Government has visibly become a futile effort. Thus, our safety rests in our own hands.

■

---

31. Ananthakrishnan G, "SC orders independent probe into Pegasus, says Govt can't get free pass every time 'national security is raised", *The Indian Express* (27th October 2021).
32. *Supra n*ote 5.
33. George Washington, First U.S President, address to the officers of army, (March 15, 1783).

"NOT SO PETTY": UTILITY MODELS PATENT PROTECTION FOR INCREMENTAL INNOVATIONS

*MAYANK TYAGI**

ABSTRACT : Patents are considered to be an important incentive for innovators to produce inventions and disseminate knowledge in society. However, the current patent system does not help the informal sector industries and the Micro, Small, and Medium Enterprises (MSMEs) in commercializing their innovations. Their innovations are incremental in nature, developed under limited resources that are largely influenced by local issues. These minor innovations cannot meet the high patentability standards of an examination and even if they do, the lengthy procedure and high cost of acquiring patents discourage such innovators from commercializing their innovations. This paper discusses the benefits of a Utility Models system in the context of the informal sector and how it can help in overcoming the problems faced by the grassroots innovators with respect to the present patent system. The paper also delves into different Utility Models regimes around the world and how India, where MSMEs and informal sectors have a major role in the economy could benefit from such a system and can protect the minor and incremental innovations emanating from these sectors.

KEY WORDS : Patents, Utility Models, MSMEs, Incremental innovations.

I. INTRODUCTION

Patents are considered to be an important tool of growth and innovation in this era of industrialization and technological development.

* Research Scholar, Law School, BHU, Varanai; mayanktyagi92@gmail.com

Patents have an important function in strengthening the knowledge base of a society and the technological and economic advancement of a country. Patents enable the inventor to capture the return from his investment made in the invention, that would otherwise be subject to appropriation by others[1]. However, patent laws have a very stringent level of patentability criteria that the incremental and minor inventions made by the informal sector are unable to meet. These grassroots innovations are being done outside the realm of the formal sector and are incremental in nature, making it difficult for them to overcome the regular patentability criteria. Also, complex patent procedures and the high cost of patenting prevents the MSMEs and small innovators from utilizing the benefits of patents. For a developing country, the informal sector has a very significant role in economic development as the majority of economic activities are being done there. Incentivizing the innovations generated by this sector could not only help in developing a healthy environment of competition among them but could also give a strong push to indigenous technological development leading to a strong domestic economy. Utility Models is one such system that can incentivize this sector by providing them short-term protection which is low cost and does not have a stringent procedural examination.

The present paper argues that for informal and grassroots innovators, an alternative system for awarding and protecting incremental innovation based on the utility models is suited for developing countries. The paper begins by examining the meaning and important characteristics of "Utility Models" and how they are different from regular patent regimes. The paper later moves on to discuss various utility models adopted by countries and their unique features. The paper then explores the possibilities of utility models regime in India keeping in mind the role of the informal sector in the country and concludes by suggesting that India indeed should look into framing a utility model-based system to capitalize on its grassroots and MSME sector innovations which could accelerate the growth and development of the domestic economy.

II. UTILITY MODELS PATENTS

There are certain innovations that may not fulfill the substantive requirements of inventive step as required by the traditional patent law but

1. Edmund W. Kitch, "The Nature and Function of the Patent System" 20 *Journal of Law and Economics* 266 (1977).

nonetheless, they do have some minor flashes of geniuses which seeks for an alternative means for protection. The "Utility Models" system provides protection to such minor inventions by granting protection similar to that of a patent system. Utility models are a short-term right granted for those inventions which lack the same degree of inventiveness that the patent law requires. This model is also referred to as "small patents" or "petty patents" or sometimes considered as a "second-tier" patent protection[2]. Utility model patents are generally aimed at protecting incremental or minor inventions which are novel and are capable of industrial application. The WIPO defines the utility model as "Similar to patents, utility models protect new technical inventions through granting a limited exclusive right to prevent others from commercially exploiting the protected inventions without consents of the right holders. They are sometimes referred to as "short term patents", "utility innovations" or "innovation patents". In general, utility models are considered particularly suited for protecting inventions that make small improvements to, and adaptations of, existing products or that have short commercial life. Utility models are generally used by local inventors."[3] The rationale behind utility models stems from the fact that social welfare enhancing inventions are cumulative in nature and that many of them are way below the threshold of novelty and inventive step as prescribed by regular patent law, making them ineligible for accommodation in the regular patent protection regime[4]. Presently, nearly seventy countries provide patent protection similar to the utility model protection in some form or another[5].

