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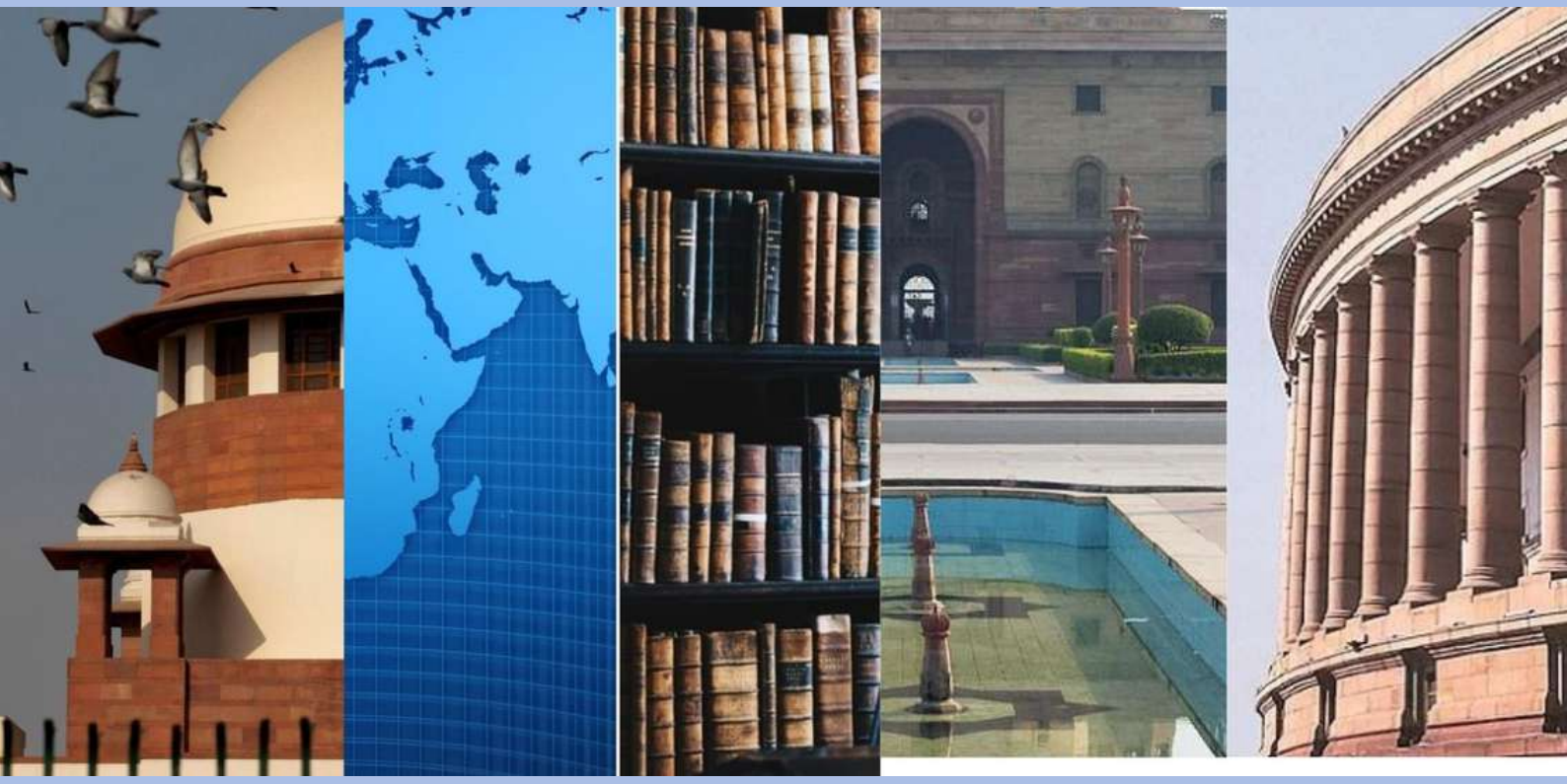

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Volume 12 (1)
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Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

ARTICLES

BOOK REVIEW

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

COURT DECISIONS AS CATALYST FOR NATIONAL DEVELOPMENT IN NIGERIA: FOCUS ON THE ELECTORAL PROCESS

PROF. TAIWO OSIPITAN, SAN[*] AND DR. ABIODUN ODUSOTE[**]

ABSTRACT

It is generally agreed by scholars, commentators and politicians that the Nigerian electoral process is always marred with irregularities, violence, fraud and rigging both at the primaries and general elections. Hence, the parties and electoral candidates often approach the courts for adjudication of their disputes. The judiciary is responsible for adjudicating all electoral disputes, inclusive pre-election and post-election disputes. This often leaves the judiciary in the eye of the storm. No matter how sound and logical the court decisions are, the courts often face a barrage of derogatory comments from the parties' sympathisers and candidates that lost in court. Based on the many criticisms that have been levied against the judiciary, this study seeks to interrogate the relationship between court decisions and national development. Library based research methodology is deployed to examine the matrix between court decisions and national development. The findings of this study reveal that the courts, through court decisions, play a pivotal role in moulding an acceptable electoral process in Nigeria for the sustenance of democracy, rule of law, promotion of independent electoral institutions and stable governance. The study concludes by making recommendations that have the potential to further deepen the role of the judiciary as a catalyst in the stability of Nigerian democracy and national development.

Keywords: Electoral disputes, court decisions. Democracy, rule of law, elections and national development

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Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

I. INTRODUCTION

The way politics in this country is played frightens me every dawning day. It is a fight to finish affair. Nobody accepts defeat at the polls. The Judges must be the final bus stop. And when they come to the Judges and Judges in their professional minds give Judgment, they call them all sorts of names[1].

Between 1960 when Nigeria attained independence and 1999, the country experienced more of military rule than Democratic Governance. It is gratifying, that since 1999 there has been uninterrupted Democratic system of Government in place in Nigeria. Voters have at least, in theory, exercised their rights to elect their leaders and legislators, at Federal and State levels, every four years.

These Elections were conducted, on the basis of various legal frameworks, which made provisions for voters' registration, registration of political parties, delimitation of wards, ward congresses, primary elections of political parties, as well as nomination of candidates by political parties. Conduct of primary election, as well as pre and post-election litigations.

The judiciary is the third arm of Government vested with judicial powers of adjudication of disputes under Section 6(1) & (2) of the 1999 Constitution of the Federal Republic of Nigeria, CFRN. Adjudication of pre and post-election related disputes is consequently exclusively monopolised by the courts and Tribunals by virtue of Section 285 of the 1999 Constitution.

The resolution of election-related cases by courts and other adjudicatory bodies resulted and will continue to result in the rendition of court decisions, which give practical effects to the rights of aggrieved persons and their supporters to have their meaningful days in courts and with these adjudicatory bodies. These decisions have the added advantage of calming the frayed nerves of aggrieved politicians, and their supporters.

[1] *Buhari* v. *INEC* (2008) 19 NWLR (Pt. 1120) P.428.

As rightly observed "… resolution of electoral disputes douses political infighting, strangulates social upheavals, welcomes peace, order and expels chaos and anarchy from polity. The progeny of this is plain stability in democratic governance"[2].

It is evident that unless voters' rights are accorded respect and court decisions are logical, sound and respected by litigants, the Nation will likely experience a state of anarchy and lawlessness which are antithetical National development. It has been rightly observed that where the rule of Law is treated with disdain and contempt, the *"culture of lawlessness is sowed into the psyche of the people"*[3]. Decisions of various adjudicatory bodies in the Electoral process are therefore critical in ensuring peace and National Development, whose primary goal is to uplift the quality of lives of citizens and residents of a Nation.

