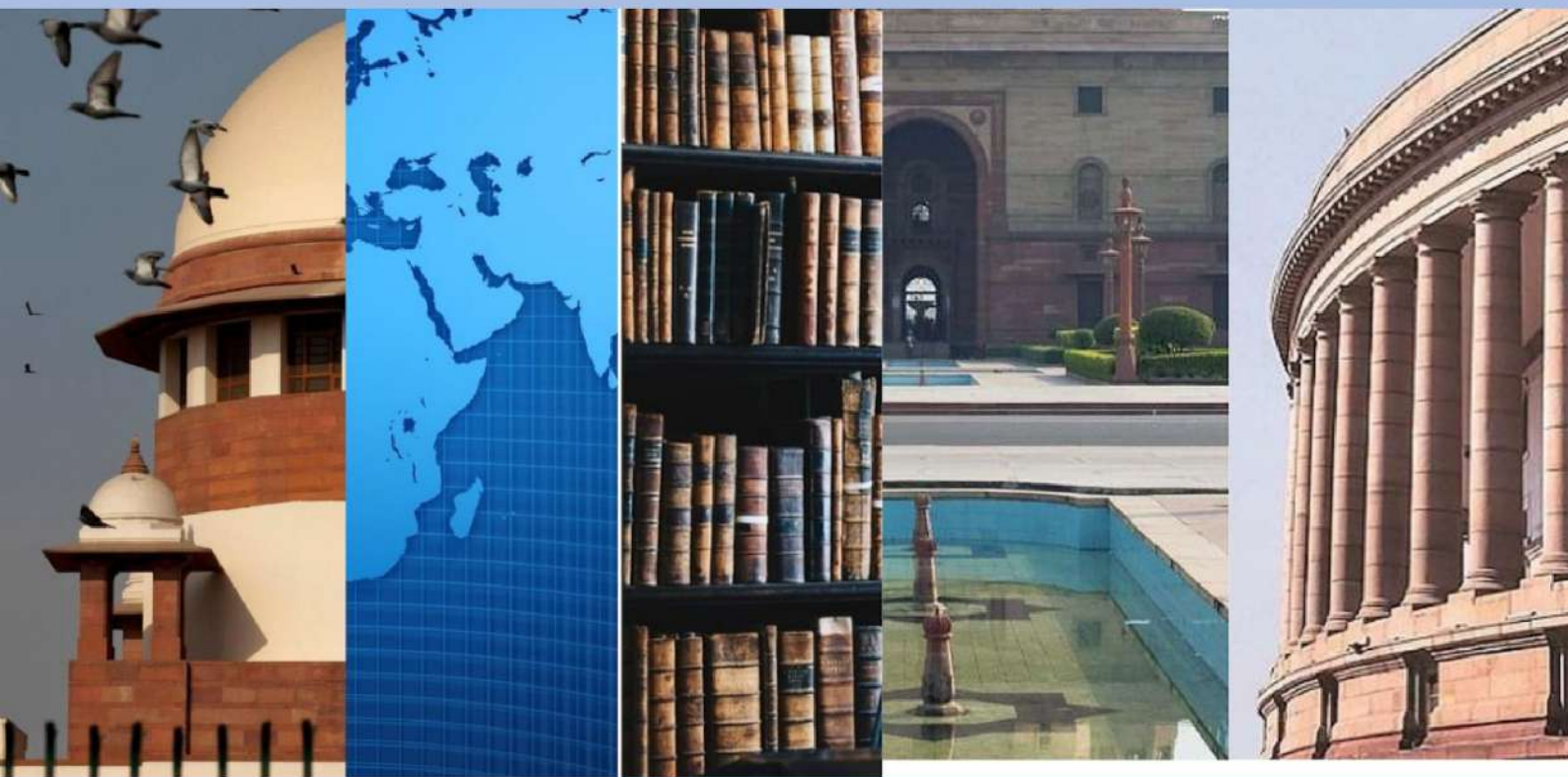


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TABLE OF CONTENTS

1. Responsibilities of States in International Refugee Law: A Retrospective Study in South Asia	
<i>Tarazi Mohammed Sheikh & Anurodh Koirala</i>	6
2. Quest for Women’s Right to Bodily Integrity: Reflections on Recent Judicial Inroads in India	
<i>Dr. Priti Rana</i>	25
3. Comparative Study of Sui Generis Geographical Indication Laws in South Asian Countries: A Way Forward to Nepal	
<i>Laxmi Sapkota</i>	31
4. Cognizance of Human Rights of Intersex People in India and the Globe	
<i>Suraj Tomar & Abhishek Dey</i>	54
5. Growth of E-Commerce and Environment Protection in India	
<i>Parth Sharma</i>	68
6. Corporate Social Responsibility and Performative Activism in the Fashion Industry	
<i>Nidhi J Shetty</i>	82
7. Modernity and Risk Society: An Inquiry of Interplay of Locals during the Risk	
<i>Samrat Sharma</i>	100
8. Rights of the Accused: A Special Emphasis on the Aspects of Discharge and Video-Conferencing Trials in the Indian Criminal Justice System	
<i>Avesh Malik & Gaurav Kumar</i>	116
9. The Doctrine of Constitutional Morality: New Arsenal for Judicial Review	
<i>Pearl Monteiro</i>	134
10. Free Legal Aid in India: Role of Lok Adalats in Administration of Justice	
<i>Vanita Sharma</i>	150

RESPONSIBILITIES OF STATES IN INTERNATIONAL REFUGEE LAW: A RETROSPECTIVE STUDY IN SOUTH ASIA

TARAZI MOHAMMED SHEIKH* & ANURODH KOIRALA**

ABSTRACT

The laws governing the rights and protection of refugees are some of the most significant in the international system, yet they are also some of the most contentious. There have been numerous shifts in the primary studies of international refugee law (IRL) since its inception in 1951, arguably after the espousal of the Geneva Convention Related to the Status of Refugees. Particularly in terms of determining the responsibility of the States involved in the refugee crises, there have been several alterations over time. However, to a large extent, the underlying question of the responsibilities of States in terms of governing the rights and protection of the refugees lies in the determination of the corresponding responsibilities between the sending and receiving States. This paper aims to track the current and preceding shifts in the study of States' responsibilities pertaining to refugee rights and protection in South Asia. It then applies the retrospective study into the regime of international refugee law, assessing the implications and effects of the emendations.

I. UNDERSTANDING THE SCOPE OF INTERNATIONAL REFUGEE LAW

A. The Structure of International Refugee Law

International refugee law [hereinafter “*I3RL*”] is a concern of public international legal studies that deal with the rights and protection of refugees and its interconnection with the responsibilities of the international community.¹ When the office of the United Nations High

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** Law Student, Kathmandu School of Law, Nepal.

¹ The Handbook on Procedures and Criteria for Determining Refugee States and Guidelines on International Protection, UNHCR, 2019.

Commissioner for Refugees [hereinafter “*the UNHCR*”] was created in 1950 following the aftermath of the Second World War, several responsibilities to play a crucial role in developing international refugee law were assigned to it.² However, the distinct development of the study of international refugee law began only after 1951 following the establishment of a regime for the international protection of refugees by the international community. Moreover, the settlement of the definition of refugee in 1967 further accelerated the study significantly. It provides a legal framework and sets of procedures to protect persons seeking asylum and persons recognized as refugees under the legal definition. There are several interlinks between the studies of international refugee law, international human rights law, and international humanitarian law as it overlaps the application of those laws to notable degrees.³ Among many sources of IRL, its primary concerns well-depend on the 1951 Refugee Convention and its 1967 Protocol, as well as the rules of customary international law.⁴

B. The nexus between refugee law and international human rights law

There is an intricate and overlapping relationship between refugee law and human rights law in the international law paradigm. Human rights law has continually helped evolve and transform the tenets of the Refugee Convention *per se* refugee law in the protection regime.⁵ It would be an oxymoron to study refugee law without connecting it with human rights law, more particularly, the human rights law of refugees. While attempting to define protection measures for refugees, the study of international human rights law is necessarily important as an interactive approach. Despite refugee rights, emanating from the Refugee Convention and its Optional Protocol, several human rights conventions⁶ have colloquially protected refugee human rights. In this

² Corinne Lewis, “UNHCR’s Contribution to the Development of International Refugee Law: Its Foundations and Evolution” 17 *International Journal of Refugee Law* 77-78 (2005).

³ York University, “Canadian Association for Refugee and Forced Migration Studies (CARFMS) Online Research and Teaching Tools (ORTT)” (2014).

⁴ *Ibid.*

⁵ Vincent Chetail, “Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law”, in R. Rubio Marin (ed), *Human Rights and Immigration, Collected Courses of the Academy of the Academy of European Law*, pp. 19-72 (Oxford University Press, 2014), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2147763 (last visited on December 2, 2022).

⁶ The human rights conventions that have protected refugee rights, considering every human beings despite of status and affiliation to nationality, caste and other parameter, are Universal Declaration of Human Rights, The twin convention of 1966 (i.e. International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR)), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) of 1984, etc.

pretext, human rights law has, over time, broadened the content of refugee law and the realm of its operation.⁷

To illustrate precisely and more convincingly, several human rights instruments⁸ have protected refugee rights and broadened the area of operation of refugee law. For instance, Article 5 of the Universal Declaration of Human Rights, 1945 [hereinafter “*the UDHR*”], Articles 2 and 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 [hereinafter “*the CAT*”], Article 7 of International Covenant on Civil and Political Rights, 1966 [hereinafter “*the ICCPR*”] have in the same manner protects the refugee human rights providing the provision of human rights protection against cruel, inhuman and degrading treatment. Similarly, the 1951 Refugee Convention and its Optional Protocol of 1967 was silent on the issues of human rights violation of refugee, particularly on xenophobia⁹ and defining the standard rules on the determination of refugee claims against detentions¹⁰ exercising the due process of law within the jurisdiction of the country of residence of refugees (either prolonged administrative custody¹¹ or arbitrary detention¹²). However, the ICCPR has granted the human rights protection mechanism of refugees as such by a mechanism of reviewing the legality of detention. The applicability of human rights law has filled the lacunae of the Refugee Convention on the protection regime matured applicability of the human rights law.¹³ In addition, United Nations [hereinafter “*the UN*”] Human Rights Committee had in General Comment No. 15 affirmed the non-discrimination on the protection of rights of aliens defined by the twin Covenant.¹⁴ More importantly, General Comment No. 31 of the UN Human Rights

⁷ Helene Lambert, “International Refugee Law: Dominant and Emerging Approaches”, Routledge, p. 344, 2009, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334667 (last visited on December 2, 2022).

⁸ Human Rights and Refugee Protection (RLD 5), available at: <https://www.unhcr.org/3ae6bd900.pdf> (last visited on December 3, 2022).

⁹ Goodwin-Gill, “Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection”, p. 35, *UNHCR*, 2001, available at: <https://www.unhcr.org/3bcfdf164.pdf> (last visited on December 2, 2022), also at: *Ibid* no. 4.

¹⁰ *Ibid* no. 4

¹¹ Revised FactSheet No. 26 (The Working Group on Arbitrary Detention), p. 6, *OHCHR*, 2019 available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/FactSheet26.pdf> (last visited on December 2, 2022).

¹² UNHCR, “Detention Guidelines”, *UNHCR The Refugee Agency*, p. 16, 2012, available at: <https://www.refworld.org/pdfid/503489533b8.pdf> (last visited on December 2, 2022).

¹³ James C. Hathaway, *The Rights of Refugees Under International Law* 120 (Cambridge University Press, Cambridge, UK, 2005).

¹⁴ CCPR General Comment No.15: The position of aliens under the Covenant, Office of the High Commissioner for Human Rights, available at: <https://www.refworld.org/pdfid/45139acfc.pdf> (last visited on December 3 2022).

Committee on the twin Covenant further affirmed that the rights guaranteed by the twin Covenant are extended to refugees, asylum-seekers, and statelessness irrespective of the nationality of individuals.¹⁵ This material resource suggests that human rights have extended the content and realm of operation of refugee law.

C. The nexus between refugee law and international humanitarian law

The study of the protection regime of refugee rights further intersects and overlaps with international humanitarian law [hereinafter “IHL”]. The principle of humanity (among two principles of IHL, i.e., military necessity and humanity) has regulated the protection of displaced persons *per se* refugee, arising from the situation of International Armed Conflict and Non-International Armed Conflict, against infliction to persons vulnerable to torture and suffering.¹⁶ The intersection between IHL and IRL operates in the situation of armed conflict. The IHL protection regime extends to the functioning of its international instruments like the Additional Protocol of the Fourth Geneva Conventions and IHL norms. The IHL protects the refugees, excluding those severely involved in war crimes, irrespective of their status. This norm has been stipulated in Article 1F(a) of the Refugee Convention and Article 8 of the Rome Statute.¹⁷

The IHL stipulates that the State should protect the human rights of individuals displaced from conflicts (either from International Armed Conflict or Non-International Armed Conflict) from the enjoyment of their human rights. Similarly, Article 73 of the Additional Protocol of the Fourth Geneva Convention has also provided protection measures for refugee rights. The area of protection shall be confined to the scope of application of Part I and III of the Fourth Convention.¹⁸

In this pretext, International Human Rights Law, International Humanitarian Law, and International Refugee Law have to be studied in a cumulative approach meaning there is a nexus between the three that extends the content and operation of refugee law and its regime.

¹⁵ CCPR General Comment No. 31: The Nature of the General Legal Obligations of States parties to the Covenant, Office of the High Commissioner for Human Rights, available at: <https://www.refworld.org/docid/478b26ae2.html> (last visited on December 3, 2022).

¹⁶ Reuvan Ziegler, “International Humanitarian Law and Refugee Protection” in C Costello et.al. (eds.), *Oxford Handbook of International Refugee Law 1* (OUP, 2020).

¹⁷ *Ibid*, p. 2.

¹⁸ *Ibid* no. 13 at pp. 755-757.

D. A statistical viewpoint of refugees in the contemporary world

According to the statistics from the UNHCR, around 53.2 million people are internally displaced in different parts of the world. At the same time, another 32.5 million are estimated refugees as of mid-2022. An additional 4.9 million people are estimated to be asylum seekers, and 5.3 million people require international protection. Among them, 36.5 million are children, and another 1.5 million are newborn refugees adding to the number. While the UNHCR publicly displays the numbers, it also asserts that the full picture of the global forcible displacement issue is yet to be demonstrated accurately.¹⁹ The UNHCR also asserts that at least 72% of the forcibly displaced population originate from 5 core countries, namely, the Syrian Arab Republic (originating approximately 6.8 million people), Venezuela (5.6 million people), Ukraine (5.4 million people), Afghanistan (2.8 million people), and South Sudan (originating approximately 2.4 million people). Coupled with that, roughly 36% of the forcibly displaced population is hosted by 5 countries, such as Turkiye (hosting around 3.7 million), Colombia (2.5 million), Germany (2.2 million), Pakistan (1.5 million), and Uganda (1.5 million). More ominously, 74% of them are hosted by low and middle-income countries, while the least developed states provide shelter to 22% of the asylum seekers. 69% of the population, statistically, is hosted by neighbouring countries. The UNHCR statistics also suggest that about 162,300 refugees returned to their home countries within the first half of 2022, and another 42,300 were resettled. It is pertinent to mention that the aforementioned return or resettlement process may be done with or without the official assistance of the UNHCR.²⁰

II. STATES' RESPONSIBILITIES UNDER INTERNATIONAL REFUGEE LAW

A. Legal obligations towards refugees and asylum seekers

Verily, the two core subjects of IRL, i.e., the qualification under the definition of refugees and the rights following the status, are prerequisites for applying the refugee conventions on the State which ratified them. As described in the previous chapter, most South Asian states are not parties to the core instruments of international law that directly provide responsibilities of states

¹⁹ Economic and Social Council, *Refugee Data*, UN ESCOR (Oct. 27, 2022).

²⁰ *Ibid.*

regarding the rights and protection of refugees. Hence, international lawyers are required to seek gateways in the other branches of international law, i.e., human rights and humanitarian law, to hold the states accountable for their obligations.²¹

As old as the concept of state responsibility is in international law, the responsibilities of states under IRL come, primarily, in two stages. First, the responsibilities of the host country or asylum country, and second, the responsibility of the country of origin. In IRL, the responsibilities of the country of origin are primarily liable for the flow of refugees.

To comprehend the responsibilities of states under IRL, the following five questions concerning the subject should be addressed first: (i) Do states have a duty to admit refugees, and if so, for how long?; (ii) What are the responsibilities of host states regarding the process of applications lodged by the asylum seekers?; (iii) Do the duties of the states vary according to the number of applications or influx? (iv) Do states have a duty to process asylum applications lodged?; and finally (v) Are there any specifications as to which states should be liable for which refugees?

a. Responsibility regarding accepting refugees and processing asylum requests

As to the primary two concerns mentioned in the previous section, the states adhere to many difficulties as the socio-economic and political situations in different states may not always allow the coexistence of the right to asylum and the corresponding duty of the state to grant asylum. Even before the establishment of the refugee conventions, the right to seek asylum against persecution was established clearly by the UDHR in Article 14, which, however, does not carry legally binding characteristics.²² On the other hand, international law, or even the 1951 Convention, does not provide a lucid duty incumbent upon the states to grant asylum.²³ The justification behind such status in IRL is traced back to the protection of the sovereignty and right to determine the internal as well as territorial matters of each state.²⁴

Despite the non-existence of a binding obligation to grant asylum, the states are albeit bound under international law to not return the refugees to their country of origin where their life and

²¹ Romit Bhandari, *Human Rights and the Revision of Refugee Law* 177 (Routledge, 2020).

²² The Universal Declaration of Human Rights, 1948, Art. 14.

²³ Goodwin-Gill, *The refugee in international law* 175 (Oxford: Oxford University Press, 2nd ed., 1996).

²⁴ Maria O'Sullivan, *Refugee Law and Durability of Protection Temporary Residence and Cessation of Status* 75 (Routledge, 1st edn., 2020).

freedom would be threatened on account of their identity about their race, religion, nationality, or membership of any particular group of thoughts or beliefs. The rule, in IRL, is called the principle of *non-refoulement* provided under Article 33 of the 1951 Convention.²⁵ The principle is further recognized as a rule of customary international law.²⁶ It is to be further noted that the rule does protect not only the formally recognized refugees but also asylum seekers and others who fall within the ambit of IRL.

b. The question relating to the duty to provide protection and the number of refugees

As demonstrated in the previous section, the states albeit have a duty to provide protection, but the identification of the extent of the duty is quite a difficult task. States are, reasonably, reluctant to commit to an unidentified number of obligations. Hence, the question that prevails is whether the obligation of states varies according to the size of the refugee populations that received or sought asylum.²⁷ Although there are numerous similarities between the provisions of the Refugee Convention and the human rights treaties of international law, the Refugee Conventions are not granted the status of human rights treaty because not all of its provisions immediately apply to individual refugees. It has a greater scope to be amended and updated over time. Hence, the nature of the Convention substantially sets it different from other human rights treaties.²⁸ As a result, the size of refugees significantly affects the obligation of the receiving states to protect the rights of the individuals even under the 1951 Convention obligations. The foremost cause behind the situation is that although the states may admit large-scale influx to their territory, they demand to the international community a *de facto* suspension of the rigidity of the obligations under the 1951 Conventions due to their socio-economic constraints to serve the same.²⁹ Consequently, with the size of the refugees, the level of protection and the extent of the international responsibility of the states vary in a significant manner.³⁰

²⁵ Convention Relating to the Status of Refugees, 1951, Art. 33.

²⁶ E. Lauterpacht and D. Bethlehem, "The scope and content of the principle of non-refoulement: opinion", in E. Feller, V. Trk and F. Nicholson (eds.), *Refugee protection in international law: UNHCR's Global Consultations on International Protection* 87-177, at 149 (Cambridge: Cambridge University Press, 2003).

²⁷ *Ibid* no. 23.

²⁸ Committee on Economic, Social and Cultural Rights, "*General Comment 3: The nature of State parties' obligations (Art.1, par.1)*", (14 December 1990).

²⁹ J-F. Durieux and J. McAdam, "*Non-refoulement through time: the case for a derogation clause to the Refugee Convention in mass influx emergencies*" 16 (International Journal of Refugee Law, 2004) p. 13.

³⁰ *Ibid* no. 24.

c. Regarding the question of whether there is any allocation of responsibilities of states

The key principle of the study of IRL is concerned with protecting the refugees and their rights. In that course, the duty lies upon all states collectively to figure durable solutions to the problem often arising without prior assumption.³¹ However, the 1951 Convention, even after several decades of its enforcement, does not specify the allocation of responsibilities of the states except the recognition of the heavyweight burden on certain states in the preamble of the instrument.³² As a result, the obligation to share the responsibilities among the neighbouring states and the states with capabilities are left with weak to no legal basis to hold them liable. It further weakens the regime of IRL as inefficient and inequitable.³³

B. The status of refugee law and state obligations in South Asian countries

Geographically, South Asia is a subregion of Asia in its southern part consisting of Countries like Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. This paper will discuss the legal framework these countries have practised on refugee law regimes for their protection from 1951 till 2022.

a. Afghanistan

The Government of the Islamic Republic of Afghanistan ratified the Refugee Convention of 1951 and its Optional Protocol of 1967 in 2005. Quite the contrary, the Government of the Islamic Republic of Afghanistan has not made any national legal framework on refugee law and its protection regime.³⁴ Hence, there is no specific national legal framework and policy enacted by the Government of the Islamic Republic of Afghanistan to implement the acceded Refugee Convention to protect refugee rights. However, the UNHCR has continually helped to protect refugee and asylum seekers' rights *per se* human rights.³⁵

³¹ *Ibid* no. 16.

³² *Ibid* no. 25, Preamble.

³³ Stephen Allen, "Harboring or Protecting? Militarized Refugees, State Responsibility, and the Evolution of Self-Defense" 25 *The Fletcher Journal of Human Security* (2010).

³⁴ Available at: <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=6339&file=EnglishTranslation> (last visited on December 4 2022).

³⁵ Available at: <https://reporting.unhcr.org/node/10105> (last visited on December 4, 2022).

Besides, Afghanistan is a party to different international instruments relating to human rights, humanitarian law, etc.³⁶ These human rights and humanitarian law instruments allow the refugees, asylum seekers and other displaced persons to enjoy broader rights corollary to the provision defined under Refugee Convention. Similarly, Afghanistan is also a party to the Fourth Geneva Convention and its Second Additional Protocol of 1977.³⁷ Other apparent policy frameworks that extended the protection of rights of refugees, IDP and asylum seekers include the Presidential Decree No. 297 made on 13 March 2002 AD [hereinafter “PD 297”],³⁸ Presidential Decree Number 104 concerning Land Distribution for settlement to Eligible Returnees and IDPS³⁹ made on 6 December 2005 AD [hereinafter “PD 104”], Comprehensive Voluntary Repatriation and Reintegration Policy⁴⁰ of 2015 [hereinafter “CVRRP”] and MoRR Strategic Plan⁴¹ in 2015.

b. Bangladesh

Bangladesh is a host to refugees primarily from Myanmar. Bangladesh has not ratified the 1951 Refugee Convention and its 1967 Optional Protocol. Similarly, it has no domestic legal framework enacted particularly protecting refugee rights.

³⁶ *Afghanistan's Forced Displacement Legal & Policy Framework Assessment*, World Bank and UNHCR, 2017, p. 17, available at: <https://documents1.worldbank.org/curated/en/117261515563099980/pdf/122556-WP-AfghanistanForcedDisplacementLegalandPolicyFrameworkAssessmentF-PUBLIC.pdf> (last visited on December 5 2022).

³⁷ *Ibid* no. 24, p. 18.

³⁸ *Ibid* no. 24, p. 23. This decree was designed on ‘*Dignified Return of Refugees*’ in accordance with the spirit of the Bonn Agreement on Afghanistan of 2001. This Decree was made to protect the rights and fundamental freedoms of the returnees i.e. Afghan Refugees from any kind to harassment or discrimination or prosecution on the ground of race, religion, etc. (pursuant to Article 2 of Decree), recovery of the returnees movable and immovable property i.e. restoring the Afghan refugees property rights (pursuant to Article 5 of the Decree), guaranteeing their human rights and fundamental freedoms of returnees as enjoyed by other citizens (pursuant to Article 6), etc Available at: <https://www.refworld.org/docid/3e523bc82.html> (last visited on December 5, 2022).

³⁹ This decree was made to reinstate the returnees, i.e. Afghan refugees, providing them shelter (housing) as basic human rights ensured to the people. However, this decree fails to ensure the alternative evidence, as required under Article two of the decree, who lost during war or civil unrest.

The decree is available at: <https://www.refworld.org/docid/5b28e4334.html> (last visited on December 5 2022).

⁴⁰ This decree was enacted by Government of Islamic Republic of Afghanistan addressing the repatriation of the returnees i.e. Afghan refugees and their reintegration in the Afghan communities ensuring basic human rights like education, property, housing, work, etc. This policy provides the measure for refugees to make informed decisions on their return in the homeland. This policy is available at: <https://documents1.worldbank.org/curated/en/117261515563099980/pdf/122556-WP-AfghanistanForcedDisplacementLegalandPolicyFrameworkAssessmentF-PUBLIC.pdf> (last visited on December 6, 2022).

⁴¹ *Ibid* no. 24, p. 32. This decree was a five year strategic plan made for “*managing displacement affairs and providing standard services to refugees, asylum seekers, returnees and IDPs*”. This plan attempts to address the protection of needs of the refugees, returnees and IDPs.

However, its national legal framework has extended the protection of refugee rights as their human rights extended similarly to the rights exercised by its citizens. Primarily, the Foreigners Act of 1946⁴² governed the protection regime of refugees in Bangladesh under the UNHCR mandate.⁴³ The Constitution of Bangladesh,⁴⁴ enacted in 1972, has extended certain rights to non-citizens *per se* refugees. Article 31 (Right to protection of the law), Article 32 (Protection of Rights to Life and Personal Liberty), Article 33 (Safeguards as to Arrest and Detention) and Article 34 (Prohibition of Forced Labour) of the Constitution of Bangladesh have provided the protection measure to refugees ensuring the enjoyment of these fundamental rights. These rights can be implemented and enforced by filing a complaint in High Court Division pursuant to Article 102 by refugees, unlike citizens of Bangladesh.⁴⁵ The enforcement of Article 31 of the Constitution of Bangladesh has been reflected in the jurisprudence in *Abdul Latif Mirza v. Bangladesh*⁴⁶ instituted against preventive detention. The High Court declared that the application of rights under Article 31 is extended to refugees as an inalienable right.

Similarly, the legal protection of refugees in Bangladesh, to some extent, has been exercised through the application of the Legal Aid Act, of 2000. Even if Bangladesh has not ratified the Refugee Convention and its Optional Protocol and has no national laws relating to refugee rights, the given Act tries to extend legal protection to refugees. Besides, several other human rights instruments ratified by Bangladesh like the UDHR 1948, twin Covenant, Convention on the Rights of the Child 1989, the CAT 1948, etc. and other International Humanitarian Laws like the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, its Additional Second Protocol, etc. have extended the obligation to the Government of Bangladesh to protect the human rights of refugees residing within its territory.

⁴² Available at: <https://www.refworld.org/pdfid/508640242.pdf> (last visited on December 6, 2022).

⁴³ Available at: https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_Bangladesh_Final_Pub.pdf (last visited on December 6, 2022).

⁴⁴ Available at: https://www.constituteproject.org/constitution/Bangladesh_2014.pdf?lang=en (last visited on December 6, 2022).

⁴⁵ Nour Mohammad, "Refugee Protection Under the Constitution of Bangladesh: A Brief Overview", 149, available at: http://www.mcrg.ac.in/rw%20files/RW39_40/12.pdf (last visited on December 6 2022).

⁴⁶ Md. Jahid Hossain Bhuiyan, "Preventive Detention and Violation of Human Rights: Bangladesh, India and Pakistan Perspective", *Bangladesh Journal of Law* 2004 p. 121, available at: <https://www.biliabd.org/wp-content/uploads/2021/08/Md.-Jahid-Hossain-Bhuiyan.pdf> (last visited on December 6, 2022).

Further, Bangladesh relies on the given Acts while dealing with the protection of refugees:⁴⁷

1. Registration of Foreigners Act, 1939
2. Passport Act, 1920
3. Bangladesh Citizenship (Temporary Provision) Order, 1972
4. Extradition Act, 1926,
5. Naturalization Act 1926, etc.

In addition, the Government of Bangladesh enacted a national strategy entitled, '*National Strategy on Myanmar Refugees and Undocumented Myanmar nationals*'⁴⁸ in 2013. This strategy is confined to the protection of refugees from Myanmar. The UNHCR, thus, is working as an institution in determining the status of refugees and providing them with the necessary protection.⁴⁹

c. Bhutan

Bhutan is not a party to the 1951 Refugee Convention and its 1967 Optional Protocol. It neither has made any policy in recognizing the status of refugees. Further, Bhutan has not ratified the twin Covenant, i.e., the ICCPR and the ICESCR, core human rights treaties.⁵⁰ Bhutan has lately signed the United Nations Declaration of Human Rights in the year 1971.⁵¹ However, Bhutan has ratified the CEDAW, the CRC, the ICERD, and the CRPD. These conventions have, to some extent, obliged the Government of Bhutan to make the necessary legal framework to protect the human rights of people covered under the ratified convention.

d. India

⁴⁷ *Ibid* no. 32, p. 153.

⁴⁸ Available at: <https://www.refworld.org/pdfid/5b081ec94.pdf> (last visited on December 6, 2022).

⁴⁹ Available at: <https://reliefweb.int/report/bangladesh/rohingya-refugee-response-bangladesh-legal-protection-factsheet-30-june-2022> (last visited on December 6, 2022).

⁵⁰ Puttiporn Chotiban, "*The Adoption of UN Human Rights Treaties in Bhutan*", (2017) (Unpublished Bachelor's Thesis, Faculty of Social Studies, Masaryk University) available at: https://is.muni.cz/th/yqnfo/CHOTIBAN_Final.pdf (last visited on December 6, 2022).

⁵¹ Available at: <https://oxfamlibrary.openrepository.com/bitstream/handle/10546/125809/bk-country-profiles-nepal-part4-010196-en.pdf?sequence=21&isAllowed=y> (last visited on December 7, 2022).

India is not a party to the 1951 Refugee Convention and its Optional Protocol of 1967. However, the responsibility of India to protect refugees enumerates from the obligation of different International Human Rights Instruments ratified by India. The particular instrument dealing with asylum includes the adoption of the UN Declaration of Territorial Asylum in 1967.⁵² Other instruments include the twin Covenant (i.e., ICCPR and ICESCR) in 1976, CRC, CEDAW and acceptance of Bangkok Principles that envisaged principles of *non-refoulement*. India's obligation to refugees accrued from these international human rights instruments. For instance, Article 14 of UDHR obliges parties to the Declaration to ensure 'Rights to Seek and Enjoy Asylum', Article 13 of ICCPR accrues obligation to ensure rights relating to 'Prohibition of expulsion of aliens except by due process of law', etc.

The Domestic legal framework that ensures the obligation to protect refugee rights in India involves Article 21 of the Constitution of India.⁵³ However, India had tried to formulate bills for refugee protection, even if it had rejected the bill owing to national security concerns, in the year 1997 (this year, India had drafted a modal refugee policy to address the refugee protection regime under the guidance of the retired Chief Justice of India P.N. Bhagwati), 2006 (in this year India had drafted the Refugee and Asylum Seekers Protection Bill) and 2015 (in this year a policy has been drafted to control and manage the influx of refugee and asylum seekers in India).⁵⁴ Similarly, jurisprudence developed by the Judiciary of India has played an important role in recognizing the principle of *non-refoulement* and other related human rights of refugees in India. The court jurisprudence shall be discussed in the next chapter.

e. Maldives

⁵² T. Ananthachari, "Refugees in India: Legal Framework, Law Enforcement and Security", *ISIL YearBook of International Humanitarian and Refugee Law*, 2001, available at: <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/7.html> (last visited on December 7, 2022).

⁵³ The Article 21 of Constitution of India states that Fundamental right of Right to life and Liberty shall apply to all persons whether they may be citizens of India or aliens. Available at: <https://legislative.gov.in/sites/default/files/coi-4March2016.pdf> (last visited on December 7, 2022).

⁵⁴ Dr. Yashwant Naik, "India's Refugee Policy: Issues and Concerns", 107 available at: <https://www.jiwaji.edu/pdf/ecourse/law/INDIA%E2%80%99S%20REFUGEE%20POLICY%20ISSUES%20AND%20CONCERNS.pdf> (last visited on December 7, 2022).

Maldives has not ratified the Refugee Convention of 1951 and its 1967 Optional Protocol.⁵⁵ Similarly, Maldives is not a party to the Convention relating to the Status of Stateless Person 1954 and Convention on the Reduction of Statelessness 1961. Similarly, Maldives has not made any national legislation particularly relating to the protection of the rights of refugees, asylum seekers, and stateless persons. Maldives has also not established any administrative or institutional mechanisms to ensure the protection of the rights of refugees, asylum seekers, etc.

Additionally, Maldives has ratified nine core⁵⁶ international human rights instruments like⁵⁷ ICCPR, ICESCR, CAT, CEDAW, CERD, CRC, CRPD, etc. These international frameworks obliged the nation to respect and promote the human rights of every person, including refugees, by domesticating these instruments. Similarly, the Government of the Republic of Maldives had developed a framework to formulate a five-year National Human Rights Action Plan.⁵⁸ The aim of such an Action Plan includes the measures in the identification of human rights issues of vulnerable groups and ensuring the promotion, protection, and fulfilment of human rights as accrued from the obligation of ratified international human rights instruments.

f. Nepal

Nepal is not a party to the Refugee Convention of 1951 and its 1967 Optional Protocol.⁵⁹ Nepal is also not a party to the Convention relating to the Status of Stateless Person of 1954 and the Convention on the Reduction of Statelessness of 1961. Similarly, Nepal has no legal or policy framework that addresses the rights of refugees, asylum seekers, etc. Earlier in the year 2010, the government of Nepal drafted the legislation entitled ‘*Refugee Status and Protection Act, 2010*’⁶⁰ but it was not implemented due to national security reasons. Besides, Nepal has ratified nine core human rights treaties and domesticated such treaties in the national legal framework for their

⁵⁵ Available at: <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=7958&file=EnglishTranslation#:~:text=There%20is%20no%20asylum%20adjudication.on%20the%20Reduction%20of%20Statelessness>. (last visited on December 7, 2022).

⁵⁶ Attorney General’s Office, “National Human Rights Framework”, 2016 available at: https://maldives.unfpa.org/sites/default/files/pub-pdf/NHR%20Framework_EN.pdf (last visited on December 7, 2022).

⁵⁷ Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=106&Lang=en (last visited on December 7, 2022).

⁵⁸ *Ibid* no. 45, p. 14.

⁵⁹ Available at: <https://un.info.np/Net/NeoDocs/View/11156> (last visited on December 7, 2022).

⁶⁰ Subash Acharya, “Tibetan Refugee Issues in Nepali Press”, 43 *The Tibet Journal* 51 available at: https://www.jstor.org/stable/26634917?seq=11#metadata_info_tab_contents (last visited on December 8, 2022).

effective implementation. Therefore, the international human rights treaty framework governs the issue of protection of the rights of refugees. Similarly, other domestic legal frameworks like the Constitution of Nepal (promulgated in 2015 AD), The Immigration Act of 1992, etc., governed the non-citizen *per se* refugee issues.

g. Pakistan

Pakistan is not a party to the 1951 Refugee Convention and its 1967 Optional Protocol. Additionally, it has no national legal framework dealing with refugee rights.⁶¹ The international instruments ratified by Pakistan relating to the human rights regime have to some extent, incurred an obligation to respect, promote and fulfil the human rights of refugees despite their status. Similarly, the pertinent legal framework that addresses the obligation of non-citizens of Pakistan is the Foreigner's Act of 1946.

Some of the notable domestic legal frameworks include Article 4 (relating to the rule of law) of the Constitution of the Islamic Republic of Pakistan guarantees the rule of law, i.e., the right relating to due process of law in the enjoyment of life and liberty either by the citizen of Pakistan or non-citizen,⁶² Article 9 made provision of right against preventive detention, and many other rights which can be enjoyed by non-citizen *per se* refugees.

Furthermore, UNHCR conducts the refugee status determination mechanisms in accordance with the Cooperation Agreement between UNHCR and the Government of Pakistan in 1993.⁶³ Therefore, Pakistan apparently accepts the decision of UNHCR on granting refugee status or accepting refugee status. Besides, Pakistan had drafted the National Policy on Afghan Refugee focusing on voluntary repatriation and sustainable reintegration of the returnees in Afghanistan.⁶⁴ This policy has to some extent, notable work done to address the issues of refugees. Additionally, Pakistan enacted another policy called '*Comprehensive Policy on Voluntary*

⁶¹ Raha Irfan Azam, *Analysis of Pakistan's Policy Towards Afghan Refugees: A Legal Perspective* 2021, (unpublished thesis, RIGA Graduate School of Law) available at: https://dspace.lu.lv/dspace/bitstream/handle/7/56528/Azam_RajaIrfan.pdf?sequence=1 (last visited on December 8, 2022).

⁶² The Constitution of Islamic Republic of Pakistan, Article 4, available at: https://na.gov.pk/uploads/documents/1333523681_951.pdf (last visited on December 8, 2022).

⁶³ Available at: <https://www.unhcr.org/pk/protection/asylum-system-in-pakistan> (last visited on December 8, 2022).

⁶⁴ Muhammad Abbas Khan, "Pakistan National refugee Policy", 2014, available at: <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/afghanistan/khan.pdf> (last visited on December 8, 2022).

Repatriation and Management of Afghan Nationals’ in 2017, ensuring the strategy for voluntary repatriation and enactment of domestic refugee legislation, among other strategies.⁶⁵

h. Sri Lanka

Sri Lanka has not ratified the 1951 Refugee Convention and its 1967 Optional Protocol. Similarly, Sri Lanka has not ratified the Convention relating to the Status of Stateless Person of 1954 and the Convention on the Reduction of Statelessness of 1961.⁶⁶ The UNHCR has undertaken the mandate of refugee status determination and protection of rights owing to the *Memorandum of Understanding* with the Government of Sri Lanka in 2005.

In addressing the refugee issue, the Government of Sri Lanka adopted the ‘*National Policy on Durable Solutions for Conflict-Affected Displacement*’ which tries to address the issue of refugees and other IDP returnees.

Sri Lanka has ratified International Human Rights Instruments Like CAT, ICCPR, ICESCR, CEDAW, CERD, CRC, etc.⁶⁷ These instruments will obligate the Government of Sri Lanka to domesticate the national legal framework for its effective implementation and protection of human rights.