The term "Utility model" has not been defined in the international intellectual property paradigm as there is no uniform applicability of it

---

2. Dr. Hans Peter Brack, *Utility models and their comparison with patent and implications for the us intellectual property law system*, Boston College Intellectual Property & Technology Forum, 1, *available at* <http: // bciptf.org /wp-content/uploads/2011/07/13-iptf-Brack.pdf> (last visited on October 15, 2021).
3. What is a Utility Model, WIPO, *available at*: https://www.wipo.int/patents/en/topics/utility_models.html (last visited on 13 October, 2021).
4. Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* 178 (Edward Elgar Publishing Ltd., 2008).
5. Uma Suthersanen, "Utility models: do they really serve national innovation strategies?" in Josef Drexl and Anselm Kamperman Sanders (eds.), *The Innovation Society and Intellectual Property* 2 (Edward Elgar Publishing Ltd., 2019).

throughout the world depending upon the domestic laws. Despite that, according to Suthersanen, there are certain common features which could be found in all the national utility model laws like they give exclusive rights to the proprietor of the right for a term shorter than the regular term given under patent, novelty is the norm in all utility models systems, but the degree of it may vary from country to country and lastly, registration is mandatory but usually, there is no substantive examination of applications[6] and the fee of registration is usually low as compared to regular patent application. Apart from these common features, the utility model-based legal regimes around the world have certain points of difference that are important for us to look at. First, the subject matter of protection greatly varies from one country to another. For instance, German utility model law specifically bars discoveries, aesthetic creations, plans, and biotechnological inventions and processes from being regarded as the subject matter of the utility model[7]. Most of the utility model regimes simply follow the yardstick provided by the domestic patent law in defining subject matter[8]. Secondly, in most of the legal systems the requirement of technical advancement in the invention also known as 'inventive step' is either diluted or completely removed for the utility models. The level of novelty required differs from universal novelty to relative novelty to domestic novelty[9]. The only thing which goes similar to that of patents is the industrial applicability or utility[10]. Lastly, the granting procedure where some legal systems provide simple registration procedures while few call for a detailed examination process. Many systems offer a detailed search option for the applicant with the payment of a certain fee[11].

The proponents of the utility model system consider it significant for developing countries that are looking to advance their domestic technological

---

6. *Id*. at 4.
7. Gebrauchsmustergesetz (Utility Model Act), §1, §2.
8. *Supra* note 4 at 180.
9. *Ibid*. Universal novelty means that the invention is not anticipated anywhere in the world by writing or usage, prior to the filing of the patent application. Domestic novelty refers to non-prior anticipation of the invention by writing or ussge, only within the territory of the nation where the application for patent rights are being filed.
10. N. Ayse Odman Boztosun, "Exploring the Utility Models for Fostering Innovation" 15 *Journal of Intellectual Property Rights* 430 (2010).
11. *Supra* note 4 at 180.

capabilities and diffuse the usage of intellectual property at the local level[12]. Cheap and expedited application procedure in utility models helps in reducing the cost of the patent which is helpful for local innovators in developing countries. It promotes practical and useful researches and expands the pool of knowledge through disclosure which further helps in the diffusion of legally protected innovations. It would also ease the burden upon the patent authorities and they could divert their attention to the examination of general patent applications saving money and time of applicants[13]. The utility model can help the local and small innovators survive the onslaught of new and complex technologies by protecting their innovations and increasing their business life and role in the development of the economy[14].

Another important area that can be benefitted from the creation of 'utility models' legal regime is the SMEs, especially in the context of developing countries where their presence is quite large and cumulative innovation and imitating of ideas is quite prevalent. In developing countries, many breakthroughs and incremental innovation come from the SME sector than from larger enterprises. Such creations tend to have lower standard of inventiveness and are prone to be copied by rivals, thus deserve to get protected under a utility model system[15]. It can enhance access to the patent system for SMEs as a shorter examination period and a low level of inventive step requirement could reduce the cost of acquiring patents[16]. A fast and cost-effective utility model-based legal regime can improve the legal environment for those SMEs which are constantly involved in the process of innovation and adaptation[17]. Utility models encourage developing countries' enterprises especially SMEs to undertake minor incremental innovations and adaptations which have a cumulative effect upon the growth

12. Gautam Sharma and Hemant Kumar, "Exploring the Possibilities of Utility Models Patents Regime for Grassroots Innovations in India" 23 *Journal of Intellectual Property Rights* 122 (2018).
13. *Supra* note 10.
14. *Supra* note 12.
15. *Supra* note 5 at 8.
16. Mark D. Janis, "Second Tier Patent Protection" 40 *Harvard International Law Journal* 179 (1999).
17. Uma Suthersenan, "Utility Models and Innovation in the Developing Countries" UNCTAD-ICTSD, 7 (2006) *available at* <https://unctad.org/system/files/official-document/iteipc20066_en.pdf.> (last visited on April 20, 2021).

and total factor productivity could be considerable[18].

However, there are also certain risks associated with Utility models based legal regime that requires due attention. By lowering the threshold of inventive step and novelty under the utility model, there could be a proliferation of below-par and low-quality innovations which could actually harm the innovation process in the society. Also, the lack of substantive examination could certainly lead to more frequent exhaustive validity attacks on inventions protected under the utility model regime. This would lead to excessive litigations and uncertainty which could go against the interest of local innovators and SMEs[19]. Another related concern is that in interpreting the required level of inventiveness, the courts might deviate from the suggested standards which could lead to uncertainty in enforcing the rights granted under the utility model system[20]. The critics of the utility model also point out the risk of abuse of such a system by the large market players, who can flood a promising technological sector with numerous utility model patent applications, creating a serious problem for SMEs attempting to enter the market[21]. Therefore, a careful and well-thought approach is required in the implementation of utility models system to mitigate such undesirable results.