The Electoral Act of 2022 signaled the commencement of the Electoral process with respect to the 2023 general elections in Nigeria. This discourse on court decisions and National development with particular reference to the election process, is therefore not only timely, but also a right step in the right direction. This paper consequently X-rays some court decisions on the electoral process, against the backdrop of their contributions not only to the development of our legal jurisprudence, but also National development, whose primary goals are to uplift and improve the quality of lives of citizens and residents of a Nation. Issues examined below include sui generic status of Electoral process/ litigation. Time being of essence in Election related litigations, Locus standi, judicial restraint, judicial self-restraint, justiciability and burden of proof in pre and post-election related litigation. The paper ends with observations, conclusions and suggestions.

II. DEFINING TERMS

First, key words are identified and defined.

A. Courts Decisions

[2] Frank McLoughlin (2016) "Prioritizing Justice: Electoral Justice in Conflict-Affected Countries and Countries in Political Transition", International IDEA Policy Paper No. 12. Available at https://www.idea.int/sites/default/files/publications/prioritizing-justice.pdf (Accessed 24 August, 2022).
[3] *Dapiolong* v. Dariye (2007) 8 NWLR (Pt. 1036) 291 at 330.

The judiciary is the arm of Government that is vested with the monopoly of applying, interpreting and pronouncing on statutory and Constitutional provisions. Judicial powers are vested in the courts, under Section 6(1) and (2) of 1999 Constitution. By virtue of Section 6(6) (b) of the same constitution the judicial powers of the court *"extends to all matters between persons or between government or authority and to any person in Nigeria and to all actions and proceedings relating thereto for the determination of any question as to civil rights and obligations of that person"*

Pursuant to the above provisions, judicial decisions have been, are being and will continue to be rendered by the courts and other adjudicatory bodies. Court decisions are evidently part of the sources of Nigerian Law. These decisions have find expression in the principle of stare decisis/judicial precedent, which enjoins the courts to follow previous decision of superior courts, on the same issue, unless they are able to distinguish previous decision from the case before them. Judicial precedent provides the platform for the debate on whether Judges make the Law or not. Proponents of strict separation of powers insist that Judges declare and apply the Law. They do not make Laws. Law making is the primary responsibility of the Legislature. Prof. C. K. Allen is the frontline advocate of non-law making role of Judges. Lord Denning on the other hand agreed that where there is no precedent on an issue, Judges have to say what the Law is. He thereby lent his weight to law making role of Judges. Further, common law is Judge made law. Various principles of contract and torts law are based on decisions of Judges. It is therefore futile to argue that Judges do not make Laws.

Court decisions have the added advantage, of calming frayed nerves of aggrieved litigating politicians and their teeming supporters. Court decisions provide a measure of certainty and peace, which are necessary for the orderly development of a Nation. Court decisions go a long way, in avoiding self help and lawlessness on the part of aggrieved persons. A Nation without trusted Judiciary, which delivers well reasoned decisions, will likely be one where anarchy and self help prevail.

Well reasoned court decisions, are pivotal to development of electoral framework and Electoral rights. They seek to enthrone free and fair elections which are devoid of banditry, rigging, manipulation of Election results and sabotage of the Electoral process. They also identify defects in the Law, and thereby provide the platform for Law reform.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

As rightly observed "court decisions in respect of electoral process covers*"... all aspects of electoral process including quality of electoral civil and other political rights, integral in the electoral process, resolution of disputes related to election, identification and punishment of electoral–related wrong doings; the identification and correction of irregularities related to the electoral process in all possible cases and the provision of remedies to restore integrity of the electoral process"*[4]

Courts exercise their judicial powers with some measure of restraint, especially in matters which are either specifically made non justiciable or within internal and domestic domain of political parties. Nigerian Judges are not politicians. They do not stand for elections. They are appointed and not elected. Consequently as much as possible Judges are expected to distance themselves from determining political questions.

Election years have been acknowledged as the most trying periods for Nigeria Judges, because desperate politicians in the bid to win at all costs attempt to reach out to Judges through their relations, friends, close associates with mouthwatering bribes in order to win election petition cases in courts[5].

B. Catalyst

To members of the chemistry family, a catalyst is a chemical substance which increases rate of chemical reaction without, it (the catalyst) undergoing any permanent change. Happily, the chemistry family does not enjoy monopoly of words (catalyst). In its ordinary grammatical sense, a Catalyst is something or someone that causes a change. Such a person or thing acts as a stimulus in bringing about or hastening a result. A person or something that speeds up or brings about an event is a catalyst. An accelerator, activator, indicator, modificator, synergist, is a catalysts. Consequently, in the context of this paper judicial decisions and Judges are to be viewed as agents of rapid positive changes in development of the Nation.

[4] Frank McLoughlin (2016) "Prioritizing Justice: Electoral Justice in Conflict-Affected Countries and Countries in Political Transition", International IDEA Policy Paper No. 12. Available at https://www.idea.int/sites/default/files/publications/prioritizing-justice.pdf (Accessed 24 August, 2022).
[5] Nhochiri I (2012) "Politicians often tempt Judges with bribes" Adekeye – Vanguard Newspaper Nov., 2012.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

C. National Development

National Development is associated with the general well being of citizens and residents of a Nation. Issues such as development of citizens, their socio-economic emancipation, civil and political freedom, national integration and cohesion are central to the discuss on National development. National development is also the gradual advancement or growth through progressive changes. It is the ability of a Nation to improve and make positive impact on the lives of its citizens and residents. Issues such as quality of life, access to qualitative education, employment, healthcare, shelter, life expectancy and good governance are evident of the sign posts of a Nation's development.

D. Electoral Process

In Black's law Dictionary "Electoral process has been defined, as the method by which a person is elected to public office in a democratic society"[6].

Electoral process is also the totality of Electioneering in an election cycles[7]. It consists of a series of key election related undertakings including formulation of legislation, delimitation of constituencies, conflict prevention and management initiatives. Civic and voter education, registration of voters, development of code of conducts, nomination of candidates, campaigning, voting, conduct of elections, tabulation of election results, announcements of election results, trial and determination of election disputes, electoral malpractices and their consequences[8] are all within the wide scope of Electoral process.

Elections in Nigeria dates back to 1959, when the first election was held preparatory to self rule. Nigeria has consistently embraced, multi party system, with two or three emerging as the strong parties. In its almost quarter of a century of uninterrupted democratic governance, elections have been held in Nigeria in 1999, 2003, 2007, 2011, 2015 and 2019. Hopefully, in 2023, being another election cycle, general election will be held to elect the president and vice president the,

[6] 9th Edition P. 956.
[7] N Elekwe. "The Electoral process Nigeria; How to make INEC succeed" in 2008 2 (1) The Nigeria Electoral Journal. P. 30; PDP v. INEC (2012) LPELR (SC) P. 24.
[8] Sanusi, Election administration in Nigeria. A comparative analysis with united State of America cdra.org.ng/home?; *Ojukwu* v. *Obasanjo* (2004) 1 EPR 626 at 653.

109 senators and 360 members of House of Representatives, State Governors, their Deputies and members of House of Assemblies at Federal and State levels respectively.

III. COURT DECISIONS AND PRE-ELECTION LITIGATIONS

Since 1999, Nigerian courts have been called upon to resolve election disputes. It is gratifying, that except in isolated instances, our courts have generally risen up to the challenges and given good account of themselves, through well reasoned pronouncements, rulings, judgments, exercise of restraint and the application of judicial brakes, where necessary. The judiciary is praised to high heaven by the winning party and condemned as well as called all sorts of names by the losing party!