III. TRANSCENDENCE OF STATE RESPONSIBILITIES UNDER INTERNATIONAL REFUGEE LAW

As we describe in the previous section that there is no binding obligation on the states to grant asylum, it remains one of the core discussions of the study of refugee law. The international community has, over time, made several attempts to establish a right of territorial asylum for the refugees, which would correspondingly hold the application recipient state liable for the same.⁶⁸

⁶⁵ Available at: https://www.vidc.org/fileadmin/michael/dard_kush_ii/dard_kush_ii_a_comprehensive_desk_review_of_refugee_policies_in_pakistan.pdf (last visited on December 8, 2022).

⁶⁶ Available at: <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=4535&file=EnglishTranslation> (last visited on December 8, 2022).

⁶⁷ Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=164&Lang=en (last visited on December 8, 2022).

⁶⁸ Susan F. Martin, Rochelle Davis, et.al., “International Responsibility-Sharing for Refugees” 25-26 (2018).

The UN adopted a Declaration on Territorial Asylum in 1967,⁶⁹ which led to a United Nations Conference on Territorial Asylum in Geneva in 1977, where the Carnegie Endowment Working Group proposed an initial draft of a Convention on Territorial Asylum in 1972.⁷⁰ Shortly thereafter, it was concluded that the texts of the proposed Convention would only hold the states accountable to the extent of their “best endeavour” to grant asylum to the applicants. Ultimately, the 1977 Conference turned into a miserable failure to adopt the texts of the proposed Convention and no further attempt has been recorded afterwards.⁷¹

However, the exact scope of the principle of *non-refoulement* is debated in IRL. For instance, it is quite evident that the principle applies to all refugees who already crossed the border and stand on the territory of the host state. However, it is unclear to what extent the principle shall apply to the refugees who arrive at the border and seek admission into the territory upon arrival. As a result, the previous debate about the obligation of the states to receive and grant asylum to refugees is revived. Regardless, it is commonly accepted among the international community that the states under no circumstances should be free to reject refugees at the frontier while it is also, although arguably, agreed that such rejection does not amount to *refoulement*.⁷² To cite a state practice, we may refer to the 1993 US Supreme Court Case between INS and Haitian Centres Council, where the Court held that the principle of *non-refoulement* only applies to the refugees within the state territory.⁷³

Again, concerning the number of refugee obligations, it is highly disputed that the situation fails to reflect the actual scenario of the refugee crisis.⁷⁴ Since there is no legal definition of “mass influx” under IRL, it can be abused and misinterpreted in many circumstances, resulting in gross

⁶⁹ Katerina Linos and Elena Chacko, “Refugee Responsibility Sharing or Responsibility Dumping?” California Law Review 29-34 (2021).

⁷⁰ Vincent Chetail, “Moving Towards an Integrated Approach of Refugee Law and Human Rights Law”, in C. Costello, M. Foster, et.al. (eds.), The Oxford Handbook of International Refugee Law 4-8 (Oxford University Press, 2021).

⁷¹ María-Teresa Gil-Bazo, “The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited” 18 International Journal of Refugee Law 577 (2006).

⁷² *Ibid* no. 13.

⁷³ Sale, Acting Commissioner, *INS v Haitian Centers Council* (1993) 113 S.Ct 2549.

⁷⁴ Committee on Economic, Social and Cultural Rights, “General Comment 3: The nature of State parties’ obligations (Art.1, par.1)”, (1990).

violation of the basic human rights of the persons seeking refuge.⁷⁵ Hence, the most common practice has been so far, when a state faces a massive unpredicted influx, they simply depict their inability to comply with their obligations under the 1951 Convention. The practice, therefore, led to the international community considering the insertion of a derogation clause to the 1951 Convention to resolve the issue to the best extent.⁷⁶ The discourse also led to another discourse about responsibility-sharing among the states when faced with the large-scale influx.⁷⁷

Further, the issue regarding burden-sharing among the states has been discussed several times among the international community, and indeed, several *ad hoc* measurements to establish the reality of the concept have also been attempted. One example is the Comprehensive Plan of Action (CPA) for Indo-Chinese Refugees.⁷⁸ It is often asserted that many resources and efforts have gone into implementing the CPA. However, it would have been much more efficient to establish a system of allocation separately to the countries of first asylum and the countries further afield. Further, the matter of safety in a “third country” also sets the discourse complicated as the refugees may not have first-hand applied for asylum there.⁷⁹ Thus, it is commonly agreed that a clear system of allocation of responsibilities would be in the interest of both the states and the refugees, as well as strengthen the regime of IRL. Countries that are further afield would also be beneficiaries of the process. It is pertinent to mention that several academic discourses have been made in this regard. Furthermore, the UNHCR devoted a discussion on the Global Consultation on International Protection to discuss and develop further. Another discourse, as part of the Convention Plus process, was held where the UNHCR submitted a paper addressing irregular secondary movements of refugees and asylum seekers, which substantially distinguished between the responsibilities of the states and assessments relating to their merits of asylum claims. The UNHCR asserted that the states should be responsible to assess and figure a durable solution for refugee protection, and the question of the

⁷⁵ Roberta Arnold and Noëlle Quéniwet (eds.), *International Humanitarian Law and Human Rights Law* (Martinus Nijhoff Publishers, Netherlands, 2008).

⁷⁶ J-F. Durieux and J. McAdam, “*Non-refoulement through time: the case for a derogation clause to the Refugee Convention in mass influx emergencies*” 16 (*International Journal of Refugee Law* 4, at 13, 2004).

⁷⁷ *Ibid.*

⁷⁸ Erika Feller, “International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future” 83 *Ricr* (2001).

⁷⁹ Richard Towle, “Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing?” 18 *International Journal of Refugee Law* 540 (2006).

intention of the refugee should nevertheless be accounted for.⁸⁰ The discourse further led to the conclusion that resettlement can be the next durable solution after local integration and repatriation despite the percentage of resettlement being severely low.⁸¹

IV. CONCLUSION

The responsibilities of states under the regime of international refugee law, mostly based on the provisions of the 1951 Refugee Convention, are faced with numerous fundamental concerns regarding the protection of refugee rights as described in this paper. One of the prime reasons for that is that despite the Convention's rigorous attempt to define the obligations of the states, the protection regime is faced with many gaps. Alarming enough, South Asia has been one of the biggest preys of the failure of the attempts to set legal bindings on the responsibility-sharing principle. The immediate lack of responsibility-sharing in regions of origin added overwhelming responsibility to the countries in this region dealing with some of the largest groups of refugees in the world. Concurrently, determining states' responsibilities towards refugees and asylum-seekers has been a stressful exercise in IRL. The argument on the thin line between the obligation under the principle of non-refoulement and the freedom to reject asylum to the refugees adds to the issue. Hence, it becomes formidable to formulate solid arguments for determining the state's responsibilities. Most South Asian Countries, except Afghanistan, have not ratified the 1951 Refugee Conventions, its 1967 Optional Protocol, and other related Conventions that particularly deal with refugees, asylum seekers, IDPs, or alike. These countries have not enacted any regulatory policy framework to deal with the protection of refugee rights. Such a scenario will inhibit the refugees' protection mechanism through dereliction of obligatory instruments *vis-a-vis* denies the enjoyment of human rights in the host countries, seemingly due to the absence in the determination of refugee status. Likewise, the Refugee Convention fails to recognize the xenophobia and the claim procedure filed by refugees in the host countries. Succinctly, the state's attitude to respect the human right of refugees is of prime concern. The human rights paradigm evolves with the refugee regime. Lastly, even if the countries have not ratified the Refugee

⁸⁰ Erika Feller, "Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come" 18 International Journal of Refugee Law 530 (2006).

⁸¹ Susan Kneebone, Christopher McDowell, et.al., "A Mediterranean Solution? Chances of Success" 18 International Journal of Refugee Law 499-505 (2006).

Convention, they must, to a minimum extent protect the issues of refugee pertaining to xenophobia and claim procedure without further in lieu of domestic framework.

QUEST FOR WOMEN'S RIGHT TO BODILY INTEGRITY: REFLECTIONS ON RECENT JUDICIAL INROADS IN INDIA

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ABSTRACT

In India, often, it is seen that the male members of society prescribe limits for women, deciding what is good for them, what they can yearn for and even defining what women can do with their own bodies. Interestingly, such practices and societal norms were duly sanctified through customs, religious prescriptions, and, later, through legislation. Post-independence India witnessed an era of progressive social reform movements, legislative developments, as well as bold judicial interventions, which altogether brought down many of the rituals, taboos and gender-based inequalities. Currently, India is going through a state of bewilderment for gender sensitivity as well as for women's rights and equality. The Constitution provides for the equality of all individuals and grants them equal protection before the law. Despite this, gender-based discriminatory practices occur under the garb of religious and cultural norms. However, the Indian judiciary has generated many rays of hope for the fundamental human rights of women in a society essentially driven by patriarchy. Time and again, the Supreme Court has played the vanguard role in enforcing the fundamental rights of women enshrined under the Constitution. The apex court has recently dealt with cases of discriminatory practices, especially against women, such as globally ostracised female genital mutilation (FGM/C) as well as excommunication of Parsi women upon marrying a non-Parsi man. These path-breaking judicial decisions have once again highlighted the phase of remarkable perplexity for gender sensitivity as well as a quest for women's rights and equality. In this article, two concrete cases will be analysed to provide a glimpse into the effects of broader judicial horizons of the Supreme Court and how it is taking on the task of "socio-legal engineering" for upholding women's rights and equality.

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I. FEMALE GENITAL MUTILATION

Female Genital Mutilation/cutting (FGM/C) is a global concern, which amounts to major human rights violations of girls and women worldwide. Due to the disruptions caused by the COVID-19 pandemic, UNICEF estimates that two million additional cases of FGM/C may occur over the next decade.¹ According to the World Health Organization (WHO), FGM encompasses “all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons”.²

Despite the global and national efforts to promote the abandonment of the practice, FGM/C remains widespread in different parts of the world. Over 200 million girls and women have undergone FGM/C. The practice is most common in 30 countries across Africa and some countries in Asia (particularly the Middle East) and Latin America and among migrants from these areas.³ In India, this practice is common amongst the Bohra community, where the ritual is referred to as “Khatna” or “Khafz/Khafd”.⁴ Khatna essentially involves cutting the tip of a girl’s clitoris when she is 6-7 years old.⁵ It is performed by Mullanis i.e. women who have a semi-religious standing, by traditional cutters, or by any woman with some experience. As some families become more interested in safe circumcision, they prefer to go to doctors.⁶ Members of the family are usually involved in the decision-making about FGM/C, although the older women of the family are usually responsible for the practical arrangements for the ceremony.

There are various socio-cultural reasons for FGM/C, which vary from region to region. Underlying all these reasons, however, is deep-rooted discrimination against women and girls. The various justifications that have been advanced for FGM/C include religious dicta, an aid to female hygiene and a tool to control or reduce female sexuality. In many places, the practice is

¹ Joint Statement by UNICEF Executive Director Henrietta Fore and UNFPA Executive Director Dr. Natalia Kanem, FGM Elimination and COVID-19: Sustaining the Momentum, UNICEF Annual Report 2020.

² WHO ‘Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation’, November 2014, at p. 16.

³ Female Genital Mutilation, Guide to Eliminating the FGM practice in India, Available at <https://www.lawyerscollective.org/wp-content/uploads/2012/07/Female-Genital-Mutilation-A-guide-to-eliminating-the-FGM-practice-in-India.pdf>.

⁴ Harinder Baweja, India’s Dark Secret, Hindustan Times. Available at: <http://www.hindustantimes.com/static/fgm-indias-dark-secret>.

⁵ *Ibid.*

⁶ R. Ghadially, ‘All for ‘Izzat’: The Practice of Female Circumcision among Bohra Muslims’, Manushi, No.66, September-October 1991.

often linked to a ritual marking the coming of age and initiation to womanhood. In a study conducted amongst women of the Dawoodi Bohra community, it was found that religious requirements, traditions and customs and the wish to curb the girl's sexuality were the main reasons for the flourishing practice.⁷

FGM/C, in many instances, is also perceived as a way to cleanse a girl from impure thoughts and desires. The perception is that a girl who is circumcised does not get as aroused as one in 'qalfa' (meaning with a clitoral hood) or one whose clitoris is intact. Sexual desire in girls and women is viewed as something from which they need 'protection'. This perceived protection extends beyond the protection of the girl herself to the protection of the whole family's reputation.⁸ In many places, the belief that the clitoral head is 'unwanted skin' or that it is a 'source of sin', which will make them 'stray' out of their marriages are reasons that lie at the heart of a practice that predates Islam but thrives amongst Bohras.

Against this backdrop, in the case of *Sunita Tiwari v. Union of India*,⁹ the practice of FGM/C was raised before the Supreme Court as a public interest litigation under Article 32 of the Constitution. This petition brought to light the dark secret of 'khafz' or female genital mutilation in India. The SC has questioned the practice of FGM/C or *khatna* or khafz as a violation of the fundamental rights and integrity of the girls. The practice of FGM as an "essential religious practice" has also been questioned. The SC bench observed that no one has the right to violate the bodily privacy and integrity of women in the name of religion. The respondents argued that FGM or khafz is integral to religious and cultural beliefs and hence protected under Articles 25 and 26 of the Constitution (right to practice and propagate religion). While taking an emphatic objective view, Hon'ble Dr. Justice D Y Chandrachud countered these contentions and asked, "Why should the bodily integrity of a woman be subject to some external authority? One's genitals are extremely private affairs".¹⁰

⁷ See <https://sahiyo.com/2016/01/> dated April 13, 2016.

⁸ Norman K, Joanne H, Hussein E, Oyortey, 'FGM is Always With Us: Experiences, Perceptions and Beliefs of Women Affected by FGM in London', Centre for Development Studies (Swansea).

⁹ *Sunita Tiwari v Union of India* (2017): WP(C) No 000286.

¹⁰ *Ibid.*

At the international level, the United Nations General Assembly (UNGA) in 2006 condemned religious considerations as a justification for violence against women.¹¹ In pursuance of the same, the UNGA specifically adopted a resolution to impose a worldwide ban on FGM in 2012¹² and again in 2014.¹³ Despite this nearly seventy-five percent of women of the Dawoodi Bohra community in India had subjected their daughters to the cruel practice.¹⁴

In a recent case, the Supreme Court has held that the right to privacy includes the right to bodily integrity emanating from Article 21.¹⁵ Further, the Protection of Children from Sexual Offences Act, 2012 (POCSO) makes touching the genitalia of a girl less than eighteen years of age for non-medical purposes an offence punishable with imprisonment,¹⁶ while provisions also exist for punishing sexual assault committed by deadly weapons.¹⁷ Moreover, voluntarily causing grievous hurt upon the body of a person using dangerous weapons is punishable up to ten years according to the Indian Penal Code, 1860 (IPC).¹⁸ However, while provisions regarding grievous hurt do exist in the IPC, the need for a specific provision which addresses the inhumane act of female genital mutilation remains absent.

The core of the legal battle on FGM centres on the argument that “it amounts to a serious violation of the right to life and bodily autonomy of women and girls under the garb of religious practice”. This case will require the Supreme Court to balance the doctrine of essential religious practices with the rights of women and girls thereby calling the judicial order of the highest court to take a decisive stance, in sync with India’s constitutional and international obligations. What remains to be seen is ‘would the Apex Court be able to put an end to a discriminatory, cruel and harmful customary practice’?

¹¹ G.A. Res. 61/143, U.N. Doc. A/61/438 (December 19, 2006).

¹² G.A. Res. 67/146, U.N. Doc. A/67/450 (December 20, 2012).

¹³ G.A. Res. 69/150, U.N. Doc. A/69/481 (December 18, 2014).

¹⁴ Shalini Nair, At least 75% Bohra women admit female genital mutilation, says study, *The Indian Express* (February 6, 2018) available at <https://indianexpress.com/article/india/75-bohra-women-admit-female-genital-mutilation-study-5052869/>.

¹⁵ *Justice K.S. Puttuswamy v. Union of India*, (2017) 10 SCC 1.

¹⁶ Clauses 3 – 13, The Protection of Children from Sexual Offences Act, 2012.

¹⁷ Clauses 5(h) and 9(h), The Protection of Children from Sexual Offences Act, 2012.

¹⁸ Section 326, Indian Penal Code, 1860.

II. EXCOMMUNICATION OF PARSI WOMEN

Currently being heard by the Supreme Court, the *Goolrokh Gupta v. Burjor Pardiwala*¹⁹ case attempts to answer whether a Parsi woman “loses her religious identity and gains the religious identity of her husband, upon marriage to a Hindu man under the Special Marriage Act”. The High Court of Gujarat, in this case, infamously held that when a Parsi woman marries a non-Parsi person under the Special Marriage Act, 1954, she ceases to be a Parsi unless she obtains a declaration from a competent court stating that she has continued to practice her religion even after marriage.

This judgment of the Gujarat High Court is criticized herein on three grounds. First, it goes against the basic tenet of equality mentioned in Article 14 of the Constitution of India. Unlike a Parsi woman, a Parsi man married to a non-Parsi woman does not face ostracization of any kind and is allowed to enter sacred institutions of the Parsi community. Second, the judgment infringes upon the fundamental right to religious freedom and identity of Parsi women granted under Article 25 of the Indian Constitution. Third, the High Court’s judgment is in direct opposition to the very object behind enacting the Special Marriage Act i.e., to facilitate inter-religious marriages without individuals having to forgo their respective religious identities. This paper focuses on the third ground.

By accepting the argument made by the Parsi trust, “that a woman is de facto excommunicated upon marrying a man from another religion”, the court grants the leaders of religion the final say on what it means to be Parsi. By holding that a woman’s religion is that of her husband’s after marriage, the High Court locates her religious identity in her family, not in her as an individual. It further creates a ‘deemed conversion’ for all women marrying men of a different religion in the absence of any religious ceremony. In its judgement, the High Court notes that in the absence of any law by Parliament, a woman’s religious identity “shall merge into that of her husband” and that such a rule is “generally accepted throughout the world”. Therefore, the Gujarat High Court has effectively made a woman’s religious identity conditional upon her father or husband. By locating a woman’s religious identity in the family and not the individual, the judgement stands in direct contradiction to Article 25 of the Constitution.

¹⁹ SLP (C) 18889/2012.

With the enactment of the ‘Special Marriages Act’, 1872, inter-religious marriage was recognised for the first time in India, provided that “both parties made a declaration to not profess any particular religion”. The Special Marriage Act was amended in 1954, consequent to which a shift was witnessed in the new legislation. In stark contrast, Section 4 of the Special Marriages Act, 1954 makes no mention of religion in listing out the conditions for a valid marriage.²⁰ This shift from the 1872 Act to the present-day legislation was cited by Justice Kureshi in his dissenting opinion as part of the division bench. He concludes that “the legislature had specifically provided for the recognition of inter-religious marriage without the need for either spouse to renounce their religion or convert to the religion of the other”. He also added that the current Special Marriages Act was a “reflection on the post-independence constitutional philosophy of a secular state”.

Goolrokh Gupta’s case promises to be an intriguing case that brings up to the forum several key constitutional questions. What remains to be seen is whether the Supreme Court would be able to accommodate the individual’s views on religion over the communitarian absolutism of the Parsi trust.

III. CONCLUSION

As has been witnessed in the past, the higher judiciary has never hesitated whenever issues of “social justice” are thrown into its arena. There have been times when there has been resistance to change in social mores, customs, and religious practices. Still, the judicial inroads have sought to superimpose constitutional values upon the prevailing societal morality. In both these cases, it is imperative for the Supreme Court to take a decisive stance in sync with India’s constitutional and international obligations. Will these judgements bring about the much-awaited change in the societal attitude towards the treatment of women? There is a hope that the apex court would certainly change the status quo and lead the way for making decisive inroads for the fundamental human rights of Indian women in a society essentially driven by patriarchy.

²⁰ Section 4, The Special Marriages Act, 1954.

COMPARATIVE STUDY OF SUI GENERIS GEOGRAPHICAL INDICATION LAWS IN SOUTH ASIAN COUNTRIES: A WAY FORWARD TO NEPAL

LAXMI SAPKOTA*

ABSTRACT

In the context of South Asian Countries, being the parties to the TRIPS Agreement (Bhutan has observer status since April 1998), they are obliged to protect their GIs. It may be safeguarded by obtaining protection through statutory measures using Sui Generis legislation (of its kind of law), certification mark, collective mark, or laws focusing on business practices. Out of eight countries (Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka) in the South Asian Association for Regional Cooperation (SAARC), only 3 countries (Bangladesh, India, Pakistan) have protected their Geographical Indications (GI) through Sui Generis Geographical Indication law. The paper, through doctrinal research, has aimed to make a comparative study of those countries legal provision of Sui Generis GI. It suggests the importance of the Sui Generis GI laws over other measures of protection, especially over the collective mark. Further, the paper recommends the best way to protect and promote the GI goods of Nepal by the enactment of Sui Generis GI laws. The presence of Nepal in international trade is not felt in the lack of GI laws. The more it delays, the more chances of losing its Geographical indication or have to bear the legal complexities. For example, Basmati is registered by America as its own GI. India claimed it. Nepal has also filed for the shared GI in the European Union. Therefore, this paper reinforces the enactment of Sui Generis GI laws.

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I. INTRODUCTION

Intellectual property comprises the product of intellect. Therefore, it is an intangible property. There are two forms of intellectual property: one is copyright, and the other is an industrial property right. Industrial property right includes patent, trademark, industrial design, geographical indication, and trade secret.

According to the Agreement of Trade-Related Aspects of Intellectual Property Rights (TRIPS), GI means an indication that identifies a good as originating in the territory, region, or locality of a member, where a given quality, reputation, or other characteristics of the good is essentially attributable to its geographic origin.¹ Hence, the main job of a GI is to identify goods whose quality, reputation or other characteristics are linked to the territory of origin.²

Tracing the evolution of GI in the international arena from random definition to TRIPS agreement, various developments can be seen. WTO report of article 24.2 of the TRIPS Agreement on Geographical Indication, has stated the 26 different names used in different documents.³ Other examples can be taken like The Paris Convention for the Protection of Industrial Property 1883 uses the word ‘indication of source’ and ‘appellations of origin’; the Agreement for the Repression of False or Deceptive Indications of Source on Goods 1891 uses the word ‘indication of the source’; The Lisbon Agreement for the protection of Appellations of Origin and their International Registration, 1958 defines the word ‘appellation of origin’ and so forth.

The GI has root in a French word, ‘terroir,’ the territory or place.⁴ The three “Ps” (Product, Place and People) are considered to be related to GI. Mainly, the place is more pertinent in the GI important.

There are multiple benefits of GI. It gives premium price to the products, which boost the local economy. Further, it gives the identity to the place that shows the presence of that particular

¹ World Trade Organization, Agreement of Trade- Related Aspects of Intellectual Property Rights (TRIPS), art. XXII (1994).

² WIPO, (2022) World Intellectual Property Indicators. https://www.wipo.int/edocs/pubdocs/en/wipo-pub-941-2022-en-world-intellectual-property-indicators-2022.pdf?fbclid=IwAR0eMS0ZibRgd1cnMcIxbEfrdgjFhYAyvJiP8DY_WBNLpoOMeRIHzZiFl_A.

³ Agreement of Trade- Related Aspects of Intellectual Property Rights (TRIPS), art. XXIV.II (1994).

⁴ WIPO, *Geographical Indications: An Introduction* (2021).https://www.wipo.int/geo_indications/en/.

country in the international arena or conversely developed the particular area of that particular country.

II. SAARC COUNTRIES STATUS ON THE RATIFICATION OF INTERNATIONAL AGREEMENT ON GI

Among, 179 contracting states of the Paris Convention, except Maldives, all other SAARC countries have signed it. Similarly, among 38 countries, contracting parties to Lisbon Agreement for the protection of Appellation of Origin and their International Registration, none of the countries of the SAARC have ratified it. Furthermore, Bangladesh, Maldives and Nepal are not parties to the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (1891). Likewise, Bhutan has status observer to the TRIPS Agreement, 1995. All other SAARC countries are parties to it. None of the SAARC countries is a party to the Lisbon Agreement, 1958. The ratification of the international agreement makes it obligatory to protect the GI laws, and it also shows the country's solidarity on international platforms.

S. No.	Countries	Paris Agreement, 1883	Madrid Agreement, 1891	Lisbon Agreement, 1958	TRIPs Agreement, 1995
1.	Afghanistan	May 14, 2017	June 26, 2018		July 26, 2016
2.	Bangladesh	March 3, 1991			January 1, 1995
3.	Bhutan	August 4, 2000	August 4, 2004		Observer status, April 1998
4.	India	December 7, 1998	July 8, 2013		January 1, 1995
5.	Maldives				May 31, 1995

6.	Nepal	January 22, 2001			April 23, 2004
7.	Pakistan	July 22, 2004	May 24, 2021		January 1, 1995
8.	Sri Lanka	December 29, 1952	December 29, 1952		January 1, 1995

III. CONSTITUTIONAL PROTECTION OF INTELLECTUAL PROPERTY IN THE SAARC COUNTRIES

Maldives has not recognized intellectual property in the constitution. Conversely, all other SAARC countries (Afghanistan, Bangladesh, Bhutan, India, Nepal, Pakistan, and Sri Lanka) have recognized intellectual property in their constitution. This clearly shows that these countries are aware of the recognition and protection of intellectual property. The constitutional provisions of the respective countries are shown below:

S. No.	Country	Constitution	Provision
1.	Afghanistan	The Constitution of the Islamic Republic of Afghanistan, 2004.	The Constitution, in its fundamental rights, recognizes the IP. ⁵
2.	Bangladesh	The Constitution of the People's Republic of Bangladesh, 1972	The Constitution, in its fundamental rights, mentions the recognition of human intellectual labour. ⁶

⁵ The Constitution of the Islamic Republic of Afghanistan. art. XXXXVII (2004). (the state will devise effective programs for fostering knowledge, culture, literature, and arts for which it will guarantee the copyrights of authors, inventors, and discoverers, and will encourage and protect scientific research in all fields, publicizing their results for effective use).

⁶ The Constitution of People Republic of Bangladesh, art. XX (1972). (the work is a right, a duty, and a matter of honor for every citizen who is capable of working, and everyone should be paid for his work based on the principle "from each according to his abilities to each according to his work." The state will endeavor to create conditions in

3.	Bhutan	Bhutan's Constitution of 2008	The constitution of Bhutan has stated the material interest resulting from the intellectual. ⁷
4.	India	The Constitution of India	The Constitution of India, in its Seventh Schedule, has listed patents, inventions, and designs; copyright; trademarks and merchandise marks.
5.	Maldives	Maldives's Constitution of 2008.	Not mentioned
6.	Nepal	Constitution of Nepal	The fundamental rights state the right to property, and its explanation clause states that property includes intellectual property right. ⁸
7.	Pakistan	Constitution of Pakistan (Stated in the schedule)	The fourth schedule has listed copyright, inventions, designs, trademarks, and merchandise marks. ⁹
8.	Sri-Lanka	The Constitution of the Democratic Socialist Republic of Sri Lanka	In the schedule, Patents, inventions, designs, copyright, trademarks, and merchandise marks ¹⁰ are included.

which a person shall not be able to enjoy unearned incomes, and in which human labor in every form, intellectual and physical, will become a fuller expression of creative endeavor and of the human personality).

⁷ Bhutan's Constitution of 2008, art. XIII (2008). (Every person in Bhutan have the right to material interests resulting from any scientific, literary, or artistic production of which he or she is the author or creator).

⁸ Constitution of Nepal, art.XXV (2015).

⁹ Constitution of Pakistan, article 70(4)

¹⁰ The Constitution of the Democratic Socialist Republic of Sri Lanka, Schedule, List II (amend. 2020).

IV. WAYS ADOPTED FOR GI PROTECTION BY THE SAARC COUNTRIES

TRIPS Agreement advises three ways to protect GI by obtaining protection directly in the jurisdiction concerned. They are protected through the Trademark System (Collective Marks, Certification Marks), Sui generis System (making own kinds of GI laws), and Laws focusing on business practices. Also, it may be protected by taking advantage of a bilateral agreement concluded between countries; or through WIPO's Lisbon system for the international registration of an appellation of origin and through the Madrid System for the international registration of marks. The following table shows that only three countries (Bangladesh, India, and Pakistan) have the Sui Generis GI laws. In contrast, other countries (Afghanistan, Bhutan, Maldives, Nepal) protect their GI through trademark laws. The following table shows in more precise.

S. No.	Countries	Sui Generis GI Laws	Trademark Laws
1.	Afghanistan		Law on Trademark Registrations, 2009
2.	Bangladesh	Geographical Indication (Registration and Protection) Act 2013. The Geographical Indications of Goods (Registration and Protection) Rules, 2015.	Trademark Act, 2009
3.	Bhutan		The Industrial Property Act of the Kingdom of Bhutan, 2001 (for collective TMs). The Copyright Act of the Kingdom of Bhutan, 2001.

4.	India	Geographical Indications Goods (Registration and Protection) Act, 1999. Geographical Indications Goods (Registration and Protection) Rules, 2002.	
5.	Maldives		The Copyright and Related Rights Act Trademark Registration Process of Maldives. Additional Class, Word Mark, and Logo 0.00 USD.
6.	Nepal		Patent Design and Trademark Act, 2022 Collective Mark Registration Directives, 2076.
7.	Pakistan	The Geographical Indication (Registration and Protection) Act, 2020.	Trademark Ordinance, 2001.
8.	Sri-Lanka		Intellectual Property Act, 2003, no. 36

V. IMPORTANCE OF THE SUI GENERIS GI LAWS OVER COLLECTIVE MARKS

GI could be protected through the Sui Generis GI, collective marks, or other ways. The thesis entitled “Trademarks and Geographical Indications: Conflict or Coexistence”, submitted by Melissa A. Loucks, has affirmed that trademark and GI are neither “equal” nor “identical”, or

interchangeable. And, coexistence is possible through legislation adopting a harmonious approach to protect both.¹¹

US emphasis on trademark whereas, EU emphasis on GI. Some scholars stress the importance of trademarks and vice versa. However, the Sui Generis GI laws are important over the collective marks, which are discussed below:

S. No.	Points of Differences	Geographical Indication (GI)	Collective Mark (CM)
1.	Definition	GI is an indication that identifies a good as originating in place, and the product should attribute to the geographical origin.	A CM member is a mark adopted to indicate membership in a collective group. It is not used to identify and distinguish the source or origin of goods or services; its sole function is to indicate that the person displaying the mark is a member of an organized collective group.
2.	Origin	GI indicates the natural origin or the value of the geographical origin of the goods or services is linked. ¹²	CM indicates a commercial origin of goods or services.
3.	Owned by	GI does not belong to a particular enterprise and can be used by several enterprises at the same time ¹³ and as owned	CM belongs to a person, either an individual or a corporation.

¹¹ Melissa A. Loucks, *Trademarks and Geographical Indications: Conflict or Coexistence?* (2012) (The University of Western Ontario) (western graduate and postdoctoral studies), available at <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=2044&context=etd>.

¹² Zografos, Daphne. (December 2008). *Geographical Indications & Socio- Economic Development*, Working Paper 3.

¹³ Ahuja, V.(2004). Protection of Geographical Indications: National And International Perspective. *Journal of the Indian Law Institute*, 46(2) , 269, 287. <http://www.jstor.org/stable/43951907> .

		by governing bodies of groups of producers within a region. Some European countries view the collective ownership of GIs as a right “which cannot be licensed or transferred out of the region.” ¹⁴	
4.	Term of protection	The terms of protection are unlimited in their duration as TRIPs and European Union also states for the unlimited duration.	The terms of protection differ from country to country may be seven may be renewed for one or two times. However, The <i>TRIPS Agreement</i> limits trademark protection to “no less than seven years,” although indefinite renewal is possible if one meets a condition. ¹⁵
5.	Nature of Object	GI generally protects one good at a time.	Trademarks may protect multiple goods at a time. ¹⁶ However, in Nepal, collective mark registration protects a good at a time.
6.	Right	GI is a collective right ¹⁷	The trademark is the personal property of a group of persons.

¹⁴ Loucks, Melissa A. (2012). *Trademarks and Geographical Indications: Conflict or Coexistence?*, [Western Graduate and Postdoctoral Studies, The University of Western Ontario]. <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=2044&context=etd>.

¹⁵ Ahuja, V. (2004). Protection of Geographical Indications: National And International Perspective. *Journal of the Indian Law Institute*, 46(2) , 269, 287. <http://www.jstor.org/stable/43951907>

¹⁶ Blakeney, Michael. (2014). *The Protection of Geographical Indication, Law and Practice*, Elgar Intellectual Property Law and Practice series.

¹⁷ Gangee, Dev S. (2020). Sui Generis or Independent GI Protection, *Cambridge University Press*, 257, 436 <https://doi.org/10.1017/9781316711002>.

7.	Creativity	GI is above human creativity, which includes topography, and environment.	The trademark is the product of human creation.
8.	Applicable	A GI is a generic description that applies to all traders in a particular geographic location to goods that emanate from that location. ¹⁸	A trademark is a sign which distinguishes the products of a specific trader from those of its competitors. ¹⁹
9.	Generic	There is less possibility of GI becoming generic	There is the risk of becoming the marks as generic terms.
10.	Applicability	A GI is a generic description that is applicable to all traders in a particular geographical location to goods that emanate from that location. ²⁰	CM is a sign which distinguishes the products of a specific (collective) trader from those of its competitors. ²¹
11.	Protection	All traders from the particular GI enjoy the right to protect a GI from a wrongful appropriation. ²²	The trademark is protected from a wrongful appropriation at the suit of the registered proprietor of that mark. ²³

¹⁸ Blakeney, Michael. (2014). *The Protection of Geographical Indication, Law and Practice*, Elgar Intellectual Property Law and Practice series.

¹⁹ Arbind karna. (2014). *The Protection of Geographical Indication*, Nagel Intellectual Property Law and Practice series.

²⁰ Blakeney, Michael. (2014). *The Protection of Geographical Indication, Law and Practice*, Elgar Intellectual Property Law and Practice series.

²¹ Sapkota, L. (2021). Evolution of Geographical Indication Law in Nepal: A Way Forward, *Nepal Bar Council Journal*, 383.

²² Zografos, Daphne. (December 2008). *Geographical Indications & Socio- Economic Development*, Working Paper 3.

²³ WANG, SZU-YUAN. (2013). *Geographical Indications as Intellectual Property: In Search of Explanations of Taiwan's Gi Conundrum*, [Firth Thesis Submitted for the Degree of Doctor of Philosophy in Law, New Castle University].

12.	Transfer of ownership	GI is not freely transferable from one owner to another as a user must have the appropriate association with the geographical region, and it must comply with the production practices of that region. ²⁴	CM can be transferred from one owner to another.
13.	Availability	Geographical indications are generally available only in jurisdictions that have legislated.	Trademark is available in every jurisdiction.
14.	Choice in trademark or GI	Countries protecting geographical indications under <i>sui generis</i> legislation, such as the European Communities <i>Regulation</i> , create the possibility “for subsequent GIs to prevail over prior trademarks, and in certain circumstances, the <i>Regulation</i> envisages coexistence between trademarks and geographical indications.”	Countries protecting geographical indications within their trademark regimes tend to favor the First in Time First in Right principle, which affords protection to the first sign registered, whether Trademark or geographical indication and registered signs enjoy exclusive rights preventing use by third parties. ²⁵
15.	Time	GI represents a link to the	CM can be created overnight.

²⁴ Blakeney, Michael. (2014). *The Protection of Geographical Indication, Law and Practice*, Elgar Intellectual Property Law and Practice series.

²⁵ Loucks, Melissa A. (2012). *Trademarks and Geographical Indications: Conflict or Coexistence?*, [Western Graduate and Postdoctoral Studies, The University of Western Ontario]. <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=2044&context=etd>.

	Duration	country's tradition, culture, and history. ²⁶ Many years may be required to produce the link between a product and its geographical origin. ²⁷	
16.	Traditional Formulas and process	GI is often based on traditional formulas and processes. ²⁸	Traditional formulas are not the basis of the CM.
17.	Rules Governing the Relation between GIs and Trademarks	The registration of a name under the GI prevents the registration of a similar trademark submitted after the date of submission of the registration application to the authority, which results from a trademark registered in breach, is invalidated. ²⁹	Collective trademark is in less benefit compared to the GI in the questions of priority arising between an earlier trade mark and a later PGI or PDO. For example, the name "Grana Padano", was registered as a PDO for Italian hard cheese in 1996, but in 1998, Biraghi S. P. A., succeeded in registering as a CTM "Grana Biraghi" for cheese. ³⁰
19.	Product	Sui Generis Laws are generally product specific, which is	CM are not product specific.

²⁶ Joshi, B. K. et al., (2020). Geographical Indication: A tool for supporting on farm conservation of crop landraces and for rural development, *Journal of Nepal Agricultural Research Council*, 6(1), <https://cgspace.cgiar.org/bitstream/handle/10568/109652/geographical.pdf>.

²⁷ Zografos, Daphne. (December 2008). *Geographical Indications & Socio- Economic Development*, Working Paper

²⁸ Zografos, Daphne. (December 2008). *Geographical Indications & Socio- Economic Development*, Working Paper p. 67.

²⁹ WANG, SZU-YUAN. (2013). *Geographical Indications as Intellectual Property: In Search of Explanations of Taiwan's Gi Conundrum*, [Firth Thesis Submitted for the Degree of Doctor of Philosophy in Law, New Castle University].

³⁰ WANG, SZU-YUAN. (2013). *Geographical Indications as Intellectual Property: In Search of Explanations of Taiwan's Gi Conundrum*, [Firth Thesis Submitted for the Degree of Doctor of Philosophy in Law, New Castle University].

	specific	product/ spirit/wine/food specific legislation. Therefore, it is much more specific, requiring more research and coordination with locals of the place where products have their origins. ³¹	
20.	In economic Justification ³²	GI is based on the pursuit of social equity, and it promotes merit goods. ³³	CM or trademark may cause market failure because of information asymmetry.
21.	Relation to market competition	GI may deviate from market competition.	CM facilitates market competition.
22.	Social cost	GI restricts other traders from using the same or similar sign, but it spreads the burdens	Restricting other traders from using the same or similar sign, but CM does not spread the burdens among

³¹ WANG, SZU-YUAN. (2013). *Geographical Indications as Intellectual Property: In Search of Explanations of Taiwan's Gi Conundrum*, [Firth Thesis Submitted for the Degree of Doctor of Philosophy in Law, New Castle University].