III. INTERNATIONAL PERSPECTIVE OF UTILITY MODELS: A BRIEF OVERVIEW

The Paris Convention for the Protection of Industrial Property 1883 recognizes utility models as one of the objects of industrial property and hence covered under the convention[22]. Apart form that, it nowhere defines it nor specifies its scope but merely confirms that principles, as given under

---

18. Nagesh Kumar, "Intellectual Property Rights, Technology and Economic Development: Experiences of Asian Countries" 38 *Economic and Political Weekly* 223 (2003).
19. *Supra* note 16 at 182.
20. Peter A. Cummings, "From Germany to Australia: Opportunity for a Second-Tier Patent System in the United States" 18 *Michigan State Journal of International Law* 321 (2010).
21. *Supra* note 16 at 187.
22. Paris Convention for Protection of Industrial Property, 1883, art. 1(2): "The protection of industrial property has as its object patents, **utility models**, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition."

the convention, would be applicable to utility models also. The TRIPS agreement of 1994 does not explicitly mention utility models but by virtue of its article 2(1), relevant provisions of the Paris convention are extended to all WTO members which includes article 1(2) of the Paris Convention[23]. If we sift through history, the seeds of the present utility models regime were sown by the United Kingdom's Utility Designs Act of 1843[24]. The scope of the act was confined to external appearance or form of the invention, not its function or principle. In other words, the act only protected the designs for the shape or configuration of useful articles of manufacture[25]. This act encouraged other European countries to also consider such a model for their intellectual property regime.

The German patent law at that time had a very stringent patentability standard, specifically with regard to 'inventiveness' which was too difficult for minor inventions to overcome[26]. Taking a cue from the United Kingdom, Germany also in the year 1891 came up with its own utility model act "Gebrauchsmuster" which has now become the prototype for other countries. The act, which was recently amended in the year 2017, protects any invention that is new, involves an inventive step and is capable of industrial application[27]. The law also has certain excluded subject matters which include, apart from the usual matters excluded under the patent law, inventions concerning processes and biotechnology inventions[28]. There is no examination with regard to novelty, inventive step, and industrial applicability prior to registration under the act[29]. The subject matter is considered novel if it does not form part of the state of the art which means any knowledge by the written description or use made available to the public within the territory of Germany[30]. The protection under the act is granted for a period of ten years which includes paying of maintenance fees from fourth to tenth year[31].

23. *Supra* note 4 at 181.
24. *Supra* note 16 at 156.
25. *Ibid*.
26. *Supra* note 20 at 303.
27. *Supra* note 7, §1.
28. *Supra* note 17 at 16.
29. DPMA, "Utility Models: An Information Brochure on utility model protection" 4, *available at* < https://www. dpma.de/docs/english/ broschueren_eng/bro_utilitymodels_en.pdf.> (last visited on April 10, 2021).
30. *Supra* note 17 at 16.
31. *Supra* note 7, & 23.

If we turn our gaze to the east Asian neighbors of India, many of them have adopted utility model legal system for the protection of minor inventions in their intellectual property regimes. Japan was the first Asian country which enacted its Utility Model Act in the year 1905 on the lines of German law in order to protect minor inventions and accelerate the industrial development of the Japanese economy[32]. The subject matter of the Utility law comprised of any device which is industrially applicable and is related to the shape or construction of articles, explicitly excluding processes and substance[33]. Initially, there was no fundamental difference between the structure of the patent and utility model system apart from the duration of right which was six years and degree of inventive step[34]. All the applications filed under the Utility Model Act had to go through a substantive pre grant examination. However, by the end of 1980's there was a substantial increase in the applications because of the low cost of utility models and an increase in the applications by both large and small companies due to the confidence in the validity of the utility models[35]. This led to congestion of the patent office and increasing backlogs of unexamined applications. To counter this problem, a major overhaul of the act was carried out in 1994 in which the system of substantive examination was done away with. Currently, the term of protection under the Utility Model Act is ten years. It has been argued that this system has helped in diffusing technological information and incremental innovations in the domestic Japanese industries, which had a positive impact on the productivity growth of Japan[36].

Malaysia has a two tier patent protection system under it Patents Act 1983, in which two types of protection are available, first through the grant of regular patents and secondly through the issue of certificate for "utility innovation"[37]. A utility innovation is an exclusive right granted to minor inventions which do not have to pass the inventiveness test as required of a patent[38]. Only one claim is allowed under utility innovation and a

32. *Supra* note 20 at 306.
33. Dr. K S Kardam, *Utility Model: A Tool for Economic and Technological Development: A Case Study of Japan*, 44 (2007) (Final Report in Fulfillment of Long-Term Fellowship, Tokyo Institute of Technology) *available at* <https:// www.ipindia.gov.in/writereaddata/images/pdf/ FinalReport_April2007.pdf> (last visited on March 20, 2021).
34. *Id.* at 41.
35. Supra note 17 at 17.
36. *Supra* note 33 at 43.
37. *Supra* note 17 at 21.
38. MyIPO, "Patent Basics", *available at*: https://www.myipo.gov.my/en/ 1814-2/ (last visited in September 23, 2021).

substantive examination is done with respect to prior art before granting of a certificate of utility innovation[39]. Apart from the above countries South Korea, Vietnam, Taiwan, China have also adopted the "Utility Models" system according to their socio-economic demands.