Put simply, a pre-election litigation is any litigation which precedes the conduct of general election and which does not complain about the conduct of the general election[9]. Voters' registration, uploading of voter registration, transfer of registered voters, printing and issuance of voters register and voters card, display of voters and candidates list, appointment of Electoral officer, nomination of candidates and submission of candidates list to INEC are all pre-election. The scope of pre-election related issues covers registration of political parties ward congresses, primaries of political parties, challenge, and substitution of candidates.

In the case of *Action Congress* v. *INEC*[10]. The bone of contention, was whether INEC had the power to verify the credentials or papers of candidates, screen or disqualify candidates of a political party. The case arose on account of the attempted disqualification of the party's presidential candidate. The High court held that INEC lacked the power to disqualify the candidate. The Court of Appeal disagreed with the High Court and voted in favour of INEC's power of disqualification. On further appeal to the apex court, it was held, that only the court and not INEC is constitutionally empowered to disqualify a political party's candidate from

[9] See Section 285 14(a) - (c) of 1999 Constitution for definition of pre-election.
The scope of pre-election matters/issue has been admirably identified. See Dr. Olatubora Pre-Election litigation in Nigeria principles and precedents (2022) Books Industries Ltd Pp1 -2; see the following cases on definition and identification of pre-election. *Salim* v. *LPL* (2013) LPELR 19928 (SC) ; *Vivian Clems Akpamgbo-Okadigbo & Ors* v. *Egbe Theo Chidi & Ors* No.1 92015) 10 NWLR (Pt.1466) 171 (2015) LPELR-24564(SC).
[10] (2007) 12 NWLR (Pt. 1048) 1220.

contesting election. The above decision was cited with approval by Court of Appeal in the case of *Uduma* v. *Arunsi*[11]

Another courageous decision was handed down by the apex court in Independent *National Electoral Commission* v. *Balarabe Musa*[12] the crux of the matter in the case was the scope of the Electoral body's powers to refuse to register a political party, which has satisfied the registration requirement prescribed by the enabling constitutional provision. While acknowledging powers of INEC to make regulations and guidelines, such powers, where exercise, in a manner that is inconsistent with the constitutional provisions on formation and registration of political parties, will be held as void and ultra vires powers of INEC.

The above decisions which curtail the excesses of INEC, will definitely deepen our Democracy and provide platform for National Development. The decision also corroborates judicial independence and vote of confidence in the judicial arm, to dispense justice without fear or favour.

The likes of the above case are re-assuring to potential and existing local and foreign investors in the Nation's economy that the electoral body and the judiciary are two separate and independent arms of Governments.

Outside the electoral process, it is gratifying that our Law reports host cases, which corroborate judiciary's ability to curtail the excessive and ultra vires acts of the other two arms of Government. In *Ondo State* v. *Aaatorney General Federation*[13] for example, the apex Court resisted the Plaintiffs attempt, to exclude the application of Anti-corruption Act, from the states. The decision was also applied in the case of *Olafisoye* v. *FRN*[14]. These decisions also send the right signal that in the fight against corruption and enhancement of National development, promotion of domestic and foreign investments, no State would be allowed to be a safe haven for corruption.

The courts have also intervened and provided remedies for wrongs committed against a person. Where there is a remedy, there is a right (ubi jus ibi remedium). Where one's right is invaded or

[11] (2012) 7 NWLR (Pt. 1298) 55 at 130.
[12] (2003) 13 NSCQR page 39 at 118-119.
[13] 2002)9 NWLR (Pt. 772) 222 at 282.
[14] (2004) 4 NWLR (Pt. 864) 561.

destroyed, the law gives a remedy. Where a person's right is denied, the law affords a remedy for an action for its enforcement. The principle of remedies and corresponding rights has been utilised to give practical effect to person whose rights have been violated. The principle was deployed by the Supreme Court in the case of *Nosiru Bello* v. *Attorney General Oyo State*[15] to give effect to the right to life of a convict who was hastily executed during the pendency of appeal against his conviction.

The above decisions will definitely deepen our constitutional democracy and corroborate the separateness between the Legislative, Executive and Judicial arms of Government. The decision also confirms the ability of the courts to dispense even justice to litigants no matter their standing. These decisions are reassuring to existing and potential investors, who are the catalyst for National Development, of a level playing field in disputes between the governed and Government and the preparedness of the judiciary, to dispense even justice to parties before the courts.

A. Election Related Proceedings/Litigations Are Sui Generis and Time Bound

Preparation for primaries and elections in Nigeria, are characterized by litigations initiated by losing parties and their teeming supporters. The importance of timely resolution of election disputes is self evident in multi cultural and multi religious Nation like Nigeria. If Election disputes are not timeously resolved, the fault lines and problem of National integration may be exacerbated.

There are consequently special rules enthroned for timeous resolution of election related litigations. Time is therefore of the essence of pre and post election cases[16]. The sui generis status of election related litigations is a very trite jurisprudence, of election litigations in Nigeria. Election related cases are neither civil nor criminal proceedings[17]. Consequently, rules of civil and criminal litigations do not apply hook and sinker, to them. The rules on election cases are

[15] (1986) 5 NWLR (Pt. 45) 828 at 886; See also *Amaechi* v. *INEC* (2008) 5 NWLR (Pt. 1080) 227; *Harka Air Services (Nig) LTD* v. *Keazor* (2011) 13 NWLR (Pt. 1264) P. 32 at 361.
[16] Section 285 (5)(6)(7)(9)(10)(11) and (12) of 1999 Constitution as altered.
[17] *Ajadi* v. *Ajibola* (2004) 16 NWLR (Pt. 898) 91 at 174.

generally rigid, and are as fixed, as the rock of Gibraltar or mount zion, which cannot be moved[18].

Time is, for example, always of essence in most election related litigations[19]. The time within which to commence pre election litigation, time for the conduct of proceedings in pre election litigations, the time to appeal against decisions in pre-election cases and time for the conclusion/determination of appeals arising from such litigations are all fixed by either the constitution or Electoral Act. Similarly, there is fixed time table, for challenging the results of primary elections and time to challenge false information given by candidates. There are also fixed time for appealing against decision of election petition Tribunal and time within which appeals are to be concluded[20].

A comparative study of Sections 285 (5), (6, (7), (9), (10), (11) and (12) of 1999 Constitution as amended shows that while Section 285 (5) uses the expression "within 21 days after the date of the declaration of result of the election, in the other provisions, the words within 14 days from the date of declaration of result of the election are used. The difference between Section 285 (5) and other above identified subsections of 285 are the words from and after the specific dates which feature in these in provisions respectively.

The Supreme Court in *Maku* v. *Sule*[21], held that under Section 285(5) of the 1999 Constitution, the date of declaration of election result is not reckoned with (excluded) in calculating time for presenting the petition, whereas under Section 285(9) the number of days within which to

[18] Oguniya CON Judiciary in the sustenance of Nigerian Democracy in Justice in the service of Humanity: essays in honour of Hon. Justice Aloy Nwankwo. Hon. Justice Nweze and Hon. Justice Ogbuniyi (Eds) 2019 ACENA Publishers AP. P. 737.

[19] 'It is settled law that in an election or election related matter, time is of the essence. I will add that the same applies to pre-election matters. Election matters are sui generis, very much unlike ordinary civil or criminal proceedings" Onnoghen, J.S.C. in *Alhaji Jibrin Bala Hassan* v. *Dr. Mu Azu Babangida Aliyu & Ors* (2010) LPELR-1357(SC).