(For example: No. 322-XV of 18.07.2003 on the Declaration of the Complex "Combinatul de Vinuri "Cricova" S.A.", an Object of the National-Cultural Heritage of the Republic of Moldova, the Parliament created a special regime for the use of the GI "Cricova" for wine. Swiss Federal Council Ordinance of December 23, 1971, to regulate the use of the "SWISS" appellation in SWISS Watches. As a result, it is difficult and cumbersome to have product-specific sui generis GI law).

³² WANG, SZU-YUAN. (2013). *Geographical Indications as Intellectual Property: In Search of Explanations of Taiwan's Gi Conundrum*, [Firth Thesis Submitted for the Degree of Doctor of Philosophy in Law, New Castle University].

³³ WANG, SZU-YUAN. (2013). *Geographical Indications as Intellectual Property: In Search of Explanations of Taiwan's Gi Conundrum*, [Firth Thesis Submitted for the Degree of Doctor of Philosophy in Law, New Castle University].

		among consumers. Further, it impedes innovation. ³⁴	consumers further.
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VI. COMPARISON OF THE KEY ELEMENTS OF THE SUI GENERIS GI LAWS OF THE SAARC COUNTRIES

TRIPS provide the privilege to protect the GI laws according to the need of the country that are parties to TRIPS and is also in the regional cooperation. Further harmonization of the national legal framework of SAARC countries is very important. Uniformity or at least a common understanding ground helps to maintain the ‘GI alliances’ stronger in SAARC.

Nepal has just drafted a policy that includes the GI. A collective mark is registered through the collective mark directory in Nepal. Immediately, it is time to draft the Geographical Indication of Goods (Registration and Protection) Act with the objective to register and protect the GI of goods.

The word ‘Sui Generis’ itself suggests its own types of laws. Prof. Dr. Yubaraj Sangroula says to use the word “Utpati Mool” instead of Sui Generis as Utpati Mool better carries the notion of ‘of its own kinds’ in Nepal. Minimum Criteria Nepal should adopt for the Registration of the GI. Some common ground of legal provision was found in these countries, which are discussed below:

A. Name of the Act

The Sui Generis GI is protected in India through ‘The Geographical Indications of Goods (Registration and Protection) Act, 1999’³⁵. India has drafted the laws before Bangladesh (Geographical Indication of Goods (Registration and Protection) Act, 2013) and Pakistan (Geographical Indications (Registration and Protection) Act, 2020³⁶).

³⁴ WANG, SZU-YUAN. (2013). *Geographical Indications as Intellectual Property: In Search of Explanations of Taiwan’s Gi Conundrum*, [Firth Thesis Submitted for the Degree of Doctor of Philosophy in Law, New Castle University].

³⁵ *The Geographical Indications of Goods (Registration and Protection) Act 1999*(India).

³⁶ *Geographical Indications (Registration and Protection) Act 2020*(Pakistan).

B. Objective

The objective of the laws of all three countries (Bangladesh,³⁷ India³⁸ and Pakistan³⁹) is to make provision for the registration and protection of GI goods. The preamble of Pakistan states the benefits of GI, which are recognized as well, protection of GI for the public interest, and it advances the economic reform and development of areas and states preventing other and unfair competition.

C. Definition of Geographical Indication of Goods

In the definition of GI of goods, all three countries (Bangladesh⁴⁰, India,⁴¹ and Pakistan⁴²) have a common understanding of GI, as stated by TRIPS. The GI of goods means agricultural or natural or manufactured goods which identify its originating county or territory, or a region or locality of that country or territory, where any specific quality, reputation or other characteristics of the goods is essentially attributable to its geographical origin. When such goods are manufactured goods, one of the activities of either production or processing or preparation of the goods concerned takes place in such territory, region, or locality as the case may be.⁴³

D. Generic Name (GN) or indication

In India⁴⁴ and Bangladesh⁴⁵, generic names indicate the Geographically indicative name of goods which relates to the place or region where the goods are originally produced, exploited or manufactured and have become the common name of such goods and serve as a designation for or indication of the kind, nature, type or other property or characteristic of the goods.⁴⁶ In Pakistan, GN also means a name that corresponds to the name of a territory, region or locality, and does not have any meaning in Pakistan as an

³⁷ *Geographical Indication of Goods (Registration and Protection) Act, 2013*, pmb. (Bangladesh).

³⁸ *The Geographical Indications of Goods (Registration and Protection) Act, 1999*, pmb.(India).

³⁹ *Geographical Indications (Registration and Protection) Act, 2020*, pmb. (Pakistan).

⁴⁰ *Geographical Indication of Goods (Registration and Protection) Act, 2013*, s. 2. (Bangladesh).

⁴¹ *Geographical Indications (Registration and Protection) Act, 2020*s.2.vii (Pakistan).

⁴² *Geographical Indications (Registration and Protection) Act, 2020*s.2.vii (Pakistan).

⁴³ *The Geographical Indications of Goods (Registration and Protection) Act, 1999* s. 2.h(India).

⁴⁴ *The Geographical Indications of Goods (Registration and Protection) Act 1999*s. 9 explanation clause (India).

⁴⁵ *Geographical Indication of Goods (Registration and Protection) Act, 2013*s. 2.4 (Bangladesh).

⁴⁶ *Geographical Indication of Goods (Registration and Protection) Act, 2013*s. 2.4 (Bangladesh).

indication or reference of geographical origin and has become a commonly used name for the goods in question.⁴⁷

E. Goods

The definition of Goods by Bangladesh⁴⁸ and India,⁴⁹ and Pakistan include natural or agricultural products or any product of handicraft or industry and include any foodstuff. Further, Pakistan has stated, horticulture natural, raw, or manufactured goods and drink products, whether in a processed or semi-processed or semi-finished form.⁵⁰ However, TRIPS has not defined good or goods.

F. Indication

Bangladesh defines Geographical indicative name of goods which relates to the place or region where the goods are originally produced, exploited, or manufactured and have become the common name of such goods and serves as a designation for or indication of the kind, nature, type or other property or characteristic of the goods.⁵¹ India includes any name, geographical or figurative representation or any combination of them conveying or suggesting the geographical origin of goods to which it applies⁵² Further, Pakistan includes any words, letters or numerals, geographical name or other name, device or any figurative representation, label or any combination thereof indicating or referring or suggesting or conveying the geographical origin of the goods to which it is applied.⁵³

G. Registration of GI

The registration of GI is not made mandatory in all three countries. The registration gives the prima facie evidence of validity.⁵⁴ as well as offers better legal protection to facilitate an action for infringement since the registered proprietor *and* authorized users can initiate

⁴⁷ *Geographical Indications (Registration and Protection) Act, 2020s. 2.x*(Pakistan).

⁴⁸ *Geographical Indication of Goods (Registration and Protection) Act 2013 s. 2.8* (Bangladesh).

⁴⁹ *The Geographical Indications of Goods (Registration and Protection) Act 1999s. 2.f*(India).

⁵⁰ *Geographical Indications (Registration and Protection) Act 2020s.2.xi* (Pakistan).

⁵¹ *Geographical Indication of Goods (Registration and Protection) Act 2013s. 2.4*(Bangladesh).

⁵² *The Geographical Indications of Goods (Registration and Protection) Act 1999s. 2.f* (India).

⁵³ *Geographical Indications (Registration and Protection) Act 2020s. 2.xii* (Pakistan).

⁵⁴ *Geographical Indications (Registration and Protection) Act 2020s. 29* (Pakistan).

infringement actions. Further, authorized users can exercise the exclusive right to use the GI.⁵⁵

H. Ground for refusal of registration of GI

The ground for refusal of registration of GI in Bangladesh is if it does not conform to the definition given in the act, if it is apprehended that its use may deceive or cause confusion, if its use is contrary to any law in force, if it is contrary to public order or morality, if it comprises or contains any matter likely to hurt to religious susceptibilities of any citizen of Bangladesh, if it is, or may otherwise be, disintitiled to protection, it is determined to be a generic name or indication, or is not or has ceased to be protected in its country of origin, if it is true as to the territory, region or locality in which the goods originate, but falsely represents that the goods originate in another territory, region or locality.⁵⁶

Likewise, in India also, the ground for refusal of registration of GI are: if the use of which would be likely to deceive or cause confusion; the use of which would be contrary to any law for the time being in which comprises or contains obscene matter; susceptibilities of any class or section of the citizens; or which comprise or contains any matter likely to hurt the religion; which would otherwise be disintitiled to protection in a court; or which are determined to be generic names or indications of goods and are, therefore, not or ceased to be protected in their country of origin, or which have fallen into disuse in that country; or which although literally true as to the territory, region, or locality in which the goods originate, but falsely represent to the persons that the goods originate in another territory, region, or locality, as the case may be.⁵⁷

Same way, in Pakistan, the ground for refusal of registration of GI is if it does not correspond to the definition, the use of which is likely to deceive or cause confusion, which is not or has ceased to be protected in its country of origin, which has fallen into disuse in that country, which the Registrar determines to be a generic name or an indication, which is opposed to morality or public policy.

⁵⁵ *The Geographical Indications of Goods (Registration and Protection) Act 1999* s. 21 (India).

⁵⁶ *Geographical Indication of Goods (Registration and Protection) Act 2013* s. 19 (Bangladesh).

⁵⁷ *The Geographical Indications of Goods (Registration and Protection) Act, 1999* s. 9 (India).

The language is different, but the GI is refused to register if it does not correspond with the definition of GI in their countries.

I. Prohibition to assign transfer

GI cannot be transferred in Bangladesh, India, and Pakistan.

J. Registration of homonymous GI

Homonymous geographical indications are registered in Bangladesh (talks about equitable treatment and protection to every producer of such goods are conferred for all indication).⁵⁸, India⁵⁹, and Pakistan⁶⁰ (if all practical conditions under which the homonymous indication in question is differentiated from other, equitable treatment of the producer of the goods concerned and that the consumer of such goods should not be confused or misled in consequence of such registration).

K. Renewal of GI

The registration of GI in India⁶¹ and Bangladesh⁶² is for 10 years and should be renewed within 10 years, whereas, the registered authorized user of the GI of goods has 5 years and can renew for the next 3 years in Bangladesh.⁶³

L. Prohibition in registration of Trademark

There is a prohibition on the registration of trademarks as GI of goods in Bangladesh⁶⁴ India,⁶⁵ and Pakistan.⁶⁶

M. Unregistered GI

No legal action is taken in India,⁶⁷ or Pakistan⁶⁸ for the infringement of unregistered GI.

⁵⁸ *Geographical Indication of Goods (Registration and Protection) Act 2013* s. 7 (Bangladesh).

⁵⁹ *The Geographical Indications of Goods (Registration and Protection) Act, 1999* s. 10 (India).

⁶⁰ *Geographical Indications (Registration and Protection) Act, 2020* s. 9 (Pakistan).

⁶¹ *The Geographical Indications of Goods (Registration and Protection) Act, 1999* s. 18 (India).

⁶² *Geographical Indication of Goods (Registration and Protection) Act 2013* s. 25 (Bangladesh).

⁶³ *Geographical Indication of Goods (Registration and Protection) Act 2013* s. 16 (Bangladesh).

⁶⁴ *Geographical Indication of Goods (Registration and Protection) Act 2013* s. 21 (Bangladesh).

⁶⁵ *The Geographical Indications of Goods (Registration and Protection) Act, 1999* s. 25 (India).

⁶⁶ *Geographical Indications (Registration and Protection) Act, 2020* s. 46 (Pakistan).

⁶⁷ *The Geographical Indications of Goods (Registration and Protection) Act, 1999* s. 20 (India).

N. Provision of foreign GI:

Foreign GI is registered in Pakistan but should be registered in its original country.⁶⁹

VII. IMPLEMENTATION ASPECT OF GI

The success or failure of anything can be seen from its implementation aspect. The measurement of the success of GI is seen in three areas: Firstly, the number of GI registration within Bangladesh, India, and Pakistan. Secondly, the result of the Global Innovation Index of SAARC of 2022 and thirdly, the WIPO's Standing Committee on the Law of Trademarks, Industrial Design and Geographical Indications (SCT).

The WIPO has provided the following data of the registration of Sui Generis GI.

Sui Generis GI in force in 2021.⁷⁰

S. No.	Countries	Sui Generis GI
1	Bangladesh	6
2	India	417
3	Pakistan	1

Secondly, in the Global Innovation Index of SAARC, India is in a good rank to f Bangladesh, India, Nepal, Pakistan, and Sri- Lanka but the ranking has not been done of Afghanistan, Bhutan and Maldives.

⁶⁸ *Geographical Indications (Registration and Protection) Act, 2020* s. 33 (Pakistan).

⁶⁹ *Geographical Indications (Registration and Protection) Act, 2020* s. 10 (Pakistan).

⁷⁰ WIPO, (2022). World Intellectual Property Indicators. https://www.wipo.int/edocs/pubdocs/en/wipo-pub-941-2022-en-world-intellectual-property-indicators-2022.pdf?fbclid=IwAR0eMS0ZibRgd1cnMcIxbEfrdgjFhYAyvJiP8DY_WBNLpoOMeRIHzZifl_A

S. No.	Countries	Total Number of Countries 132
1.	Afghanistan	
2.	Bangladesh	102
3.	Bhutan	
4.	India	40
5.	Maldives	
6.	Nepal	111
7.	Pakistan	87
8.	Sri-Lanka	85

Thirdly, there are 55 states members of the WIPO's Standing Committee on the Law of Trademarks, Industrial Design and Geographical Indications (SCT). Among 55 countries, India is only the SAARC country member in the database as the result shows that India is in progressing scores.

VIII. CONCLUSION: SUI GENERIS GI PROTECTION AS THE BEST WAY TO PROTECT AND PROMOTE THE GI GOODS OF NEPAL

A geographical indication is an indication that shows the products, goods or things that are produced, manufactured, or originated in a particular origin. The product, place and people are very important in GI. It is the tool of the farmer to get the market, premium price. Same way, the consumer is also not deceitful if there is GI in the products.

The paper explores the status of the SAARC countries in the TRIPS. Bhutan has observer status, but other countries (Afghanistan, Bangladesh, India, Maldives, Nepal, Pakistan, and Sri Lanka) in SAARC are parties to TRIPS.

Further, the paper has analysed the status of the SAARC countries in the recognition, protection, and enforcement of GI in their respective constitution. Maldives has not recognized intellectual property in its constitution. Nevertheless, all other SAARC countries, Afghanistan, Bangladesh, Bhutan, India, Nepal, Pakistan, and Sri Lanka, have recognized intellectual property in their constitution.

TRIPS Agreement advises three ways to protect GI by obtaining protection directly in the jurisdiction concerned. They are protected through the Trademark System (Collective Marks, Certification Marks), Sui generis System (making own kinds of GI laws), and Laws focusing on business practices. Only three countries (Bangladesh, India, and Pakistan) have the Sui Generis GI laws, whereas other countries (Afghanistan, Bhutan, Maldives, and Nepal) protect their GI through trademark laws. The paper showed that the Sui Generis GI protection triumphs over the collective marks.

In comparing the key elements of the Sui Generis GI laws of Bangladesh, India, and Pakistan. It found that all three acts have been drafted to make provision for the registration and protection of GI of goods. They align with the definition as stated by TRIPS: the GI of goods means agricultural or natural or manufactured goods which identifies its originating county or territory, or a region or locality of that country or territory, where any specific quality, reputation or other characteristics of the goods is essentially attributable to its geographical origin and in a case where such goods are manufactured goods, one of the activities of either production or processing or preparation of the goods concerned takes place in such territory, region or locality as the case may be. Same way, the generic names, goods, and indications have been defined. The registration of GI is not made mandatory in all three countries, but it provides better protection. Some ground for refusal of registration of GI is also made. GI cannot be transferred in Bangladesh, India, and Pakistan. There is also provision for the registration of homonymous geographical indications and renewal of GI, and a prohibition on registering trademarks as GI of goods in Bangladesh, India, and Pakistan. No legal action is taken for unregistered GI. Coordination of the national legal framework of SAARC countries is very important. The consistency or at least of common understanding ground helps to maintain the 'GI alliances' stronger in SAARC.

In the implementation aspect, according to WIPO, six Sui Generis GI in Bangladesh, 417 in India and one in Pakistan have been registered in 2021. Also, the result of the Global Innovation Index of SAARC of 2022 in which India is in 40th rank and Bangladesh in 102nd, Sri-Lanka in 85th rank, Pakistan in 87 and Nepal in 111. In contrast, Afghanistan, Bhutan, and Maldives have not been ranked. Finally, India is only the SAARC country member of the WIPO's Standing Committee on the Law of Trademarks, Industrial Design and Geographical Indications (SCT) database.

The Federal Democratic Republic of Nepal is a land-locked country, in the Himalayan region of South Asia. Geographically, located at 26.4831N to 29.8412N latitudes and 80.3333E to 88.0943E longitudes, Nepal covers 0.3% of Asia's continent and 0.03% of the world's land with an area of 147,181 sq. km. Yet, the never colonized history of Nepal makes it an interesting terrain to explore. The population of Nepal, according to National Census 2022, is 2,91,92,480. Among this Men's count is 1,42,91,311, which is 48.93% of the total population, and 1,49,01,169 is a total female population which is 51.04% of the total population. Nepal is an agricultural country. Also, the main occupation of Nepali is agriculture.

Nepal has many products probable of Geographical Indication protection. To name a few are Lapsi, Rudraksha, Dhaka Topi, Amliso, Marsi Beer, Gundruk, Sinki and sinnamani Nepali Kagaj (Lokta Paper), Chhurpi, Nepali Woolen Craft. Similarly, the research grant paper submitted to Kathmandu School of Law by Laxmi Sapkota, found that the Bhaktapur Juju Dhau (Yogurt of Nepal) has a unique quality. Similar products like Greek Yogurt are protected and promoted, but due to the lack of GI Laws, Nepal could not protect Juju Dhau as a GI product of Nepal.⁷¹

The Constitution of Nepal has protected intellectual property (IP) as a fundamental right. Collective Mark Registration Related Directory, 2010 (2067) registers the collective mark. The National Intellectual Property Policy 2017 (2075) has enlisted Geographical Indication as one of the intellectual properties. The Fifteenth Plan (Fiscal Year 2019/20-2023/2024) indicates the increment of GI. Harmoniously, Budget Speech 2022/2023, Trade Policy 2014(2072), Nepal Trade Integration Strategy 2016 (2074), and Trademark Operating Manual 2014 (2072) issued

⁷¹ Sapkota, L. (2021). "Sui Generis Geographical Indication Protection Law in Nepal: A Comparative Study of Juju Dhau of Bhaktapur with Greece 'Greek Yogurt'", Research Grant, Kathmandu School of Law.

by the government of Nepal also discuss the GI. Now, Nepal should immediately draft the sui generis GI laws, as it aids more over the collective mark laws.⁷²

Nepal needs to draft the GI laws because it has abundance of GI goods. Laxmi Sapkota, in the article submitted to Judicial Academy, has stated four points *for the necessity of the Sui generis Geographical Indications (GI) protection in Nepal. Firstly, Nepal has a plenty of local geographic indications to represents it in national and international world. BK Joshi, HB KC, and AK Acharya in their research paper has identified that there are 38 location-specific unique crop landraces, 20 popular location-specific crops, 53 geo's linked popular crop landraces along with their important traits, 21 popular geo's linked agro-products, and 8 GI products from Nepal at an international market.⁷³ Similarly, Bal Krishna Joshi in his paper states, GI is one amongst the twenty-four approaches for the conservation of non-orthodox agricultural plant genetic resources in Nepal. Moreover, Nepal Trade Integration Strategy, 2016 has identified nine goods and three services as priority exports potentials based on expert performance and inclusive and sustainable development parameters. Secondly, Nepal is a party to different international conventions (Paris Convention, TRIPS Convention), where it has shown its commitment to making national laws compatible with international GI laws. Thirdly, Nepal has its laws and policies assuring to adopt the GI laws. The National Intellectual Property Policy, 2017, has duly mentioned about GI. Further 'Industrial Enterprise Act, 2076 has defined intellectual properties incorporating geographical indications. Lastly, essential cases by High Court, Patan (Highlander Whisky Association V. Highlander Distillery Pvt. Ltd, DN 97, 2076/10/29, and Tea Board of India v. Modern Tea Industries Pvt. Ltd, DN 169, 2077/09/19) has already stated the necessities of sui generis GI.*

Nepal gets international recognition with the GI products in the international trade and business. Therefore, it is necessary to draft the Sui Generis GI Law in Nepal.

⁷² Sapkota, L. (2021). Evolution of Geographical Indication Law in Nepal: A Way Forward, *Nepal Bar Council Journal*, 383.

⁷³ Joshi, B. K. et al., (2020). Geographical Indication: A tool for supporting on farm conservation of crop landraces and for rural development, *Journal of Nepal Agricultural Research Council*, 6(1), <https://cgspace.cgiar.org/bitstream/handle/10568/109652/geographical.pdf>.

COGNIZANCE OF HUMAN RIGHTS OF INTERSEX PEOPLE IN INDIA AND THE GLOBE

SURAJ TOMAR* & ABHISHEK DEY**

ABSTRACT

This article briefly examines the shift in the status of intersex individuals over time in Indian society. It critically examines the deplorable state of intersex and transgenders despite several changes in the legal structure of India post-independence. This article gravely discusses the lacuna in the medical infrastructure and amenities required for gender affirmation surgeries which stands instrumental in the infringement of human rights. It also highlights how the newly passed Transgender (Protection and Rights) Act 2019 is detrimental to the very essence of the landmark NALSA judgement with an emphasis on the new protocols to be followed for legal recognition as “third gender”. The article discusses the formulation of new laws in India and abroad to elevate the living standards of intersex individuals. This article mirrors the lack of awareness about intersex people in India via a small survey of 56 individuals pursuing higher studies. It discusses the inclusion of gender studies abroad and concludes with a note on the efforts to bring gender studies into the school curriculum in India.

I. INTRODUCTION

The sex of a person is determined by various biological and physiological characteristics like the morphology of sexual organs (both internal and external), the prevalence of certain types of chemical messengers in the body called hormones and secondary sexual characteristics with the onset of puberty. Thus, it is assigned at birth by observing the morphology of the sex organs. Gender, on the other hand, is a social construct. Gender can be described as traits an individual possesses to be a man or a woman. For instance, masculinity is associated with men while feminine nature is expected from women. Masculine or feminine nature also varies with time,

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society or between different cultures and ethnicities. As per World Health Organization, an individual's gender identity refers to how one experiences gender internally which may or may not be the sex assigned at birth.¹

A biological man may feel like a woman and may have feminine traits and may wish to lead a dignified life like a woman in a particular society. We refer to the gender or gender identity of such an individual as that of a woman. However, gender is very fluid and may be more than two (man or woman) or may not be anything (agender). Coherently, a lesser-known and understood category called "intersex" exist which can colloquially be described as a sex other than that of a man or a woman based on physiological characteristics discussed previously. Whenever the process of sexual development differs from the usual process, it brings about alterations in physiological characteristics leading to the condition called "intersex". Depending on the anomaly that occurs at different stages of sexual maturation, the intersex condition can be classified into several categories.

A. Scientific insight into Intersex Condition

Intersex refers to a group of conditions where a person is born with reproductive or sexual anatomy that does not appear to match the traditional criteria of female or male based on sex organs and/or secondary sexual characteristics. Predominantly male-type anatomy of the internal sex organ may be born female, or a person may be born with genitals that appear to be somewhere between the typical male and female types—for example, a girl may be born with a noticeably large clitoris or without a vaginal opening, while a boy may be born with a noticeably small penis or a divided scrotal sac which resembles labia. There are several intersex conditions known to human beings and are being evaluated. Medically, 17 different intersex conditions in human beings are there, which have been explained by ISNA or the Intersex Society of North America.²

Here, we review some of them to understand the complexity of sexual development. During sexual intercourse, the spermatocyte or a sperm cell (male gamete) fuses with the oocyte or egg

¹ *Gender and health*, World Health Organization. World Health Organization. Available at: https://www.who.int/health-topics/gender#tab=tab_1 (Accessed: November 02, 2022).

² *Frequently asked questions*, Intersex Society of North America. Available at: <https://isna.org/faq/> (Accessed: November 15, 2022).

cell (female gamete) leading to the formation of the zygote which further divides to form an embryo, finally giving rise to the foetus or a new individual. In simpler words, a new individual is formed by properly segregated chromosomes from both parents. Chromosomes are a cluster of DNA or genetic material which codes for how an individual will be composed. Intersex conditions may develop due to either anomalous chromosomal segregation during the fusion of gametes or mutation at the DNA level. We will discuss a few intersex conditions which are graspable for people from non-science/medical backgrounds.

a. Androgen Insensitivity Syndrome

A mutation (or a deleterious change) in a particular part of DNA halts the production of a receptor of a sex hormone which is involved in the development of the sex organs. The person with this condition is biologically a male but possesses female characteristics like incomplete vaginal closure, an enlarged clitoris, and a small vagina but no cervix or uterus.³

b. 5-alpha reductase deficiency

A mutation in a particular part of the DNA halts the production of 5-alpha reductase which produces a hormone required for the development of the external sex organ of a man. People with this condition are men biologically but with ambiguous genitalia that neither resemble entirely male nor female genitalia.⁴

c. Klinefelters' Syndrome

In this condition, an individual acquires an extra chromosome from either the father or the mother. This leads to breast development in some despite masculine development. The ejaculate from the testes contains no sperm making them infertile.

d. Turners' Syndrome

³ Werner, R. *et al.* (2012) "Androgen insensitivity syndrome," *Seminars in Reproductive Medicine*, 30(05), pp. 432–442. Available at: <https://doi.org/10.1055/s-0032-1324728>.

⁴ Okeigwe, I. and Kuohung, W. (2014) "5-alpha reductase deficiency," *Current Opinion in Endocrinology, Diabetes & Obesity*, 21(6), pp. 483–487. Available at: <https://doi.org/10.1097/med.000000000000116>.

In this condition, a woman lacks one of the sex chromosomes and thus has a short stature and some secondary sexual traits like men. They are also infertile.

e. Swyer Syndrome

A child born with this condition looks like a female. The sex glands are improperly developed and non-functional.

II. SOCIAL ACCEPTANCE AND UNDERSTANDING OF INTERSEX

A. Intersex in the LGBTQ+ umbrella community

The intersex people have been grouped under a broad LGBTQI+ community where the letters stand for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex, respectively. Lesbian refers to a woman who establishes a liking or love or an emotional and/or sexual relationship for or with another woman, respectively. When a man does the same for another man, such a man is referred to as gay. A man or a woman who likes both man and a woman similarly is referred to as bisexual. People who feel that the sex they were born with fails to match their gender identity or the gender they feel about themselves are called transgenders. For instance, an individual who is physiologically a man but feels like a woman and celebrates living a dignified life like other women in a particular society will be referred to as transgender. The word queer is used to collectively describe all non-heterosexual individuals. We have already discussed the Intersex in the previous section. While transgender and queer studies are frequently combined, the same cannot be said for transgender and intersex studies.

As Todd Reeser points out, work on intersex and transgender studies are highly different in the broad field of gender studies, and few scholars or scientists engage in both fields concurrently. Some transgenders believe that transgender status is an intersex disorder of the brain. This ideology is largely resisted by the intersex community, and the tension developed by such

differences in ideology frequently pulls the two communities apart.⁵ In a crux, intersex is a medical condition, unlike homosexuality, bisexuality, and transsexuality.

B. History of Intersex in Indian society (pre-and post-independence)

Although concrete evidence as to the existence of what we understand as intersex in the modern world does not exist in Hindu mythology, there are plenty of stories based on gender fluidity in the Puranas, folklore and oral tradition in India deduced from ancient times. The story of ‘Shikhandi’ who was born as a woman but fought an epic battle as a man is very popular. As per the religious texts, Lord Buddha (personification of planet Mercury) was born as neither a man nor a woman as a result of a curse. Several other stories of such a kind exist since time immemorial.⁶ From the 15th through the 19th century, Muslim monarchs of the Mughal Empire were wealthy sponsors of transgenders and the intersex, who referred to them as the “third gender”. Many people from this group climbed to positions of substantial authority under both Hindu and Muslim monarchs. The most popular group of the third gender in India is the “Hijra or the Kinnara Samaj”. Hijras are typically born masculine but dress and seem conventionally feminine. The majority of them opt to have their male genitalia removed as a sacrifice to the Hindu deity “Bahuchara Mata”.⁷

Some hijras are intersex individuals whom their families abandon during birth or in their childhood. Outsiders frequently refer to Indian society and most hijras as transgender, although hijras believe themselves to be third gender—neither male nor female, and not transitioning. They consider themselves an entirely different gender. For thousands of years, hijras have been viewed with terror and reverence, yet much of this respect did not survive Hinduism's confrontation with colonialism. In the nineteenth and twentieth centuries, the British occupied most of South Asia and were astounded by third-gender individuals. In 1871, the British declared all hijras criminals and ordered colonial officials to arrest them on sight, based on Christian

⁵ Horlacher, S. (2016) “Transgender and intersex: Theoretical, practical, and artistic perspectives,” *Transgender and Intersex: Theoretical, Practical, and Artistic Perspectives*, pp. 1–27. Available at: https://doi.org/10.1057/978-1-349-71325-7_1.

⁶ Pattanaik, D. (2014) *Shikhandi and other tales they don't tell you*. New Delhi: Zubaan and Penguin Books India.

⁷ *The third gender and Hijras, Religion and Public Life at Harvard Divinity School*. Available at: <https://rpl.hds.harvard.edu/religion-context/case-studies/gender/third-gender-and-hijras> (Accessed: November 02, 2022).

notions about gender. Hijras, on the other hand, continued without substantial interruption due to their vital religious roles for Hindus.

Although the 1871 ordinance was abolished immediately after independence, hijras are still commonly regarded with disrespect today. Outside their ritual functions, they are nearly invariably barred from work and education. As a result, they are frequently impoverished and forced to rely on begging and prostitution to survive. They are frequently the victims of assault and abuse, are hounded by authorities, and are denied care in hospitals.

III. GENDER-AFFIRMATIVE SURGERIES FOR INTERSEX PEOPLE

Suppose an individual is born with ambiguous genitalia which has characteristics of both male and female sex organs, and this individual feels her gender identity is that of a woman. Then, she can undergo correction surgeries to shape her sex organs to look like that of a woman. Similarly, an individual with a female body who identifies as a man can undergo surgeries to masculinize the body's appearance, breast excision, etc. Version 1 of Indian Standards of Care (ISOC-1) published recently in November 2020 in Delhi has been derived from the World Professional Association for Transgender Health (WPATH) Standards of Care Version 7, which provide globally accepted guidelines for gender-affirmative surgeries to be performed on transgender and intersex people in India along with the proper protocols of surgical care needed.⁸ However, this ISOC-1 fails to be inclusive as none of the members of the panel who came up with these guidelines belongs to the transgender or intersex community. All of them were medical practitioners. As per the recently revised Transgender Persons Act, to undergo a gender affirmative surgery a transgender or an intersex individual have to be certified by an authoritative government body. The person willing to undergo the said surgery must write in a designated format to the District magistrate of the jurisdiction in which they have resided for not less than a year.

The District Magistrate will then issue a 'Transgender identity card' after verifying the authenticity of such an application. This document can then be used to request changes in their

⁸ Gupta, R. and Gupta, R. (2021) "Management of gender incongruence and gender affirmation surgeries – the Indian perspective, from a large volume Gender Identity Clinic," *Indian Journal of Medical Sciences*, 73, pp. 289–296. Available at: https://doi.org/10.25259/ijms_494_2020.

other documents like Aadhar card, birth certificate, senior secondary examination certificate and others mentioned in annexure-I. The application can also be sent after the medical transition requesting a change in name and binary gender (male or female) as per Section 7 of The Transgender Person (Protection of Rights) Act 2019 that must be duly signed by the Medical Superintendent or Chief Medical officer of the medical institute where this procedure will be performed. The magistrate will then issue a revised “certificate of identification”.

Although various policies have been introduced and documented by various state governments, the work in the field is minimal and cumbersome. Kerala was one of the first states to set up policies for gender-affirmative surgeries in 2015.⁹ Despite this, there are no governmental medical institutions which provide such surgeries, making it difficult for transgender and intersex people from financially compromised status to undergo such surgeries. There are reports of a lack of proper counselling required before and post-surgery. There are only a few private hospitals which perform such complex surgeries. The failure of surgeries makes such hospitals unreliable. The Kottayam Medical College, specially set up in 2017 to provide healthcare facilities to transgenders and Intersex people, only provides general healthcare and counselling services.

As per Section 15 of The Transgender Person (Protection of Rights) Act, 2019, influenced by the landmark NALSA judgement, the state governments must cover the medical expenses for all gender-affirmative surgeries. Surprisingly, only the state of Tamil Nadu provides comprehensive insurance for coverage of medical expenses related to these surgeries. Since 2010, Tamil Nadu has been the first state in India to offer free sex change procedures at two government hospitals: Kilpauk Medical College (KMC) Hospital and Government Hospital (GH).¹⁰ Ashok Gehlot-led government of Rajasthan has recently announced its new policy under the “Samman Yojana” which will provide medical assistance of INR 2,50,000 to transgender people who wish to undergo gender affirmation surgery. As per the deputy director of the Department of Social Justice and Empowerment, any transgender individual (or intersex individual) who wishes to

⁹ 'Anannyah was pushed out of hospital twice', Kerala Trans Woman's father alleges (2021) *The News Minute*. Available at: <https://www.thenewsminute.com/article/anannyah-was-pushed-out-hospital-twice-kerala-trans-woman-s-father-alleges-152733> (Accessed: November 08, 2022).

¹⁰ Suresh, S. (2016) *Transgenders prefer private clinics for SRS surgeries*, *Deccan Chronicle*. Available at: <https://www.deccanchronicle.com/nation/current-affairs/060216/transgenders-prefer-private-clinics-for-srs-surgeries.html> (Accessed: November 08, 2022).

undergo this surgery must apply for it to the said department. If these surgeries are performed in government hospitals, they shall be free of cost or a medical assistance ship of up to INR 2,50,000 will be provided. However, whether the government medical hospitals can provide the requisite care and facility for such surgeries is a matter of concern.¹¹

IV. NATIONAL LEGAL SERVICES AUTHORITY V. UNION OF INDIA (2014)

National Legal Services Authority of India (NALSA) moved to the Supreme Court of India, demanding recognition of individuals who did not fall into the male or female binary concept of gender.¹² The Hijra community has considered itself as a third gender since time immemorial. The court had to decide whether a third gender needed recognition. The “sex” of an individual was discussed in length; it was not only described as a biological attribute based on sex organs but also included gender identity, which is how a person feels – masculine, feminine or non-binary in a body. Discrimination based on sex is against Articles 15 and 16 of the Indian constitution. Unequivocally, the right to equality and non-discrimination (Article 15) and the right to freedom of expression (Article 19 (1) (a)) were formulated in gender-neutral terms. It further added that an individual is free to express one’s gender identity “through dress, words, action, or behaviour”. The Court ruled that transgender people have fundamental rights guaranteed by Articles 14, 15, 16, 19(1)(a), and 21 of the Constitution. To recognize transgender people’s human rights, the Court also relied on key international human rights treaties and the Yogyakarta Principles. Since the apex court, for the first time, recognized “third-gender”, it is considered a landmark judgement to elevate the living standards of transgender and intersex individuals.

V. EFFORTS AT IMPROVING INTERSEX LIFE: INDIA AND THE WORLD

In the 1960s, gender reassignment surgeries were normalized and somewhat popularized among intersex individuals. There has been a bounty of such forced surgeries on record. Since the

¹¹ New Indian Express (2022) *Rajasthan government to cover sex reassignment surgery costs of Transgenders*, *The New Indian Express*. The New Indian Express. Available at: <https://www.newindianexpress.com/nation/2022/oct/19/rajasthan-government-to-cover-sex-reassignment-surgery-costs-of-transgenders-2509668.html> (Accessed: November 15, 2022).

¹² *National Legal Services Authority (NALSA) vs. Union of India - South Asian Translaw Database - third gender* (2020) *South Asian Translaw Database*. Available at: <https://translaw.clpr.org.in/case-law/nalsa-third-gender-identity/> (Accessed: November 10, 2022).

beginning of 2011, the United Nations (UN) human rights treaty bodies have condemned such forced surgeries 40 times. HB 6171 was presented in Rhode Island in January 2021 in the US.¹³ The Protection of Youth with Variations in Physical Sex Characteristics Act, or HB 6171, seeks to restrict genital surgery on intersex children until they are at least twelve years old which has been considered a proper age for decision-making and to obtain consent for surgeries. This measure seeks to guarantee that life-altering decisions are made with the agreement of the people affected. However, the Committee suggested that HB 6171 be delayed for additional review on April 13th, 2021, and as a result, the measure is kept on hold presently.

In France, for legal recognition of a gender of a transgender individual, the person need not undergo surgery. It is merely a matter of choice. However, if a transgender or intersex person wishes to undergo gender affirmation surgery, it shall be funded by the state. However, as per a report for List of Issues Prior to Reporting (LOIPR) on the International Covenant on Civil and Political Rights (ICCPR) by an NGO the state party via the public health system funds all typical forms of Intersex Genital Mutilation or IGM in secrecy. Medical practitioners do not inform the parents properly about the condition of their child. Within a few months after birth, such surgeries are carried out on intersex babies (who lack any understanding) which is a violation of the “bodily autonomy” of an individual as per human rights.¹⁴

The 2014 NALSA judgement prohibits forced gender reassignment surgeries in India. When intersex individuals are born with ambiguous genitalia, doctors usually perform surgeries on the sex organs to conform to the male and female- binary. In April 2019, the Madras High Court directed the Tamil Nadu government to pass a government order banning such gender reassignment surgeries except for surgeries that stand mandatory to save lives in some complex and fatal forms of intersex condition. Justice GR Swaminathan mentioned that parental consent on performing such surgeries on their children with the intersex condition cannot be equated with the consent of the child.¹⁵ A child with an intersex condition must be given proper time to attain

¹³ *National and state legislation on intersex in the United States (2021) interACT*. Available at: <https://interactadvocates.org/intersex-legislation-regulation/> (Accessed: November 10, 2022).

¹⁴ *OHCHR Treaties - Home*. Available at: <https://tbineternet.ohchr.org/Treaties/> (Accessed: November 10, 2022).

¹⁵ *Ban sex reassignment surgeries on intersex infants, Madras HC tells TN Govt (2019) The News Minute*. Available at: <https://www.thenewsminute.com/article/ban-sex-reassignment-surgeries-intersex-infants-madras-hc-tells-tn-govt-100565> (Accessed: November 10, 2022).

an age where the child will develop decision-making ability and decide whether to undergo such surgeries.