IV. UTILITY MODELS AND INDIA: EXPLORING THE POSSIBILITIES

Currently, in India, there is no alternative system on the lines of "Utility Models" for the protection of minor innovations apart from the regular patent protection. The presence of a large-scale informal sector and MSMEs in India surely provides a strong case for adopting such a system for these sectors where most of the innovations are incremental and minor. The MSMEs have a significant contribution to the Gross Domestic Product (GDP) of the country which is constantly increasing over the years[40]. They have an important role in generating employment and industrializing rural and backward areas thus, ensuring equitable distribution of wealth and national income[41]. This sector has a large pool of grassroots innovations which requires a legal framework to be utilized to its fullest. Incremental innovations have a very crucial role to play in the generation of knowledge and enrichment of public innovations stock. These innovations certainly require some sort of legal protection which would not only prevent imitation but also incentivize the small and individual innovators to extract commercial benefits out of it.

However, the strict level of inventiveness and novelty as prescribed under the present patent law would exclude most of these innovations and the grassroots innovators would fail to capitalize on the benefits of the patents[42]. In addition to that, the complicated and lengthy application procedure makes patents an unattractive proposition for these sectors. The IPR policy of 2016 stresses on to the need to spread awareness of intellectual property rights amongst the MSMEs[43]. A Utility Model system that is cost-effective, less time consuming, and does not have substantive pre-grant examination can certainly help in not only spreading awareness but would

39. Laws of Malaysia Act 291, Patents Act 1983, Second schedule, s. 28.
40. Ministry of Micro, Small and Medium Enterprises, "Annual Report 2020-21" 22 (March, 2021).
41. *Id.* at 23.
42. *Supra* note 12 at 126.
43. Department for Promotion of Industry and Internal Trade, "National Intellectual Property Rights Policy 2016" 5 (May, 2016).

also increase and strengthen the innovative capabilities of MSMEs and grassroots innovators. The utility model would provide them with an incentive to innovate and since the cost is low, the investment requirement is also much smaller[44]. It would also help in preserving traditional knowledge by incentivizing traditional models of innovation based upon traditional methods available by the local population. Mainstreaming such traditional knowledge would ward off any attempt by outsiders to exploit it and gain commercial benefits out of it[45]. This system would also help in ironing out the inadequacies of the patent act and can certainly lessen the burden of the patent examiners. A bottom-up approach is required to diffuse these innovations made by the MSMEs in the market as they are in a better position to understand the issues faced by the common people as compared to the formal sector[46].

V. CONCLUSION

Studies have shown that soft patent regimes like "Utility Models" have helped an important role in diffusing technological advancements and facilitating a firm level of technological advancement in the countries, especially in Eastern Asia[47]. For a developing country like India which is largely dominated by MSMEs and the informal sector, a utility models system could certainly provide an impetus to its growth and development. Utility models have certain drawbacks also which could not be ignored at any cost, hence what India could do is to come up with its own Utility Model system which is tailored according to its own needs and circumstances specifically with regard to the informal and MSME sector. Such a system must be target-oriented, aiming towards specific sectors of the domestic sector of the economy which have the potential for growth and development and which could help in creating and promoting an environment of innovation. The utility model can work in tandem with the patent system where the latter would deal with high-level and technologically complex innovations, leaving incremental innovations for the former. Utility models system can indeed help in rewarding local innovators and can act as revitalizing factor for MSMEs in the "Make in India" movement of the Government of India.

■

44. Malathi Lakshmikumaran and Shilpi Bhattacharya, "Utility Models: Protection for Small Innovations" 46 *Journal of the Indian Law Institute* 328 (2004).
45. *Id*. at 330.
46. *Supra* note 12 at 128.
47. *Supra* note 18 at 214.

COMPARATIVE ANALYSIS OF LAND ACQUISITION ACTS IN INDIA

*MADAN MOHAN SHAHI**

ABSTRACT : Land acquisition is necessary for the progress of a country in order to provide employment, social infrastructure, physical infrastructure and other public facilities In India. Land Acquisition has been brought out by a set of legislations: (i) the Land Acquisition Act, 1894, which was imposed during the British rule (ii) the Land Acquisition, Rehabilitation and Resettlement Bill, 2013 brought out by the United Progressive Alliance (UPA) Government, which was different in several aspects as compared to 1894 Act; (iii) the Land Acquisition, Rehabilitation and Resettlement Ordinance, 2015 brought out by the National Democratic Alliance (NDA) government, which has changed many clauses of the 2013 Act. This paper makes a comparative analysis of the Land Acquisition Acts in India through a debate of the various provisions and also the case analysis of the effect of differences of the Act provisions for three different development projects requiring land. The case analysis points to the need for addressing ground level issues in order to make land acquisition successful.

KEY WORDS : Patents, Utility Models, MSMEs, Incremental innovations.