[20] S.285 (9) CFRN 1999 as amended provides a time limit of 14 days from the cause of action to file pre-election matters. Federal High Court has exclusive jurisdiction on pre-election matters and it is only the candidates and INEC that could be joined as necessary parties, *Nwaogu* v *Atuma* (No 1) (2013) 9 NWLR (pt.1358) 113 at 133. The judgment must be delivered, it's ruling in writing within 180 days from the date of filing the suit S.285 (10) CFRN as amended, in *ANPP* v. *Goni & Ors* where the Supreme Court rightly held that the election petition tribunal must mandatorily deliver its judgment within 180. And appeals must be filed within 14 days from the date of the delivery of the judgment appealed against S.285 (11) CFRN 1999 as amended and the court has affirmed that application for extension of time will not be permitted *Ngige* v. *INEC* (2015) 1 NWLR (pt.1440) 281 at 293-294. If a pre-election matter is struck out, it cannot be relisted, it will be deemed as resolved, S.285 (9) CFRN as amended, Toyin v. PDP (2019) 9NWLR (Pt.1676) 60.

[21] (2022) 3 NWLR (Pt. 1817) 231 at 254.

commence court proceedings in pre-election matter, includes the date of declaration of the result of the party's primary elections.

As stated above, timetable in election related litigations shows that time is always fixed and mostly immutable. There is hardly space for enlargement of time for filing of cases, filing of appeals and conclusion of cases and appeals. These provisions have been rightly acknowledged and likened to *"rock of Gibraltar, Mount Zion which cannot be moved, extended expanded or elongated or in any way enlarged*[22]*"* In the case of *Ehinlanwo* v. *Oke*[23] for example, the Supreme Court held that where a political party failed to submit the list of its candidate to INEC within the period prescribed by the enabling law, the list will be unacceptable and such political party will be deemed to have fielded no candidate for the posts/offices.

The sui generis rule has been utilized to displace general principles in civil proceedings that sins and lapses of counsel and court officials are not to be visited on litigants. Therefore, where due to a lapse on the part of the adjudicatory body, trial or appeals in pre or post election cases are not concluded within the prescribed time, no valid Judgment can be delivered after prescribed time[24].

Where time has been prescribed within which a person, or aspirant should challenge accuracy of information contained in information submitted by a candidate to INEC the time should be strictly adhered to. Consequently, a challenge of the information submitted to and published by INEC after the prescribed 14 days, or during subsequent election (four years after submission of the form) will be time barred[25] and the court will be stripped of the jurisdiction to entertain such suit.

The legal consequences of acting outside the time prescribed by the constitution and other enabling statutes, have been admirably summarized by Dr. Olatubora, thus:

> *"A pre-election suit filed outside the 14 days prescribed by Section 285(9) is statute barred, it is incompetent and the court in which it is filed is bereft of the jurisdiction to hear and*

[22] Oguniya CON Judiciary in the sustenance of Nigerian Democracy in Justice in the service of Humanity: essays in honour of Hon. Justice Aloy Nwankwo. Hon. Justice Nweze and Hon. Justice Ogbuniyi (Eds) 2019 ACENA Publishers AP. P. 737.
[23] (2011) 17 NWLR (Pt. 1277) 485 at 507.
[24] *ANPP* v. *Goni* (2017) 7 NWLR (Pt. 1298) P. 14.
[25] *Akinlade* v. *INEC & Ors*. *Toyin* v. *PDP* (2019) 9 NWLR (Pt. 1676 P. 60.

determine the suit and the proper order to make is to strike out the Suit. Failure to hear and determine a pre-election matter within 180 days prescribed by Section 285(10) of the Constitution renders the action void and takes away the jurisdiction of the trial court to adjudicate the matter. Similarly upon the expiration of 180 days limited by the constitution for hearing and determining the election matter, it becomes pointless for an appellate court to order re-trial of the action, where an appeal against the decision of the Federal High Court in pre-election matter is not heard or determined by the Court of appeal within 60days, the appeal becomes caught with the limitation, it becomes nullity and the court becomes divested of jurisdiction over the appeal. The same rule applies to appeal from decision of the Court of Appeal to Supreme Court in pre-election matters. The proper Order to make when an appeal is caught up with limitation is to strike it out[26]*"*

Onnoghen JSC (as he then was) in the case of *P.D.P* v. *C.P.C*[27] justified the immutability of time fixed for filing and concluding elections related cases on the ground, that it is a difficult sacrifice, which must be made in the interest of justice until *"our politicians learn to accept the verdict of the people expressed through the ballot box*[28]*"*

Where the time for conducting an election related trial has expired, an appeal if successful, will serve no useful purpose, the appellate court will decline remitting the case back to a lower court. Further a pre-election matter is struck out it cannot be re-listed if the time for filing the suit has lapsed[29].

It suffices to acknowledge that unlike the usual civil and criminal proceedings, time is of essence and consequently there can be no enlargement of the time prescribed for taking any of the above steps[30].

[26] Pre-section litigation in Nigeria principles and precedents (supra) of P. 104; *Archbishop Okogie* v. *Attorney General of Lagos State* (1981) NCLR 625; *Senate of National Assembly* v. *Tony Momoh* 1982 FNR 307.
[27] (2011) 17 NWLR (Pt. 1277) 485 at 507.
[28] Ibid.
[29] *APC* v. *Umar* (2019) 8 NWLR (Pt. 1675) 564 at 575.
[30] In Hon. Saviour Okon Nyong v Hon. Joseph Effiong Etene &Ors (2011) LPELR-4264 (CA) Akeju, JCA at page 16 held that: "Election petition is sui generis and by the provisions of Section 285 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), time has now become of its essence more than ever before. A Tribunal can ill afford the luxury of grnating extension of time upon frivolous excuses that are not well founded or grounded. A party who has decided to adopt a lackadaisical or lethargic attitude in election petition proceedings under the current dispensation must have no one else but only himself to blame for the consequences. All parties to a dispute as well

B. Challenging an Election: Required Standard of Proof

Election results are presumed by law to be correct until the contrary is proved. It is however a rebuttable presumption. In other words, there is a rebuttable presumption that the result of any election declared by a Returning Officer is correct and authentic and the burden is on the person who denies the correctness and authenticity of the return to rebut the presumption The standard of proof in Election Petitions, is on the preponderance of evidence or the balance of probabilities. See *Okuarume* v. *Obabokor*[31]; *Are* v. *Adisa*[32] However, where fraud, forgery or any act of criminality is alleged, the person making the allegation is required to prove beyond a reasonable doubt. Such allegations are provable on the standard of proof in criminal proceedings, which is proof beyond reasonable doubt. See Niki Tobi JSC in *Abubakar* v. *Yar' Adua*[33] where he rightly stated, "… the law as I know is that where a crime is alleged in an election petition, the Petitioner must prove it beyond reasonable doubt."

Generally, where crime is not alleged, in determining either the preponderance of evidence or the balance of probabilities in the evidence, the Court is involved in some weighing by resorting to the imaginary scale of justice in its evaluation exercise. Accordingly, proof by preponderance of evidence simply means that the evidence adduced by the plaintiff, the petitioner or the appellant should be put on one side of the imaginary scale and the electoral figures applied to determine the tilt of justice. It is the present position of the law that the party challenging an election (the Petitioner) can do so on any of the three grounds under S.134 Electoral Act 2022:

a. A person whose election is questioned was, at the time of the election, not qualified to contest the election.
b. The election was invalid by reason of corrupt practices or non-compliance with the provisions of the Electoral Act
c. The respondent was not duly elected by majority of lawful votes cast at the election.