VI. AGITATION ON TRANSGENDER (PROTECTION AND RIGHTS) ACT, 2019

The Transgender Persons (Protection of Rights) Act, 2019 is highly controversial and has been a matter of debate. There was widespread agitation against the bill by several transgender communities. Despite such agitation, this bill was passed and has been in force since 2020 as the Transgender (Protection of Rights) Act 2019. This Act forbids discrimination against transgender people on numerous grounds as well as offers a procedure for “recognition” of transgender identity by submitting a stipulated form before jurisdictional District Magistrates which has been discussed previously. Furthermore, the Act requires governments and companies to implement welfare measures for transgender people and not discriminate against them in the workplace. Subsequently, this Act also safeguards transgender people’s right to a residence by prohibiting the separation of transgender children from their parents and exclusion from households. Some transgender communities have demanded the right to live by choice with other transgender and intersex people willingly in “Hijra gharanas” beyond the legal structures of adoption and kin-based on birth. The fact that transgender people must apply for recognition of their genders to a District Magistrate of the jurisprudence they are living in is against the very essence of the NALSA judgement. It contradicts the “self-perception of gender identity”.¹⁶

Furthermore, for legal recognition, a transgender individual will have to request it by submitting a form to the magistrate duly signed by the Medical Superintendent and Chief Medical officer of the medical institute where that individual’s gender affirmation surgery has been performed. This itself stands against the 2014 NALSA judgement. Swati Bidhan Baruah challenged this Act in the Supreme Court of India. The case is pending, and a judgement is yet to be made.¹⁷

¹⁶ Jain, D. (2022) “Right to health and gender-affirmative procedure in the Transgender Persons Act 2019 in India,” *Indian Journal of Plastic Surgery*, 55(02), pp. 205–210. Available at: <https://doi.org/10.1055/s-0042-1749137>.

¹⁷ *Supreme Court Observer - Challenge to transgender act SCObserver*. Available at: <https://www.supremecourtobserver.in/court-case/challenge-to-transgender-act> (Accessed: November 11, 2022).

VII. SURVEY ON AWARENESS OF “INTERSEX” PEOPLE

A survey was conducted to study awareness regarding the intersex condition in college students. The survey was carried out online via google forms. The sample size of this study or the number of participants in this study was 56. The online forms were circulated amongst students of different age groups in different universities and institutes, irrespective of the subject they studied. The leading participants were the students of SRM University Haryana (SRMUH) and Amity University, Noida, and the Indian Institute of Technology (IIT)s across India.

Around 64% of the students belonged to the age group of 25-35 years, whilst the rest belonged to the age group of 15-25 years. 75% of the sample size knew that “I” stands for intersex in the LGBTQIA+ community. This good percentage could be due to more visibility and growing sensitization about the LGBTQIA+ community through online sources and social media. However, only about 46% of this cohort knew about what exactly is the “intersex condition”. It is to be kept in mind that around 37% of this sample size belongs to the field of either medical or biological sciences. So, it is evident for them to know about the medical or genetic basis of this condition. Biology students in colleges study intersex conditions in animals in their curriculum as a part of Developmental biology.

Around 50% of this sample size have some idea about gender-affirmation surgery. 70% of the sample size thinks that the government must cover medical expenses for both intersex and transgender individuals. Approximately 20% think that the government should only do this for transgender people and not for intersex people. Though 87.5% of the survey sample are well aware that “third-gender” has legal recognition in India, about 50% did not have a clear idea about who belongs to the “hijra” community. 85.7% of the sample size are not aware of the fact that intersex is a medical condition. This becomes very alarming knowing 37% of the sample pursue life sciences-related careers. The data suggest a lack of awareness in the educated young generation about intersex and transgender people. This corresponds to the existence of no provisions in the school curriculum that explains such conditions. However, this study reveals that around 79% of the sample size agrees with the inclusion of gender studies in the school curriculum. Around 20% think it must be included after a child has attained an age fit for understanding such sensitive subjects. 87.5% from this survey think that more NGOs must come

up for sensitising about the LGBT community (which includes intersex people) so that people from this community can have access to a healthy and dignified life devoid of discrimination and work for the betterment of society and the nation.

VIII. GENDER STUDIES IN THE SCHOOL CURRICULUM

It is not surprising to know that there is a lack of knowledge about the intersex community in the Indian population. Thanks to the growing popularity of social media and reasonable internet charges people have access to the internet and can make themselves aware of anything, anywhere anytime. Due to a lack of awareness and fear of talking about gender fluidity and diversity in sex and gender, several people within the LGBTQIA+ community have struggled for years to understand themselves. In the National Council of Educational Research and Training (NCERT) Class- XII Biology textbooks conditions like Klinefelter's Syndrome and Turner Syndrome are explained. However, the word "intersex" is missing. Other than this, there is no context of anything related to the LGBTQIA+ community anywhere in the school curriculum in India.

Recently, the Department of Gender Studies, NCERT launched its online training manual for teachers named "Inclusion of Transgender Children in School Education: Concerns and Roadmap" regarding how to make the school environment a little more inclusive for transgender and non-conforming gender students. A former member of RSS and an activist against fraudulent religious conversions filed a complaint to the NCPCR addressing this step by NCERT as "criminal conspiracy...to psychologically traumatize school students under the name of gender sensitization". Subsequently, the National Commission for Protection of Child Rights (NCPCR) wrote to NCERT, stating that it had received complaints about the instruction manual's content and had taken Suo moto cognizance of the case concerning the deprivation and violation of child rights. NCPCR criticized some parts of the manual which guided teachers to talk about "puberty blockers" and their availability for the teenage group. After all this controversy, the manual has been removed from the online portal. However, one of the officials of NCERT informed that the

manual was still being worked on when it was accidentally put on the website. The council will respond to the NCPCR when needed.¹⁸

Meanwhile, in 2011 California became the first state to teach about the LGBTQIA+ community with proper identities in Social Science in schools. By 2019, other states in the United States passed laws mandating LGBTQIA+ inclusive curriculum.¹⁹ In the United Kingdom, when schools believe it is appropriate to teach their students about LGBT issues, they can ensure that this information is thoroughly incorporated into their curriculum rather than provided as a stand-alone unit or lesson. Schools have been given complete autonomy about the protocols they need to follow to do the same.²⁰

Contentedly, many central universities and educational institutes have implemented new strategies for building a more inclusive campus life for LGBTQIA+ students. IIT Delhi has recently given official recognition to its queer-collective body called “Indradhanu” and established an office of “Diversity and Inclusion” headed by an independent Dean.

IX. CONCLUSION

Statistically, 1.7% of the world’s population is intersex.²¹ Despite this, there are no guidelines in the school curriculum to teach about intersex people. In most cases, the intersex condition is diagnosed with the onset of puberty and not just after birth. Since there is a lack of awareness about intersex individuals, even parents of such individuals remain confused about their children when diagnosed with such conditions. It must be understood that one intersex condition can be different from other, so there is profound diversity. As discussed earlier, there are 17 different intersex conditions known to humans. An intersex child faces a tremendous amount of physical

¹⁸ *Ncert drops transgender inclusion manual from website after NCPCR Rap (2021) Hindustan Times*. Available at: <https://www.hindustantimes.com/india-news/ncert-drops-transgender-inclusion-manual-from-website-after-ncpcr-rap-101636169182949.html> (Accessed: November 11, 2022).

¹⁹ *Six states have now passed LGBTQ+ inclusive curriculum legislation-each with a different definition of 'inclusion' (2021) New America*. Available at: <https://www.newamerica.org/education-policy/edcentral/six-states-have-now-passed-lgbtq-inclusive-curriculum-legislation-each-with-a-different-definition-of-inclusion/> (Accessed: November 11, 2022).

²⁰ *Introduction to requirement GOV.UK*. Available at: <https://www.gov.uk/government/publications/relationships-education-relationships-and-sex-education-rse-and-health-education/introduction-to-requirements> (Accessed: November 11, 2022).

²¹ Available at: <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/intersex-people#:~:text=Intersex%20people%20are%20born%20with,are%20born%20with%20intersex%20traits.>

as well as emotional trouble while growing up in a society where such a condition is stigmatized and ridiculed. Unequivocally, he/she is made to believe that his/her condition is socially not acceptable. There is no proper representation of intersex people. Policies must be made to educate school students about such conditions. More NGOs must come forward to sensitize the common mass so that it becomes easier for them to accept their children with an intersex condition. A more inclusive society is an urgent need. There is a massive difference between the government making new policies and these policies being implemented in society. The lack of standards and criteria for gender-affirming surgeries for transgender and intersex people has severe consequences for the quality of health care available. We, as a society, need a critically crafted legal framework to overcome such impediments to make this nation more inclusive and safer for every citizen.

GROWTH OF E-COMMERCE AND ENVIRONMENT PROTECTION IN INDIA

PARTH SHARMA*

ABSTRACT

The e-commerce industry serves as a link between the digitalization of our society and the move to a more sustainable economic model. It is a sector evolving constantly and rapidly, driven by new technology, new goals, new ideas, and new demands, which makes it capable of pioneering creative and sustainable solutions. Sustainability in all of its facets is one of the most important issues of our time. E-commerce business models enable firms to conduct business without needing physical travel. Transportation is a significant source of hazardous gases and pollution. Traditional consumer policy enables the customer to consume as much as they desire. However, occasionally, sustainability necessitates a reduction in consumption. The difference cannot be resolved by attempting to reconcile two fundamentally separate policies. Sustainability must be recognised as the foundation, and consumer perception or behaviour is a crucial component that must be analysed when formulating regulations that may simultaneously protect the environment and promote consumerism. Relevant Environment Protection Laws with reference to the Consumer Protection framework in India, including e-commerce rules, 2020 need to be analysed to come up with sustainable solutions. Government and Civil Society can play a significant role in the “greening” of consumer policy. This research investigates the environmental implications of e-commerce. It focuses on how consumers perceive the significance of sustainability in e-commerce, including required policy intervention from the Government in India.

I. INTRODUCTION

In the past decade, India’s retail sector has experienced a dramatic upheaval and a revolutionary transformation. E-commerce has been revolutionising the retail scene, enabling many sellers and

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multiple industries. This is mostly due to digitalization and the Digital India initiative of the Government of India. There is no doubt that cheaper smartphones and data packs are the driving force behind this adaptive revolution. Even though the infrastructure was primarily in place, it was necessary for industry players to not only adjust to the new method of purchasing items but also to establish a customer-friendly ecosystem. The most important component in this adoption has been the trustworthiness of established e-commerce platforms' products and brands, as well as their customer retention initiatives, which have created the most transparent and equitable environment for purchasers.

According to a recent report by the CUTS Institute for Regulation & Competition (CIRC), close to 78% of Indian consumers perceive online shopping to be as safe and transparent as offline shopping, with over 80% of respondents claiming that products purchased from e-commerce platforms meet their expectations, giving them the confidence to shop online. Even though this aspect of trust has an element of inevitability due to the rapid adoption of technology in every aspect of daily life, the level of trust that buyers place in online purchases would not exist without the efforts e-commerce platforms have made to assure buyers of predictability and accountability. Industry stakeholders, including sellers, platforms, and the government, must guarantee that this becomes a solid foundation for work, enabling a sustainable rise in e-commerce to maintain the rapid adoption of digital technology in Tier 1, Tier 2, and Tier 3 markets¹.

There have been a few main variables that have enabled consumers to have large faith and belief while purchasing on e-commerce platforms, despite the fact that buyer conviction is evident. These include flexible and transparent pricing, adherence to product quality, competent customer service, and positive buyer feedback, all of which contribute to the platform's and product's trustworthiness².

E-commerce platforms' flexible pricing and tempting bargains – mostly unavailable through offline channels – have been a significant factor in India's embrace of e-retail. 83% of

¹ Abukhader, Sajed and Jönson, Gunilla (2003), "E-commerce and the Environment: A Gateway to the Renewal of Greening Supply Chains," Accepted and forthcoming in International Journal of Technology Management – a special issue on supply chain management.

² Bowersox, Donald J. and Closs, David J. (1996), Logistical Management – The Integrated Supply Chain Process, Chapter 16, page 463, McGraw-Hill, New York.

respondents to the CIRC poll stated that they had obtained better deals on online platforms than conventional markets, highlighting the increasing influence of e-commerce over the past decade. It is undeniable that e-commerce platforms have been able to offer better offers to their customers as a result of lower operating and logistics costs³.

Sustainability is an option approach causing less harm to the earth that ensures the limited and appropriate use of natural resources in the present while preserving them for the future. Considering the global impact of global warming and our planet's deteriorating condition, the notion of sustainability is currently being incorporated into every field. The global concerns of environmental deterioration have compelled society to reconsider its approach to development and evolve the notion of sustainable development⁴. As a result, more and more eco-friendly and sustainable technologies are being produced. Concerns about the natural environment have led to increased green consumption in the commercial sector, where this change has had the greatest impact⁵. Over time, the business sector has entirely converted into a virtual platform that not only efficiently manages the demands of the people, but has also shown to be environmentally beneficial. However, the greater question is how successful e-commerce has been in creating a greener future for our world. Is it genuinely balancing the ecology, or is it harming the environment further? In addition, it is essential to examine if e-commerce has attained the degree of sustainability anticipated.

Over the past decade, global e-commerce has expanded steadily. The COVID-19 epidemic has further pushed the sector, resulting in shifts in consumer behaviour and astonishing sales records. Amazon, Alibaba, and Walmart have monopolised the online purchasing market and raised consumer expectations. They want products to be delivered on the same day and to be returned free of charge. Indeed, digitalization and technology advancements have enabled the sector to accomplish what was thought to be unthinkable only a few decades ago. However, this revolution has had a significant impact on our earth. We examine the increasing popularity of

³ Available at: <https://timesofindia.indiatimes.com/blogs/voices/increased-consumer-trust-spearheading-growth-of-e-commerce-in-india/>.

⁴ Mohd. Wira Mohd Shafiei and Hooman Abadi, *The Importance of Green Technologies and Energy Efficiency for Environmental Protection*, INTERNATIONAL JOURNAL OF APPLIED ENVIRONMENTAL SCIENCES ISSN 0973-6077, Volume 12, Number 5, pp. 937, 937-951 (2017).

⁵ Prakash Rao, Sreejith Balasubramanian, Nitin Vihari, ShaziJabeen, Vinaya Shukla & Janya Chanchaichujit, *The e-commerce supply chain and environmental sustainability: An empirical investigation on the online retail sector*, COGENT BUSINESS & MANAGEMENT (2021).

internet shopping and its environmental impact. This research studies whether it is possible to employ these technologies sustainably over the long term.

II. POSITIVE EFFECTS OF E-COMMERCE ON THE ENVIRONMENT

Transportation is mostly responsible for carbon dioxide emissions. Reducing the amount of vehicle journeys is one method for lowering carbon emissions. E-commerce software enables individuals to conduct business without commuting. By allowing their workers to work in virtual offices, shop online, and work from home, businesses can further minimise their carbon footprint. This reduces the number of commuters on the road. If more commercial transactions could be completed online, the number of commuters may be reduced. Transitioning to a paperless world would benefit deforestation, which contributes to global warming. There are numerous applications for digital information transfer through e-commerce. E-commerce can decrease waste and the demand for inventory, warehouse space, and business operational expenses. For instance, it is not necessary to lease office space or send invoices by the usual, more expensive paper mail. Moreover, for the sake of the environment, recyclable packaging must be utilised. It has also been suggested that e-commerce reduces waste by significantly improving the worldwide market for secondary materials through online auctions⁶.

III. NEGATIVE EFFECTS OF E-COMMERCE ON THE ENVIRONMENT

Imagining the “negative environmental impact” of e-commerce is quite challenging. It emits no harmful substances and requires little energy or natural resources. Not only are the negative environmental repercussions of e-commerce present, but they are also significant. The type and extent of these negative effects are such that their resolution is neither obvious nor familiar⁷.

A closer examination of the Internet’s environmental implications reveals that the possible good effects are only one side of the story. Although it cannot be denied that the Internet has the potential to save material and energy, it is too early to say that e-commerce has exclusively beneficial effects on the environment. A potentially overwhelming negative effect accompanies each possible positive effect. For instance, shifting a business online can minimise waste such as

⁶ Carter, Craig R. and Ellram, Lisa M. (1998), “Reverse Logistics: A Review of the Literature and Framework for Future Research,” *Journal of business Logistics*, Vol. 19, No. 1, pp. 85-102.

⁷ *Id.*

printed catalogues, store space, and transportation needs, but we must produce more energy-intensive computers as a result! Web-based marketing may promote wasteful rather than prudent consumption. Indeed, the Internet has already significantly increased the global mass production of various things. The convenience of online purchasing leads to increased spending. Regarding energy usage, faster delivery requirements tend to result in trucks that are only partially occupied. E-commerce also tends to favour speedier forms of conveyance, which can dramatically increase fuel usage. When we choose trucks instead of boats or trains, energy consumption increases significantly. Moving the same package by air a second time significantly increases energy consumption. As a result, a portion of the increase in transport energy consumption can be linked to the expansion of e-commerce, as it tends to influence consumer preferences toward more energy-intensive, faster delivery journeys. The Internet economy has both pros and cons. Despite the rising body of work on the environmental effects of e-commerce, our understanding of the scope and mechanisms behind patterns of material use and energy consumption is inadequate.

IV. PHYSICAL MARKETPLACE TO VIRTUAL MARKETPLACE: THE CHOICE THAT MODERN BUSINESS MADE

The reality that online technology has created various new opportunities is beyond debate. The entire brick-and-mortar system has been changed to online ordering. It must be ensured, however, that these prospects do not come at the expense of environmental quality. Because most of the time, introducing new technology promotes the deterioration of the ecosystem by making it easier and more convenient to embrace environmentally damaging practices.

Now, nearly every storefront we pass on the street also has an internet business, which may be even more popular and accessible than the real one. The COVID-19 epidemic further spurred the expansion of e-commerce. Statistics indicate that by 2020, there will be around 150 million online shoppers annually, and the number has been rising significantly each year⁸. E-Commerce retail purchases are projected to increase from 14.1% to 22% in 2023⁹. In line with the expansion

⁸ *Number of annual online shoppers in India from 2018 to 2020*, STATISTA.COM, <https://www.statista.com/statistics/1191958/india-number-of-annual-online-shoppers/> (last visited Nov 6, 2022).

⁹ Coral Ouellette, *Online Shopping Statistics You Need to Know in 2022*, OPTINMONSTER.COM, (January 7, 2022) <https://optinmonster.com/online-shopping-statistics/>.

of e-commerce, it is arguable if the appropriate efforts are being made to ensure a greener and more environmentally sustainable future, given these rising numbers.

V. SUSTAINABILITY IN E-COMMERCE: CHOICE OR NECESSITY

Recognizing the depth of the situation, each industry is developing an environmentally sustainable approach. There is a global drive to improve sustainability, particularly in e-commerce, which has been seen to have both beneficial and bad effects on the environment. Numerous measures have been taken to alleviate this problem. Various legislative frameworks and policies have been enacted and enforced, including The National Green Tribunal Act, 2010, which was enacted to establish the Green Tribunal for effective and expeditious disposal of cases for environment protection and conservation of forests and other natural resources, enforcement of legal rights relating to the environment and giving relief and compensation for damages to person and property and matters relating connected in addition to that. To ensure the safe handling, generation, processing, treatment, packaging, storage, transportation, use, reprocessing, collection, conversion, offering for sale, destruction, and disposal of Hazardous Waste, the 2016 Hazardous Waste Management Rules were published¹⁰.

The Environment Protection Act was enacted in 1986 to protect and improve environmental conditions, as well as to implement recommendations made at the 1972 Stockholm UN Conference on the Human Environment. The Air (Prevention and Control of Pollution) Act of 1981 was passed because of the same meeting. It was a law aimed at preventing, controlling, and mitigating air pollution. The Consumer Protection (E-Commerce) Rules, 2020 were proposed to apply to all goods and services purchased or traded over digital or electronic networks, as well as to all models and formats of e-commerce retail, except natural persons transacting in their capacity, as this does not constitute a professional or commercial activity that is undertaken on a consistent or methodical basis. The Plastic Waste Management Amendment Rules, 2021 sought to mitigate the damage that plastics pose to the environment. India's e-commerce ecosystem has been made more consumer-friendly by these acts¹¹. Due to the slow and incremental knowledge people build over time, the revolution in the e-commerce industry to create a greener future has only begun.

¹⁰ Statement of objectives, National Green Tribunal Act, 2010.

¹¹ CENTRAL POLLUTION BOARD, (last visited Dec 1, 2022), <https://cpcb.nic.in/rules/>.

In some way, e-commerce can help achieve ten of the seventeen SDGs. E-commerce has a favourable impact on the sustainable growth of individual nations and the global economy. This effect is especially obvious in the labour market, as the number of Internet-based businesses continues to increase, and with them, the number of jobs. Most job openings in 2020 required some level of education, but there was an increase in fields such as courier service where education was optional. E-commerce enables access from any location in the world to the same market for education and health services. Typically, these services bought via the Internet are less expensive. It encompasses primary and secondary education, further training, obtaining medical advice from foreign specialists via the Internet, etc. Nonetheless, e-commerce can have negative environmental implications. Searching, packaging, shipping, and returning things from online businesses all impact the environment. Although this may incur additional expenses, e-commerce businesses can reduce their carbon footprint by employing efficient packaging and transportation methods. They can impact sustainable consumption by teaching their clients about environmentally responsible behaviour and ways to reduce environmental pollution. E-businesses can drastically lessen their negative impact on sustainable development objectives¹².

VI. ADVERTISEMENT STRATEGIES IN E-COMMERCE

In the business sector, social networking has shown to be a godsend. Unquestionably, social media platforms contribute significantly to e-development. Commerce's Now, social media is utilised as an advertising medium. Despite the fact that consumers are still apprehensive about trusting internet products. It is not a secret that many clients have been deceived due to their lack of technological knowledge. This is still an impediment to sustainability in many locations across the nation. Evidently, the evolution of a legal framework has aided in establishing e-long-term commerce's viability. Recently, the Ministry of Consumer Affairs, Food and Public Distribution published the Consumer Protection Act, 2019 and the Consumer Protection (E-Commerce) Rules, 2020¹³. E-commerce Rules restrict unfair commercial practices and deceptive and misleading advertising, allowing customers to trust e-commerce items. If they have any complaints, they can use the act's grievance procedure. When customers are confident that their

¹² Jelniski, L. W. et al. (1992), "Industrial Ecology: Concepts and Approaches," Proceedings of the National Academy of Science, pp. 793-797.

¹³ Sanjana Buch, *India: E-Commerce Sector In India – An Overview Of Legal Framework*, MONDAQ.COM, (Feb 08, 2022) <https://www.mondaq.com/india/dodd-frank-consumer-protection-act/1158964/e-commerce-sector-in-india-an-overview-of-legal-framework>.

concerns will be effectively addressed, there are benefits on both sides: the customers will act on the advertisements without hesitation, and these methods will be sustainable and environmentally friendly because not all advertisements need to be printed in the newspaper, thereby reducing paper waste and the cost of doing so.

There have been several cases in which false ads have resulted in the sale of products that consumers found to be of no benefit. Despite the fact that these faults can be penalised and addressed under Section 89 of the Consumer Protection Act of 2019, they nonetheless result in unwanted environmental externalities. In the recent case of *Francis Vadakkan vs. The Proprietor, A-One Medicals & Ors*¹⁴, a customer purchased hair cream based on an advertisement promising that his hair would grow threefold in six weeks. However, his hair did not grow in accordance with the advertisement, and he was subsequently compensated. And there have been countless other incidents involving the same issue, which are eroding customer confidence and becoming an impediment to consumer adoption of this move to green technology¹⁵.

VII. PACKAGING METHODS AND THEIR IMPACT ON THE ENVIRONMENT

Various regulations have been enacted to ensure that e-commerce uses sustainable packing technologies. Over time, it became evident that plastic was not a sustainable solution and could not be relied on for an extended period since it might create irreversible environmental damage. As a result, the Central Pollution Control Board decided to prohibit the use of plastic, as it was determined to be the leading pollutant. Uncontrollable and difficult to manage was the amount of plastic waste being produced. This is due to the inability of plastic to break down and its inability to be burned due to the emission of toxic fumes and hazardous gases during combustion¹⁶.

The government implemented several plastic-banning measures to improve packing techniques. We witnessed a great deal of uproar during the 2018-2019 calendar year. As a result, the Plastic Waste Management Amendment Rules, 2021 were enacted, prohibiting single-use plastic items with poor usefulness and a high potential for littering by 2022. In addition, the Ministry of

¹⁴ Francis Vadakkanv. The Propreitor, A-One Medicals & ors. CC 345 / 2012.

¹⁵ Mohana Basu, *Govt's new rules for plastic packaging: Recycle upto 50% of single-use plastic in 3 yrs*, THE PRINT (Feb 18, 2022 04:06 pm IST), <https://theprint.in/environment/govts-new-rules-for-plastic-packaging-recycle-upto-50-of-single-use-plastic-in-3-yrs/836530/>.

¹⁶ Dewhurst, Frank (2000), "Environmental change and supply chain management: a multi-case study exploration of the impact of Y2000," *Supply Chain Management – an International Journal*, Vol. 5, No. 5.

Environment, Forests, and Climate Change has issued directives mandating that producers, importers, and brand owners recycle up to fifty per cent of the plastic they use or generate within the next three years, or face a fine¹⁷.

In addition, Amazon, Flipkart, and others have been the subject of numerous petitions regarding their excessive plastic usage in packaging. In one of the petitions submitted to the National Green Tribunal, it was argued that the Central Pollution Control Board (CPCB) should conduct an environmental audit and then collect fines from enterprises that violate green regulations. There have been claims that corporations transport products in cardboard boxes that are significantly larger than the item being delivered and that the boxes and plastic wraps used to keep these items in place wind up in landfills. In addition, the return procedures of e-commerce companies necessitate repackaging and redistribution, both of which are environmentally damaging¹⁸.

VIII. THE EFFECT OF BIOMIMICRY ON E-COMMERCE

Biomimicry can prove to be highly sustainable in e-commerce, as it can in any other industry. Biomimicry can embrace various business concepts if utilised at its maximum capacity. Amazon, for instance, unveiled their electric delivery van in an endeavour to achieve zero net carbon by 2040¹⁹.

In one way or another, humans must satisfy their insatiable appetites. One of the purposes of e-commerce is to ensure that individuals' inherent interests are satisfied. Biomimicry can be used to make this process in e-commerce sustainable, despite the fact that it is a never-ending process. The biomimicry technique has spawned a variety of technology. Based on the lotus plant's water

¹⁷ Ministry of Environment, Forest and Climate Change, *Government notifies the Plastic Waste Management Amendment Rules, 2021, prohibiting identified single use plastic items by 2022*, PIB.GOV.IN, (2021), <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1745433>.

¹⁸ New Delhi, HT Correspondent, *NGT pulls up e-commerce firms Amazon, Flipkart for excess plastic use*, HINDUSTAN TIMES (Sep 13, 2020 02:25 AM IST), <https://www.hindustantimes.com/delhi-news/ngt-pulls-up-e-commerce-firms-amazon-flipkart-for-excess-plastic-use/story-54HxLejVZkCWfUZy6Mbm4K.html>.

¹⁹ Camille Collins, *Is e-commerce really sustainable? Understanding its impact on the environment*, SANA-COMMERCE.COM (Feb 17, 2021), <https://www.sana-commerce.com/blog/impact-of-ecommerce-on-the-environment/#:~:text=Even%20though%20e%2Dcommerce%20business,large%20amounts%20of%20harmful%20pollutants.>

resistance, a water-resistant textile material has been developed²⁰. Similarly, a textile fabric adopting the functionality of duck feathers has been made by imitating the structures of duck feathers on cotton and polyester fabrics and coating it with chitosan for surface roughness. Therefore, e-commerce should be used as a platform to advertise these products explicitly. As these items are not only sustainable but also economical, it is necessary to provide sales incentives, discounts, and the like.

IX. WASTE MANAGEMENT STRATEGIES IN E-COMMERCE

E-commerce has greatly reduced commercial trash compared to garbage generated by conventional markets, which is a good environmental effect. When information is recorded digitally, paper waste is minimised to an absolute minimum.

On the other side, we have observed an entirely different market practice. To popularise e-commerce platforms and in a frenzy of rivalry, return policies are becoming more permissive, leading to increased waste in transit, packing, and decreased product lifespan²¹. At least 30% of all things purchased online are returned, compared to 8.89% in traditional stores. 92% of consumers surveyed stated they would purchase again if the product return process is simple, while 79% desired free return shipping²².

This “buy many, keep one” mentality and the return policies' lax nature are unquestionably harmful to the environment.

Extending the return policy's grace period could solve this issue. When a consumer has a product for an extended period, he is frequently enticed to utilise it or to change his mind about returning it. This will therefore serve as an incentive for customers to make sustainable decisions. There is a need for a provision in consumer legislation that strikes a balance between the protection of consumers and the competitive nature of e-commerce businesses.

²⁰ Biomimicry in Textiles - shaping the future, <https://www.fibre2fashion.com/industry-article/6975/biomimicry-in-textiles-shaping-the-future>.

²¹ Dr. Evelyne Terryn, *Can e-commerce become more sustainable? Rethinking consumer law to drive sustainability, Global and Business Law, Regulated Sectors, LAWAHEAD.IE.EDU, (n.a.)* <https://lawahead.ie.edu/can-e-commerce-become-more-sustainable-rethinking-consumer-law-to-drive-sustainability/>.

²² Khalid Saleh, *April 11E-commerce Product Return Rate – Statistics and Trends[Infographic], INVESPCRO.COM, (n.a.)* <https://www.invespro.com/blog/ecommerce-product-return-rate-statistics/>.

X. THE IMPACT OF B2C COMMERCE ON THE SUPPLY CHAIN

Business-to-Consumer (B2C) is a tendency that has intensified over time, particularly during the COVID era, due to the introduction of technology. B2C is a business model in which products are delivered directly to final consumers. In a sense, it has shown to be an efficient strategy, as it facilitates direct communication between businesses and consumers. Through business-to-consumer (B2C) e-commerce, businesses attempt to decrease or eliminate supply chains. Removing intermediaries from the supply chain facilitates the green transition. This is quite useful for the purchase and sale of virtual goods such as software, music, and movies. When the products are physical, however, costs and waste might fluctuate significantly. Studies have revealed that transportation accounts for the highest portion of greenhouse gas (GHG) emissions in B2C e-commerce, as the use of road transportation for product distribution has expanded in tandem with the expansion of B2C e-commerce globally²³. In the case of business-to-consumer (B2C) transactions, clients must be aware of the things being offered, which necessitates substantial investments and multiple marketing. In this sense, the government must issue policies capable of calculating the advantages and disadvantages of both the B2B and B2C models and implementing them in a manner that promotes a greener future.

XI. MERCHANDISE IN E-COMMERCE

As a result of e-commerce, we no longer need to be physically there to purchase something, which is a very handy delivery method. The order will be delivered to our doorsteps in a few minutes after we just press the button. On the surface, it would appear that the distribution techniques chosen by e-commerce are lowering the number of trucks that would have been used in traditional marketplaces. However, e-commerce delivery trucks and other vehicles (e.g., planes) can still produce significant amounts of dangerous pollutants. Moreover, return policies and missed deliveries contribute to an increase in transportation's environmental impact²⁴.

²³ Geísa Pereira Marcilio Nogueira, João José de Assis Rangel & Eduardo Shimoda, *Sustainable last-mile distribution in B2C e-commerce: Do consumers really care?*, CLEANER AND RESPONSIBLE CONSUMPTION, (2021), ISSN 2666-7843, <https://doi.org/10.1016/j.clrc.2021.100021>.

²⁴ Stock, James R. (1997), "Applying Theories from Other Disciplines to Logistics," *International Journal of Physical Distribution and Logistics Management*, Vol. 27, No. 9/10.

In addition, there are also options for speedier delivery that incur additional fees. Comparatively, less pollution is generated when products are delivered via postal or courier services because they are supplied in bulk. However, when customers request speedier delivery, there is a chance that vehicles, such as vans, would be less loaded or make more stops, hence increasing emissions and traffic pressure²⁵.

Additionally, there are instances in which a single consumer orders multiple items at the same address but on different dates. The lack of regulation in this area results in several deliveries on different days, ultimately deteriorating environmental conditions. To ensure that commodities are not supplied separately when this may be readily avoided, there must be a legislative framework requiring consumer and customer understanding.

XII. CONCLUSION AND SUGGESTIONS

The ecologically sustainable business acts with the intention of reducing its impact on the environment. It considers more than simply earnings, including its impact on society, the earth, and human well-being. The eco-friendly firm generates revenue by being environmentally and socially responsible, conserving the planet's resources, and fostering a healthy business environment.

Communication has been identified as a crucial part of sustainable development since everyone must know why they should act sustainably and what compromises are required. Since corporations are driven by client demand, it is the customers that "control" the market. There are several incremental changes that businesses can make to adopt a more sustainable development, as modern consumption patterns are not always sustainable. Companies must primarily tell consumers why they should select more sustainable products, what the products can provide, and how the products or the firm impact the environmental, economic, and social dimensions of sustainability. If so, it raises the customer's knowledge and understanding of sustainability, which might elicit emotional attachments and alter purchase behaviour.

²⁵ Evelyne Terryn & Elias Van Gool, *The role of European consumer regulation in shaping the environmental impact of e-commerce*,
file:///C:/Users/DELL/Downloads/The%20role%20of%20European%20consumer%20contract%20law%20in%20shaping%20the%20environmental%20impact%20of%20e-commerce.pdf.

Consumers must demand more sustainable products and company behaviour for businesses to invest in sustainability initiatives. Companies can raise their clients' awareness by educating them with relevant information. Utilizing economic incentives, such as fees for new items, less sustainable delivery means, and / or rebound shipping fees, can encourage customers to go in the right way further. By generating regional and global momentum, multilateral organisations and international multi-stakeholder collaboration can play a significant role as sustainability drivers in e-commerce.

It has always been a tremendous job to simultaneously meet the needs of the environment and the convenience and accumulate people's expectations. However, this does not warrant jeopardising sustainability. Several commercial dealers have modified their marketing methods, and there are still a significant number of others who will follow suit.

Although sustainability cannot be achieved all at once, nor can it be mandated that only eco-friendly methods be used in the future, as a business or customer, we can make changes to increase sustainability. Notifying the delivery person of the customer's unavailability will at least lessen the frequency of failed deliveries. If no customers are present, the delivery boy can be instructed to hand over the products to a nearby individual, from whom they can be retrieved by the client later, eliminating the need for the delivery boy to return for the same delivery and waste fuel. In this regard, the law should be more lenient on the liability of traders, because if there are too many associated risks, the trader may not be ready to pursue environmentally friendly practices at the expense of their liabilities.

Considering this, some e-commerce companies now provide customers with the option to select their preferred delivery time. Currently, practically all e-commerce businesses should implement this strategy. In addition, local self-government can play a significant role in enhancing sustainability at the local level. Therefore, rules and regulations must be formulated that have the capacity to fix the challenges and are addressed at the grassroots level.

Essential to keep in mind is that legislative frameworks can only define the responsibilities of the authorities or can, at most make provisions regulating e-commerce. Still, the monitoring and implementation of those rules and regulations are equally important as it has the potential to

become a serious environmental challenge. Therefore, everyone must work together to achieve the required level of sustainability to move towards a greener future.

CORPORATE SOCIAL RESPONSIBILITY AND PERFORMATIVE ACTIVISM IN THE FASHION INDUSTRY

NIDHI J SHETTY*

ABSTRACT

The fashion industry is one of the fastest-growing sectors in the world. With the ever-changing fashion trends, brands are working towards meeting their demand by reducing production time and compromising the quality of their products. This has not only affected the overall output but has also resulted in various labour and environmental malpractices. Many corporations have sought to tackle this problem through various Corporate Social Responsibility activities and are taking the path of sustainability. Unfortunately, the model is now being used as a strategy to cover up their derelictions and garner benevolence from the stakeholders. From greenwashing to opting for vague activities, companies have mastered dodging responsibility. This paper aims to address the loopholes in the current CSR regime in the context of the fashion industry and elucidate the need for it in the supply chain.

I. INTRODUCTION

The fashion business is the fourth biggest industry in the world. As of 2022, the global fashion industry has been valued at \$1.7 trillion, with a projected growth rate of 6.2%¹. With about 3,000 new fashion enterprises hitting the market every day, the industry creates a variety of job opportunities for people with the greatest technical expertise and education as well as to those without any formal education. The increasing competition in the industry has pushed many

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¹ Sky Ariella, 28 Dazzling Fashion Industry Statistics [2022]: How much is the fashion industry worth, Zippia, available at: [https://www.zippia.com/advice/fashion-industry-statistics/#:~:text=The%20global%20fashion%20industry%20is,to%20hit%206.2%25%20by%202020,\(Visited on December 10, 2022\).](https://www.zippia.com/advice/fashion-industry-statistics/#:~:text=The%20global%20fashion%20industry%20is,to%20hit%206.2%25%20by%202020,(Visited on December 10, 2022).)

fashion brands to resort to expeditious ways of ramping up production to meet its increasing demand in order to keep pace with the volatile trends.

Due to the enormous labour requirements of the clothing industry, employers search around the world for cost-efficient labour and turn to developing countries to meet the same. The textile and garment industry is primarily controlled by multinational firms with extensive supply chains, and outsourcing is the norm. Globalisation has assisted this process since the removal of trade barriers has enabled the unrestricted flow of commodities, services and labour. Emergent nations often receive corporations with open arms as they generate employment opportunities in the country and increase foreign investment funds. Unfortunately, this comes with its own set of perils for the employees working under the organisation. This has been proved by the International Labour Organization (ILO), which has stated that a large portion of the 170 million child labourers are compelled to produce textiles and clothing in order to meet consumer demand in various parts of the world². It has also been estimated that merely 2% of the workers around the world are paid living wages for their labour³. In addition, the bulk production of textiles and garments has proven detrimental to the environment as nearly 20% of the world's wastewater and 8-10% of its carbon emissions come from the fashion business.⁴

With rising awareness and a need to maintain strong goodwill, corporations take up Corporate Social Responsibility (CSR) as a measure to not only give back to society but also to counter the negative repercussions that have occurred during production. The clothing industry, in particular, has taken up various CSR initiatives to ensure there's no violation of any rights during the production phase and to cater to the needs of society to garner benevolence from the public. This paper aims to study the fashion industry through the lens of its Corporate Social Responsibility and to analyse the lacunae in the process using real-life examples and statistics. Furthermore, the

² International Labour Office, Report: *Making a progres against child labour: Global estimates and trends 2000-2012* (2013), available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_221513.pdf (Visited on December 10, 2022).

³ Irene San Segundo, Do you know how much garment workers really make?, *Fashion Revolution*, available at: <https://www.fashionrevolution.org/usa-blog/how-much-garment-workers-really-make/> (Visited on December 10, 2022).