I. INTRODUCTION

Eminent domain law is the necessary power of the State to take hold of citizen's private property, take away it, or the capture of a citizen's rights in property with due monetary compensation, but without the property owner's consent. It is considered to be one of the most controversial and

* Research Scholar, Law School, BHU, Varanasi; shahimadanmohan8@gmail.com

politically external instruments of exercising State power which is used in numerous parts of the world (Bedi and Gangwani 2015)[1]. However, implementing the eminent domain law is not easy task and it is very hard to deal with ground level issues. The implementation of eminent domain (or, compulsory acquisition of land) by the State frequently results in various social, cultural, economic and psychological trouble for the affected communities i.e. land and property owners. Such acquisition and the consequent displacement not only leads to loss of economic assets, habitat and livelihood but also disrupts the communities, social relationships, cultural identities, local markets for goods as well as labour, thus placing the ousted in a "spiral of impoverishment". In view of such hurting consequences, a legal rule representing eminent domain needs to restrict its application only to the cases of 'compelling public interest' and further minimise (or, compensate suitably for) the socio-economic costs of land acquisition and consequent displacement of property owners. Moreover, it is also necessary that such rule also include provision for a fair restoration of standards of living, community relations and production systems enjoyed by the affected persons prior to land acquisition so that the community moves on an ascent path.[2]

Depending on how the important power is used, it can clear the way for quick economic growth, technological progress and infrastructure development; otherwise, it can breach upon property rights, the economic interests of poor and helpless groups, and fundamental principles of justice[3]. In India, the legal foundation for eminent domain was established by colonial era law - the Land Acquisition Act 1894, which continued to prevail and served the purpose until 2000s.[4] The Land Acquisition Act, 1894 allowed

---

1. P.Bedi, and S.Gangwani, (2015), "Legislative Brief - The Land Acquisition, Rehabilitation and Resettlement Bill", 2011, PRS Legislative Research Institute for Policy Research Studies, *available at:* at http://www.prsindia.org/uploads/media/Land%20and%20R%20and%20R/LARR%20- %20Final%20Brief.pdf
2. https://www.researchgate.net/publication/327155932_Comparative_Analysis_of_Land_Acquisition_Acts_in_India_A_Case-Based_Approach visited on 08/10/2021
3. M. Ghatak., S. Mitra, D. Mookherjee and A. Nath , "*Land Acquisition and Compensation: What really happened in Singur* ?" 32-44,(Economic and Political Weekly of India, XLVIII ,21,2013):
4. J. Ghose., 2015, Bill Summary: The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Bill, 2015, PRS Legislative Research Institute for Policy Research Studies *available at*: http://www.prsindia.org/uploads/media/Land%20and%20R%20and%20R/Bill%20Sum mary%20-%20LARR%20Bill%202015.pdf

government to acquire private land for public purposes after paying a government-fixed compensation to cover the losses incurred by landowners from surrendering their land to concerned public agency. This act was criticized for its tough nature i.e., the State was authorized to acquire the land even without the willingness of land owners to part with it. Yet it survived over a very long time due the easy process and also due to undeveloped land markets in an agrarian dominant economy.

In the last some years, the Government of India has understood the necessitate for bringing up new acts rather than making small changes so that land acquisition can be achieved while protecting some of the rights of its own citizens. In the procedure, the Land Acquisition Act has been modified and brought out in the form of a new legislation Land Acquisition, Rehabilitation and Resettlement (LAR&R) Bill, 2013; it has been further been subject to some more changes and to be brought out as Land Acquisition, Rehabilitation and Resettlement (LAR&R) Ordinance, 2015. The implications of the changes in land acquisition act are not fully understood by different stakeholders both legally and operationally. Therefore, this case paper attempts to bring out the major legislative changes in the form of a comparative analysis of the provisions of these acts in the next section. The implications of the changes in the provisions are then brought out in the form of select cases, each of which brings out these changes in a comparative approach. Finally, the case paper concludes with the implications of the Land acquisition act changes with reference to the case projects and also spells out the major learning's.

II). EMINENT DOMAIN AND THE RIGHT TO LAND IN INDIA: A COMPARISON

The Land Acquisition Act, 1894 (LAA 1894) is the first important domain act that came into being under the British rule. This act was required to be replaced by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (RFCT LAR&R 2013)), which was promulgated by the United Progressive Alliance (UPA) government after broad consultations and several rounds of discussion of first legal draft prepared in 2011. The next being the Right to Fair Compensation for Land Acquisition, Rehabilitation and Resettlement (Amendment) Bill, 2015 which is now in the parliament seeking some amendments to the RFCT LAR&R 2013. In the current section of the paper, we will talk about the features of all these three important domain/

land acquisition acts of India.[5]

i) Land Acquisition Act, 1894

Land Acquisition Act 1894 (LAA 1894) is a well drafted and well served piece of legislation that served land acquisition purpose for more than a century[6]. In common land acquisition is composed of three macro-processes (Mahalingam and Vyas 2011):

- Ø First, affected parties and their land ownership are to be identified.
- Ø Second, fair processes by which stakeholders are notified of the acquisition and are given a opportunity to voice their views followed by the declaration.
- Ø Finally, an satisfactory compensation package to be arrived upon and distributed.