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as the Court (or Tribunal) are entitled to justice. It is not for the Appellant alone. The 1st Respondent is entitled to have his petition disposed within 180 days prescribed by the Constitution which the Tribunal must comply with.
[31] (1965) All NLR 360.
[32] (1967) 1 All NLR 148.
[33] (2008) 19 NWLR (PART 1120) 1 at 17 page 171.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

d. We shall briefly examine the court decisions in respect of allegations of non-compliance with the Electoral Law. The courts have established that for a Petitioner to succeed on this ground, he must proof that:

e. That there was corrupt practices or non-compliance with the Electoral Law S. 134 (1) (b) of the Electoral Act 2022. The courts have consistently held that the Petitioner must proof substantial noncompliance to succeed in his action.

f. That the Petitioner was materially affected by the non-compliance and that the non-compliance substantially affected the result of the election to his disadvantage. In *General Muhammadu Buhari* v. *Independent National Electoral Commission*[34] Niki Tobi JSC at page 58 held as follows:

Also in *Buhari* v. *Obasanjo* (2005) 7 S.C. (Pt. I) 1;(2005) 13 NWLR (Pt.941) 1, Belgore, JSC., in interpreting this provision of Section 135(1) of the Electoral Act, 2006, had this to say: 'It is manifest that an election by virtue of Section 235(1) of the Act shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provisions of the Act. It must be shown clearly by evidence that the non-compliance has affected the result of the election. Election and its victory is like soccer and goals scored. The petitioner must not only show substantial non-compliance but also the figures, i.e. votes that the compliance attracted or omitted. The elementary evidential burden of "the person asserting must prove" has not been derogated from by Section 135(1). The Petitioners must not only assert but must satisfy the Court that the non-compliance has so affected the election results to justify nullification". See also *Awolowo* v. *Shagari* (1979) 6-9 S.C. 51; (1979) 6-9 S.C. (Reprint) 37; *Ihute* v. *INEC* (1999) 4 NWLR (Pt. 599) 360*; Akinfosile* v. *Ijose* (1960) SCNLR 447; and *Ajadi* v. *Ajibola* (2004) 16 NWLR (Pt. 898) 91'. It is clear from the above authorities that the onus of proof of the substantiality of the non-compliance and the substantiality of the effect of the non-compliance on the election result rests on the petitioner. **The petitioner has in the instant case established the substantiality of the non-compliance with Section 145(2) of the Electoral Act , but has failed to establish the substantiality of this non-compliance on the result of the election.** This issue is therefore resolved in favour of the respondents**.**

[34] (2008) LPELR-814(SC).

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

C. Justiciability and Avoidance of Political Question

The above is an area where courts exercise restraint and apply judicial brakes in some which come before them for adjudication. It is common knowledge that Nigerian Judges are appointed by Federal or State Government as the case may be, the appointments are either in consultation with or on the recommendation of National Judicial Council. The arrangement is unlike what obtains in some jurisdictions, where Judges are elected[35].

In view of the fact that Nigerian Judges are not elected, they hardly dabble into or resolve political questions or especially deciding on the choice of a political party's flag bearer and candidate.

Further Section 6(6) (c) of the constitution expressly restricts the court from granting reliefs based on the Socio Economic rights in chapter II of the 1999 Constitution.

Therefore, except otherwise provided by the constitution/political, educational environmental socio and economic rights in Chapter II of the 1999 Constitution are also non justiciable in section 6(6) (c) of the 1999 Constitution. Legitimacy of past military Governments by virtue of Section 6(6) of the same 1999 Constitution is also made non-justiciable. The courts exercise restraint over non justiciable provisions by declining to grant any declaratory or mandatory relief to litigating parties.

Notwithstanding non justiciability of these Political, Educational, Socio and Economic rights, there are progressive court decisions which are to the effect that they serve as useful compass to the courts in the interpretation of the constitution and in some matters that are before them[36]. The duty imposed on the government to eradicate corruption and abuse of power is in section 15(5) of the constitution was for example, skillfully utilised in the case of *Attorney General Of Ondo State* v. *Attorney General of the Federation*[37] to legitimize the nationwide application of a Federal anti-corruption legislation, (the Corrupt Practices and other Related Offences, No.4 of 2000).

[35] Japan and Switzerland are two of the countries that hold judicial elections.
[36] *Damisha* v. *Speaker Benue State* (1983) 4NCLR 625.
[37] (2002) 9 NWLR (Pt.772) 222; (2002) 6 S.C (Pt.I) 1; (2002) LPELR-623(SC).

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

D. Nomination of Candidates by Political Parties

In the area of the nomination of candidates of political parties, the courts strives generally to accord respect to the rights of political parties to nominate their candidates. Consequently, where due process has been followed during political parties' primaries, nomination of candidate will be regarded as the internal and domestic affairs of political parties. The caveat of the courts is that political party should ensure internal democracy in electing candidate[38].

Hear Onnoghen JSC (as he then was) stated on this point, in the case of *Olley* v. *Tunji*[39]

> *"politicians should note that it is not the duty of the court to nominate candidates for political parties but to see to it that in the process of nominating a candidate for an election the political parties comply with the provisions of the Electoral Act and/their party constitution and/or guidelines relevant to the nomination process. It is important that political parties must do everything possible to entrench internal democracy in their dealings with their members and also strive very hard to earn credibility in the conduct of their primary elections so that the court can believe and rely on the result declared by the party following nomination exercise."*[40]

It was similarly held in *LADO* v. *CPC*[41] that *"…the question of a candidate, a political party will sponsor in an election is in the nature of a political question which is not justiciable in a court of Law.*[42]*"*

In Mahalu v. Saraki[43], Tobi JSC of blessed memory held:

"…it is clear that the right to sponsor a candidate by a party is not a legal right but not a domestic right of the party which cannot be questioned in a court of Law[44].

Notwithstanding the above concession to political parties, the courts have not hesitated to intervene in cases of breaches and sideling of the party's constitution or guidelines in the conduct

[38] *Ardo* v. *Nyako* (2014) 10 NWLR (Pt. 591 at 623; *Ohuoha* v. *Okafor & Ors.* (1983) 2 SCNLR P. 244.
[39] (2013) 10 NWLR (Pt. 1362) 275 at 328.
[40] Ibid.
[41] (2011) 18 NWLR (Pt. 1279) 689 at 718.
[42] Ibid .
[43] (2003) 15 NWLR (Pt. 843) 342; See also *APC* v. *MArafia* (2020) 6 NWLR (Pt. 1721) 383 at 433; *Ndull* v. *Wayo* (2018) 16 NWLR (Pt. 1646) P. 548.
[44] Ibid .

of primary elections or where there is unjustified, improper substitution of a candidate by a political party. For example, under the 2006 Electoral Act, political parties were expected to give cogent and verifiable reasons for the substitution of a candidate and where this was not established, the court rightly intervened. In *PDP* v. Slyva[45] the Supreme Court. Per Rhodes Vivour JSC held:

> *"But where the political party conducts its primary and a dissatisfied contestant at the primary complains about the conduct of the primaries, the courts have jurisdiction by virtue of the provisions of section 87 (9) of the Electoral Act to examine if the conduct of the primaries was in accordance with the party's constitution and guidelines. This is so because in the conduct of its primaries the courts will never allow a political party to act arbitrarily or as it likes. A party must obey its constitution. See Hope Uzodinma v. Senator Osita Izumaso (2011) Vol. 5 (Pt. 1) MJSC P. 27"*

The decisions in *Ugwu* v. *Ararume*[46] and *Ameachi* v. *INEC*[47] are the authorities for the proposition that under the (2006) Electoral Act a person who contests and wins the primary election can only be barred from contesting the General Election if and only if his political party gives cogent and verifiable reasons for the substitution required by the Electoral Act 2006. If no reason is given that person remains the flag bearer of the political party even if he did not contest the general election.