⁴ United Nation Economic Commision for Europe, UN Alliance aims to put fashion on path to sustainability, *UNECE*, available at: <https://unece.org/forestry/press/un-alliance-aims-put-fashion-path-sustainability> (Visited on December 10, 2022).

paper seeks to reason the need for CSR from the supply chain phase and its various benefits. The research methodology used is empirical, and the evidence gathered is verifiable.

II. CORPORATE SOCIAL RESPONSIBILITY: THE SELF-REGULATING MODEL

Business practices all over the world have undergone a comprehensive transformation due to the onset of Globalisation. One such change brought about is the practice of implementing Corporate Social Responsibility in almost every industry. CSR is a self-policing business model that enables an organisation to be socially accountable to itself, its stakeholders, and the general public. In his book *Social Responsibilities of the Businessman*, economist Howard Bowen first introduced the concept of CSR. Bowen realised that the businessman's decisions had an impact on all our lives⁵. He claimed these decisions have effects far beyond himself, his stockholders, and his clients. Therefore, Corporate Social Responsibility is a company's ongoing commitment to act morally, promote economic growth, and improve the lives of its employees and their families, the local community, and society.

A. Types of CSR

The notion of Corporate Social Responsibility is quite wide, and each company adopts its rendition and applies it in different ways with the fundamental objective of conducting business that is sustainable from an economic, environmental, and social perspective. The United Nations Industrial Development Organisation (UNIDO) bases its development programme on the Triple Bottom Line (TBL) approach. According to TBL, CSR refers to a company's efforts to balance economic, environmental, and social imperatives while meeting the expectations of stakeholders and shareholders⁶. Generally, CSR is broken down into the following categories:

- a. **Environmental Responsibility:** A company's environmental CSR programme consists of steps taken to lessen its harmful influence on the environment and to increase environmental sustainability. These initiatives, i.e., recycling, energy reduction and generating renewable energy etc., can be carried out by any organisation to enhance

⁵ Stirling Myles, A Brief History of CSR, *Smartsimple*, available at: <https://www.smartsimple.com/blog/2019/3/29/a-brief-history-of-csr> (Visited on December 10, 2022).

⁶ United Nations Industrial Development Organization, What is CSR?, *UNIDO*, available at: <https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr> (Visited on December 10, 2022).

environmental CSR performance. Businesses must, however, pay great attention to those areas where their specific industry has an outsized detrimental impact on the environment.

- b. *Philanthropic Responsibility:*** Philanthropic Responsibility is the goal of a company to improve society and the planet actively. Many businesses support organisations, often referred to as “cheque book philanthropy”, through which they support charities that share their guiding principles by offering money or financial assistance. Corporations also support in-house projects where businesses take the lead in their own charitable endeavours whilst simultaneously enjoying corporate control. Focusing on partnerships between businesses and non-business partners is another way to fulfil philanthropic obligations. These partnerships aim to address societal problems by pooling resources from all participants and providing what are commonly referred to as “mutually beneficial” solutions. Not every collaboration result in such tidy outcomes, and businesses should reconsider where and how they direct their charitable giving.⁷
- c. *Ethical Responsibility:*** Businesses strive to have the maximum positive impact by considering how stakeholders will be impacted by their actions. Ethical CSR activities aim to ensure that all parties involved in a business, from clients to employees, are treated properly. Ethical CSR considers every link in the supply chain, even those that the company may not employ directly. Though sometimes challenging to implement, these initiatives ensure that all parties involved, i.e., employees, clients, shareholders, and other stakeholders, get the best possible deal.⁸
- d. *Economic Responsibility:*** Economic responsibility is the process of making financial decisions motivated by a desire to do good. Economic responsibility is the practice of doing business to promote long-term growth while simultaneously upholding moral,

⁷ Oliver Balch, Deconstructing CSR: Corporate Philanthropy, Reuters Events, available at: <https://www.reutersevents.com/sustainability/deconstructing-csr-corporate-philanthropy> (Visited on December 11, 2022).

⁸ The Gift Giving Machine, Corporate Social Responsibility- A Simple Guide, *The Gift Giving Guide*, available at: <https://www.thegivingmachine.co.uk/blog/posts/corporate-social-responsibility-a-simple-guide/#:~:text=Ethical%20responsibilities%20are%20self%20enforced,have%20the%20most%20positive%20impact> (Visited on December 11, 2022).

environmental, and charitable norms. Businesses can enhance operations while simultaneously adopting sustainable practices by weighing economic decisions against their overall societal consequences. When a business adapts its production procedures to incorporate recycled items, it demonstrates economic responsibility because it may cut material costs for the business and benefit society by using fewer resources.⁹

- e. Legal Responsibility:* Every company has a duty to conduct its operations within the restrictions established by the various commissions and agencies at all levels of government. These rules were put in place to maintain equilibrium and enhance social welfare. A company that values social responsibility upholds the law. The company is allowed to conduct business as usual, but only as long as it complies with all applicable laws, including labour, environmental, and criminal laws.¹⁰

A well-executed CSR concept can provide several competitive advantages, including improved access to capital and markets, increased sales and profits, operational cost savings, improved productivity and quality, an efficient human resource base, improved brand image and reputation, increased customer loyalty as well as improved decision-making and risk management processes.

B. Indian Laws and Corporate Social Responsibility

The Indian laws have made CSR a mandatory measure that every organisation must comply with. Earlier, the Companies Act had made CSR contributions and reporting follow a “comply or explain” approach where companies had to either comply with statutory expenditure or state reasons for the unutilised amount in the Board’s report. Under Section 135 of the amended Companies Act, the company must mandatorily comply with CSR rules or pay a penalty for the infringement.¹¹

Every Indian and foreign company, including its holding and subsidiaries, with a net worth of 500 crores or more, a revenue of 1000 crore rupees or more, or a net worth of more than 5 crores

⁹ Scott Krohn, Four Types of Corporate Social Responsibility, *Bizfluent*, available at: <https://bizfluent.com/info-8117691-four-types-corporate-social-responsibility.html> (Visited on December 11, 2022).

¹⁰ Toppr, Kinds of Social Responsibility, available at: <https://www.toppr.com/guides/business-studies/social-responsibilities-of-business/kinds-of-social-responsibility/> (Visited on December 11, 2022).

¹¹ The Companies Act, 2013. s.135.

for the most recent financial year is subject to the CSR provision. In addition, every corporation must have a CSR Committee, which must approve the CSR policy and make recommendations. After weighing in the recommendations made by the committee, the Board of Directors must ensure that only the activities mentioned in the policy must be followed and spend a minimum of 2% of the average net profits made during the three immediate financial years¹². In the case of a new company, the average net profits shall be derived from the time of its incorporation. The nature of activities mentioned in the policy must be specified in Schedule VII of the Companies Act, and it should differ from the activities done in the ordinary course of business. The activities mentioned in Schedule VII are activities relating to:

- Eradication of hunger and poverty
- Promotion of education
- Gender equality and women empowerment
- Reducing child mortality and improving maternal health
- Combating HIV/AIDS
- Social Business Projects
- Contribution to Prime Minister's relief fund and other State funds
- Environment Sustainability
- Employment enhancing vocational skills
- Other matters as may be prescribed

The Board of Directors must also furnish a report which shall disclose the committee's composition, the contents of the CSR policy, the reason for the unspent amount and the details relating to a specific fund. The account shall be named 'Unspent Corporate Social Responsibility Account', and the unspent amount must be transferred within six months from the end of the financial year. In the event of an ongoing project, the amount shall be transferred in less than 30 days from the end of the financial year. The funds listed for the transfer of the remaining money are directed towards the prime minister's national relief fund or any other fund established by the government for the socio-economic improvement, assistance, and welfare of the scheduled caste, minorities, tribes, women, and other underprivileged sections. The contribution can also be made

¹² Ibid.

to incubators sponsored by the central or state government, public sector enterprises of the federal or state governments, or other organisations¹³.

Section 135 of the Companies Act also specifies that a corporation will be subject to a minimum fine of Rs 50,000 and a maximum fine of Rs 25 lakh if it violates the rules governing CSR spending, transferring, and using unspent funds. Every employee of this organisation who fails to comply would also be subject to a punishment that includes either imprisonment for a term that may reach three years or a minimum fine of Rs 50,000 that may rise to Rs 5 lakh or both.

The Indian laws, through their uncompromising methods, have made it clear that every corporation with a certain level of profit needs to give back to the community. The imposition of hefty penalties has ensured that there's strict compliance of the same, and no company can escape unscathed.

III. NOTORIETY OF THE FASHION INDUSTRY: THE CULPRIT OF LABOUR AND ENVIRONMENTAL MALPRACTICES

The fashion industry has always garnered a bad reputation for its environmentally hazardous way of production and mass exploitation of labour. The booming fast fashion sector has pushed consumption to an all-time high by selling products at a questionably inexpensive price, making it concede to the ever-changing fashion trends. This not only fuels the “throw away” culture but also results in the opacity of labour practices.

Many fashion giants often subcontract their production to third-world countries to meet their demand due to the lower cost of production. Manufacturers and retailers prioritise quantity over quality by shortening design and production turnaround times. Unfortunately, most of the working conditions in the supply chains are precarious, subjecting its workers to an inhumane environment. Many textiles manufacturers resort to hidden or informal subcontracting practices where child and bonded labour and poverty wages are rampant¹⁴. Many workers are made to work in unhealthy and dangerous conditions, which further puts their lives at risk. The infamous Rana Plaza accident is a testament to this.

¹³ Ibid.

¹⁴ Martje Theuws, “Fact sheet: Hidden subcontracting in the garment industry”, *SOMO 2*, (2015), available at: <https://www.somo.nl/fact-sheet-hidden-subcontracting-in-the-garment-industry/> (Visited on December 11, 2022).

On April 24, 2013, at least 1132 people were killed, and over 2500 were injured when an eight-story commercial building named Rana Plaza, which contained five garment companies, collapsed in Dhaka, Bangladesh. Even though large structural cracks were discovered the previous day, the garment workers were ordered to return to work. This harrowing incident awakened the world to the various uncertainties garment and textile workers faced and the lack of internal inspection due to weak labour laws.

Unfortunately, this is not the first incident that exposed the malpractices adopted by the industry. In 2011, Brazilian federal government inspectors discovered 15 undocumented migrants living and working in appalling conditions in So Paolo. The labourers were heavily restricted from moving freely and were required to work for days that could last up to 16 hours. The inspectors later concluded that the two workshops should be labelled as having conditions “analogous to slavery.” The employees were sewing clothing for Zara, a company owned by Inditex, the famed Spanish innovator of fast fashion.¹⁵

Fashion production is fraught with issues of violence and discrimination based on gender, as most of garment workers are women of colour who are often made to work in conditions that would be considered unacceptable for white people. The exploitation of these women is, therefore, a feminist issue, as it is estimated that around 85% of garment workers are women.¹⁶ Despite the fact that the garment sector is dominated by women in the total workforce, they are less likely to be employed in managerial positions or high-paying roles. Not to mention, these women are denied maternal leaves and are often fired for being pregnant. Sexual harassment is a common experience for garment workers. Global Labour Justice, a worker’s rights advocacy group, disclosed in June 2018 that 540 factories in India, Bangladesh, Cambodia, Indonesia, and Sri Lanka, many of which supply to the clothing company Gap, had received reports of verbal abuse, physical abuse and sexual assault.¹⁷

¹⁵ Martje Theuws, “Fact sheet: Hidden subcontracting in the garment industry”, *SOMO 2*, (2015), available at: <https://www.somo.nl/fact-sheet-hidden-subcontracting-in-the-garment-industry/> (Visited on December 11, 2022).

¹⁶ Care, Women in Cambodia’s Garment Industry: Their Work, Their Safety, available at: https://www.care.org.au/wp-content/uploads/2017/04/SHCS_Brief-Women-Cambodia-Garment-Industry-March-2017_CA.pdf (Visited on December 11, 2022).

¹⁷ James Hitchings-Hales, Hundreds of H&M and GAP workers abused daily, *Global Citizen*, available at: <https://www.globalcitizen.org/en/content/hm-gap-factory-abuse-fast-fashion-workers/> (Visited on December 11, 2022).

Garment workers are also exposed to numerous health hazards. Numerous “sweat shops” have exceedingly dangerous factory conditions where employees are not offered safety gear to protect themselves. For instance, some distressed denim is created through sand-blasting, in which high-pressure hoses filled with sand are directed at the denim. The sand may result in severe respiratory problems, yet the workers are hardly provided with adequate protective equipment.¹⁸

Due to the supply chain’s reliance on low-skilled labour and the fact that some occupations are even more appropriate for children than adults, child labour is a specific problem in the fashion industry. The fashion supply chain is incredibly complicated, making it difficult for businesses to supervise every step of production, so employers get away with it. Because of this, it is possible to hire kids without the knowledge of major companies or the general public¹⁹.

According to the India Committee of the Netherlands (ICN) and the Centre for Research on Multinational Corporations (SOMO), recruiters in southern India persuade parents in underdeveloped rural areas to send their daughters to spinning mills with promises of well-paying jobs, cosy housing, three wholesome meals per day, and opportunities for training and schooling, as well as a lump sum payment at the end of three years. Their on-the-ground investigation reveals that “in reality, they are working under abhorrent circumstances that are akin to contemporary slavery and the worst kinds of child labour²⁰”.

The fashion industry is also deemed one of the main culprits of Global warming. It has been estimated that a pair of jeans takes 3,781 litres of water right from production to the delivery of the final product. This has an emission of around 33.4 kilograms of carbon equivalent. The fashion industry has been estimated to use approximately 93 billion cubic metres of water, and around 20% of wastewater is generated from fabric dyeing and treatment. The sector contributes 10% of annual global emissions and has been estimated to reach 50% by 2030.²¹

¹⁸ Michelle Chen, Your ‘Distressed’ Jeans are wearing out workers’ lungs, *In these times*, available at <https://inthesetimes.com/article/your-distressed-jeans-are-wearing-out-workers-lungs> (Visited on December 10, 2022).

¹⁹ Josephine Moulds, Child labour in the fashion supply chain, *The Guardian*, available at: <https://labs.theguardian.com/unicef-child-labour/> (Visited on December 10, 2022).

²⁰ Martje Theuws & Pauline Overeem, “Flawed Fabrics”, *SOMO* 6 (2014), available at: <http://www.indianet.nl/pdf/FlawedFabrics.pdf> (Visited on December 10, 2022).

²¹ United Nations Environment Program, Putting the brakes on fast fashion, *UNEP*, available at: <https://www.unep.org/news-and-stories/story/putting-brakes-fast-fashion> (Visited on December 10, 2022).

From poor labour practices to environmental pollution, every step in the production of garments is infested with malpractices that have severe repercussions on society. Thus, it is needless to say that the fashion industry should strictly adhere to every CSR protocol as it is one of the biggest culprits for the social and ecological damage in the world.

IV. CORPORATE SOCIAL RESPONSIBILITY AS A TOOL OF REDEMPTION BY THE FASHION INDUSTRY

The increasing activism and preservation of good image have driven many fashion brands to advance their CSR initiatives. From philanthropic help to volunteering, corporations worldwide have taken it upon themselves to not only produce garments ethically but also to build a stronger bond with their employees. This change is due to the shift in consumer mentality towards opting for impactful brands that are transparent in their work and offer sustainable alternatives. Through activities such as artisan protection, education, health initiatives and environmental protection, fashion companies are aiming to undo the negative impact on society.

Multiple popular corporations, such as H&M, are eschewing their fast fashion heritage by introducing sustainable options in their product depository. Hennes & Mauritz Retail Pvt Ltd has launched the Conscious line, constructed of materials like organic cotton and recycled polyester. The business aims to lessen its environmental impact by utilising more environmentally friendly production techniques and wants to employ resources from sustainable sources by 2030 exclusively²². The corporation has also collaborated with a social initiative called SNEH, which gives the opportunity to women artisans in India to produce handcrafts for the brand's interior decor collection²³.

The popular denim brand Levis, through its new collection, aims to counter the water wastage caused by the manufacturing of jeans by using 96% less water. The entire design and production

²² Blake Morgan, 11 fashion companies leading the way in sustainability, *Forbes*, available at: <https://www.forbes.com/sites/blakemorgan/2020/02/24/11-fashion-companies-leading-the-way-in-sustainability/?sh=6f74a38c6dba> (Visited on December 10, 2022).

²³ H&M Home, For the love of craft, *H&M*, available at: https://www2.hm.com/en_in/sustainability-at-hm/our-work/the-latest/7055e-sneh-social-initiative.html (Visited on December 10, 2022).

process and all of Levi's products are committed to sustainability. This includes aiming for 100% cotton obtained ethically and turning old jeans into home insulation.²⁴

Many Indian brands, such as Aditya Birla Fashion and Retail Limited, are highly active with its CSR initiatives focusing on girl child education and health issues. Before beginning any project, the standard operating procedure is interacting with local communities, including village panchayats and other stakeholders. The Group's ReEarth programme, founded on "responsible stewardship," aims to adhere to global standards established by institutions like the Global Reporting Initiative and the Organization for Economic Cooperation and Development.²⁵

Although many additional CSR and sustainability activities may be carried out in the fashion, apparel, and accessory industries, these examples might be considered ideal initiatives. Fashion and clothing brands have undergone significant shifts since the pandemic, particularly in how people today view investing in clothing as the practice of thrifting is gaining momentum. All things considered, the apparel industry seems to be considering vanquishing its wrongdoings by aiming at sustainable production.

V. PERFORMATIVE ACTIVISM BY THE FASHION INDUSTRY THROUGH ITS CSR INITIATIVES

Despite the CSR initiatives by many fashion companies, there appears to be a wide range of interim work that has not been addressed. Many brands fail to be transparent with their CSR measures and are often involved in vague activities. This makes it appear that the measures are performative and are just 'symbolic strategies' adopted to stay on the customers' good books.

'Symbolic CSR strategies' are passive actions of the firm, taken not to effect any substantial change but to show ceremonial conformity to meet the stakeholder's demands without the need to modify the business process. It is a way to deflect attention to garner societal legitimacy and improve trust. CSR communication reports have been criticised for being manipulative, flimsy, and shallow. Due to the absence of a strict reporting methodology, CSR reports are frequently

²⁴ Unzipped Staff of Lev Strauss & Co., How Levi's® is Saving Water, Levi Strauss & Co, available at: <https://www.levistrauss.com/2019/03/25/world-water-day-2019-saving-h2o/> (Viewed on December 11, 2022).

²⁵ C B Bureau, CSR of fashion and lifestyle brands: Far from wearing it on their sleeves, Cause Because, available at: <https://causebecause.com/csr-fashion-lifestyle-brands-far-wearing-sleeves/5280> (Viewed on December 11, 2022).

used to mislead information made available to customers. Management uses tone manipulation to cloud bad performance and presents it positively. Therefore, relying on the company's report must be done cautiously²⁶.

Fashion brands utilise their Corporate Social Responsibility to window-dress the factual scenario. This reduces consumers' guilt associated with buying products from fast fashion brands and dodges scrutiny from them.

A. Greenwashing

Greenwashing is a symbolic CSR strategy where the company claims to be environmentally conscious for marketing purposes but is misleading the stakeholders by not making any sustainability efforts. It occurs when a company spends more resources, i.e., both time and money, promoting its environmental friendliness rather than reducing its impact. It is a dishonest marketing ploy used to deceive customers who prefer to purchase goods and services from companies who care about the environment.

Jay Westerveld first coined the term in his critical essay on the practice of hotels requesting their patrons to reuse towels to save the environment. The hoteliers' interest in washing fewer towels appeared to be driven more by a desire to save money than by a concern for the environment. Since then, debates concerning marketing communications and sustainability have focused heavily on "greenwashing," with several campaigns, laws, and pieces of advice being formed to decrease or stop it.

Greenwashing in the fashion industry is on the rise, making it challenging for people to determine whether they are purchasing from ethical brands or are victims of deceptive methods. The industry has frequently been discovered to sell using the climate problem without changing its business model.

The biggest flaw in sustainability is that it lacks a precise, quantifiable definition. "Ethical" and "eco-friendly" are words with no legal value. This pushes fashion brands to act irresponsibly. Another obstacle is the lack of empirical evidence and government-funded studies on the effects

²⁶ Sourour Hamza and Anis Jarboui, CSR: A Moral obligation or a strategic behaviour, *Intech Open*, available at: <https://www.intechopen.com/chapters/73912> (Viewed on December 10, 2022).

of fashion. Inadequate public knowledge and education about the detrimental practices the industry embraces, which permits businesses to continue spreading false information, is another factor contributing to greenwashing.

An instance of greenwashing is the sustainable clothing line of H&M. The Conscious collection by H&M has come under scrutiny for illegal marketing as the Norwegian Consumer Authority claimed it misled consumers by using statements, symbols, and colours to characterise the brand to be more sustainable than it is. In the recycling program, the company uses a very small portion of recyclable textiles and makes frivolous statements about using old materials to manufacture new clothes. On-demand by the Norwegian Authority, H&M has to apologise for its fictitious sustainability collection²⁷.

Greenwashing is done in the corporation's best interest, as it only works when it successfully deceives its customers. Despite the existence of Corporate Social Responsibility, it is infrequent that companies follow it diligently, and it is not just a surface-level effort. Therefore, artificial, and sincere environmental concerns can be reconciled through transparency.

B. Labour Violations

Despite tragedies such as the Rana Plaza incident, there appears to be little to no change in how fashion industries deal with their labour force. Companies are failing to achieve their long-term objectives of putting an end to labour abuse and creating decent work in global supply chains.

The enforcement of CSR is done through means such as social audits and certification schemes. Unfortunately, these audits are manipulated to hide labour exploitation, and most suppliers cannot afford ethical certification schemes. From restricted movement to bonded labour, the fashion industry has plagued the lives of many garment workers in third-world countries. These mistreatments are a result of structural issues in the supply chain that generate a predicted demand for labour exploitation as well as factors like gender inequality, high living expenses, and a lack of viable economic options that lead to a supply of vulnerable workers.

²⁷ Kate Dweyer, H&M make sustainable fashion miscue in Norway, *Fortune*, available at: <https://fortune.com/2019/06/27/hm-makes-sustainable-fashion-miscue-in-norway-fast-fashion/> (Viewed on December 10, 2022).

Many luxury fashion houses, such as Saint Laurent and Dior, use talented artisans from Maharashtra for their expensive fashion collections. These artisans are made to work in a dingy environment with less ventilation and no rest hours. In 2016, the luxury fashion brands entered the Utthan Pact, a three-year project which aimed at the well-being of the workers in Mumbai and encouraged embroiderers. The signatories of the pact were Burberry, Mulberry, LVMH Louis Vuitton Moët Hennessy and Kering. Unfortunately, the pact was a mere facade as many factories claimed that the brands threatened to reduce the amount they would pay for the orders as complying with the fact involved investing in pricey compliance standards. The current fashion weeks in Europe coincide with seasonal demands for thousands of hours of overtime. However, many workers still do not have any job benefits or protections and the environment in which the embroidered work does not meet the factory safety laws²⁸.

In another incident, nearly 1,300 garment workers in Karnataka, India, who worked for H&M were laid off. The workers were given no prior intimation, nor were they paid for their past work. Most workers were women who worked for living wages and had to travel a long distance to their workplace. The corporation has failed to earn the trust of its garment workers despite its widely marketed CSR initiatives²⁹.

Corporate Social Responsibility is now used as a tool for the fashion industry to sweep its wrongdoings under the rug on the pretext of fulfilling its stated responsibilities. The impreciseness in the CSR regime as well as the loopholes in the labour laws, are serving as conduits for the corporations to carry out unwarranted activities further. The same apparatus introduced to undo the wrongdoings of the corporations are now being used to supplement its transgressions.

²⁸ Kai Schultz, Elizabeth Paton and Phyllida Jay, Luxury's hidden Indian supply chain, *NY Times*, available at: <https://www.nytimes.com/2020/03/11/style/dior-saint-laurent-indian-labor-exploitation.html> (Viewed on December 10, 2022).

²⁹ Haripriya Suresh, Months after H&M factory workers laid off, company to rehire them, *The News Minute*, available at: <https://www.thenewsminute.com/article/months-after-hm-factory-workers-laid-karnataka-company-rehire-them-143536> (Viewed on December 10, 2022).

VI. THE NEED FOR CSR IN THE SUPPLY CHAIN AND TAX DEDUCTIONS FOR A HOLISTIC APPROACH

A. CSR in Supply Chain

Corporate Social Responsibility is important at every point along the supply chain for the garment business, from suppliers to end users. Consumers' desire for apparel that was not made in abusive or exploitative conditions by mistreated workers and seek proof that the clothing they wish to buy was produced under ethical working conditions as they do not want to feel guilty over contributing to the harm of others.

Working conditions, hours worked, and pay are the three key CSR concerns in the fashion business, as they are all related to social responsibility to employees. Companies must keep in mind that their ethical views cannot end at their headquarters because outsourcing to developing countries is common in the business. Since the fashion industry relies extensively on subcontracting, it is imperative to ensure that their subcontractors are complying with the standards in the following ways³⁰:

- Encourage the implementation of international standards such as ISO 9001, ISO 14001, OHSAS 18001, and SA 8000
- Build expanded frameworks
- Usage of supplier's code of conduct
- Verify the supplier's social audit

Companies must always aim to bring imperative changes in their internal structures by introducing healthcare and other necessary self-development programmes for their workers. Introducing lucrative pay packages and safe working conditions will further increase employee loyalty and trust within the company.

Since the industry is a women-dominated sector, it is time for the fashion industry to adopt a regime which provides workers with adequate maternity leaves, creche facilities and grievance

³⁰ Paulina Książka, "The CSR Challenger in the Clothing Industry", 3 Issue 2 *Journal of Corporate Responsibility and Leadership* 58 (2016), available at: <http://dx.doi.org/10.12775/JCRL.2016.008>, (Visited on December 11, 2022).

cells. A strict Zero Tolerance Policy will further help in bringing an end to any misdemeanour and discriminatory behaviour.

In addition to bringing important social changes in organisations, companies must also pay attention to environmental factors during the manufacturing process. Adhering to a stern ecological programme promoting the reduction in the overall consumption of water and electricity is a way to undo the negative environmental impact. Brands must consider introducing eco-friendly packaging to reduce wastage and add some innovations that might reduce production costs. Therefore, every approach of the corporation needs to be done with the responsibility to conserve natural resources and be climate smart.

Hence, a clever CSR initiative must start with bringing positive changes in the inward supply chain and should be responsible from start to finish. At no stage in the production process, neither the human rights be violated, nor the well-being of the natural environment must be tampered with.

B. Changes in Taxability of CSR Activities

Despite the stringent policies regarding the CSR implementation in the Companies Act, there have been no changes in the Income Tax Act, 1961. According to Section 37(1) of the Income Tax Act, CSR expenditures have an underlying philanthropic tone attached to them, removing them from the scope of business expenses. In order to avail deductions, the businesses have to meet the conditions specified in Section 36. The section addresses deductions for calculating business or professional profits and gains and specifies requirements to be met in order to take advantage of such deductions³¹.

In addition, the companies can avail of tax deduction under Section 80G if they have incurred any expenditure on the Nation Relief Fund connected with skill development and agriculture activities. However, the tax authorities have expressed dissenting views regarding the deduction option. Certain tax authorities are of the view that CSR expenditure is a mandatory measure, and

³¹ The Income Tax Act, 1961.

the expenditure stated under 80G must be voluntary in nature and should be considered a donation. As a result, CSR expenses cannot be considered for deduction³².

In other cases, Income Tax authorities have opined that the tax deduction under 80G is granted from the assessee's total income; this included the business and income from other sources³³. In addition, Section 37 of the Act, prohibits deductions on earnings from business heads and professions³⁴. Thus, while calculating the profits from the business or profession, the disallowance gets added back to the net profit, which obligates the assessee to pay tax on them. This results in "double disallowance" and defeats the purpose of the Act³⁵. For this purpose, tribunals have safely assumed that when the legislature, in this case, has only provided for two specific exceptions for claiming deduction under Section 80G, then it is implicitly permitting the other CSR contributions as a deduction under the other sub-clauses of Section 80G. This is done by applying the Latin proverb "expressio unis est exclusio alterius," meaning "express mention of one thing excludes all others."³⁶

It is hereby advised, that there must be tax uniformity when it comes to CSR activities to encourage accountability and transparency for the expenditure incurred. Due to the irregularities, corporates opt for activities that are entitled to tax deductions, thereby prohibiting the scope of the overall social and environmental development of the country. It is the need of the hour to consider the recommendations of the committee constituted by the Ministry of Corporate Affairs, which suggests that all activities under Schedule VII of the Income Tax Act must enjoy uniform tax benefits and implementing agencies must be treated as partners in CSR activities³⁷.

By imposing strict laws on CSR, businesses would be forced to comply with the rules in order to avoid fines rather than fulfilling their social responsibilities and pursuing the triple bottom line. Therefore, it is time for India to review its CSR-related taxes policy and use the deduction as an incentive rather than a new tax burden.

³² The Income Tax Act, 1961. s.80G.

³³ Ibid.

³⁴ The Income Tax Act, 1961. s.37.

³⁵ *M/S. Fnf India Private Limited, ... vs Assistant Commissioner Of Income [ITA No.1565/Bang/2019]*.

³⁶ *JMS Mining (P.) Ltd. v. PCIT [I.T.A. No. 146/Kol/2021]*.

³⁷ Government of India, Report: *High Level Committee on Corporate Social Responsibility 2018* (Ministry of Corporate Affairs on August, 2019).

VII. CONCLUSION

In general, the difficulties faced by the fashion industry regarding corporate social responsibility are significant. As a labour-intensive business, it must demonstrate its concern for workers' health, safety, and working conditions inside and throughout its supply chain. Further, it must compensate for exploiting the planet's supplies and manage waste effectively because it is a resource-intensive sector which must aim to reduce environmental impact. Therefore, there is ample hope for the business to metamorphosize into a socially responsible industry by taking accountability and working towards implementing honest programmes.

MODERNITY AND RISK SOCIETY: AN INQUIRY OF INTERPLAY OF LOCALS DURING THE RISK

SAMRAT SHARMA*

ABSTRACT

Modernity has always been anticipated with a secure and rewarding existence (Giddens, 1991). The notorious faith persists that modernity always reproduces good outcomes and rewarding existence, which have been challenged by the recent occurrence of calamities, including a devastating earthquake in Nepal's context followed by the Covid-19 pandemic at a global scale. Correspondingly, in advanced modernity, the social production of wealth is systematically accompanied by the social production of risks (Beck, 1992). Unlike, the rewarding and promising aspect, modernity has started showing a duskier side. This paper deals with the risks associated with modern times. Particularly, following Ulrich Beck (1992) and Anthony Giddens (1991) notion of risk society and the consequences of modernity, this paper tries to unfold the gradual risk the Nepalese society has stumbled into over the years. However, this paper delves into associating the theoretical argument by Giddens (1991) and Beck (1992) on the risk society with that of interplay human beings concede during the rigidities of risk. This paper will try to shed light on the mechanism and strategies the locals carry on such instances. Based on Nepal's case, primary and secondary data sources will be used to examine the context.

I. CONTEXT OF THE STUDY

The continuously changing dynamics of society have been a dominant field of study within the purview of social science. Social transformation usually announces a continuous influx of changes which may sometimes be gratifying and sometimes below par. Perhaps, the simple connotation of social transformation is hard to unveil. Similarly, among the various delineations of social science, modernity has been widely discussed and asserted. The varying societal

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dynamics are associated with the extent and intensity of the process of modernization. This paper deals with the risks associated with the modern times. Particularly, following Ulrich Beck (1992) and Anthony Giddens (1991) notion of *risk society* and the *consequences of modernity*, this paper tries to unfold the gradual risk the Nepalese society has stumbled into over the years of time. Modernity has always been anticipated with a secure and rewarding existence (Giddens, 1991). The notorious faith persists that modernity always reproduces good outcomes and rewarding existence, which have been challenged by the recent occurrence of calamities including devastating *earthquakes* in Nepal's context followed by the *Covid-19 pandemic* at a global scale. Thus, risk¹ has become a common embodiment for everyone in everyday life. Beck (1992) argues that 'risks are defined as the probabilities of physical harm due to given technological or other processes'. Beck (1992) puts down the general overview of risk in the forms of physical harm that may be accounted for in terms of technological by-product or through other forms of processes. Further, Beck (1992) stipulates three observations regarding risk. *First*, risks are always created and affected in social systems. *Second*, the magnitude of the physical risks is, therefore, a direct function of the quality of social relations and processes. *Third*, the primary risk, even for the most technically intensive activities (indeed perhaps most especially for them), is, therefore, that of social dependency upon institutions and actors who may well be and arguably are increasingly alien, obscure, and inaccessible to most people affected by the risks in question. Beck (1992) signifies risk with social relations and processes, incorporating risk with the societal context. Among all three observations in relation to risk, the third one encompasses the social dependency among different actors and institutions. He assures that the regular and continuous interplay of an individual and an institution is a common attribute in a society. Human society experiences disasters in relation to its activities, including wars, atomic explosions, chemical emissions, environmental degradation, and a host of such events (Albala-Bertrand, 2002). Thus, those who lost their lives or got injured are also members of households or families. Their death or injury may have long-term implications in different contours of social lives.

In due course, risks need to be normalized and regulated as well at a certain point in time. In the face of harm created by such risks, locals have to devise strategies to mitigate these problems.

¹ Risk in this study is primarily associated with the theoretical orientation as argued by Beck (1992) per se. The other spheres of risk study haven't been discussed and should therefore regard as limitation in this study.

Thus, the interplay of locals during the risk is seen to be carrying a variety of strategies and mechanisms. Further, the post-risk phenomenon is vital in encompassing activities ranging from rescue, relief, and rehabilitation. During risk, the community is an important social site where locals invent and reinforce themselves with different forms of ties and support. Tonnies (1966) has noted that a community's most important attribute is a relationship that features 'intimate, private and exclusive living together'. A community is, therefore, a group whose members are bound by informal and intimate relations. MacIver (1961) argues that 'the members of the community are connected in a comprehensive relationship, which helps them to satisfy their physical, psychological, social, and economic needs. Perhaps, the strategies and mechanisms used by the individual seem to be passive and futile, but indeed, the individual interacts with society even at times of risk and difficulties. This paper sheds light on the strategies and mechanisms locals use during times of risk. Also, assessing Nepal's earthquake context along with the Covid-19 pandemic, this study tries to inquire about the interplay locals utilize during the risk. In doing so, this paper juxtaposes the theoretical argument made by Giddens along with Beck about the risk alongside the strategies the locals carry to overcome such instances.

The rest of the paper is sketched as follows: The *first* section construes a general context of the whole study, followed by the *second* section as a literature review which underpins the theoretical explanation of the study. While the methodology section is featured in section *third* the *Fourth* section deals with the findings of the study, which highlight the strategies and mechanisms implemented by locals during the time of risk. *Finally*, the last section concludes the study.

II. SOME EXCERPTS FROM LITERATURE

This section particularly delves into considering the literature written on risk and society. The concept of risk in social science has received wide forms of scrutiny. Likewise, the recent outbreak of the Covid-19 pandemic, followed by other disastrous phenomena, has obligated social scientists to gaze more at the recent occurrences of risks.

A. Assessing modernity and risk society

Risk can be investigated through various dimensions and definitional categories. Further, risk can be associated with different spheres of social life as well. Lupton (2006) argues about the

three theoretical perspectives in sociological writings on risk. She considers- *risk society*, *cultural/symbolic* and *governmentality* perspectives as commonly discussed in sociology. As Beck states, western societies are moving from early modernity to a late modern period where the incidents of hazards and dangers bloomed as a result of industrialization, urbanization, and globalization. The debates about risks have been a common utterance of all and a dominant phenomenon of modern times. Lupton (2006) argues that both Beck and Giddens consider that threats and dangers have challenged all societies in human history; these have resulted from the natural world, such as infectious diseases, famine, and natural disasters. She further stipulates that people seem to be attached to the risk in the meantime responsible for their minimization. All such risk being triggered is regarded as the product of human endeavour. Thus, the locals and lay people are continually challenged by information and activities to be carried out concerning risk. Similarly, the *cultural/symbolic* perspective assumes that pre-established cultural beliefs help people make sense of risk, and notions of risk are not individualistic but shared within the community. From this perspective, the risk is a more cultural and communal attribute which acts as practices and ways of maintaining social cohesion, stability and order and dealing with deviance. The last one, the *governmentality* perspective, takes risks as a political domain that emerged from modernization. Most of the scholar from this scheme takes a risk as neo-liberal societies, which highlight individual freedom and rights against the excessive intervention of the state. Thus, we can conclude that risk is intertwined with social and cultural norms, concepts, and habits.

Giddens (1992:1) accounts modernity as “*Modernity*” refers to *modes of social life or organization which emerged in Europe from about the seventeenth century onwards and which subsequently became more or less worldwide in their influence. This associates modernity with a time period and an initial geographical location, but for the moment, it leaves its major characteristics safely stowed away in a black box*”. Giddens generalizes the sophisticated characteristics of modernity as hidden assumptions, just as in the black box. He summarizes the uncertain forms of modernity which could plunder its effects into consideration. He further went on distinguish modernity as – *discontinuities of modernity*². He stipulates that the idea of human history and its development does not have smooth sailing. Giddens points out the discontinuities

² Giddens (1992) interprets discontinuities of modernity in terms of three features – pace of change, scope of change and nature of modern institutions.

at various phases of historical development. The historical transformation of different epochs has been marked with different forms of discontinuities. He thinks through the basic three features as a major opening in calculating the discontinuities. First, the *pace of change* from which the era of modernity sets into motion. Secondly, the *scope of change* is when different areas of the globe are drawn into interconnection with one another the influences of social transformation become so perceptible among all. Finally, *modern institutions*, where Giddens regard that some forms of social institutions are not available in prior historical time. Giddens (1992) argues that the modern time where we persistently revel in different forms of amusement is in serious illusions and discontinuities. Further, he specifies the idea of modernity through the themes of *security versus danger* and *trusts versus risk*. Giddens argues (1992:7) *Modernity, as everyone living in the closing years of the twentieth century can see, is a double-edged phenomenon. The development of modern social institutions and their worldwide spread have created vastly greater opportunities for human beings to enjoy a secure and rewarding existence than any re-modern system. But modernity also has a somber side, which has become very apparent in the present century.* He further argues (ibid), “The world in which we live today is a fraught and dangerous. This has served to do more than simply blunt or force us to qualify the assumption that the emergence of modernity would lead to a happier and more secure social order.