On the face of it, the LAA 1894 seems to acquire all these three issues into consideration (GOI 1985). The Act contains a definition of "persons interested" in the project which is intended to be used to determine groups affected by the acquisition of the land, essentially the owners of property i.e., farm or non-farm land. A detailed land acquisition process consists of public authorities necessary to notify land owners prior to acquiring the land and giving the affected stakeholders with an chance to contest both the acquisition of land (on the grounds, for instance, that a particular parcel of land is not wholly or in part required for the project, that due process was not followed, or the purpose of acquisition is not for public good), and determining the amount of compensation that is to be paid to them. Here again, LAA 1894 defines some ways by which compensation can be awarded-including a consideration of the market value of land, assets present on the land, income derived from the land and a solarium for compulsory acquisition (GOI 1985), which is based on the commonwealth knowledge.[7]

However, there are some shortcomings in the practical implementation of the Act (Raghuram, Bastian and Sundaram, 2009):

---

5. K. B. Nielsen," Land, Law and Resistance" XLVI (41) *Economic and Political Weekly of India,* 38-40 (2011).
6. "Tenth Report of the Law Commission of India", 1958 *available at* http:// lawcommissionofindia.nic.in/1-50/Report10.pdf (visited on Oct 20, 2021)
7. Raghuram, G. S. Bastian and S. S. Sundaram (2009), "Mega Projects in India: Environmental and Land acquisition Issues in Road Sector", *Working Paper, IIM Ahmedabad* 03(2009)

* First, there is no clear base as to how affected parties can be determined and the existing definition is imprecise. Very frequently, only the minimum subsets of landowners who are affected are identified. Encroachers, sharecroppers, landless labourers and so on, who have an interest in the land, are not compensated. some people practicing agriculture are not lawfully registered and are as a result not eligible for compensation, foremost to widespread unrest.

* Second, the procedure of acquisition is very time-consuming and can take up to three years even if implemented without undue conflict. Further, although the wide steps of the land acquisition process are outlined in the Act, an enormous amount of discretion is vested upon the district collector and deputy collector (or tehsildar), who effectively adjudicate on several objections related to the acquisition as well as on the compensation to be provided. This frequently leads to decisions and awards that are ad hoc and are not willingly accepted by the local community[8].

* Finally, no clear method is given as to how compensation must be calculated. Government officials often consider the least value derived from all probable compensation approaches and as a result the final compensation arrived at is often an order of magnitude lower than that expected by landowners. The actual value of this compensation is further reduced due to the time lag between determining the compensation and awarding it to project-affected parties.

Project-affected stakeholders then need to seek recourse to the judiciary. The unfairness of the compensation amount has been demonstrated in some cases, where, the courts have ruled that the government pay compensation more than three times the original amount, to affected parties. Nevertheless, the process of obtaining such an award is extremely lengthy and in the interim, affected groups are effectively uncompensated and landless.

ii) Land Acquisition, Rehabilitation and Resettlement Act, 2013

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 had introduced some

8. A. Mahalingam, and A. Vyas (2011); "Comparative Evaluation of Land Acquisition and Compensation Processes across the World" Vol XLVI, *Economic & Political Weekly* 32 (August 6, 2011)

important changes to India's land acquisition law. The primary among them is the vastly compensation for the land owners, who were also recognized as urban and rural land owners. The law therefore distinguished the procedure of differential forces of land markets operating in urban and rural setting while determining land value. Therefore, the cash award required was raised to be at least four times the estimated local market value of land in rural areas, and at least twice in urban areas. The act also mandates that all affected parties be paid a Rehabilitation and Resettlement (R&R) package in addition to the cash compensation for lost assets so that the displacement costs are met by projects. The scope of 'Affected parties' was also expanded to the persons and families whose primary source of income was the land that is being taken, which therefore includes the intended beneficiaries as tenants of property, sharecroppers and agricultural workers who were employed on the seized land (Bedi and Gangwani 2015).[9]

The stipulated R&R package for affected community includes a variety of entitlements, including transportation and resettlement allowances, a monthly income for one year, and a job for one family member which can be exchanged for a lump sum payment. The compulsory R&R benefits may add up to the cash value of nearly Rs. 6.5 lakhs for every affected family (Bedi and Gangwani 2015), which were ignored so far. There are, in addition, conditional benefits to be provided to affected families, such as the provision of constructed housing (with different built space entitlement for rural and urban areas) when there is loss of homestead, some land-for-land in the case of irrigation and urbanization projects, and a share of capital gains if the land is resold undeveloped. Even industries buying land on the open market will have to meet R & R obligations if the procured area is 100 acres or more (50 acres in urban areas).[10]

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 requires that a Social Impact Assessment (SIA) be conducted to identify the affected families and calculate the social impact when land is acquired. A committee of independent experts examines and approves the social impact assessment

9. https://www.researchgate.net/publication/327155932_Comparative_Analysis_of_Land_Acquisition_Acts_in_India_A_Case-Based_Approach (last visited on Oct 25,2021

10. A. Jojan,., A. Chaturvedi, A. Talpade, M. Bose, S. James and S. Bhattacharjee (2013), "Of platitudes and million-dollar promises-A Critique of the land acquisition, rehabilitation and resettlement bill 2011" 3 *Journal of Indian Law And Society*, (Winter, 2013)

of the project, an administrative committee reviews if it serves the public interest and also if the benefits outweigh the costs, and the disputes are to be referred to a specially constituted body instead of civil courts. Multi-cropped land is proposed not to be acquired except under special conditions, and, even under such, land acquisition must not exceed 5% of the cultivated area in the district.

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013[11] necessary that if land acquired under it remained unutilized for five years, it would be returned to the original owners or the government land bank. The Ordinance states that the period after which unutilized land will need to be returned will be five years, or any period specified at the time of setting up the project, whichever is later. The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 also states that the Land Acquisition Act, 1894 would continue to apply in certain cases where an award was made under the LAA 1894. However, if such as award was made five years or more before the enactment of the RFCT LAR&R Act 2013, and the physical possession of land has not been taken or compensation has not been paid, the LAR&R Act 2013 provisions would apply (GOI 2013).