E. Locus Standi in Election Litigations

Locus standing (standing to sue) remains a threshold jurisdictional issue. A plaintiff or litigant is expected to demonstrate his special interest in a suit which gives him/her peculiar rights over the generality of the public in order to be accorded a locus. The Plaintiff's locus donates party jurisdiction to the court or Tribunal. Where the Plaintiff or petitioner lacks locus standi, the case or petition is dead on arrival as the court will be stripped of jurisdiction to entertain the suit or petition.

[45] (2012) 13 NWLR (Pt. 1316) page 85 at 128.
[46] (2007) 12 NWLR (Pt. 1048) 365.
[47] (2008) 5 NWLR (Pt. 1080) 227.

Decided cases show that in election related cases, Locus standi will be accorded candidates and aspirants who took part in the general election or political party's primary election[48]. Prior to the enactment of 2022 Electoral Act, a person was entitled under the 2010 Electoral Act to apply for the certified true copy of documents submitted by a candidate especially Form CF001 to INEC. Where forged certificates have been submitted or false information is given by a candidate to INEC, such a person is entitled to approach the Court for the disqualification of such a candidate. Such a person though neither an aspirant nor a contestant was afforded the Locus standi to institute proceedings in Court.

There is evidently a significant shift under the 2022 Electoral Act. Only an aspirant who participated in the primaries is accorded Locus standi under Section 29(5) and 84(14) of the said Act to apply to Federal High Court for appropriate relief, inclusive of the disqualification of the candidate on ground of submission of forged certificates or induction of false information in documents submitted to INEC.

Whether there is a practical distinction between an aspirant and a candidate[49] remains a moot point. Suffice it to say that for purpose of Locus standi in election petition litigations there is conveyance. The Locus standi accorded non aspirants and non-candidates under 2010 Electoral Act has been jettisoned under the 2022 Electoral Act. Consequently, the categories of persons who have Locus in election related litigation is now closed to aspirants and candidates during primaries and general elections.

IV. QUALIFICATION OF CANDIDATES AND SUBMITTED INFORMATION

A situation where a candidate submits information or certificates to INEC which differs to information or certificates submitted to the same INEC in previous election has attracted conflicting decision. The bone of contention whether inconsistence in forms and certificates submitted in previous and current election exercise amount to submission of false information or forged certificates as to justify the disqualification of a candidate from contesting the election. Ancillary to the above issue is whether the candidate must disclose all his qualifications and

[48] *Ardo* v. *Nyako* (2014) 10 NWLR (Pt. 1416) 591 at P. 634; *Daniel* v. *INEC* (2015) 9 NWLR (Pt. 1463) at P. 113.
[49] See: *Shinkafo* v. *Tari* (206) 7 NWLR (Pt. 1511) 340 *Ardo* v. *Nyako* (2014) 10 NWLR (Pt. 1416) 591 – Defines aspirant as "a person who aspires or strives to contest. See also *Aghedo* v. *Adenawo* (2018) 13 NWLR Pt. (1936) 264 at 297.

whether the candidate is eligible to serve the one year mandatory National Youth Service Corps and where he has neglected to serve, he is thus disqualified from contesting the election.

The case of *Modibbo* v. *Usman*[50] is the leading authority which supports the view that a candidate must maintain consistency at all times in the information and certificates submitted to INEC in previous and subsequent elections. The case also supports the position that a serving member of NYSC is precluded from contesting an elective position during the service year. The Supreme Court disapproved appellant's participation in partisan politics during his compulsory NYSC. The court agreed with the trial court that the appellant contravened paragraph 9 of section 4 of the NYSC Act.[51] The Supreme Court disagreed with the Court of Appeal and held that continuous service for one year is compulsory and default is an infraction of the 2011 revised bye-law which makes him liable to three months extension of service without pay.

The case of *Abubakar* v. *INEC*[52] supports the view point that discrepancies in the Educational qualifications stated by a candidate in the forms submitted to INEC during previous and subsequent election is not a ground for disqualifying such candidate. The case of *Akinlade* v. *INEC*[53] and others goes a step further by insisting that once, the issue of submission of false information or forged Certificate to INEC is not raised within the 14 days after publication of the information by INEC, the cause of action if thereafter time barred.

A question which should agitate our mind from the view point of constitutional amendment is the educational qualification for contesting election in Nigeria. The minimum qualification is school certificate. However the definition of School in Section 318 of the constitution shows lowering of the bar below the traditional School certificate. The minimum educational qualification to contest for either the presidential or gubernatorial positions is as set out by Sections 131 and 177 of the CFRN respectively. These provisions provide;

"A person shall be qualified for the election to the office of the president/governor if… he has been educated up to at least School Certificate level or its equivalent"

[50] (2020) 3 NWLR (Pt. 1712) P. 470.
[51] Any member who takes part in partisan politics is liable to extension of service for a period not less than (3) three months without pay.
[52] (2020) 12 NWLR (Pt. 1737) P. 37.
[53] (2020) 17 NWLR (Pt. 1754) 439.

Section 318 (1) of the CFRN as amended (which is the interpretation section of the Constitution) states that:

"School Certificate or its equivalent" means –

a) a Secondary School Certificate or its equivalent, or Grade II Teacher's Certificate, the City and Guilds Certificate; or

b) education up to Secondary School Certificate level; or

c) Primary Six School Leaving Certificate or its equivalent and-

I. service in the public or private sector in the Federation in any capacity acceptable to the Independent National Electoral Commission for a minimum of ten years, and

II. attendance at courses and training in such institutions as may be acceptable to the Independent National Electoral Commission for periods totaling up to a minimum of one year, and

III. the ability to read, write, understand and communicate in the English language to the satisfaction of the Independent National Electoral Commission; and

d) any other qualification acceptable by the Independent National Electoral Commission.

These provisions have been given very liberal judicial interpretation, in *Alhaji Kashim Isbrahim Imam* v. *Senator Ali Modu Sheriff*[54] MUKHTAR, J.C.A stated: "that the statement of result showing that the 2nd respondent sat for the Grade II Teacher's Certificate, the 2nd respondent has the required educational qualification to contest the election into the office of Deputy Governor of Borno State", cannot be faulted. A statement of result of an examination is an eloquent evidence of an attempt at the particular examination concerned and it is also a good evidence that he has been educated to that level. The issue of whether he passed or he did not pass the examination is a different issue that is not relevant under the provision of Section 177 (d) of the Constitution of the Federal Republic of Nigeria, 1999 .

[54] (2004) LPELR-7315(CA) p.16.

In the case of Digai v. *Nanchang*[55]. per Obadina, J.C.A. thus

"What is required under the law is that there must be evidence that a candidate is educated up to the school certificate level, and not that he must produce a certificate to that effect". There is also the case of *Bayo* v. *NJIDDA*[56] where it was held by Ogbuagu, J.C.A., thus:

"... as regards a secondary school certificate level, one does not have to pass the secondary school certificate examination. It is enough, in my view that one attended a secondary school and read up to secondary school certificate level i.e., without passing and obtaining the certificate".

In *Atiku Abubakar* v. *Independent National Electoral Commission*[57], the court held that, the mere production of an affidavit deposed to by the respondent evidencing his education up to School Certificate level as interpreted by the Constitution, and to the satisfaction of the Independent National Electoral Commission (INEC) was more than enough, the respondent does not have to present his certificate.