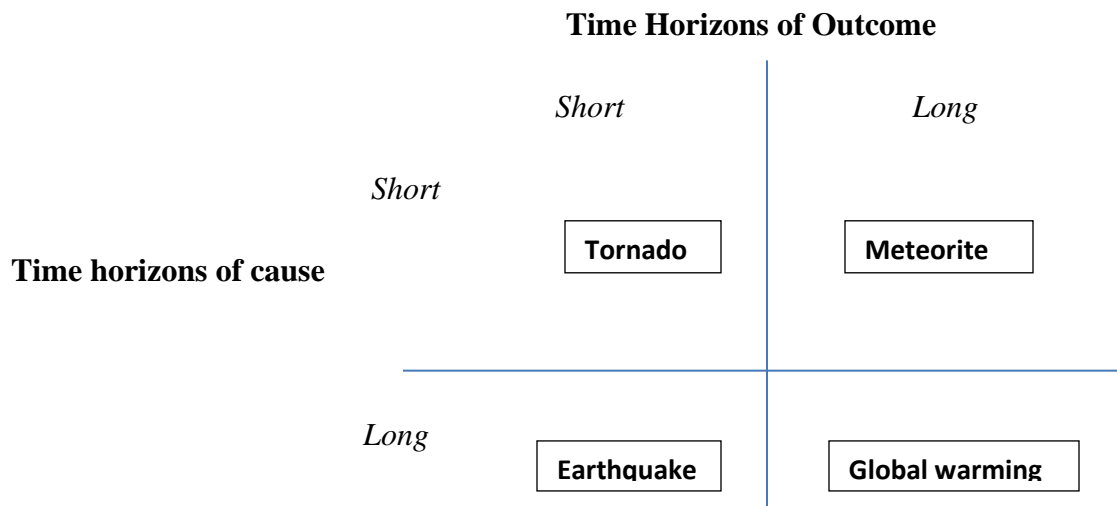
Beck (1992) lays down the concept of reflexive modernization, where he argues that science is the source of solutions to the problem and also a cause of problems. Beck (1992: 156) argue that “*When they go into practice, the sciences are now being confronted with their own objectivized past and present - with themselves as product and producer of reality and of problems which they are to analyze and overcome. In that way, they are targeted not only as a source of solutions to problems but also as a cause of problems.*” Likewise, Beck puts down his argument as a matter of the fact that science in the coming time spectrum will widely be contradictory. Beck discusses two factors While tracing the modernization of tradition and reflexive modernization - *Primary Scientization* and *Reflexive Scientization*. First, science is applied to nature, people, and society. In contrast, in the second instance, science is confronted with its products, defects and secondary problems. Similarly, Beck argues that the expansion of science continues to question the science itself, which is more blatantly put forth by public criticisms. Thus, in the long run, the inscapes of predominant science might shake down.

B. Apprehending Events, Processes and Time prospect

Social scientists are often concerned about the moment once the events or processes are triggered. The important occurrences usually associated with that case in point are whether the social scientist is well versed in capturing the whole progressions of the events. The necessity of analyzing the context of the rise and eventually spread of the processes has been of paramount impact in social science. We usually undermine the rise and fall of events that have a peculiar impact on our lives. In simple words, events seem to be natural and unpredictable. We often regard events as natural phenomena happening in society. Regardless, of its occurrence, we hardly investigate its concealment. Carlsson (1972) argues, “Research is a game against nature in which nature counters with concealment strategy. Thus, as a researcher, we opt to design a peculiar concealment strategy.

Risk as an important scheme looks natural on some historical occasions, but unlike its normal outlook, risk as a social process took an extreme time to rise and may take an extremely long time to unfold. Social scientists focus on the immediate and temporary contiguous factors while focusing on any explanations (Pierson, 2003). However, many important social processes take a long time – sometimes an extremely long time- to unfold (ibid). Pierson (2003) discusses with the help of four examples from natural sciences that the processes of any events should be well defined with time prospect.

Figure: 1 Time Horizons of Different Causal Accounts



Source: Paul Pierson (2003) Big, *slow-moving and Invisible*

Considering the occurrence and its impact to be analyzed, Pierson (2003) focuses on apprehending the causal accounts of all these phenomena. Particularly, he focuses on two variables in assessing the accounts of these four phenomena from natural science- The time horizon of cause and the Time horizon of the outcome. As in Figure 1.1, Tornado is '*quick/quick*' case. The causal process unfolds over a short period, as does the outcome of interest. Similarly, in the case of an earthquake, the outcome of interest takes place in a very short period, while its cause may take a long-term and slow-moving process. Thus, in terms of outcome, it is '*quick case*'. Further, meteorites that hit the earth might have different forms of causal and outcome tendencies. This could be regarded as '*quick/slow*' case. The cause of a meteor impact takes place in a short period of time, while its impact may take a slow unfolding outcome. For instance, the extinction of creatures along with climate change are some examples of the impact made by meteors. The final one is global warming which could be considered as '*slow/slow*' case as it is a case of a long-term causal process (increasing emissions) and a long-term outcome (temperature outcome). Thus, the incidents have different time prospects concerning their cause and outcome to be triggered. Accentuating the understanding of events and processes through short-term hesitation might limit the tendency to find the truth, just like the above explanation, the risk society might take long historical instances to build up. Distinguishing and outlining different processes of risk that might operate over extended periods is essential. If we could make such distinctions, it could help to integrate long-term causal processes. The earthquake in Nepal in 2015 and the recent Covid-19 pandemic have made us rethink the context and rise of risk in modern times. Similarly, we might misapprehend the processes that have triggered in happening of Covid-19 pandemic and earthquakes as such if we do not shed light on the processes and context of these instances as such.

C. Institutions, power relations and recovery mechanism

Consolidation, participation, and recovery mechanisms usually come from institutional support who worked continuously in the site area. Usually, in the urban areas, local clubs, and volunteer groups were found to be active in supporting and helping people who were victimized. Unlike,

the disaster period, the help and support during the pandemic time was very undecided and difficult. The distribution of food items, medical support, medical kits, and other materialistic stuff varied greatly from the distance that the village took. Further, the village adjacent to the city area gets the support easier and faster than vice versa. Similarly, people with access to the institutions, may be governmental or non-governmental, usually gets more priority compared to those who do not. *'People in Lele areas usually get the supportive item more easily than us as we are far from the core city area'* (Interview, 2021). A male respondent from Nallu VDC, nearly one hour far from Lele replied in this manner. Also, distance does affect the amount of relief materials to be delivered. Usually, the core city areas get supporting materials and access to medical facilities more smoothly than the remote areas. Moreover, the support delivered by the government was messy and confusing. People with direct linkages with higher official easily accessed the materials, whereas the others had to wait a long. *'The procedural delay and lack of better communication within the governmental officials had affected the recovery process'* (Interview, 2021). A resident from Sindhupalchowk articulated his experience in this way. This instance was also substantiated in the case of provision for Covid-19 Virus vaccination, where vulnerable groups were segregated and powerful got a chance to be part of the vaccination process.

Further, victims were more isolated regarding power hierarchy which usually works for those with close connections with related government officers. The old nepotism and favouritism³ practices in Nepal further exacerbated the messy government structural arrangement. Power hierarchy, disorganized recovery method, lack of proper recovery mechanism, and freshly out broke pandemic had created major hurdles in expanding and distributing the stuff properly. Interestingly, on the other side, the locals in the village are more organized in a better manner than the government recovery organization by the local institutions. The recovery work of the government was more distressing than that of local institutions. Local NGOs/INGOs both worked combined in disaster-affected regions and have at least maintained optimism of the victimized family. An old man from Kathmandu said, *'It was local NGO who continuously supported us through their various mechanisms and led us to more convenient position'*

³ Favoritism relates to the act of favoring a person not because he or she is doing the best job but rather because of some extraneous feature-membership in a favored group, personal likes and dislikes, etc. Nepotism on the other hand is the act of granting favor to relatives.

(Interview, 2021). Such statements were common remarks in almost all three districts during the field visit. The enormous faith of people was more towards the local NGOs than the government.

III. METHODOLOGY

This study particularly highlights the implication of risk in modern times. Thus, data has been gathered considering the earthquake of 2015 in Nepal's context and the Covid-19 pandemic in the global case. The study was conducted during the Covid-19 pandemic periods. Thus, the frequency of visiting site areas was made repeatedly, and there were plenty of intervals while collecting data. Also, during that time, even the districts affected by the earthquake were studied. Among the different 14 most disaster-stricken communities, through purposive sampling, I selected three districts Sindhupalchowk, Lalitpur and Kathmandu district, as my area of study as they were the most affected areas of Nepal during the earthquake. Accordingly, Melamchi, Lele and Basantapur regions were selected among those districts, respectively. After selecting the site, I spent nearly 3 days observing the community with the local leader to review the preliminary context of the place. I chose the respondents purposively based on the objective of my study. The total numbers of respondents were 28 (16 respondents from the disaster context and 12 respondents from the Covid-19 pandemic context), comprising 15 females and 13 males in the case of the earthquake.

Similarly, in the case of the Covid-19 pandemic Kathmandu as the capital city, was hard hit, with numerous patients hospitalized. Thus, first, hospitals from Kathmandu were chosen purposively within the local vicinity, which was taking care of Covid-19 patients. Based on the list provided by the hospitals of different patients (Covid-19), they were selected using a simple random sampling method. The total number of respondents was 12 in number. While selecting them, the diversity of geographical locations, gender equity, rural and urban dimensions, along with class propensity was given high priority. The qualitative method was used overall, to explore the actual scenario of the community, which was later developed into different tabular forms and in narrative mode. Three strategies of locals, namely – *coping mechanisms*, *adaptive mechanisms*, and *transformative mechanisms*, were studied, and the interplay of these was centralized. While in the case of identifying support, three components were proposed—*Contact*, *trust*, and *coordination*.

Similarly, Data gathering included interviews, key informant interviews, direct observations, and systematic data collection methods to know the information at individual, institutional and community levels. The key informant embraces an intense conversation between the informant and interviewer, which could help to build a strong rapport with the informant. Similarly, direct observation was carried out to observe and record the actual behaviour and pattern of respondent lifestyles, rather than reported or recalled. The observer records as much behaviour as possible, including actions, conversations, and descriptions of the locale and persons observed. Validity had been maintained by consulting with supervisors, experts and concerned persons. Extra emphasis was given to maintaining the objective of the data and avoiding data errors by comparing them with different data collected from different sources. Likewise, the reliability of the data was guaranteed by carefully planning the questions in the interview schedule. Similarly, the data was analyzed using narrative analysis. With field texts such as stories, conversations, interviews, family stories, and life experiences, coherent details were developed. Likewise, the whole findings have been divided into various sub-themes, which were then orderly presented in narrative form.

IV. FINDINGS

This section describes the findings of the study in relation to risk society and the mechanisms implemented. Further, this section investigates analyzing different forms of mechanisms individuals endure during times of risk. The support system and forms of interaction is highlighted in this section.

A. Strategies and Mechanisms of interplay by locals

Table 1: Forms of Interaction in Different Contexts

Forms of interaction	Urban Context	Rural Context
Coping mechanism	Fragile	Strong
Adaptive mechanism	Lengthier	Shorter
Transformative mechanism	Faster	Slower

(Source: Field study 2021)

The above table reveals that interaction is contextual in nature while comparing the urban and rural contexts. Urban areas usually do not face calamitous or traumatic sequences more often. If they do, they usually have advanced form of mechanisms compared to the rural context, which can be utilized rapidly. However, the complicated lifestyle and advancement in different domains of life certainly triggered more risk in urban areas than in rural. The given table indicates that urban people are more likely to depend on power-driven progression than the collective help and support that they normally lack. Unlike urban, rural people usually face smaller or bigger dreadful situations more often. Also, they hardly get any quick response from the nearby institution in any form of disaster or risk. Thus, they are more used to face any dreadful situation collectively. An old man from Lele replied, *'I know this pandemic has shaken all the people from Nepal. It definitely weakens people's confidence in coming back to normalcy. However, we have been facing such traumatic situations in different forms and formats (may not be pandemic or disaster). Urban people believe in machines we believe in ourselves'* (Interview, 2021). Similarly, adapting to the dreadful situation also remains constriction among the urban people compared to rural people. Time and again, faced with the traumatic situation may be in the form of the loss of a person in one's life, landslides, flood, or illness have made them stronger and more resilient than urban people. However, transformative capacity is found to be more vigilant and rigorous among urban people than rural people. A man from Kathmandu replied, *'The earthquake has immensely shattered down all of us; its impact may remain for years long but having said that, I cannot sit ideal. From the next month, sequential bills of household chores, schools, and electricity will start to knock on my door. At that time, where shall I go?'* (Interview, 2021). He explicitly put forward finding some economic ways out to the given situation. On the other hand, rural people do not have any alternatives to replace their regular work schedule. Most of them are farmers, potters, mason workers, and labourers who are compelled to sit at home due to the closure of their work. The number of works they carry is linked and operated at urban rather than rural centres. Thus, transforming their lives usually is at a slower pace compared to the urban context.

Correspondingly, field study revealed the fact that the level of interaction also differs at individual, institutional and community levels. Based on their personal experiences at their respective place specifically, the growth of interaction is defined by the product of the given social situation.

B. Strategies Implemented at Different Level

Table 2: Strategies implemented at different level

Forms of Interaction	Individual Level	Institutional Level	Community level
Coping Mechanisms	<ul style="list-style-type: none"> • Making Jokes related to earthquakes (Its usage has been more often on social sites) • Laughing and building fun, creating an environment • Updating each other with the news (referring to the geological centres) 	<ul style="list-style-type: none"> • Sharing information about earthquakes/pandemics in different media • Sharing hand in hand with people in helping others victimized people (Different NGOs, INGOs rendered their support) 	<ul style="list-style-type: none"> • Praying ‘nature god’ as reflexive power of the symbol. • Getting information about the earthquake/pandemic from adjacent villages.
Adaptive Mechanisms	<ul style="list-style-type: none"> • Assure one to live in a tent. • Being a volunteer in cooking • Providing cooking utensils, and kitchen stuff required in the field. 	<ul style="list-style-type: none"> • Routine interviews with experts. • Dissemination of data at every moment. • Rendering of services by some religious institutions • Sharing hospitalization experience 	<ul style="list-style-type: none"> • Living in a small thatched house built temporarily. • Enduring trust among each other. • This health crisis will go for the long run.
Transformative	<ul style="list-style-type: none"> • Getting back into 	<ul style="list-style-type: none"> • Distribution of 	<ul style="list-style-type: none"> • Starting

Mechanisms	routine work even in the abandoned condition <ul style="list-style-type: none"> • Making one accept change. 	tin sheets, sleeping bags, gloves, and medical kits to the needy.	chores which can be carried at the local level.
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(Source: Field study 2021)

Compared to rural areas, urban areas had more connections with the advanced information system, which helped them return to normalcy. The different approaches they used in urban contexts, easily get accredited and spread wider compared to rural contexts. Similarly, using social sites like Facebook, Twitter, and others has tremendously supported in generating help and outreaching the damaged spot and vulnerable sites. Jokes and support posted on social sites were crucial in bringing life into normalcy. Such acts usually raise the faith that activities are in the chain to connect and bind the people into one. Whatever the capacities people have shown, whatever mechanisms they used in building interaction all explicitly or implicitly signify the social system as the central idea. From dead to excavation, from jokes to sharing information, from cooking to living in a tent, from phone calls to chats, and from sharing the experience of hospitalization, all forms signify the importance of the social setting in which they live. Thus, interaction is all about accepting changes in our social structure but still standing for to live within it. However, the study reveals that compared to the disastrous situation, the locals were reluctant to disseminate medical support and help during the pandemic; only after the first wave did the realization of helping others get stronger.

C. Dimensions of support during the time of risk

Table 3: Dimensions of support during the time of risk

Dimensions	Urban Context	Rural Context
Contact	Individual to collective	More intense than usual
Trust	improved than before	Nurture in a deeper way
Coordination	Admittance of different forms of network.	Lack of admittance of other institutional support.

(Source: Field study 2021)

The condition of urban and rural reproduces in different forms while incorporating the context of support. Especially, while studying support, we devise three forms of support dimensions. Unlike the previous concrete and rigid urban texture, we found a consent-making and caring urban support system. The normal culture of individualization was covered by the collectivity generated by risk. During times of altruism and difficulty, the urban support system creates a compassionate form of trust and coordination. The forms of interrelationship amongst the urban people turn out to be more collective in nature than usual. Similarly, the consent of trust is widely used and improved than before.

V. CONCLUSION

Research profoundly adds to the hidden issues that were unconcerned in the field of risk study for a long. *Firstly*, it suggests defining the idea of risk, which was scarcely discussed within the purview of social science. Similarly, the study found that the risk ethos and vulnerability of risks are commonly attributed phenomena in modern times. Risk usually exhibits uncertainties and exacerbations of vulnerability in modern times. Also, the risk may be physical or other layouts when an outburst on the surface remains natural in its phenomena. Still, its impact is always seen in normal life, social relationship, and social processes. Hence, risk has always had a deep interrelation with human beings. Unlike the theoretical orientations presented by Beck (1992) and Giddens (1991), this study investigates the dynamism locals articulated during risk. Also, this study found that locals have the strategies and mechanisms to endure the time of risk. Although the social production of risks systematically accompanies wealth, the locals devise mechanisms and strategies to overcome the risk. *Secondly*, apprehending events and processes in its broader frame are interlinked with 'social entity'. These social events and processes comprise various facets and contours of social life which explicitly or implicitly affect one's life. Furthermore, as discussed earlier, processes are not easily captured. Further, capturing social processes taking a long time to unfold is a major theoretical contribution we could make in social science. Similarly, on the other hand, theoretical supporting of the risk requires a new set of avenues and vantage points in equating with the present scenario. The endorsement of risk in these modern times needs to be redefined, as the ontological definition does not remain the same over the entire historical context. Also, its conceptuality varied greatly in the given social structure may it be rural or urban, along with its mechanism used. *Thirdly*, nevertheless, the

support system also differs based on the account of risk associated with it. The support system during the time of the disaster was commendable, while during the period of the pandemic, people were reluctant to help and assist everyone. Thus, even in risk dynamics, personal character and individualization are of the utmost centre of importance. Individuality is overly seen during the pandemic, unlike during the disaster time. Despite all these facts, the building of social capital amongst the community people was another important dimension found during the study. *Thirdly*, the locals express some forms of interplay during risk. Similarly, the study found that locals use certain forms of capital to support each other. Social capital is the one in which intensity and proximity are firmly ascended by locals during risk. The combined effort, collective nature of the individual, and trust among each other intensify the level of support. It is a matter of support that makes them survive for the date despite any governmental support. Also, Social capital has been peculiar in its occurrence in different contexts may it be urban or rural. The level and interconnection among the locals determine the magnitude and intensity of capital practice in a given context. In addition to this, the role of local clubs, local personnel, and NGOs is crucial in rendering such assistance and help. *Fourth*, Risk stricken population used their ties and connectivity with other bodies, which helped during this tragic moment which we considered as support. Further, individuals use their social capital to overcome the factor of risk. *Finally*, the locals interplay their own strategies and mechanisms during times of risk. The locals implement their own preparedness, response, and recovery in overcoming the risk factors. Thus, community support for rescue and relief operations can be regarded as a universal phenomenon which communities usually endorse during times of crisis.

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**RIGHTS OF THE ACCUSED: A SPECIAL EMPHASIS ON THE ASPECTS OF
DISCHARGE AND VIDEO-CONFERENCING TRIALS IN THE INDIAN CRIMINAL
JUSTICE SYSTEM**

AVESH MALIK* & GAURAV KUMAR**

ABSTRACT

There is an inseparable connection between a 'Criminal' and the Criminal Justice Process. The word 'Criminal' is important to be used for the purpose of this paper since the societal mindset in our country is somewhat preoccupied with the notion of treating a person with the tag of 'Criminal' as soon as a policeman is seen taking him away. However, the criminal justice system is expected, at least theoretically, to treat such a person as an 'Accused' till proven guilty in a due process model. For this, there is a criminal justice process which provides a procedure and certain safeguards to try such an accused and prove his guilt or innocence. This paper reiterates the basic rights of the accused provided under the Indian Legal framework, which even a layman must be aware of. However, several aspects need to be analysed, considering the non-implementation of these provisions and the violation of these rights on a regular basis. Among these rights, there is an important right of Discharge provided to the accused during the preliminary hearing of the criminal trial which is conducted to see whether the case is fit for dismissal. The objective of this right is to avoid prolonged trials in meritless cases to unburden the already overburdened courts. However, the perplexing question is the materials the court can look at or consider at this stage to decide whether the accused can be discharged. The paper seeks to clarify all these aspects with the help of decided cases having a special emphasis on the rights of the accused at the stage of discharge and the implementation of these rights while conducting trials through video-conferencing.

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I. INTRODUCTION

The late Herbert Packer discussed two competing value systems in the criminal process which can lay the platform for the criminal justice system in a country. One is the *Crime Control Model*, and the other is the *Due Process Model*.¹ The former has the curbing of criminal conduct as the most important function, while the latter gives importance to the rights of an individual. In India, the *Due Process Model* is followed wherein the focus is to protect an individual from the coercive authority of the State by providing him with various procedural safeguards. This includes the basic principles of presumption of innocence and moving through the process of formal adjudication with norms of procedural fairness to determine the legal guilt of the accused. The foundation of any criminal justice system must be based on the equal importance of both protecting the innocent and punishing the guilty. The most common argument against such a due process model is the lack of efficiency which it can ensue. However, in a heterogenous and hugely populated country like India, a diminution in efficiency can be accepted to protect the rights of an accused because maximum efficiency might lead to maximum tyranny by the State.

It is everyday news when legal philosophers or criminal justice experts, or a politician will attempt to suggest a model or change, and some may even claim a cent per cent efficiency to end the crime. It can be possible, but not without sacrificing the very basic values of a democratic society. If the basic rights of the accused can be bypassed to have the dream safe society instantly, a process may be witnessed which will not get voluntary compliance from the society. Consequently, such a weak social order based on fear will require more tyranny and force exertion by the state functionaries to be maintained. So, what a legal system in a democratic society must look for is a social order based on respect for the law. This requires a vision to observe the social realities acting from behind the mask of the crime committed by anyone. Further, the aim of equal justice, which for instance, is not less than what the Preamble of the Indian Constitution reflects as the fundamental feature of a democracy, must be attempted. Thus, ultimately, equal force and effectiveness in the criminal process must be visible from both the accused and the victim's point of view.

¹ Herbert L. Packer, "Two Models of the Criminal Process" 113 *University of Pennsylvania Law Review* (1964).

Article 10 of the Universal Declaration of Human Rights, 1948 (UDHR)² says that “Everyone is entitled in full capacity to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”. This has been expressed in very general terms but acts as the basis for further elaboration of the rights of the accused by various legal systems. The elaborate mention of rights can be seen under Article 14(3) of The International Covenant on Civil and Political Rights (ICCPR),³ which includes the right to prompt information of the nature and cause of the accusation, the opportunity of reasonable time and facilities for preparing his defence along with the right to have a legal counsel, the facilities of interpreters and the right to examine the witnesses in the same way as the prosecution.

The criminal justice system in India is based on the due process model from colonial times, as is evidenced by Acts like the Indian Evidence Act of 1872 and the Code of Criminal Procedure of 1898. After the coming into action of our highest legal document in the form of a common Constitution for both the Union and the States, unlike in the United States of America (USA), there are several procedural requirements laid down first in the Constitution and then in the subsequent procedural and substantive laws passed like the Code of Criminal Procedure, 1973 (hereinafter referred to as the ‘Code’), Legal Services Authorities Act, 1987 and the Human Rights Act, 1993. The foundational intention of equal rights for the accused in the form of procedures is visible in Article 21 of the Constitution, which says that “No person shall be deprived of his life and personal liberty except according to the *procedure established by law*”. The intentional deletion of ‘Due Process’ and substituting it with the words from the Constitution of Japan ‘Procedure established by Law’ has another interesting history and a never-ending conflict in judicial opinions. A separate provision in Article 22 for the prevention of arrests carried out arbitrarily, and the preventive detention safeguards further support the framers’ intention of procedural invocation of criminal responsibility for a fair administration of Justice. Article 39-A added later, provides for free legal aid for the economically disadvantaged to promote equal justice for all. The Code attempts to contain a fair procedure at every step of the

² The Universal Declaration of Human Rights was proclaimed by the United Nations General Assembly in Paris on November 10, 1948 as a common standard of achievements for all people and all nations.

³ ICCPR is a multilateral treaty adopted by United Nations General Assembly Resolution 2200A (XII) on December 16, 1966 and in force from March 23, 1976.

criminal justice process to protect the rights of the accused, some of which will be discussed in this paper hereinafter.

One important aspect that will be focussed on in the paper is the rights of the accused at the stage of *Discharge*. The Criminal Justice System guarantees the accused a valuable right in the form of “Discharge” when a preliminary hearing is conducted to see whether the case is fit for such threshold dismissal. The objective is to avoid prolonged trials in meritless cases to unburden the already overburdened courts. However, the limited scope of scrutiny that the courts can exercise at this stage has been the point of debate visible in many judicial opinions, including the recent judgement of the Supreme Court in the case of *Nitya Dharmananda v. Gopal Sheelam Reddy*⁴ and is going to be discussed in this piece as well.

II. BASIC RIGHTS OF THE ACCUSED

A person can enter a criminal process if any complaint is filed against him or he is arrested for any reason or even while being a witness. Limiting it to just an accused, various procedural requirements have to be followed from the very point of the complaint or arrest running along till the conviction or acquittal of an accused. Indian legal system provides certain basic rights inherited from the common law to such persons. Nobody would argue that an innocent person should be unnecessarily harassed or his liberty being jeopardized and the means of punishing the accused are as important as the conviction or punishment. This is why certain procedures to promote natural justice are implicit in various laws starting from the Constitution.

A. Constitutional Provisions

The Preamble lays the foundation stones with the promise to secure *Justice*, whether social, economic, or political and *Equality*, whether of status or opportunity, with India continuing to be a democracy. Then, the most important chapter on fundamental rights, chapter III, comprehensively covers almost every basis of fairness in the procedure for all. Starting with the *Right to Equality* contained in Article 14,⁵ which ensures equal respect for every person

⁴ (2018) 2 SCC 93.

⁵ Art.14: Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

subjecting everyone to the same laws irrespective of their status and binding the state in negative terms not to violate its intent. Thus, no discrimination is allowed by this Article or the adjacent Article 15, which also prohibits it on various grounds like religion, caste, sex, etc. Article 20⁶ adds some more important safeguards in this series in relation to a conviction. It says that a person can be punished only for an act which was punishable at the time it was committed and not making it an offence subsequently by making any laws. Thus, it protects from ex-post facto laws. Further, Article 20 also protects a person from double jeopardy which means that “no one can be punished more than once for the same offence”. This provision has to be read with Section 300 of the Code, which unlike Article 20, also includes the acquittal aspect meaning that “the person convicted or acquitted will not be tried again for the same offence”.

There is Article 21 which aims to protect the life and personal liberty of any individual subject to the ‘procedure established by law’ under which the Supreme Court has read many unenumerated rights like the right to a fair and speedy trial,⁷ the right against cruel and inhumane treatment, right to privacy⁸ and right to livelihood etc. In the case of *Francis Coralie v. Union territory of Delhi*⁹, Supreme Court held that a detenu has a right to interview friends or family members and a lawyer. Then, there is Article 22,¹⁰ which safeguards against arbitrary arrests and preventive detention. It says that “no person shall be detained in custody without informing him of the grounds of his arrest and has to be produced to the nearest magistrate within 24 hours of his arrest”. Further, there is a right to consult and be represented by a lawyer of his choice, and this

⁶ Art.20: Protection in respect of conviction for offences:

1. No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
2. No person shall be prosecuted and punished for the same offence more than once.
3. No person accused of any offence shall be compelled to be a witness against himself.

⁷ *Hussainara Khatoon (4) v. State of Bihar*, (1980) 1 SCC 98.

⁸ *K.S Puttaswamy v. Union of India* (2017) 10 SCC 1.

⁹ (1981) 1 SCC 608.

¹⁰ Art 22: Protection against arrest and detention in certain cases

1. No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
2. Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

is to be read with Section 303 of the Code, which says that “an accused in a criminal case has a right to be defended by a lawyer of his choice”.

B. Rights under the Code and Indian Evidence Act, 1872

a. Right to be informed of the grounds of Arrest

Some provisions in the Code follow the requirement of Article 22(1) that the person arrested has to be informed of the grounds of his arrest. Section 50 of the Code says that full particulars of the offence for which he is arrested have to be communicated to him. Further, if the offence is bailable, he is also to be informed of his right to be released on bail. Section 55 requires the officer to make an order in writing mentioning the accused, the offence, and other particulars if he deposes any subordinate officer to carry out the arrest and such a subordinate officer shall notify the order to the arrestee while making the arrest and show him such order if required by him. Similarly, under Section 75, the particulars of the warrant have to be read, or the warrant itself has to be shown if required by the accused to be arrested under a warrant.

b. To be Produced before the Judicial Officer

Provisions following Article 22(2) of the Constitution, which requires the arrested person to be produced before the magistrate, are Sections 56 and 57 of the Code. Section 56 requires the police officer arresting any person without a warrant to produce him to the officer in charge of the police station or the nearest magistrate in the jurisdiction. Further, Section 47 forbids any unnecessary restraint on the person arrested. Only that much restraint can be used, which is essential to prevent the escape of such a person.

c. Right to be examined by a Medical Practitioner

Section 54 of the Code mandates that the person arrested shall be examined by a government medical officer or any medical practitioner soon after the arrest. Further, “a female arrestee shall be examined only by a female practitioner or under the supervision of a female officer or practitioner”. Such a doctor shall report any injuries or marks present and give a copy to the arrestee or his nominee.

d. Statements to the Police not to be signed

Section 162 of the Code says that any statement or confession made to a police officer during an investigation by the police shall not be signed by the person making it. Any such statement or confession shall not be a substantive piece of evidence in the court. It is to be noted that this only applies to the statements made during the investigation by the police under Chapter XII of the Code¹¹ and not any statement. For example, the statement made to the police officer before the investigation can be taken as a substantive piece of evidence. Also, any confession made to a police officer cannot be used against the accused by virtue of Section 25 of the Indian Evidence Act. A confession is admissible only if it is made before a judicial magistrate under Section 164 of the Code, who also can record it only if he is satisfied that it is voluntarily made. Further, Section 316 forbids any influence in the form of threat, promise or otherwise to induce the accused to disclose or withhold any information. All the evidence is required to be taken in the presence of the accused unless his attendance has been dispensed with, in which case the evidence is to be taken in the presence of his pleader.¹²

e. Accused to be a Competent Witness

There are many circumstances in which the accused knows the reasons or justifications for his actions to prove his innocence, and that is why he is considered a competent defence witness under Section 315 of the Code. However, he can be called as a witness only if he himself has requested in writing for this, and any failure on his part to give evidence cannot be a matter of any comment or presumption against him.

f. Presumption of Innocence throughout

It is the general rule of criminal law due process model that the accused shall be presumed innocent throughout the process until proven guilty. The onus to prove everything as to his guilt lies on the prosecution. However, the absence of facts to bring the accused within the general or special exceptions is to be proved by the accused only. There is a difference in the standard of proof on both sides. As per Section 101 of the Indian Evidence Act, 1872, the burden of proof on

¹¹ Chapter XII of the Code deals with the Information to the Police and their Powers to Investigate.

¹² See s.273 of the Code.

the prosecution is beyond a reasonable doubt to prove the guilt of the accused. The burden to bring the case within exceptions, as per the standard of preponderance of probabilities, is on the accused.

g. Transfer on the application of the Accused

Under Section 191 of the Code, If the magistrate took the cognizance of the offence *suo moto* under Section 190(1)(c) of the Code, the accused has to be informed that he has a right to be tried by a different magistrate from the one who took the cognizance and failure to inform him of this right vitiates the trial. However, this right can be exercised only before the evidence is taken.

h. Supply of Police Report and other Documents to the Accused

Under Section 207 of the Code, the Magistrate shall supply him with a copy of the First Information Report (FIR), the police report and all other relevant documents, including any statements or confessions under Sections 161 and 164, without delay. The magistrate is also obligated to see under Section 238 of the Code whether such copies have been furnished to the accused. Further, if any document is voluminous, he can allow it to be inspected rather than furnishing it to the accused. A similar provision is contained in Section 208 of the Code in relation to a session triable case instituted on a complaint.

i. Production and Examination of witnesses

As soon as the prosecution evidence closes, the accused has a right to examine all the defence witnesses and ask for the process to get the presence of any witness already examined, and the court has to grant it unless it is satisfied that it is vexatious or for the purpose of delaying the proceedings.

j. Right to Bail

This is one of the most important rights of the accused in the criminal justice process and is a rule rather than an exception. Bail keeps the liberty factor on the same plane as the need to protect society and is given as a right to the accused in the bailable offences. It does not mean that bail cannot be granted in non-bailable offences. Even in non-bailable offences, bail can be granted if the requirements of Section 437 of the Code are satisfied.

k. Hearing of Accused on Sentencing

Once the accused has been convicted, it is mandatory to hear him on the question of the sentence as per Section 235 of the Code.

l. Judgement Copy to be delivered to the Accused and the Right to Appeal

These rights are essential to give every opportunity to the accused to put forward his defence, and there is always a possibility of error or mistake on the part of judges as well while appreciating the evidence. Thus, the copy of the judgement is to be immediately delivered to the accused, and the right to appeal is given to the accused to challenge his conviction and sentence in a criminal case.¹³

III. RIGHTS OF THE ACCUSED AT THE STAGE OF DISCHARGE

The accused in a criminal case has a very important right in the form of *Discharge* during the preliminary hearing of the case. This is the stage where the court decides whether the case is fit to proceed for the trial, and if it finds so, the court frames the charges. However, the perplexing question is the materials the court can look at or consider at this stage to decide whether the accused can be discharged. The objective of this stage in the criminal process is to throw out meritless cases from the process at the very beginning. The scheme of the statute or the Code of this stage is covered by Sections 227 and 239, which can be produced for reference:

Section 227: "If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing".

Section 239: "If, upon considering the police report and the documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing".

¹³ s.363 and s.386 of the Code.

These two provisions deal with the discharge of the accused. The only difference is regarding the nature of the trial, where Section 227 deals with session triable cases and Section 239 deals with the warrant cases by the Magistrate. It is clear from the wordings of these two provisions that the only material which the court can consider at the stage of Discharge is the “record of the case”, and hearing the accused or examining him on these records only, which are submitted by the prosecution in the form of the police report or other documents along with such report. Thus, this was the position for many decades that the court can only rely on the prosecution material for deciding whether the accused should be discharged or the case is fit for proceeding to the trial. The significant opinion came in 1996 with the case of Satish Mehra v. Delhi Administration¹⁴ in which the Supreme Court held that “If the accused is able to produce any reliable material at the stage of taking cognizance or framing of charge which might affect the very sustainability of the case, it would be unjust to hold that no such material can be looked at by the court at that stage”. However, this was overruled by the three-judge bench of the Supreme Court in the case of Debendra Nath Padhi v. State of Karnataka¹⁵ (Padhi) wherein the court held that the statutory scheme says that the material by the defence cannot be looked into by the court at the stage of discharge and only the material produced by the prosecution in the form of police report or the submitted record of the case can be considered to decide on the question of discharge. Further, the words “hearing the submission of the accused” does not mean that an opportunity is provided to the accused to file any material he likes and is limited to the submissions made by the prosecution.

Now, the question that arises is what all is contained in the “Record of the Case” or the Police Report submitted by the prosecution and what all can be contained as per the law and whether such record can contain the materials favouring the case of the accused? For this, the relevant provision is Section 173(5) of the Code, which says that “The police officer shall send along with the police report all documents or relevant extracts which the prosecution proposes to rely on and the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses”. Thus, the words are what the “prosecution proposes to rely on or examine”, and thus, there is no obligation on the prosecution to submit the materials or statements which are in favour of the accused, and this gives a statutory confirmation when the

¹⁴ (1996) 9 SCC 766.

¹⁵ (2005) 1 SCC 568.

prosecution sends only those materials and statements which are incriminating in nature and suppress or withhold the matter which can disprove the case against the accused at that stage itself.

When the prosecution is not bound to present the exculpatory material in its submission under Section 173 of the Code, another argument that is raised and a point of dispute is whether the court can ask for such material on its own, which brings Section 91 of the Code into action, the relevant part of which can be reproduced here:

*Section 91(1): “Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any **investigation, inquiry, trial or other proceeding** under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order”.*

The bare reading seems to us as giving the solution to the entire problem since it does not bar the court in any way from asking for any material which might be necessary for trial or any proceeding under the code. However, when read with Sections 227 and 239 of the code, which specifically deal with the stage of discharge, the meaning that was culled out from Section 91 seems to disappear. The relevant question is whether the accused can ask the court to exercise its powers under Section 91 of the code? The harmonisation attempt of these provisions was made in the case of Padhi,¹⁶ where the Supreme Court held in this regard that “Ordinarily, there would be no right of the Accused to seek production of a document under Section 91 of the Code at the stage of framing of charge”. The objective of the court while saying so seems to be to follow the statutory scheme of Sections 227 and 239 of the code and to avoid a trial within a trial with the fear that it might prolong the trial more than it already is.

In such a scenario, it would be very difficult for the accused to prove the falsity of the case at this stage. The stage of discharge seems to be of negligible value since there is no mechanism to check the integrity of the prosecution and the investigating officer when it would not follow the due process and the principles of fair investigation and suppress or withhold the exculpatory

¹⁶ *Supra* note 15.

materials. A progressive opinion can be seen in the case of *Rukmini Narvekar v. Vijaya Satardekar*,¹⁷ wherein the matter relating to the quashing of proceedings under Section 482 of the code was in issue, and the question was whether the High Court could look into the material of the defence at the stage of deciding on cognizance. This was a bench of two judges, where Markandey Katju J. gave an opinion while analysing the case of *Padhi* and held:

While it is true that ordinarily defence material cannot be looked into by the court while framing of the charge in view of Padhi case, there may be some very rare and exceptional cases where some defence material when shown to the trial court would convincingly demonstrate that the prosecution version is totally absurd or preposterous, and in such very rare cases the defence material can be looked into by the court at the time of framing of the charges or taking cognizance.

(Emphasis supplied)

The above view of Katju J. would not be accepted as a good authority since this was out of place as the context of Section 482 of the code was transposed to interpret the powers of the court while framing the charges. Further, this was a two-judge bench with another judge Altamas Kabir J. holding a different view on this point from Katju J.