The Ordinance also states that while calculating this time period, any period during which the proceedings of acquisition were held up: (i) due to a stay order of a court, or (ii) a period specified in the award of a Tribunal for taking possession, or (iii) any period where possession has been taken but the compensation is lying deposited in a court or any account, will not be counted.

iii) Land Acquisition, Rehabilitation and Resettlement Bill, 2015

The RFCT LAR&R Bill 2015[12] is still under the process of becoming a law and it seeks to make some amendments to the earlier act of 2013. It has been passed by the Lok Sabha but yet discussion of its controversies is going in Rajya Sabha to get passed.[13] It has same lines as that of RFCT LAR&R 2013 Act but with some major modifications. The modifications are as below (Chopra 2015).

---

11. Land acquisition Act, 2013 (Act no.30 of 2013)
12. Goi (2015), The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Bill, 2015, Bill No. 20-C of 2015 Web page.
13. Ibid

The RFCT LAR&R Act 2013 exempted 13 laws (such as the National Highways Act, 1956 and the Railways Act, 1989) from its purview. However, the RFCT LAR&R Act 2015 required that the compensation, rehabilitation, and resettlement provisions of these 13 laws be brought in consonance with the RFCT LAR&R Act 2015, within a year of its enactment, through a notification. The Ordinance also brings the compensation, rehabilitation, and resettlement provisions of these 13 laws in consonance with the RFCT LAR&R Act 2013.

The RFCT LAR&R 2015 Ordinance creates five special categories of land use to be exempt from the provision of public consent: (i) defence, (ii) rural infrastructure, (iii) affordable housing, (iv) industrial corridors, and (v) infrastructure projects including Public Private Partnership (PPP) projects where the central government owns the land.[14]

The RFCT LAR&R Act 2013 requires that the consent of 80% of land owners is obtained for private projects and that the consent of 70% of land owners be obtained for PPP projects. The new Ordinance exempts all the five categories mentioned above from this provision of the Act. In addition, the Ordinance permits the government to exempt projects in these five categories from the following provisions, through a notification:

The RFCT LAR&R Act 2013 excluded the acquisition of land for private hospitals and private educational institutions from its purview. The new Ordinance removes this restriction. While the RFCT LAR&R Act 2013 was applicable for the acquisition of land for private companies, the new Ordinance changes this to acquisition for 'private entities'. A private entity is defined any entity other than government entity, and could include a proprietorship, partnership, company, corporation, non-profit organisation, or other entity under any other law. It therefore expanded the scope of 'purpose' from strictly 'public agency' to lenient 'public-like private body'. The compulsion of the current government to make such change lies in its drive to propel economic growth through large scale industrial and urban development. However, taking such legal short-cuts may only harm the citizenry and may become detrimental in the long term.

III. COMPARATIVE ANALYSIS OF LAND ACQUISITION PROVISIONS: A STUDY OF THREE CASES

In this section, a comparative analysis of land acquisition and R&R

14. Supra note 10 at 4.

under the three legislations is carried out with the help of three cases:

* the first being Tata Nano Project in Singur;
* the second being Noida Development; and
* third being Koyambedu Market, Chennai.

While first two cases are examples of failures of land acquisition and the third case is an example of success. These cases can also help us to understand further reforms in Land Acquisition Acts. We introduce these three projects first and later we compare Land Acquisition Acts considering these projects.

i) Case 1: Tata Nano Project, Singur[15]

This case is based on Divya Gupta (2014). In the second half of 2006, the West Bengal government acquired 997 acres of prime agricultural land in Singur are of West Bengal state (Refer figure 1) in order to enable M/s Tata Motors, a leading industry house in India, to build a factory for manufacturing Nano car, its new model touted as small and cheap car. In order to do so, the State government used its power of eminent domain under the aegis of the 1894 Land Acquisition Act.[16] The West Bengal government subsequently decided to acquire the area required for the car factory and offer compensation to the farmers and other land owners whose lands were being acquired as required by the 1894 Act. The local community of Singur was incensed by this action, and put up resistance led by farmer households against forced acquisition and displacement.[17]

This resistance soon snowballed into a protest movement, which the main opposition party, the Trinamool Congress (TMC) subsequently galvanised. The state government subsequently offered to improve the terms of compensation, including 25% compensation for tenant farmers engaged in cultivation of acquired plots. No plans were offered to compensate agricultural workers claiming to have lost employment on acquired lands. Local outbreaks of violence occurred, and the protests acquired national and international media attention. Eventually, two years later, after being frustrated with the protests and non-acquisition, M/s Tata

15. https://www.livemint.com/Politics/Yrl5OkSielFvHttnG4AajM/CPM-govts-acquisition-of-land-for-Tata-Motors-in-Singur-ill.html (last visited on Oct 10, 2021

16. *Surya Pal Singh v. State of Uttar Pradesh*, 1952 SCR 1056, at 1073; *State of Bihar v. Kameshwar Singh*, AIR 1952 SC 252

17. https://www.researchgate.net/profile/Ramakrishna-Nallathiga (last visited on Oct 12, 2021)

Motors decided to withdraw from West Bengal, and took the Nano car manufacturing factory to Sanand, Gujarat.

ii) Case 2: NOIDA Development[18]

This case is based on the publication of Patil (2012). Over the past ten years, the National Capital Region (NCR) has been rapidly developing; New Delhi and its vicinities in the NCR particularly witnessed high growth. New Okhla Industrial Development Authority (NOIDA), which is located on the eastern side of Yamuna River, has also been experiencing rapid development as a commuter town of the capital, as can be seen by many industrial complexes being built one after another[19].