In fact the Supreme added a delicate slant to this by holding that changing the qualification of a candidate is tantamount to accusing the candidate of forgery and the accuser must prove the allegation beyond reasonable doubt! See *APC* v. *PDP*[58].

The above decisions which allow qualification as low as primary school leaving certificate, attendance in schools without necessarily passing examinations and indeed any qualifications acceptable to INEC, does not ensure that persons with requisite educational background emerge as candidates in and winners of primary and general elections. From the above interpretation of Section 318 of the CFRN, it is safe to say that the phrase 'School Certificate or its equivalent' has a very wide interpretation. A presidential or gubernatorial candidate has met the qualification requirement once he deposes to an affidavit that he is educated up to Secondary School Certificate level even without showing any certificate to support his assertion and whoever disputes the assertion must proof beyond reasonable doubt. We are of the opinion that there is a need for rethink or amendment of these provisions. The minimum qualification to the office of the president and the governor requires urgent redefining.

[55] (2005) All F.W.L.R. (pt. 240) 41 at 70.
[56] (2004) 8 NWLR (PT. 876) 544 at 630.
[57] (2019) LPELR-48488(CA).
[58] (2015) 15 NWLR 9 (Pt. 1481) 1.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

V. CONCLUSION

National development remains the principal objective of most constitutional democracies. Democracy and National Development are therefore perfect bedmates. In ensuring National developments through constitutional democracy, the crucial role of interpretation and application of the constitution and relevant statutes has been assigned to the judiciary. It has been demonstrated that to a large extent, the judiciary through various court decisions has given a good account of itself in the timely and just resolution of disputes, especially election process-related disputes. The judiciary has intervened where it is empowered to do so and applied judicial breaks in no-go areas such as non-justiciable and political issues/questions.

Well-reasoned court decisions are valid insurance policies for a vote of confidence in the courts by end users. Such decisions hinder anarchy, lawlessness and self-help. The decisions will usher peace, progress and orderly development of the nation. The judiciary has good reasons to therefore continue to dispense justice without fear or favour no matter the political weight of the litigating parties. Let us acknowledge the obvious that it is not part of the role of the court to fill obvious gaps in the law. The task has been assigned to the legislative arm by section 4 of the 1999 Constitution. However, Judges as torchbearers of our legal system in their judgments through obiter pronouncements can legitimately direct the attention of the legislative arm to yawning gaps in the law. Such exercise will definitely provide the platform for law reform in the task of National development.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

INTELLECTUAL PROPERTY AS THE FUNDAMENTAL RIGHT: WIDENING SCOPE AND CHANGING DIMENSION OF OWNERSHIP OF INTELLECTUAL PROPERTY

LAXMI SAPKOTA*

ABSTRACT

Nepal has protected intellectual property (IP) as a fundamental right in its constitution. The first point about the inclusion of IP in fundamental rights is welcoming because these rights get constitutional remedies in case of violation. But, neither the intellectual property Rights (IPR) is limited to core IP, nor the concept of property is glued to the monopoly rights. IPR is more than the Copyright and Related Rights and Patent, Design, and Trademark that are protected under the Copyright Act, 2002 AD and Patent, Design and Trademark Act, 1965 AD in Nepal. Further, IPR also includes the geographical indication (GI) that is protected under the Collective Mark Registration Directive. The core intellectual property that includes copyright, patent, design, and trademark are private rights. The inclusion of GI in IP makes it a community right because the right that is acquired through GI is the right of the community. By the extension of the domain of IP with the inclusion of GI, the property right is extended from private to communal rights. If the right to the geographical indication is protected through the sui generis laws, then the entire community becomes the owner of such right. In this doctrinal research, the paper discusses the journey of IP from the core IP to the inclusion of the geographical indication, and the changing dimension of ownership of the intellectual property.

Keywords: Fundamental Rights, Geographical Indications, Intellectual Property, Property.

I. INTRODUCTION

Fundamental rights are those rights that are guaranteed in the constitution and are justifiable as they are enforceable through courts[1]. It cannot be derogated by the legislative action, unlike the

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general rights that are given by the legislative action and may be impaired by legislative action. If it is violated, then the affected person may move to the High Court or Supreme Court as mentioned in the fundamental rights for constitutional remedy. It is the rights which an individual possesses against the state and cannot be waived.[2] The *Constitution of Nepal*, Article 16 to 47[3] has the fundamental rights and duties. Article 46 provisioned the right to constitutional remedies, Article 133[4] or 144[5] can be referred to as those articles, which help in the enforcement of fundamental rights and Article 47 mentions the implementation of fundamental rights.

The concept of fundamental rights owes its beginning to human rights. However, it is an error to confuse them as synonymous. Human rights are a wide concept which includes fundamental rights too.[6] The purpose of fundamental rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all. [7] These fundamental rights as basic human freedoms that all citizens of a sovereign country have the right to enjoy for a proper and harmonious development of personality. If any laws limit these

[1] 2 LAXMI SAPKOTA ET. AL., GENERAL CONCEPT OF LAW, (Lex and Juris Publication 2023).
[2] 2 LAXMI SAPKOTA ET. AL., GENERAL CONCEPT OF LAW, (Lex and Juris Publication 2023).
[3] Nepal Const. art. 16, Right to live with dignity, art. 17. Right to Freedom, art. 18. Right to equality, art. 19. Right to communication, art. 20. Right to Justice, art. 21. Right of victim of crime, art. 22. Right against torture, art. 23. Right against preventive detention, art. 24. Right against untouchability and discrimination, art. 25. Right to property, art. 26. Right to religious freedom, art. 27. Right to information, art. 28. Right to privacy, art. 29. Right against exploitation, art. 30. Right regarding clean environment, art. 31. Right to education, art. 32. Right to language and culture, art. 33. Right to employment, art. 34. Right regarding labour, art. 35. Right to health care, art. 36. Right to food, art. 37. Right to housing, art. 38. Right of women, art. 39. Right of children, art. 40. Right of Dalits, art. 41. Right of senior citizens, art. 42. Right to social justice, art. 43. Right to social security, art. 44. Right of consumers, art. 45. Right against exile, art. 46. Right to constitutional remedy, art. 47. Implementation of fundamental rights.
[4] Nepal Const. art. 133, Jurisdiction of Supreme Court: The citizen of Nepal can file a petition in the Supreme Court if any provision is inconsistent with the Constitution. Furthermore, the Supreme Court can, for the enforcement of the fundamental rights conferred by this Constitution and can issue appropriate orders and writs of *habeas corpus*, *mandamus*, *certiorari*, prohibition, and *quo warranto*. But on the ground of lack of jurisdiction, the Supreme Court shall not interfere with any internal proceedings of the Federal Parliament or State Assembly, and with any proceedings instituted by the Federal Parliament or State Assembly concerning violation of its privileges and penalties imposed there for.
[5] Nepal Const. art.144, Jurisdiction of High Court: The High Court is authorised to issue necessary orders to uphold fundamental rights and enforce legal rights lacking remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective or for the settlement of any legal question involved in any dispute of public interest or concern. Further, the High Court may issue appropriate orders and writs of *habeas corpus*, *certiorari*, *mandamus*, *quo warranto* and prohibition. But on the ground of absence of jurisdiction, the High Court will not interfere with any internal proceedings of the Federal Parliament or State Assembly, and with any proceedings instituted by the Federal Parliament or State Assembly concerning violation of its privileges and penalties imposed therefor. Additionally, the High Court have the power to settle cases and hear appeals and its powers and procedures are determined by Federal law.
[6] HARI BANSH TRIPATHI, FUNDAMENTAL RIGHTS AND JUDICIAL REVIEW IN NEPAL (EVOLUTION AND EXPERIMENTS) 2-3 (Pairavi Prakashan 2001).
[7] BHIMARJUN ACHARYA, CONSTITUTION AND CONSTITUTIONALISM 186 (Pairavi Prakashan 2022).