*A more significant judgement is the recently passed in 2018, again a two judges bench decision of the Supreme Court in the case of *Nitya Dharmananda v. Gopal Sheelam Reddy*¹⁸ (*Nitya*) wherein the main question was whether the accused can file an application under Section 91 of the code for the purpose of summoning the statement of witnesses and documents collected during the investigation but not made a part of the submissions made to the court as the police report? In this case, the High Court had directed the trial court to summon such witnesses whose statements had been withheld in the report and had also asked to look for other material sought by the accused.¹⁹ Supreme Court set aside the High Court judgement holding that the accused has no right under Section 91 of the code to summon the material. However, the court held that it can use its discretion to summon such material in the interest of fair trial which has not been*

¹⁷ (2008) 14 SCC 1.

¹⁸ (2018) 2 SCC 93.

¹⁹ *Gopal Sheelum Reddy v. State of Karnataka*, 2016 SCC OnLine Kar 8449.

made a part of the police report if it is of sterling quality and has a crucial bearing on the framing of the charge. The important holding is:

It is settled law that at the stage of framing of charge, the accused cannot ordinarily invoke Section 91. However, the court being under the obligation to impart justice and to uphold the law, is not debarred from exercising its power, if the interest of justice in a given case so require, even if the accused may have no right to invoke Section 91. To exercise this power, the court is to be satisfied that the material available with the investigator, not made part of the charge-sheet, has crucial bearing on the issue of framing of charge. Thus, it is clear that while ordinarily the Court has to proceed on the basis of material produced with the charge-sheet for dealing with the issue of charge but if the court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not a part of the charge-sheet. It does not mean that the defence has a right to invoke Section 91 of the code de hors the satisfaction of the court, at the stage of charge.

(Emphasis supplied)

At this stage, we have two almost conflicting views between the three judges in *Padhi* and two judges in *Nitya*²⁰ but a possible harmonisation of these views is based on the word ‘Ordinarily’ used in *Padhi* wherein the court said that “ordinarily the accused cannot use Section 91 to summon the defence material”. Then, if something can be extraordinary, a fitting of the views in *Nitya* is possible in the judgement of *Padhi*. This is because there are extraordinary conditions put down in the case of *Nitya*, which are as follows:

- i. There is some material withheld by the investigating officer or the prosecution.
- ii. Such material is of sterling quality.
- iii. Such material has a crucial bearing on the framing of charge in the case.

Thus, it can be hold by getting a harmonious view of both the judgements of *Padhi* and *Nitya* that the present situation is that the accused can apply for the summoning of the withheld

²⁰ *Supra* note 18.

material or documents in the record of the case submitted to the court as the police report but the court can use its powers under Section 91 of the code only in case it is satisfied that such material is of sterling quality and has a crucial bearing on the case and in particular, on the framing of charge.

However, this still does not bring the pedestal of the accused to the same level as that of the prosecution, which has all the powers to carry out the investigation and the tools to collect the evidence that the accused does not have. In the USA, the accused have even the right to cross-examine the witnesses at the stage of the preliminary hearing and there should be a discussion to see the feasibility of such reforms in the criminal justice system of India.

IV. RIGHTS OF THE ACCUSED IN VIDEO-CONFERENCEING TRIALS

The recent outbreak of the Covid-19 pandemic, which started in India in March 2020, affected the world in an unprecedented way. It led to various emergency measures in all the fields human beings are engaged in. As far as the Criminal Justice Process in India is concerned, the Courts were not able to function properly, and physical hearings became very difficult. The Supreme Court of India issued guidelines as to how the courts have to incorporate the Video-Conferencing mode to carry out the trials during the pandemic period.²¹ This led to a negative effect on the general rights of the accused, like the right to be heard in the Court, the right to defence, the right to effective judicial remedies and the right to a fair trial.

This mode of trial seems a more metro-centric approach where it can be applied with positive results. These cities are like Delhi and Mumbai. However, when the internet facilities across the other parts of the country are looked at or observed, there is a dearth of this facility and, in some places, completely non-existent. For example, in most parts of Uttar Pradesh, the trial courts were almost locked during the lockdown. Only physical hearings of urgent cases took place without any trace of any Video Conferencing. Even where it was being carried out, the rights of the accused got a severe hit. These rights can be analysed considering the observations made during the pandemic, which are as follows:

²¹ Guidelines for Court functioning through Videoconferencing during Covid-19 pandemic, In Re, (2020) 6 SCC 686.

A. Presence of the Accused during his trial

This trial constitutes an important part of the right of Fair trial available to the accused. This has been guaranteed in various human rights instruments and the constitutional or legal framework of India. His absence during the trial leads to the vitiating trial. It does not matter whether such a hearing in the court is for any remand purpose or any kind of substantive hearing. As per Section 167(2)(b) of the Code, “there can be no detention in police custody unless he is produced before the Magistrate *in person* for the first time and subsequently every time”. The video conferencing mode is allowed only in case of extension of the judicial custody of an accused after the amendment act of the Code in 2009.²² Thus, there is a need to justify the detention of each day in the eyes of the law and for that, the accused has to be physically produced for any further remand. This rule got hit by the pandemic, and the accused lost a very important right to be produced before the Magistrate every time he was to be remanded.

B. Negligible Interaction between the Magistrate and the Accused

Any possibility of interaction between the accused and the magistrate, if at all it was there in a physical hearing, got negligible after the pandemic in the mode of trial by video conferencing. So, the scope of any complaints or grievances which could be made by the accused in front of the magistrate without any fear got redundant. Further, the weak socio-economic demographics of the accused or the prisoners, the unawareness and unfamiliarity with the advanced technologies or the video screens put the rights of the accused down the drain and face more exploitation.

C. Malpractices

It has been observed that there are a lot of malpractices or bypassing of the basic procedural norms in the functioning of the justice delivery system being observed every day. In several district courts across the country, there have been many instances that have come to light that there is a practice of remand extension through the court clerks carried out covertly. This malpractice had significantly increased during the video conferencing mode wherein the accused’s lawyer is either not there or being misinformed about the papers or judges. Such

²² Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009).

malpractice is a blot on the criminal justice system, particularly the judiciary in India, and should not be taken leniently.

D. Voluntariness in the participation of the Accused

In the video conferencing mode of the proceedings, it is almost impossible to ensure that the accused or the prisoner is not under any kind of threat or intimidation, or that he is not injured or otherwise constrained or restricted from freely taking part or speaking during the proceedings of the Court. Further, it has already been seen that there is no opportunity to put forward any complaints or requests before the Magistrate.

E. Improper Legal Counsel

The impugned mode of video conferencing has also affected the right to legal counsel available to every accused negatively. There is no opportunity for the accused to have any immediate or confidential consultations with his lawyer just before the Court proceedings. Further, a lawyer is not generally available with the accused in the prison and that affects the right of the accused to have a proper consultation with his lawyer significantly.

F. Technical Problems

Anyone engaged in any form of Online program or study or job from home will testify to this fact that how the quality of anything carried out online depends on the smooth functioning of the equipment connected with it. Further, the lack of proper internet connectivity in most of the country has already been highlighted. Even in metro cities with high Wi-Fi facilities, the frequency of technical glitches and bandwidth problems cannot be ignored and affects the quality of any activity carried out online. When it happens in court proceedings, it would affect the quality of the hearing and may seriously jeopardize the liberty of an individual.

V. CONCLUSION

The criminal trial is something which no person would like to be engaged in, especially as an accused. As said by Harold Garfinkel, a criminal trial is a “Status Degradation Ceremony”, or in other words, as already used above, society in general use the words ‘Criminal’ and ‘Accused’

synonymously, especially in the Indian context even if the people know the difference between these words in a lexicon way. Thus, strict compliance with the due process model requires that the rights of the accused are out on the same smooth plane as that of the prosecution and the State, especially when the special machinery to carry out the process lies in the hands of the State and Prosecution.

The Constitution of India contains enough provisions for the treatment of every person on an equal footing in the criminal process, and those provisions have been referred to in this paper without going into their complexities. However, the apex court has played an active role in protecting the rights of the accused even by reading unenumerated rights under Article 21 many times. This approach of the Supreme Court has often been criticized on the ground that this approach follows the line of the American *Substantive Due Process* doctrine when the framers of our Constitution had consciously and intentionally deleted the '*Due Process*' clause from the wording of Article 21. The platform provided by the Constitution has been further exposed by the provisions in the Code of Criminal Procedure of 1973 and the already established Indian Evidence Act of 1872. Some basic provisions have also been referred to in this paper generally for reference.

As far as the rights of the accused at the stage of discharge are concerned, this paper has attempted to cover them significantly. The view in the case of *Padhi* reflects a violation of equality and is against the principle of a fair trial. In contrast, the views of Katju J. in *Rukmini Narvekar*²³ show a progressive view. There is an attempt to harmonise the sprinkled views of the Supreme Court on the scope of the courts to look into the materials at this stage of framing of charge. It leads to a little push upwards of the side of the accused in the scales, which is very heavy on the side of the strong State and prosecution in the criminal process. However, there is still more to be done. If the accused is allowed to ask for the material which can disprove the charges against him, it will go a long way to prevent the undue harassment of the accused and the release of burden from the courts by throwing the unworthy cases from the protracted trials. It is vital to maintain a non-criminal image for a person and a criminal trial as an accused puts the self-identity and self-respect of the accused at stake. Thus, the trial against an accused should be conducted only if adequate grounds are there to proceed against him. The provisions which

²³ *Supra* note 17.

provide the scope for institutional domination and oppression²⁴ must be looked for reforms and modifications to attain the ultimate objective of Justice in the country.

Finally, when we look at the prospects of conducting trials via video-conferencing, the various problems have been highlighted by taking the example of such action carried out during the Covid-19 Pandemic. For such a system to be made feasible in a country like India, it needs to be thoroughly analysed in light of the specific conditions of the citizens of the country and the inequality in terms of money and development prevalent across the nation.

²⁴ Iris Marion Young, *Justice and the Politics of Difference*, (Princeton University Press, New Jersey, 1990).

THE DOCTRINE OF CONSTITUTIONAL MORALITY: NEW ARSENAL FOR JUDICIAL REVIEW

PEARL MONTEIRO*

ABSTRACT

The Constitution of India is the repository of the dreams and ideals of the freedom struggle and a visionary road map for a developed and modern India. The architects of our Constitution safeguarded certain cherished fundamental rights by inserting them in Part III, along with the power of judicial review. This was done to keep them out of the vagaries of a populist government; at the same time, a living organic, dynamic Constitution necessitated the capacity to keep pace with the changing times, resulting in the provisions for amendment of the Constitution entrusted to Parliament. This article studies the concept of Judicial Review by the Constitutional Courts and its Limitations in India. The article traces the evolution of the concept of judicial review in the United States of America, the article further reviews the Indian Constitutional provisions, and the various doctrines propounded by the Supreme Court of India over the years, including Doctrines of Eclipse, Severability, Prospective Overruling and Basic Structure. The paper will document the tussle between Parliament and the Judiciary vis-à-vis amendment of fundamental rights and judicial review. The article will also focus on and trace the pattern of the Judicial Review of Personal Laws. The paper will elaborate on the recent trend of the judiciary in using the Doctrine of Constitutional Morality in reviewing various ancient laws, customs, and practices in implementing the Principles of Transformative Constitutionalism.

I. INTRODUCTION

Humans are the most unique life forms on earth. They are rational and possess rights, duties, and obligations. This uniqueness needs to be channelled to fulfil one's purpose or destiny. Human

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beings need certain guaranteed rights in order to develop and fulfil their potential as humans.¹ Human rights are a consequence of the uniquely human nature of human beings. That is, human beings have certain essential rights, simply because they are human.² Human beings are also the most contradictory of all life forms. They are capable of the highest good and at the same time, the most despicable evil. The violation and protection of human rights are both attributed to human beings. Human rights are protected from violation by other human beings, , often in the guise of the organized power of the State. The Second World War saw a complete depravity of absolute State power leading to the violation of the most basic human rights, the right to life and dignity, in the cruellest and most deprived manner possible. The World was forced to create an international institution entrusted with promoting universal peace and respect for human rights, the United Nations Organization. The global community understood the necessity of enumerating these human rights and recognizing the protection to be accorded to them in the aftermath of World War II, resulting in the Universal Declaration of Human Rights. Constitutionally guaranteed, and protected human rights are termed fundamental rights.³ The significance of these rights is that they may be claimed as a matter of right by any individual in any social setting.⁴

II. CONCEPT OF JUDICIAL REVIEW

International Conventions and national Constitutions, especially in the modern era, recognize the importance and role of human rights in the development of the human person. Invariably the rights are itemized and articulated. The guaranteeing of these rights puts a limit on the power of the State and the government to interfere and curtail this constitutional or conventional guarantee. Constitutional goals envision the upliftment of the people. This vision and mission include the betterment of the innumerable voiceless mass of citizens. The State also has the duty

¹ Dalal, Rajbir Singh. "Fundamental Rights Enshrined In Indian Constitution Provisions and Practices." *The Indian Journal of Political Science*, vol. 70, no. 3, 2009, pp. 779–86. JSTOR, <http://www.jstor.org/stable/42742760>. Accessed 6 Nov. 2022.

² Kardos-Kaponyi, Elisabeth. "The Charter Of Fundamental Rights Of The European Union." *Társadalom És Gazdaság Közép- És Kelet-Európában / Society and Economy in Central and Eastern Europe*, vol. 23, no. 1/2, 2001, pp. 137–70. JSTOR, <http://www.jstor.org/stable/41468504>. Accessed 6 Nov. 2022.

³ Ghosal, Sarbani Guha. "Human Rights: Concept And Contestation." *The Indian Journal of Political Science*, vol. 71, no. 4, 2010, pp. 1103–25. JSTOR, <http://www.jstor.org/stable/42748940>. Accessed 6 Nov. 2022.

⁴ Khosla, Sunil, and M. M. Semwal. "Human Rights Jurisprudence In Indian Constitution Right To Equality And Life: Concept And Substance." *The Indian Journal of Political Science*, vol. 72, no. 4, 2011, pp. 927–36. JSTOR, <http://www.jstor.org/stable/41856528>. Accessed 6 Nov. 2022.

to work for the economic progress of its people. Invariably, the State action results in curtailing or infringing the rights of some other section of its population.

State powers and actions may be visible in impacting the individual by creating statutes and administrative functions.⁵ The third arm of the State works as a buffer from violent revolution, by the function of interpreting the action vis a vis the law, or the law vis a vis the Constitution, at times even on the touchstone of the International Conventions protecting the people, safeguarding the rights which have been infringed. Conceptually, thus, judicial review may be viewed as the review of laws made by a legislature against a higher law, which may be the Constitution or an international treaty or convention.⁶ Judicial review may also be viewed as a tool to control or regulate government action.⁷

The origin of the concept of judicial review is largely attributed to the United States; in the United States, an Act of Congress was first declared unconstitutional in *Marbury v. Madison*⁸. This judgment is widely hailed as introducing the concept of judicial review in the United States of America.⁹ However, some jurists are of the opinion that too much importance is given to *Marbury v. Madison* as the original source of the concept of judicial review.¹⁰ It may be noted that legislative supremacy was never accepted in the United States.¹¹ *Marbury v. Madison* confirmed the American view of constitutional supremacy over legislature through judicial review.¹² There can be no doubt that judicial review is well accepted in the United States, even if

⁵ Elliott, Mark. *The Constitutional Foundations of Judicial Review*, edited by Tom Hadden, Bloomsbury Publishing Plc, 2001. ProQuest Ebook Central, <https://ebookcentral.proquest.com/lib/inflibnet-ebooks/detail.action?docID=1750689>.

⁶ *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*, edited by Marc Hertogh, and Simon Halliday, Cambridge University Press, 2004. ProQuest Ebook Central, <https://ebookcentral.proquest.com/lib/inflibnet-ebooks/detail.action?docID=266654>.

⁷ Halliday, Simon. *Judicial Review and Compliance with Administrative Law*, edited by David Milman, Bloomsbury Publishing Plc, 2004. ProQuest Ebook Central, <https://ebookcentral.proquest.com/lib/inflibnet-ebooks/detail.action?docID=1772543>.

⁸ 5 U.S. 137 (1803).

⁹ *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁰ Rakove, Jack N. "The Origins of Judicial Review: A Plea for New Contexts." *Stanford Law Review*, vol. 49, no. 5, 1997, pp. 1031–64. JSTOR, <https://doi.org/10.2307/1229247>. Accessed 25 Oct. 2022.

¹¹ Kramer, Larry. "Understanding *Marbury v. Madison*." *Proceedings of the American Philosophical Society*, vol. 148, no. 1, 2004, pp. 14–26. JSTOR, <http://www.jstor.org/stable/1558241>. Accessed 8 Nov. 2022.

¹² Grant, J. A. C. "Marbury v. Madison Today." *The American Political Science Review*, vol. 23, no. 3, 1929, pp. 673–81. JSTOR, <https://doi.org/10.2307/1945317>. Accessed 8 Nov. 2022.

there is a controversy as to whether it was introduced by *Marbury v. Madison* or is always implicitly present in the Constitution.¹³

III. JUDICIAL REVIEW IN INDIA

Modern India has a well-drafted Constitution. The Constitution of India was drafted after the herculean task of considering the varied needs of a diverse people of a newly independent humongous country¹⁴. The Constitution, considered one of the lengthiest in the world, has detailed provisions regarding fundamental rights, some of which are available to all persons, the rest of which are available to citizens. The Constitution also creates the various organs of the State and divides the legislative, executive, and judicial powers between them. While the Constitution does not strictly follow the doctrine of separation of powers, in that the executive is a part of the legislature and owes its continued existence as long as it has the confidence or support of the legislature, at the same time, care has been taken to keep the judiciary as a separate or exclusive organ. Moreover, the concept of checks and balances is maintained in the Constitution, where every organ is scrutinised by the other. For instance, the higher judiciary is appointed by the legislature and may be impeached by it, and the legislative and executive action, can, in turn, be tested by the judiciary. Governments seek to achieve various ends through their policies and resultant actions. Inevitably, the governmental action imposes some “burden” or detracts from the content of the fundamental rights. The task is now on the court to balance societal needs and individual rights.¹⁵

India does not have separate Constitutional Courts.¹⁶ Rather the power of judicial review is conferred by the Constitution on the higher judiciary, Supreme Court¹⁷ and High Courts.¹⁸ The

¹³ Corwin, Edward S. “*Marbury v. Madison* and the Doctrine of Judicial Review.” *Michigan Law Review*, vol. 12, no. 7, 1914, pp. 538–72. JSTOR, <https://doi.org/10.2307/1274986>. Accessed 8 Nov. 2022.

¹⁴ The Constituent Assembly sat for the first time on 9th December 1946. Over the next 2 years and 11 months, the Assembly sat for a total of 166 days to frame the Indian Constitution. The final session of the Constituent Assembly took place on 24th January 1950.

¹⁵ Dorf, Michael C. “Incidental Burdens on Fundamental Rights.” *Harvard Law Review*, vol. 109, no. 6, 1996, pp. 1175–251. JSTOR, <https://doi.org/10.2307/1342214>. Accessed 6 Nov. 2022.

¹⁶ Deva, S. (2011). *INDIA: Constitutional Courts as Positive Legislators: The Indian Experience*. In A. Brewer-Carías (Author), *Constitutional Courts as Positive Legislators: A Comparative Law Study* (pp. 587-602). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511994760.025.

¹⁷ Art 13, Art 32, Art 143.

¹⁸ Art 226, Art 227.

Supreme Court is the final authority, and the High Courts are “inferior”¹⁹ to it.²⁰ The Constitution directly confers the power of judicial review and may be inferred from a study of its provisions. In India, judicial review thus flows from the Constitution itself.²¹ The provision makes all pre-constitutional laws void to the extent of their inconsistency with fundamental rights. The State is also prohibited from making laws violating fundamental rights. Thus, both pre and post-constitutional laws are amenable to fundamental rights and may be scrutinized by the process of judicial review. Law is also defined by the Constitution itself, for the purposes of judicial review. The definition is inclusive and includes, legislation, custom, administrative action, delegated legislation and even ordinance. Finally, Constitutional amendments are expressly removed from the purview of this Article.²² Enforcement of fundamental rights is made a fundamental right and can be enforced in the Supreme Court.²³ The High Court may be approached to enforce fundamental and other rights²⁴ and has superintendence over the lower

¹⁹ Ram Saran Tewari v Raj Bahadur Varma AIR 1962 All 315. “The highest court in India is the Supreme Court and though it has appellate jurisdiction not only over High Courts but also over other courts and tribunals, they are not declared to be subordinate to it; they are inferior to it but not subordinate to it.”

²⁰ Art 124 r/w Art 214.

²¹ Art 13. Laws inconsistent with or in derogation of the fundamental rights.

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

²² Art 13.

²³ Art 32 - Remedies for enforcement of rights conferred by this Part.

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part

(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

²⁴ Art 226 - Power of High Courts to issue certain writs.

(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose

courts within its jurisdiction.²⁵ The President also has the power to consult the Supreme Court and obtain its opinion regarding a matter of law or fact of public importance.²⁶ The Supreme Court is also the highest Court of appeal. It hears appeals in civil,²⁷ criminal²⁸, and constitutional matters.²⁹ It also has the special power to entertain appeals from any Court or Tribunal in India, at any stage of the proceedings.³⁰

A beautifully drafted Constitution, a meticulously curated list of fundamental rights, only find fulfilment in the provision for their implementation.³¹ The importance of judicial review in protecting individual rights cannot be overemphasized.³² Judicial review is the main method of safeguarding the Constitution.³³ Using the power of judicial review, any administrative or legislative action may be struck down as ultra vires the Constitution.³⁴ Judicial review has also been criticised on the ground that it is a negation of democracy, wherein the laws and actions of

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

²⁵ Art 227 - Power of superintendence over all courts by the High Court

(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories interrelation to which it exercises jurisdiction.

²⁶ Art 143 - Power of President to consult Supreme Court (1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon

(2) The President may, notwithstanding anything in the proviso to Article 131, refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

²⁷ Article 133 in The Constitution of India 1949 - Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters.

²⁸ Article 134 in The Constitution of India 1949 - Appellate jurisdiction of Supreme Court in regard to criminal matters.

²⁹ Article 132 in The Constitution of India 1949 - Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies under Article 134A that the case involves a substantial question of law as to the interpretation of this Constitution.

³⁰ Article 136 in The Constitution of India 1949 - Special leave to appeal by the Supreme Court.

³¹ Nirmalendu Bikash Rakshit. "Right to Constitutional Remedy: Significance of Article 32." *Economic and Political Weekly*, vol. 34, no. 34/35, 1999, pp. 2379–81. JSTOR, <http://www.jstor.org/stable/4408327>. Accessed 6 Nov. 2022.

³² Yuval Eylon, and Alon Harel. "The Right to Judicial Review." *Virginia Law Review*, vol. 92, no. 5, 2006, pp. 991–1022. JSTOR, <http://www.jstor.org/stable/4144987>. Accessed 25 Oct. 2022.

³³ Deener, David. "Judicial Review in Modern Constitutional Systems." *The American Political Science Review*, vol. 46, no. 4, 1952, pp. 1079–99. JSTOR, <https://doi.org/10.2307/1952114>. Accessed 25 Oct. 2022.

³⁴ Sharan, P. "Constitution of India And Judicial Review." *The Indian Journal of Political Science*, vol. 39, no. 4, 1978, pp. 526–37. JSTOR, <http://www.jstor.org/stable/41854873>. Accessed 25 Oct. 2022.

a popularly elected government are challenged in a Court.³⁵ An opposite view states that judicial review promotes democracy, as it is only an impartial judiciary which keeps a check on the tyranny of the majority.³⁶ This has been countered with the concept of an insular, non-elected judiciary being more impartial and suited for judicial review.³⁷ The law should not become merely what the judges say it is. This is one of the greatest drawbacks of a judicial review.³⁸ Parliament has the power to amend the Constitution, but this power of the parliament does not make it supreme. Rather, the Constitution always retains its supremacy, even in amended form.³⁹ Judicial review is based on the premise that the legislature will use the power conferred on it by the people within the parameters of the Constitution.⁴⁰ Allowing scope for error, a provision for appeal to the highest Court is present in the Constitution. Similarly, the highest Court may even review its own decisions. The Court has even created a scope for “curative petitions.” Curative petitions are not to be lightly entertained, but rather the Court keeps in mind the principle of state decisions, and maintains a balance between finality to litigation and natural justice, bringing an end to injustice, if necessary, on scrutiny of the peculiar facts and circumstances before it.⁴¹

While pondering over the Constitutionality of Statutes and Constitutional amendments, the Courts are faced with the delicate task of harmonizing the conflicting claims of the fundamental rights and the directive principles of State policy. The Constitution makes enforcing fundamental rights a fundamental right, while expressly making the directives unenforceable in a Court of law. The decisions of the Supreme Court demonstrate three phases in these decisions, the supremacy of fundamental rights, the supremacy of directive principles, and a balance between fundamental rights and directive principles. While attempting to achieve this balance, the

³⁵ Freeman, Samuel. “Constitutional Democracy and the Legitimacy of Judicial Review.” *Law and Philosophy*, vol. 9, no. 4, 1990, pp. 327–70. JSTOR, <http://www.jstor.org/stable/3504771>. Accessed 25 Oct. 2022.

³⁶ Stone, Adrienne. “Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law.” *The University of Toronto Law Journal*, vol. 60, no. 1, 2010, pp. 109–35. JSTOR, <http://www.jstor.org/stable/40542363>. Accessed 10 Nov. 2022.

³⁷ Doherty, Kathleen, and Ryan Pevnick. “Are There Good Procedural Objections to Judicial Review?” *The Journal of Politics*, vol. 76, no. 1, 2013, pp. 86–97. JSTOR, <https://doi.org/10.1017/s0022381613001084>. Accessed 25 Oct. 2022.

³⁸ Scharpf, Fritz W. “Judicial Review and the Political Question: A Functional Analysis.” *The Yale Law Journal*, vol. 75, no. 4, 1966, pp. 517–97. JSTOR, <https://doi.org/10.2307/794865>. Accessed 25 Oct. 2022.

³⁹ Shekhawat, Vibhuti Singh. “Judicial Review In India: Maxims And Limitations.” *The Indian Journal of Political Science*, vol. 55, no. 2, 1994, pp. 177–82. JSTOR, <http://www.jstor.org/stable/41858807>. Accessed 8 Nov. 2022.

⁴⁰ Forsyth, Christopher. “Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review.” *The Cambridge Law Journal*, vol. 55, no. 1, 1996, pp. 122–40. JSTOR, <http://www.jstor.org/stable/4508172>. Accessed 8 Nov. 2022.

⁴¹ *Rupa Ashok Hurra v. Ashok Hurra* A.I.R. 2002 S.C. 177.

Supreme Court has used various doctrines to arrive at its decisions. These include the Doctrines of Eclipse, Severability, Prospective Overruling and Basic Structure. More recently, the Court has invoked the doctrine of Constitutional Morality, when the perceived conflict was the right being suppressed by the moral philosophy of the society.

A. Doctrine of Eclipse

Certain fundamental rights are available for citizens exclusively, whereas other rights are universal, and enforceable by any person. The Court has used the doctrine of the eclipse, wherein a law prima facie violating a fundamental right remains in moribund or inoperative condition vis a vis the citizen who has the protection of the fundamental right and continues to be in force vis a vis the non – citizen who does not have such protection. Such laws are revived when the protection of the fundamental right is removed, by amendment or otherwise.⁴² This doctrine nullifies the premise that an unconstitutional law is non est or does not exist but rather is merely held in abeyance.⁴³

B. Doctrine of Severability

This doctrine originated in the United Kingdom⁴⁴ and is also recognized in the United States of America.⁴⁵ The Court has saved the Constitutionally valid provisions of the legislation, provided it can be severed and logically stand independent of the severed portion, which is violative of the fundamental rights.⁴⁶ Partially invalid laws attract the doctrine of severability.⁴⁷ The Court maintains a balance between the intention of the legislation and the impact on fundamental rights.⁴⁸ Judicial interference is minimized by using the doctrine of severability.⁴⁹

C. Doctrine of Prospective Overruling

⁴² Bhikaji Narain Dhakras v. The State Of Madhya Pradesh AIR 1955 SC 781.

⁴³ Rao, Sushila. “The Doctrine of Eclipse in Constitutional Law: A Critical Reappraisal of Its Contemporary Scope and Relevance.” *Student Bar Review*, vol. 18, no. 1, 2006, pp. 45–68. JSTOR, <http://www.jstor.org/stable/44306646>. Accessed 8 Nov. 2022.

⁴⁴ Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Company Ltd. [1894] AC 535.

⁴⁵ *Champlin Refining Co. v. Corp. Commission of Oklahoma* 286 U.S. 210 (1932).

⁴⁶ *A. K. Gopalan v. State of Madras* AIR 1950 SC 27.

⁴⁷ Lea, Brian Charles. “Situational Severability.” *Virginia Law Review*, vol. 103, no. 5, 2017, pp. 735–806. JSTOR, <https://www.jstor.org/stable/26525269>. Accessed 10 Nov. 2022.

⁴⁸ “Severability of Legislative Veto Provisions: A Policy Analysis.” *Harvard Law Review*, vol. 97, no. 5, 1984, pp. 1182–97. JSTOR, <https://doi.org/10.2307/1340828>. Accessed 10 Nov. 2022.

⁴⁹ Tyler, Charles W., and E. Donald Elliott. “Administrative Severability Clauses.” *The Yale Law Journal*, vol. 124, no. 7, 2015, pp. 2286–352. JSTOR, <http://www.jstor.org/stable/43617081>. Accessed 10 Nov. 2022.

This was laid down in *Golak Nath v. State of Punjab*, where to avoid hardship, the Court declared that after a law violating fundamental rights is struck down as unconstitutional, the judgement would operate in the future, with past transactions remaining untouched.⁵⁰ The Supreme Court further held that this doctrine would only apply in Constitutional matters and could only be invoked by itself. In this case, the Court categorically held that the legislature had no power to amend the fundamental rights. The deeper question posed post this judgment, is whether the will of the people, as evidenced by legislative action, does not affect the amending Constitution, in the view of judicial review, that is, should the Constitution remain static and immutable?⁵¹ To nullify the impact of this judgement, parliament amended the constitution itself, and the amendment removed the constitutional amendments from the scope of judicial review.

D. Doctrine of Basic Structure

The judicial review vis-à-vis laws violating fundamental rights has been a tussle between the parliament and the court, resulting in the evolution of the Basic Structure Doctrine. The basic structure doctrine was initially argued in *Golak Nath* but was rejected.⁵² This Doctrine was introduced for the first time in *Kesvanand Bharati v. State of Kerala*, wherein the Court recognized the vast amending power of Parliament, even to amend the Constitution, but subject to the limitation that the basic or fundamental features of the constitution are not touched.⁵³ This doctrine is premised on the assumption that the Constitution possesses certain unamendable basic features. The Court has ruled that these features are identifiable but has not provided an exhaustive list. The Court has laid down the basic features, including secularism, federalism, democracy, separation of powers, Constitutional Supremacy and individual freedom and dignity.⁵⁴ The judicial review itself has been held to be a basic structure.⁵⁵ The Court has not decided whether all fundamental rights are basic structure.⁵⁶

⁵⁰ *Golak Nath v. State of Punjab* AIR 1967 SC 1643.

⁵¹ "Fundamental Rights." *Economic and Political Weekly*, vol. 2, no. 9, 1967, pp. 467–68. JSTOR, <http://www.jstor.org/stable/4357651>. Accessed 6 Nov. 2022.

⁵² *I. C. Golaknath v. State Of Punjab* AIR 1967 SC 1643 "The acceptance of the principle that there is an implied bar to amendment of basic features of the Constitution would lead to the position that any amendment to any article would be liable to challenge before the courts on the ground that it amounted to amendment of a basic feature."

⁵³ *Kesvanand Bharati v. State of Kerala* AIR 1973 SC 1461.

⁵⁴ "The basic structure may be said to consist of the following features:

- (1) Supremacy of the Constitution;
- (2) Republican and Democratic form of Government.
- (3) Secular character of the Constitution;

The Courts have declined to interfere in policy matters while using its power of judicial review.⁵⁷ The Court consistently maintains its stand that policy matters are beyond its scrutiny.⁵⁸ The Court has also historically tended not to review personal law matters⁵⁹.

IV. JUDICIAL REVIEW AND PERSONAL LAWS

India is a diverse land with varied cultures, customs, and religions. Personal matters such as marriage, divorce, guardianship, maintenance, inheritance, and the like are governed by various laws which are different for different individuals, the basis of this difference being the religion professed by the individual. The British did not interfere with the personal laws, but let them be administered by and large as they stood. Minor legislations, for example, permitting widow remarriage and prohibiting sati, were enacted. The Indian Constitution is secular. The preamble to the Constitution proclaims the secular nature of the Constitution. Secularism has even been declared to be the basic structure of the Constitution. The goal of secularism is further strengthened by the fundamental right which permits every individual the freedom of conscience, belief, faith, and worship. This right is not absolute. The limitations also mentioned in the Constitution include public order, morality, and health. However, after independence, some personal laws were codified and repeatedly amended. However, for the most part, drastic changes are not introduced. The personal laws are not only different for persons of different religions, but within a particular religion, applies differently depending on the gender of the person concerned. An example, the inheritance laws, and guardianship laws, to cite but two. It may also be noted, that the personal laws only recognize the two-gender binary, the third gender

(4) Separation of powers between the Legislature, the executive and the judiciary;

(5) Federal character of the Constitution.

The above structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed.” *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461.

⁵⁵ *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461.

⁵⁶ Sankaran, Kamala. “From Brooding Omnipresence To Concrete Textual Provisions: I.R. Coelho Judgment And Basic Structure Doctrine.” *Journal of the Indian Law Institute*, vol. 49, no. 2, 2007, pp. 240–48. JSTOR, <http://www.jstor.org/stable/43952108>. Accessed 8 Nov. 2022.

⁵⁷ Kapadia, S. H. “Constitutional Ethos.” *Journal of the Indian Law Institute*, vol. 54, no. 2, 2012, pp. 153–59. JSTOR, <http://www.jstor.org/stable/43953535>. Accessed 25 Oct. 2022.

⁵⁸ *State of Rajasthan v. Union of India* 1978 SCR (1) 1 “Questions of political wisdom or executive policy only could not be subjected to judicial control. No doubt executive policy must also be subordinated to constitutionally sanctioned purposes. It has its sphere and limitations. But, so long as it operates within that sphere, its operations are immune from judicial interference. This is also a part of the doctrine of a rough separation of power under the supremacy of the Constitution.”

⁵⁹ *The State Of Bombay v Narasu Appa Mali* AIR 1952 Bom 84.

is not mentioned or recognized under the personal laws, and are governed by custom. A law prohibiting and punishing Hindu bigamous marriages was one of the first instances of legislative and subsequent judicial action. The matter came up before the Bombay High Court, whose decision has ruled virtually unchallenged. This case was the first one wherein the question arose regarding the possible judicial review of personal laws. The case was decided by a division bench of the most eminent and respected judges of the time, Gajendragandar and Chagla, JJ., both the judges gave concurring, independent and almost identical judgements. The Court held that the uncodified personal law was not based on custom but on religious texts and scriptures. The court viewed custom as an aberration of this scripture-based personal law. Thus, this uncodified law did not come within the definition of law and was out of the purview of judicial review. The Courts have since then categorically declined to subject personal laws to judicial review by interpreting personal laws as out of the scope of Art 13.⁶⁰ Over time, the various laws have been challenged as arbitrary and violating fundamental rights. Sometimes Courts have declined to give relief.⁶¹ However, the recent trend has been to give relief to individuals. For instance, the court has recognized the inequality and arbitrariness in the Indian Divorce Act, which applied to Christians, whereby the male could get a divorce on ground of adultery simpliciter, whereas the female had to prove adultery coupled with cruelty or desertion to get a divorce,⁶² to Muslim women to get maintenance,⁶² by holding that Mehr, a sum of money paid under the Shariat as consideration for marriage, could not be a substitute for maintenance, that it was not the sum envisaged under the Criminal Procedure Code, as an amount paid under a personal law on divorce,⁶³ and has even struck down the provision of triple talaq as manifestly arbitrary.⁶⁴ Today it is difficult to accept the *Narsu* judgment, irrespective of its rationale, the time is long gone where injustice could be acceptably perpetrated on the ground of religion.

A. Doctrine of Constitutional Morality

The relationship between law and morality has always been debated. Many jurists are of the opinion that positive law ought to conform to a higher law or morality. Others opine that law and morality have no connection. Rather, law is what the Sovereign says it is. The law can neither be

⁶⁰ The State of Bombay v Narasu Appa Mali AIR 1952 Bom 84.

⁶¹ Ahmedabad Women's Action Group v. Union of India (AIR 1997, 3 SCC 573).

⁶² Mrs. Pragati Varghese v. Cyril George Varghese AIR 1997 Bom 349.

⁶³ Mohd. Ahmed Khan v. Shah Bano Begum AIR 1987 SC 1103.

⁶⁴ Shayara Bano v. Union of India (2017) 9 SCC 1.

good nor bad, but rather exists. Every Constitution is presumably of a distinct identity and has certain basic features which, if amended, would result in the Constitution losing its identity. In addition to these basic features, the doctrine of Constitutional morality is premised on the assumption that there are disenable moral principles in its text. Constitutions are based on immutable principles.⁶⁵ The word morality makes its appearance in four instances in the Constitution.⁶⁶ The Supreme Court has categorically held that there are certain discernible moral principles in enshrined in our Constitution. These principles may be curated from the preamble, and include justice, equality, fraternity, and dignity of the individual, in case of a conflict between the individual or societal morality and the Constitutional morality, paramountcy is to be given to the Constitutional morality.⁶⁷

⁶⁵ Kramer, Larry D., and Larry D. Kramer. *The People Themselves: Popular Constitutionalism and Judicial Review*, Oxford University Press, Incorporated, 2005. ProQuest Ebook Central, <https://ebookcentral.proquest.com/lib/inflibnet-ebooks/detail.action?docID=316358>.

⁶⁶ Art 19. Protection of certain rights regarding freedom of speech etc

(1) All citizens shall have the right

(a) to freedom of speech and expression;

(c) to form associations or unions;

(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or **morality** or in relation to contempt of court, defamation or incitement to an offence

(4) Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or **morality**, reasonable restrictions on the exercise of the right conferred by the said sub clause

Art 25. Freedom of conscience and free profession, practice and propagation of religion

(1) Subject to public order, **morality** and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly

Art 26. Freedom to manage religious affairs Subject to public order, **morality** and health, every religious denomination or any section thereof shall have the right

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

⁶⁷ Indian Young Lawyers Association v. The State of Kerala (2017) 10 SCC 689.