The Supreme Court set aside land acquisition (156.3 hectares) carried out in 2009 at Shahberi Village Uttar Pradesh State (UP), Greater Noida, Gautam Budh Nagar Districtby the UP government and Greater Noida Industrial Development Authority (GNIDA), which is an UP government body. Based on this judgment, land was returned to the original owners (most of them are farmers). This situation occurred because the land acquisitions were originally carried out by the UP State government headed by Bahujan Samaj Party (BSP) as a part of the Greater Noida's Industrial Development Plan, pursuant to the emergency clause (Article 17) stipulated in the LAA 1894, whereby procedures for residents' objections (Article 5A) were dispensed with. The grounds for the judgment of the Supreme Court were: (1) such urgency was not likely to be present, and (2) GNIDA changed the purpose of land use from industrial use to residential use without the prior approval of the State government.[20]

iii) Case 3: Koyambedu Market, Chennai[21]

This case is based on the documentation retrieved from the CMDA (2009). The Koyambedu Wholesale Market Complex has been established by Chennai Metropolitan Development Authority (CMDA) with an objective of decongesting the central business district. The market is located out of the congested areas of Chennai. But at the same time, it is easily accessible to the city's residents. As highlighted the market complex is

18. Surendra Kumar & Ors vs Greater Noida Ind. Development 2015 (CIVIL APPEAL NO. 4916 OF 2015)
19. https://www.scconline.com/blog/post/2021/08/03/land-acquisition-dispute/ visited on 09/10/2021
20. https://cprindia.org/articles/land-acquisition-development-and-constitution visited on 15/10/2021
21. *Chennaikoyambedu* v *State* wp. No. 28404 of 2015

located adjacent to Chennai Mofussil Bus Terminus (CMBT) and it is connected to both the Central and Egmore railway stations and Chennai International Airport through highways. The market complex development has been planned in three phases over an area of around 295 acres. In the first phase, the wholesale market for perishables has been developed over an area of around 60 acres.

Koyambedu Wholesale Market Complex has around 3154 shops where vegetable, fruit and flower is sold and is one of the largest markets in Asia (Figure 3 shows the location). The market has four discrete blocks; two for vegetable and one each for fruit and flower market. Approximately one lakh people visit the market complex daily for trading purpose, subsequently more vehicles also enter the market, which increases significantly during peak festival seasons. The developed market complex has good infrastructure facilities including well designed shops in various sizes; truck bays, wide heavy duty roads for easy movements of goods. The market is provided with adequate power and water supply, proper sanitation facilities, drainage and sewerage facilities. The general guidelines for land acquisition within the LAA 1894 were followed and CMDA went beyond them, and the process was completed in 28 months. Cash compensation was provided to land losers on the basis of the market value of the land, standing crops, a solatium of 30% and interest charges of 12% for the period between notification and acquisition. Furthermore, the affected families were rehabilitated and resettled in new location. About 424 sale deeds were considered and all but two were rejected on the grounds of being artificially priced. Even out of these deeds, the lowest was picked to form the basis of compensation, leading to some dissatisfaction amongst the affected parties. However, since project authorities had built houses in nearby locations, allowed encroachers to resettle and provided employment opportunities in the project, protests and resistance were minimal.[22]

IV. CONCLUSION

The above cases can be now summarised for comparison of the application of various Land acquisition acts and show some broad directions. Tata Nano project's land acquisition case clearly indicates the reason of its

22. M. Cernea, "Why economic analysis is essential to resettlement – A sociologist's view" XXXIV(31) *Economic and Political Weekly of India* 2149 (1999).

failure. This failure was due to improper market rate consideration of lands which led to less compensation paid to farmers. The other reason being, no consent was obtained from the farmers whose land was acquired, they got angry due to this and protested against the government. As this case falls under LAA, 1894 there was no R&R for the affected people. Moreover, the food security issue was not given any consideration during the acquisitions which lead to reduced supply of various food grains. A lot of lessons were learned by the government from this case, which helped them to formulate LAR&R, 2013. If this case would have fallen under LAR&R, 2013 or LAR&R, 2015 it would have cost more to Tata group, but would have certainly led to its success. Also, it was a lost opportunity as the employment in West Bengal would have increased to a great extent considering various ancillary industries associated to Tata Nano Project.

The Land Acquisition Acts in India and its transformation is that the Government was on learning curve by including stakeholders, increasing compensation and making R&R mandatory. But this learning is getting reduced with very painful escape routes sought in new bill of 2015. The transformation from 1894 to 2013 to 2015 is turning out to improve the success of large development projects. It is already understood that land acquisition becomes an impediment if it is not handled carefully and properly thereby affecting project success (Nallathiga 2009). Although changes to eminent domain act are needed as per the need of the hour, they need to strike a balance between 'gainers' and 'losers'; also, what is more important is that the implementation of the Acts at ground level from the spirit with which they have been prepared. More and more amendments will make the bill to land nowhere due to political oppositions and this political conflict may also affect the project success.

■