B. Transformative Constitutionalism

A Constitution may have intrinsic value like a piece of literature, but its real value lies in its positive, ameliorative impact on human lives. This is the doctrine of transformative constitutionalism. The value of a constitution is in its ability to transform the lives of individuals by its ambit and reach. In the absence of legislation, the Court has drafted guidelines protecting working women from sexual harassment. Court has granted compensation to victims of State violence, Court has held the right to privacy to be a fundamental right, and recognized the right of the LGBTQ community to identity and the right to pursue their unique lifestyle, in a conservative society, Court has protected individuals in live in relationships from domestic violence, Court has even referred to international law as well as foreign judgments where it has deemed necessary.⁶⁸ In *Naz*, the Court referred to several conventions and judgments before decriminalizing homosexuality.⁶⁹ Recognizing that wife is not the chattel of the husband. Adultery, too has been decriminalised and left in statute books as a ground for divorce and not a criminal action. In *Vishakha* too, to fill the legislative vacuum, CEDAW was referred to by Court while laying down guidelines for the State to follow in the prevention of sexual harassment at the workplace.⁷⁰ Court has protected women's right to worship in temples of their choice and armed women to enter temples traditionally prohibited to menstruating women. This proactive role of the Court has been equally lauded and criticised.

V. PROBLEMS & SUGGESTIONS

It may be said that the Supreme Court of India is now the most powerful constitutional court in the world⁷¹. The concept of checks and balances is difficult to apply to the higher judiciary, as the power of judicial contempt insulates them. The executive has only appointing power, which has been considerably diluted, and the removal process by the legislature has not been successful

⁶⁸ Khosla, Madhav. "Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision." *The American Journal of Comparative Law*, vol. 59, no. 4, 2011, pp. 909–34. JSTOR, <http://www.jstor.org/stable/23045692>. Accessed 25 Oct. 2022.

⁶⁹ *Naz Foundation v Government Of Nct Of Delhi* 160 Delhi Law Times 277.

⁷⁰ *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

⁷¹ Tewari, Manish, and Rekha Saxena. "The Supreme Court of India: The Rise of Judicial Power and the Protection of Federalism." *Courts in Federal Countries: Federalists or Unitarists?* edited by NICHOLAS ARONEY and JOHN KINCAID, University of Toronto Press, 2017, pp. 223–55. JSTOR, <http://www.jstor.org/stable/10.3138/j.ctt1whm97c.12>. Accessed 25 Oct. 2022.

on the sole attempt.⁷² Critics disagree on whether Judicial Review is justified and, if so, to what extent, or what is the scope of judicial review.⁷³ John Stewart Mill is of the opinion that the will of a popularly elected government should not be lightly tampered with.⁷⁴ Recognition and enforcement of various fundamental rights historically owe a debt to the Public Interest Litigations filed in Court. Unfortunately, sometimes these public-spirited individuals receive the undeserved tag of anti-nationalism.⁷⁵ The Judiciary cannot assume the role of a super house of parliament and interfere in matters properly left to Parliament.⁷⁶

The Constitution determines who and against whom the fundamental rights may be enforced. It is time that due recognition be given to the fact that these rights may be encroached upon by private players without adequate relief in the civil law regime⁷⁷. The present context needs to expand the content and reach of the fundamental rights. One of the first reforms needed would be to make them enforceable against private players, as well as State.⁷⁸

The legally binding obligation imposed on enforcing fundamental rights is the causal factor in its ability to protect the individual.⁷⁹ In India, social security rights find expression in Part IV of the Constitution in the guise of Directive Principles of State Policy. These rights are not enforceable in the Courts, though the Courts have recognized that a balance between Directives and Rights is the basic structure and that they are important for good governance. As the country develops and progresses, these rights should legitimately be shifted to Part III.⁸⁰ The status afforded to

⁷² Chandrachud, Abhinav. "The Insulation of India's Constitutional Judiciary." *Economic and Political Weekly*, vol. 45, no. 13, 2010, pp. 38–42. JSTOR, <http://www.jstor.org/stable/25664275>. Accessed 25 Oct. 2022.

⁷³ Van Der Schyff, G. (2010). *Setting the Scene*. In: *Judicial Review of Legislation*. *Ius Gentium: Comparative Perspectives on Law and Justice*, vol 5. Springer, Dordrecht. https://doi.org/10.1007/978-90-481-9002-7_1

⁷⁴ John Stuart Mill, *On Liberty and the Subjection of Women* (New York: Henry Holt, 1879), at 15–16.

⁷⁵ Aswini K. Ray. "Human Rights Movement in India: A Historical Perspective." *Economic and Political Weekly*, vol. 38, no. 32, 2003, pp. 3409–15. JSTOR, <http://www.jstor.org/stable/4413888>. Accessed 6 Nov. 2022.

⁷⁶ Suda, J. P. "Fundamental Rights And Personal Liberty Under Our Constitution Some Observations." *The Indian Journal of Political Science*, vol. 11, no. 4, 1950, pp. 37–42. JSTOR, <http://www.jstor.org/stable/42743254>. Accessed 6 Nov. 2022.

⁷⁷ Rödl, Florian. "Fundamental Rights, Private Law, and Societal Constitution: On the Logic of the So-Called Horizontal Effect." *Indiana Journal of Global Legal Studies*, vol. 20, no. 2, 2013, pp. 1015–34. JSTOR, <https://doi.org/10.2979/indjglolegstu.20.2.1015>. Accessed 6 Nov. 2022.

⁷⁸ Rai, Udai Raj. "Reach Of Fundamental Rights." *Journal of the Indian Law Institute*, vol. 36, no. 3, 1994, pp. 292–301. JSTOR, <http://www.jstor.org/stable/43952346>. Accessed 6 Nov. 2022.

⁷⁹ Clauwaert, Stefan. "The EU Charter of Fundamental Rights: An Overview." *International Union Rights*, vol. 7, no. 3, 2000, pp. 3–4. JSTOR, <http://www.jstor.org/stable/41937108>. Accessed 6 Nov. 2022.

⁸⁰ Bignami, Francesca, and Carla Spivack. "Social and Economic Rights as Fundamental Rights." *The American Journal of Comparative Law*, vol. 62, 2014, pp. 561–87. JSTOR, <http://www.jstor.org/stable/26425410>. Accessed 6 Nov. 2022.

fundamental rights and directive principles may be traced to the ancient Indian concept of dharma, which guided the monarchs in their governance.⁸¹

In a truly democratic and progressive society, any law or practice, discriminatory or derogatory, is irrational and arbitrary and cannot claim religious immunity and insulation from the process of judicial review. Ideally, legislation ought to bring the long-awaited Uniform Civil Code to light, non-discriminatory on the grounds of gender and religion. Gender must be recognized as a spectrum, and all human beings should be able to legally enforce the various human and fundamental rights, marriage, guardianship, adoption, and inheritance. In the interim, the judicial review would be a welcome much-needed relief.

It must also be recognized that dissent, sometimes evidenced in challenging laws, practices, or even constitutional amendments, is an essential attribute of a democratic society and needs protection, not stifling.⁸²

VI. CONCLUSION

Our newly independent country aspired to create a truly democratic constitution, with fundamental rights available and protection guaranteed to all.⁸³ The Constitutional provisions for judicial review have resulted in fairly adequate protection of fundamental rights, even in a federal structure.⁸⁴

Global recognition and importance meted out to human rights have impacted the domestic scenario, with Court interpretations giving effect to various internationally enshrined human

⁸¹ Ready, S. Sundara Rami. "Fundamentalness Of Fundamental Rights And Directive Principles In The Indian Constitution." *Journal of the Indian Law Institute*, vol. 22, no. 3, 1980, pp. 399–407. JSTOR, <http://www.jstor.org/stable/43950702>. Accessed 6 Nov. 2022.

⁸² Sparer, Ed. "Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement." *Stanford Law Review*, vol. 36, no. 1/2, 1984, pp. 509–74. JSTOR, <https://doi.org/10.2307/1228691>. Accessed 6 Nov. 2022.

⁸³ Amma, K. Janakikutty. "Fundamental Rights In Relation To The Indian Constitution." *The Indian Journal of Political Science*, vol. 9, no. 2/3, 1948, pp. 19–23. JSTOR, <http://www.jstor.org/stable/42743209>. Accessed 6 Nov. 2022.

⁸⁴ Tewari, Manish, and Rekha Saxena. "The Supreme Court of India: The Rise of Judicial Power and the Protection of Federalism." *Courts in Federal Countries: Federalists or Unitarists?* edited By Nicholas Aroney and John Kincaid, University of Toronto Press, 2017, pp. 223–55. JSTOR, <http://www.jstor.org/stable/10.3138/j.ctt1whm97c.12>. Accessed 6 Nov. 2022.

rights through the medium of fundamental rights.⁸⁵ A society cannot claim to be civilized unless due recognition and protection are accorded to human rights, irrespective of nomenclature.⁸⁶

The power of judicial review is constitutionally created and guaranteed. The power of Parliament to amend the Constitution is also a constitutional provision.⁸⁷ The apprehension that Parliament may use this power to dilute or completely negate the power of judicial review is, unfortunately, not inconceivable.⁸⁸

Recognizing that the Constitution is the pole star or the guiding light in any action, be it of the individual, legislature, executive, or judiciary, is true constitutional morality. The Court has successfully used the doctrine of Constitutional morality, culling its principles, in its various decisions. Now what remains is wholehearted societal acceptance and adherence, which, in its turn, hopefully, will lead to legislative action.

⁸⁵ De Búrca, Gráinne. "The Domestic Impact Of The Eu Charter Of Fundamental Rights." *Irish Jurist* (1966-), vol. 49, 2013, pp. 49–64. JSTOR, <http://www.jstor.org/stable/44027252>. Accessed 6 Nov. 2022.

⁸⁶ Shankar, Uday, and Divya Tyagi. "Socio-Economic Rights in India: Democracy Taking Roots." *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, vol. 42, no. 4, 2009, pp. 527–51. JSTOR, <http://www.jstor.org/stable/43239539>. Accessed 6 Nov. 2022.

⁸⁷ Art 368 Power of Parliament to amend the Constitution and procedure therefor

(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article

(3) Nothing in Article 13 shall apply to any amendment made under this article

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

⁸⁸ The Constitution (Twenty-Fourth Amendment) Act, 1971.

FREE LEGAL AID IN INDIA: ROLE OF LOK ADALATS IN ADMINISTRATION OF JUSTICE

VANITA SHARMA*

ABSTRACT

The concept of free legal aid was first introduced in India by Constitution (Forty-second Amendment) Act, 1976. This amendment led to the insertion of Article 39A under the Directive Principles of State Policy. It created a constitutional mandate on the state to secure justice based on an equal opportunity, and that state shall provide free legal aid to ensure access to justice to all the sections. To fulfil this mandate, the government enacted the Legal Services Authorities Act, 1987. The Act provided for the organisation of Lok Adalats at various levels. The paper elaborates on the concept of free legal aid and its need in India. Further, it will explain the establishment of the institution of Lok Adalat, its powers, and its functions. The paper, thereafter, will analyze the working of the Lok Adalats at the national, state, district, and taluk levels. Lastly, it will explain the role that Lok Adalats have played in the process of administration of justice based on equal opportunity and the overall contribution it has made to the Indian judicial system, especially in reducing the pendency of cases in Indian Courts.

I. INTRODUCTION

“In the state of nature...all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of the law.”

- Charles de Montesquieu¹

The concept of providing free legal assistance is closely tied to the idea of a welfare state, and the availability of legal aid services is influenced by attitudes towards the welfare system. Legal

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¹ Howard E. Shuman and Walter R. Thomas, eds., *The Constitution and National Security: A Bicentennial View* 19 (National Defense University, Washington D.C., 1990).

aid is a way for the government to support individuals who would otherwise not have the means to access the legal system. Additionally, legal aid ensures that those entitled to welfare benefits, such as social housing, have access to legal advice and the courts, thereby reinforcing the welfare system. Throughout history, legal aid has been instrumental in promoting and upholding economic, social, and cultural rights related to social security, housing, healthcare, education, employment law, and anti-discrimination legislation, whether those services are provided publicly or privately.

During the establishment of traditional welfare states, it was believed that all citizens had a shared responsibility for upholding economic, social, and cultural rights, and the government was responsible for supporting those unable to provide for themselves due to circumstances like illness or unemployment. The promotion of these rights was seen as a collective effort that involved policies rather than individual legal action. Although laws were created to support welfare provisions, they were typically seen as guidelines for planners rather than legal professionals. The creation of legal aid programs was initiated because it was assumed that the government had a responsibility to assist those involved in legal disputes. However, these programs initially focused mainly on family law and divorce.²

Legal aid services aim to uphold the Constitution's promise of providing equal justice to all members of society, especially those who are oppressed or disadvantaged. The government has a responsibility to ensure that the legal system promotes justice based on equal opportunities for all citizens, including those who face economic and other obstacles to accessing justice.³ The concept of social justice has gained prominence in recent times as a key principle in legislative policy and the administration of justice. The emergence of the welfare state has resulted in the recognition of equality and basic human dignity as essential criteria for a civilized government and the state's role in maintaining them. Equality, not only in form but also in substance, is now the foundation of social movements and the basis of modern systems of jurisprudence and justice administration. Without provisions for assisting those who cannot afford court and lawyer fees and other costs associated with litigation, justice becomes unequal, and laws intended to protect

² Francis Regan, *The transformation of legal aid: comparative and historical studies 89-90* (Oxford University Press, 1990).

³ Free Legal aid, available at: <http://www.lawyersclubindia.com/articles/Free-Legal-Aid-5166.asp#>. UWpqLLVaZSg/ (Visited on December 13, 2022).

individuals lose their meaning. Therefore, providing legal aid to those in need is crucial to ensuring equal access to justice.⁴

The pursuit of social justice is a critical component of equal opportunities and the equal protection of laws. Nowadays, lawmakers and judges face the challenge of developing appropriate policies and tools to promote freedom and equality while protecting fundamental rights with social justice. The Indian Constitution's Preamble reflects the promise of social justice, which aims to provide justice, social, economic, and political, and equality of status and opportunity to all citizens. The Constitution's provisions must be interpreted and implemented in a way that ensures that legal justice is available to all members of Indian society, including those who are poor, indigent, weaker, helpless, and illiterate.⁵

The Supreme Court of India has played a crucial role in advocating for and safeguarding free legal assistance services for disadvantaged groups and those affected by large-scale disasters who are unable to access the courts in India. As a result, the government took the initiative and passed several laws that offer eligible individuals different kinds of free legal aid services.

II. EVOLUTION OF LEGAL AID SERVICES IN INDIA

Ancient Indian history reveals that Manusmriti granted the King authority to dispense justice impartially, regardless of his personal desires and religious beliefs. Manusmriti emphasized the importance of preserving and developing the integrity of justice administration in social, economic, and political realms. During the medieval period, the King was mandated to apply Islamic Law in all cases, regardless of the religion of the parties involved. However, Jahangir is credited with delivering unbiased justice to all, regardless of their social status or official position. He vehemently opposed favouritism towards the nobles and even princes, asserting that justice should be served fairly. As a result of his just rulings, the term "Jahangiri Nyaya" became synonymous with impartial justice.⁶

⁴ Law Commission of India, 14th Report on Reform of Judicial Administration, 2007.

⁵ N.R.Madhava Menon, Dr.A.C.Pal , et al., "Social Justice and the Indian Legal System" 41 *Civil and Military Law Journal* (2005).

⁶ The University Grants Commission, Report: *Impact Analysis of the Legal Aid Services on the legal Aid System in City of Delhi* (NLU Delhi, 2017).

Around 1952, the Indian government discussed the issue of providing legal assistance to the impoverished in several conferences of Law Ministers and Law Commissions. In 1960, the government established some guidelines for legal aid programs, and various states introduced legal aid schemes through Legal Aid Boards, Societies, and Law Departments.⁷

J. Bhagwati pioneered establishing and promoting legal aid services in India. He headed several committees during his tenure on legal aid, such as the Committee on Legal Aid and Advice, 1950, which was instituted in Bombay; the Government of Gujarat appointed the Legal Aid Committee and was thus regarded as the originator of the India's Legal aid Programme.

In 1958, the 14th Report of the Law Commission of India focused on the importance of equal justice and free legal aid. Justice V. Krishna Iyer was appointed Chairman of the Committee for Legal Aid on October 22, 1972, and the committee submitted its report, titled "Professional Justice to Poor," to the government on May 27, 1973, after conducting sample surveys in a large part of the country. The report discussed the relationship between law and poverty. It emphasized the need for an active and widespread legal aid system that would enable the law to reach people, rather than requiring people to reach the law.

In 1976, a committee chaired by Justice P.N. Bhagwati and Krishna Iyer was established to propose ways to implement the report on legal aid. The report stressed the importance of creating a new philosophy for legal services programs that are in line with the prevailing socio-economic conditions in the country. It also noted that the traditional legal service programs primarily focused on litigation cannot adequately address the specific needs and unique challenges faced by the poor in India. The report included draft legislation for legal services and introduced the concept of Social Action Litigation.

In 1980, a national committee called CILAS (Committee for Implementing Legal Aid Schemes) was established under the leadership of Hon'ble Mr. Justice P.N. Bhagwati, who was then a Supreme Court judge. CILAS was tasked with overseeing and supervising legal aid programs across the country. The introduction of Lok Adalats provided an additional platform for litigants to resolve disputes through conciliation. Finally, in 1987, the Legal Services Authorities Act was enacted to provide a legal foundation for uniform legal aid programs nationwide.

⁷ *Ibid.*

III. RECOGNITION OF LEGAL AID SERVICES UNDER INTERNATIONAL LAW

Legal Aid is a fundamental right in many international agreements, which mandate that governments must ensure all people have access to free legal aid. The principles of equal protection of the law, fair trial, and access to justice are essential to the rule of law in many nations. The concept of legal aid as a human right is implicit in the preamble of the Universal Declaration of Human Rights (UDHR), which emphasizes the importance of socio-economic justice. Articles 7, 8, and 10 of the UDHR further recognize the importance of legal aid in protecting human dignity. The European Convention on Human Rights (ECHR) also recognizes the right to legal assistance for criminal cases in Article 6(3)(c).⁸ The 1965 United Nations Conference on the Prevention of Crime and Treatment of Offenders recognized the need for legal aid for arrested, accused, and convicted persons.⁹ Article 14 of the International Covenant on Civil and Political Rights (ICCPR) guarantees everyone the right to an effective remedy for violations of their fundamental rights. In contrast, Article 24 of the American Convention on Human Rights (ACHR) stipulates equal protection of the law and the right to counsel provided by the state for indigent persons.¹⁰ The Convention on International Access to Justice of 1980 guarantees legal aid to residents in a contracting state, irrespective of nationality, for civil and commercial court proceedings and tribunals. Also, Article 11 of the convention states that parties do not have to pay for the transmission, reception, or determination of their application for legal aid.¹¹

Legal aid services have been recognized as a fundamental human right by various international instruments, conventions, codes, and agreements. As a result, domestic legislations have been enacted to provide legal aid services in civil and criminal cases. Legal aid services are provided to financially backward individuals who cannot afford a lawyer to defend their interests in court, as mandated by domestic statutes. Countries worldwide provide legal aid services from public

⁸ Bimal N Patel, *Comprehensive guide of laws of Human Rights in Commonwealth Countries* 88(Wadhwa Publications, Nagpur, 2007).

⁹ Sujan Singh, *Legal Aid Human Right to Equality* 15 (Deep & Deep Publications, New Delhi, 1996).

¹⁰ American Convention on Human Rights, available at: <https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf> (Visited on December 13, 2022).

¹¹ Convention on International Access to Justice, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201510/volume-1510-I-26112-English.pdf>. (Visited on December 13, 2022).

funds to promote social justice and provide affordable and speedy justice to marginalized sections of society.

IV. CONSTITUTIONAL PROVISIONS RELATED TO LEGAL AID SERVICES IN INDIA

In 1976, the 42nd Amendment Act was added to the Constitution, which introduced a new provision for free legal aid under Article 39A. Article 39A of the Indian Constitution requires the government to provide free legal aid to the poor and disadvantaged sections of society. It reads as follows:

Article 39A - Equal Justice and Free Legal Aid.

*The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislations or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen because of economic or other disabilities.*¹²

The Supreme Court of India has played a crucial role in advocating for and safeguarding free legal assistance services for disadvantaged groups and those affected by large-scale disasters that are unable to access the courts in India. As a result, the government took the initiative and passed several laws that offer eligible individuals different kinds of free legal aid services.

Also, free legal aid is discussed under Article 21 of the Indian constitution. This is essentially the creation of the Indian judiciary as the bare language of Article 21 nowhere mentions the concept of free legal aid. Supreme Court, through its various judgements, inserted this concept to give broader meaning and scope to Article 21 and to make free legal aid a fundamental right. Some of the landmark judgements relating to the same have been given below:

In *Indira Gandhi v. Raj Narain*,¹³ the Court said: “Rule of Law is basic structure of Constitution of India. No one so condemn unheard Equality of justice. There ought to be violations to the fundamental right or prerogatives, or privileges, only then remedy go to Court of Law. But also at the stage when he is first produced before the magistrate in absence of legal aid, trial is vitiated.”

¹² The Constitution of India, 1950.

¹³ 1975 AIR 865, 1975 SCR (3) 333.

In *Hussainara Khatoon v. State of Bihar*,¹⁴ the apex court was thwarted by knowing the number of under trials which were languishing in the jails of Bihar for years without having been represented by a lawyer at all. Considering this situation, the Court declared that “there can be no doubt that speedy trial, and by speedy trial, we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.” The court further pointed out that free legal service was an inalienable feature of just, fair, and reasonable procedure, which has been emphasised under Article 39A of the constitution of India. Further, it was held that the right to free legal services was implicit in the guarantee of Article 21.

Khatri v. State of Bihar,¹⁵ also known as the Bhagalpur blinding case. In the instant case, the court emphasised the obligation of the state governments to provide free legal services to those who cannot afford them. The court held that a trial without offering legal aid to an indigent accused at the state cost would be vitiated, and the conviction would be set aside. The accused has the right to claim free legal aid in a situation that he is sentenced by the court and wishes to appeal against this decision. The magistrate and judge also have the legal obligation, according to the court, to inform an accused about the provision of seeking legal services and engaging a lawyer if it is evident that the accused is not able to afford legal services on account of his economic conditions, poverty, or indigence. The State is responsible for providing this help. The Court took the view that the right to free legal services would be illusory for the indigent accused unless the trial judge informs him of such right.

In *Sukh Das v. Union Territory of Arunachal Pradesh*,¹⁶ the court observed that “It may therefore now be taken as settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21.”

In *State of Maharashtra v. Manubhai Pragaji Vashi*,¹⁷ the court widened the scope of the right to free legal aid by not limiting it to Article 39A only and extending it a title of a fundamental right

¹⁴ 1979 AIR 1369.

¹⁵ 1981 SCR (2) 408, 1981 SCC (1) 627.

¹⁶ 1986 AIR 991, 1986 SCC (2) 401.

¹⁷ 1996 AIR 1, 1995 SCC (5) 730.

by inserting the concepts of 'equal justice and free legal aid' into the wider interpretation of Article 21.

V. LEGAL AID UNDER INDIAN STATUTES

The Indian Constitution has acknowledged legal aid as a fundamental right in Article 21 and Article 39-A. In addition to these constitutional provisions, several statutes have been employed by the government to provide free legal aid to the poor and vulnerable groups in certain circumstances.

A. The Civil Procedure Code, 1908

Order 33 of the Civil Procedure Code permits a financially disadvantaged individual to bring a lawsuit in civil court without being required to pay court fees.¹⁸ Additionally, if the individual is unable to arrange for legal representation due to various factors, the civil court may appoint a legal practitioner to represent the indigent person at its discretion.¹⁹

B. The Criminal Procedure Code, 1973

Section 304 of the Cr PC stipulates that the state is responsible for providing legal services at no cost to an accused person. It is mandatory for the state to fulfil this obligation during the trial in the Court of Session. The state has the power to extend the application of the provision to any of the trials before any other court in the state. If the provision under Section 304 is not complied with, any verdict rendered by the court shall be deemed invalid.

C. The Legal Services Authorities Act, 1987

The Act was enacted in pursuance of an objective enshrined under Article 39A of the constitution of India. The Legal Services Authorities Act of 1987, amended in 1994 and enforced on November 9, 1995, aims to establish a nationwide network to provide free and comprehensive legal aid to the weaker sections of society. It is the responsibility of the State to ensure equality before the law and a legal system that promotes justice based on equal opportunities for all. The objective of the Act is to fulfil the constitutional pledge of providing equal justice to the poor,

¹⁸ The Code of Civil Procedure, 1908, Order 33 Rule 17.

¹⁹ The Code of Civil Procedure, 1908, Order 33 Rule 9A.

downtrodden, and weaker sections of society. Under the Act, legal services authorities are created to provide free and competent legal aid services to disadvantaged sections of society through empanelled legal practitioners. The primary goal of the Act is to ensure social justice for those who cannot approach judicial or administrative authorities due to various disabilities. Free legal aid services are provided by specified agencies under the Legal Services Authorities Act before judicial and quasi-judicial authorities at different levels, including subordinate courts, tribunals, high courts, and the Supreme Court.

The Act establishes certain statutory bodies to implement and monitor Legal aid Programmes in the country. Such as:

D. National Legal Services Authority (NALSA)

It is a statutory body which implements and monitors legal aid programmes throughout the nation. The programs adopted by NALSA include the promotion of legal literacy, the establishment of legal aid clinics in universities and law colleges, the training of paralegals, and the organization of legal aid camps and Lok Adalats. NALSA is the highest body created to formulate policies and principles for the provision of legal services under the Act and to devise the most effective and cost-efficient legal aid schemes. Additionally, it provides funds and grants to State Legal Services Authorities and NGOs to implement legal aid programs.

E. Supreme Court Legal Services Committee

The Legal Services Authorities Act, 1987 established the Supreme Court Legal Services Committee to ensure effective justice in the apex court. Those eligible for free legal aid from the Committee include people with an annual income of less than Rs. 1.25Lac, Scheduled Castes or Scheduled Tribes, victims of natural calamities, women, children, mentally ill or disabled persons, industrial workers, and those in custody, including protective custody. The Committee provides legal aid, including the cost of case preparation and all related applications, and an advocate to argue the case. To avail of the service, a person must submit an application to the Secretary and provide all necessary documents. The Committee determines eligibility and provides legal aid as needed. For those in the middle-income group with an income above Rs. 1.25 Lac per annum, the Supreme Court Middle Income Group Society provides legal aid on payment of nominal fees.

F. State Legal Services Authority (SLSA)

In each state, a State Legal Services Authority has been established to implement the policies and directions of NALSA, to provide free legal services to people, and conduct Lok Adalats. The State Legal Services Authority is headed by the Hon'ble Chief Justice of the respective High Court, who serves as its Patron-in-Chief. The State Legal Services Authority also has an Executive Chairman, who is a serving or retired Judge of the High Court, nominated for the position.

G. District Legal Services Authority (DSLAs)

Every district in India has a District Legal Services Authority (DLSA) responsible for executing legal services programs in the district. The office of DLSA in every state is located in the district and is headed by the District Judge of that district.

H. Taluk Legal Services Committee

The Legal Services Authorities Act, 1987 was amended by Act 59 of 1994 to add provisions for Taluk Legal Services under Sections 11-A and 11-B. Rules framed by individual States govern the functioning of the Taluk Legal Services Committees. These committees are established for each Taluk or Mandal or a group of Taluks or Mandals to coordinate legal services activities in the area and conduct Lok Adalats. The ex-officio chairman of the committee is a senior Civil Judge who operates within the jurisdiction of the committee.

VI. LOK ADALATS

NALSA and other legal institutions organize Lok Adalats, a form of alternative dispute resolution. They provide a platform for resolving disputes or cases that are either pending in court or the pre-litigation stage, in an amicable and mutually agreed upon manner. These Lok Adalats have been recognised under the Legal Services Authorities Act, 1987. As per this Act, the award (decision) made by a Lok Adalat is considered a decree of a civil court and is final and binding on all parties. Although there is no provision for an appeal against such an award, parties can choose to approach the court of appropriate jurisdiction and file a case following the required procedure, if they are not satisfied with the award.

When a case is filed in a Lok Adalat, there is no need to pay a court fee. If a case is already pending in a court and is referred to a Lok Adalat and settled there, the court fee paid for that case will be refunded to the parties. The individuals who preside over cases in a Lok Adalat are called Members, and their role is limited to that of a statutory conciliator. They do not have any judicial powers and can only encourage the parties involved in a dispute to reach a settlement outside of court. The Members are not allowed to pressure or coerce any party to settle the case, directly or indirectly. The Lok Adalat cannot decide the case on its own but is only based upon the settlement that is agreed upon by the parties. The Members must provide impartial assistance to the parties to resolve the dispute amicably.

VII. ADMINISTRATION OF JUSTICE IN INDIA

The legal framework given by the Constitution of India for the administration of justice contained the establishment of the Supreme Court at the Apex, High Courts at the State level and District Courts at the district level. The highest judicial body in India is known as the Supreme Court of India, which has jurisdiction throughout the country. It was established under Part V Chapter VI of the Indian Constitution and consists of one Chief Justice and 33 judges selected through the collegiums system. The functions and operations of the Supreme Court of India are described in Articles 124-147 of the Indian Constitution. Its primary role is to review the judgments passed by the High Courts, although some matters can be brought directly to the court under Article 32 of the Constitution.

Currently, there are 24 High Courts in India located in different states and union territories. Each High Court has jurisdiction limited to its respective state or union territory, and it is obligated to follow the orders and guidelines of the Supreme Court under Article 141 of the Indian Constitution. An individual can appeal to a High Court under Article 226 of the Constitution. The Calcutta High Court is the oldest in India.

The district courts are established by state governments in different regions of the states based on population and number of cases. The High Courts in India oversee the functioning of the district courts in India. Each district court is presided over by a district judge and several assistant judges based on the workload of the court.

Certain challenges can be seen in the administration of justice in India, such as pendency of cases, lack of transparency, pending undertrials, high cost of litigation, corruption, inaccessibility to poor and population that resides in remote areas, complex laws and lengthy procedures, lack of awareness of laws and procedures among the general masses etc. To cater few of them, the concept of Free Legal Aid was established, alternative means of dispute resolution were promoted, Lok Adalats were established etc.

VIII. ROLE OF LOK ADALATS IN THE ADMINISTRATION OF JUSTICE

Almost 4.29 Crore cases are pending in the Indian courts and out of which around 69 per cent of cases are more than one year old.²⁰ As of 30.09.2015, more than 15.14 lakh Lok Adalats have been organized in the country since its inception. More than 8.25 crore cases have been settled by the Lok Adalats so far.²¹

The National Legal Services Authority (NALSA) provides fast and affordable justice to citizens. Recently, it has placed more emphasis on the role of National Lok Adalat in effectively reducing the number of pending cases through Alternative Dispute Mechanisms.

To achieve this objective, the Legal Services Authorities have adopted more dynamic preparation strategies for organizing the Lok Adalats. As a preparatory measure, NALSA has started organizing prior consultative and review meetings with all the State Legal Services Authorities to guide them towards achieving the maximum disposal during the Lok Adalats. Before organizing each National Lok Adalat, multiple interactions were conducted with the Executive Chairpersons of all the State Legal Services Authorities. In these interactions, one-to-one discussions were held to assess the level of preparation and to boost the morale of the stakeholders responsible for organizing the Lok Adalats.

The combination of all the preparation and mobilization measures led to exceptional disposal rates in 2021. In four National Lok Adalats, a total of 1,27,87,329 cases were resolved throughout the country, which included a significant number of pending cases totalling 55,81,117 and a record number of pre-litigation cases totalling 72,06,212. These efforts by the

²⁰ National Judicial Data Grid, *available at*: <https://njdg.ecourts.gov.in/njdgnew/index.php> (Visited on December 14, 2022).

²¹ Lok Adalat, *available at* <https://nalsa.gov.in/lok-adalat> (Visited on December 14, 2022).

Legal Services Authorities resulted in the resolution of a substantial number of cases, providing relief to ordinary citizens by concluding or preventing protracted legal disputes.²²

During the year, Criminal Compoundable Cases topped the list of disposed of cases, with a total of 17,63,233 such pending cases and 18,67,934 pre-litigation cases being resolved. The second most resolved cases were Revenue cases, which consisted of 11,59,794 pre-litigation and 14,99,558 pending cases. In addition to these, other resolved cases included cheque bounce cases under NI Act, Bank Recovery Cases, Motor Accident Claims, Labour Disputes, matrimonial cases, and so on.²³

Attaining these exceptional disposal figures was a difficult task. However, technological advancements have played a significant role in this achievement. In June 2020, the Legal Services Authorities integrated technology with traditional modes of dispute settlement and introduced virtual Lok Adalats, also known as “E-Lok Adalats”. Since then, all Lok Adalats, including National Lok Adalats, have been organized through virtual and hybrid modes. To ensure uninterrupted proceedings, Legal Services Authorities throughout the country are continually upgrading their digital infrastructure.

As a result of these technological advancements, Lok Adalats have become more accessible to parties. Parties can now participate in Lok Adalat proceedings from the comfort of their homes or workplaces, eliminating the need for travel and reserving a whole day for a brief affair. The Authorities have observed that many people participated in virtual proceedings from hundreds of kilometres away from the physical location of the Lok Adalat. Technology has also provided effective means of supervising and monitoring Lok Adalats.

It is undeniable that the number of unresolved cases increased during the ongoing pandemic. However, the Legal Services Authorities were able to establish a balance in the judicial administration of the country by disposing of a large number of cases through Lok Adalats. Lok Adalats settled more cases than any other dispute resolution mechanism and proved to be the most effective tool of the Alternative Dispute Resolution Mechanism.

²² Ministry of Law and Justice, *available at*: <https://cdnbbsr.s3waas.gov.in/s35d6646aad9bcc0be55b2c82f69750387/uploads/2022/01/2022012011.pdf> (visited on December 15, 2022).

²³ NLSA Statistical Snapshot, *available at*: <https://nalsa.gov.in/library/statistical-snapshot/statistical-snapshot-2021> (visited on December 15, 2022).

Most of the Legal Services Authorities have implemented the following measures to promote E-Lok Adalats:

- They have created Standard Operating Procedures.
- The Court Staff has received technical training through System Officers.
- Whatsapp groups have been formed for litigants, advocates, and respondents to provide them with relevant information and the link to attend e-Lok Adalats.
- The Video Conferencing Link and Cause list are displayed on the District Courts' website.

According to data shared with NALSA, the State Legal Services Authorities (SLSAs) of 28 States and UTs have organized E-Lok Adalats since June 2020. The data shows the number of cases taken up and disposed of in pre-litigation and pending cases from June 2020 to September 2022.²⁴

A total of 1,63,78,857 pre-litigation cases and 96,13,800 pending cases in courts were taken up by the E-Lok adalats from June 2020 to September 2022. Out of these, 38,39,258 pre-litigation cases and 14,99,042 pending cases in courts were disposed of.

The Lok Adalat serves as a significant mechanism for Alternative Dispute Resolution that is accessible to the general public. This forum offers the opportunity to resolve cases that are either pending in a court of law or are in the pre-litigation stage, in a peaceful and mutually agreed-upon manner. According to the Legal Services Authorities (LSA) Act of 1987, any decision made by a Lok Adalat is considered a decree of a civil court and is binding on all parties involved, without the possibility of any appeals. To reduce the number of cases that are backlogged in the court system and to settle disputes before they reach the litigation stage, Legal Services Institutions periodically organize Lok Adalats. Lok Adalat is not a permanent body, but as per Section 19 of the LSA Act, 1987, they are organized as required. A pre-arranged date is designated for the National Lok Adalats, held simultaneously in all Taluks, Districts, and High Courts.

²⁴ Settlement of Cases in Lok Adalat, *available at*: <https://pib.gov.in/PressReleasePage.aspx?PRID=1882229> (Visited on December 15, 2022).

The following information pertains to the cases resolved in Lok Adalats over the past two years²⁵:

Years	Pre-Litigation Cases	Pending Cases	Grand total
2021	72,06,294	55,81,743	1,27,88,037
2022	3,10,15,215	1,09,10,795	4,19,26,010
Total	3,82,21,509	1,64,92,538	5,47,14,047

The above table clearly shows the contribution of Lok Adalats in the administration of justice. It can be said that if not all the cases, the institution of Lok Adalats has contributed to the settlement of a considerable number of cases. It not only contributed to reducing the burden of courts relating to pending cases but also contributed to the reduction of fresh litigations by providing a firsthand mediation.

Also, it cannot be said that Lok Adalats have the capacity to resolve all the disputes and can be seen as a replacement for the existing system of dispute resolution. But it can surely be said that the only purpose of the institution of Lok Adalat was to assist the courts in the process of administration of justice by catering for the need of the poor and illiterate litigants and by providing a platform through which one can go for mediation before opting for any litigation. Considering the above figures, it can be said that the purpose for which Lok Adalats were established has been sufficiently catered by the said institutions.

IX. CONCLUSION

It can thus be concluded that the Indian legal system must align with the Constitutional aim of promoting socio-economic justice. This is particularly challenging in a society where most people are socially and economically disadvantaged, and where inequality based on the caste system is pervasive. To achieve the noble objective of equality, we need an effective program that can bring justice to the doorsteps of those who are unable to access the court system due to their socio-economic handicaps. This may require the law and its agencies to take proactive steps

²⁵ *Ibid.*

to bring justice to marginalised people. We must work towards realizing the dream of equality before the law and equal protection of the laws by reaching out to those who are unable to access the legal system due to poverty, illiteracy, and social oppression. We must come together to make legal aid and advice programs more comprehensive and effective to fulfil the Constitutional objective of social justice for all.

In a welfare state governed by the rule of law, providing access to justice for the common man is crucial. The goal of social justice enshrined in the Constitution cannot be achieved unless we address three key issues: (i) lack of awareness of legal rights, (ii) economic inequality and its consequences, and (iii) timely resolution of disputes. In a vast and overpopulated country like India, where the majority of people live in poverty in rural areas, statutory and constitutional rights and guarantees are meaningless if accessing justice is difficult and expensive. To provide easy access to justice for these marginalized communities, alternative approaches must be developed to bring justice to their doorsteps. Lok Adalats and Para Legal and Legal Literacy Camps offer an informal system for the on-the-spot resolution of disputes. These approaches prevent the disruption of local unity and are in tune with the lifestyle and culture of village folk. Justice rendered in such local settings is more satisfying and closer to the truth, as it involves the presence and hearing of others from the community. With the heavy workload in traditional courts and the time-consuming litigation process, it is necessary to explore alternative modes of dispute resolution. Considering the situation in India, Lok Adalats provided a good alternative to the people who were unable to approach the courts due to a lack of financial resources. It also provided for a first-hand mediation of all the cases capable of being solved amicably. Thus, making justice affordable and accessible to the poor is essential for fulfilling the Constitutional promise of social justice.

**GEETA GROUP OF INSTITUTIONS
PANIPAT, HARYANA, INDIA**