rights, then they must pass strict scrutiny to be un-held as constitutional.[8] There are two foundations for the constitutional protection of fundamental rights. The very first is that the rights are entrenched in such a way that they may not be violated or interfered with by an oppressive government and the second is that the right can only be amended by a formal process of constitutional amendment, rather than by ordinary legislation. The fundamental character of the fundamental rights are as follows: They can be enforced through the courts against the government; are binding on the part of the government and provide a remedy against the state; constitute restrictions and limitations on government actions and cannot be voluntarily waived. [9]

Article 25 of the Constitution of Nepal has the provision of the property rights. In its proviso clause, it has stated that the property also means the intellectual property. The two laws Copyright Act, of 2002 protects the copyright and neighboring rights whereas the Patent, Design, and Trademark Act, of 1965 protects patent, design, and trademark. There is a directory to register the collective mark which is the Collective Mark Registration Related Directory 2010 AD. The National Intellectual Property Policy 2017 has included the Geographical Indication as an intellectual property.

The paper has been written to know the impact of introducing the GI laws. Because, when GI laws are absent. The provision like the intellectual property is a private property is ok. But once GI laws are introduced then the IP does not remain private property. Also, there might be a question like what if there are no GI laws? Why Nepal needs GI laws. The paper has discussed that the IP would not remain private property after the introduction of GI laws. It is also mandatory to introduce the GI laws to keep the pace with international community and for the better protection of the GIs of Nepal.

II. EVOLUTION OF THE FUNDAMENTAL RIGHTS AND PROPERTY IN THE CONSTITUTION OF NEPAL

The jurisprudential concept of Rights in Nepali Legal history has prominently evolved after the codification of *Manab Nyayashastra*. Before the codification of *Manab Nyayashastra* the concept of 'right' in defining the legal capacity and status to be enshrined in a person was based

[8] NARAYAN PRASAD SHARMA, RUDIMENTS OF CONSTITUTIONAL LAW, 165 (2016).
[9] BHIMARJUN ACHARYA, CONSTITUTION AND CONSTITUTIONALISM 186 (Pairavi Prakashan 2022).

on the religious texts and several like documents. Therefore, *Manab Nyayashastra* was the first codified law of Nepal that incorporated the concept of rights in some manner.[10] In *Manab Nyayashastra,* the concept of rights has been inscribed mentioning the provision of property rights and possession rights. It is to say that people's right over their property means their privileges over the use of property entitled to them. Thereafter, several other codified laws in Nepal have defined the concept of rights in different subject matters like property, marriage, education, etc. Rights are fundamental only if they are combined with effective remedies. There is no limitation restrictions or violation by the states in these fundamental rights, unlike other legal rights.[11]

The concept of rights as fundamental rights of citizens has also been defined and incorporated by different constitutions of Nepal. [12] There are seven constitutions in the history of Nepal. Starting from the Government of Nepal Act 2004 to the Constitution of Nepal promulgated in 2072 that are discussed below:

Government of Nepal Act, (1948) 2004 BS: Part II, includes the fundamental rights in Articles 4 and 5 which states, the Constitution guarantees to the citizens of Nepal freedom of personal liberty, freedom of speech, freedom of press, freedom of assembly and organization, freedom of religion, complete equality before the law, affordable and speedy justice, universal free compulsory elementary education, universal and equal suffrage for all adults, security of private property.[13] And, the duty of every citizen to promote public welfare, to contribute to public funds, to be in readiness to labour physically and intellectually for the safety and well-being of the Realm and bear true allegiance to His Majesty the Maharajadhiraja Shree Panch and Shree Teen Maharaja and be faithful to the State and its constitution.[14] Article 4 of the constitution guarantees of security of private property.[15]

[10] 2 LAXMI SAPKOTA ET. AL., GENERAL CONCEPT OF LAW, (Lex and Juris Publication 2023).
[11] Gopal Siwakoti Chintan, *Comments on Draft Fundamental Rights, Fundamental Duties and Directives Principles,* 21 NEPAL LAW REVIEW, 137 (2009).
[12] Government of Nepal Act, 2004, art.4 and 5 Acts of Parliament, 2004 (Nepal), available at: http://www.lawcommission.gov.np/en/wp-content/uploads/2018/09/government-of-nepal-act-2004-1948.pdf.
[13] Government of Nepal Act, 2004, art.4, Acts of Parliament, 2004 (Nepal).
[14] Government of Nepal Act, 2004, art.5, Acts of Parliament, 2004 (Nepal).
[15] Government of Nepal Act, 2004, art.4, Acts of Parliament, 2004 (Nepal).

The Interim Government of Nepal Act (1951) 2007 BS: The Interim Government of Nepal Act (1951) 2007 BS did not provide for a separate chapter of fundamental rights, but rather mingled them with Directive Principles of State Policy in part 2, especially under article 17 that is fundamental principles of law.[16] It has the provision of property which in the fundamental rights has the provision to acquire, hold, and dispose of property[17].

The Constitution of Kingdom of Nepal, (1959) 2015 BS: In part III provisioned about the fundamental rights in articles 3-9.[18] It has also the provisions of the property state that: no person is deprived of his property by the law[19] and every citizen is entitled to the right to earn, possess, hold, and sell property[20].

The Constitution of Nepal (1962) 2019 BS: Part III stated the Fundamental Rights in article Articles 9-17[21]. The constitution has the provision of property which states that no person is deprived of his/her property saved by the law[22]

Constitution of the Kingdom of Nepal (1990) 2047 BS: Part III affirmed Fundamental Rights in Article 11-23.[23] It has the provisions of the property which states that all citizens have the rights to acquire, own, sell, and dispose of property.[24] The state except in the public interest, requisition, acquire or create any encumbrance on, the property of any person.26 And the basis of compensation and procedure for giving compensation for any property requisitioned,

[16] (1) No tax shall be levied or collected except under the authority of law. (2) Subject to the laws for the time being in force, all citizens shall have the right. (a) To freedom of speech and expression; (b) To assemble peaceably and without arms; (c) To form associations and unions; (d) To move freely throughout the territory of Nepal; (e) To reside and settle in any part of Nepal; (f) To acquire, hold, and dispose of property; (g) To practice any profession or to carry on any occupation, trade, or business.

[17] The Interim Government of Nepal Act, 2007, art.17, Acts of Parliament, 2007 (Nepal).

[18] The Constitution of Kingdom of Nepal, 2015. Art. 3, Personal Liberty, art. 4. Equality, art. 5. Religion, art. 6. Property, art. 7. Political Freedom, art. 8. Public Good, art. 9. Right to Constitutional Remedies.

[19] The Constitution of Kingdom of Nepal, 2015. art. 6(1).

[20] The Constitution of Kingdom of Nepal, 2015. Art. 6(2).

[21] The Constitution of Nepal (1962) 2019 BS: In part, III stated about the Fundamental Rights in article Articles 9-17. They are as Article 9. Fundamental Duties of the Citizen, Article 10. Right to Equality, Article 11. Right to Freedom, Article 12. Right against Exile, Article 13. Right against Exploitation, Article 14. Right to Religion, Article I5. Right to Property, Article 16. Right to Constitutional Remedies, Article 17. Restrictions on the Exercise of fundamental Rights for Public Good.

[22] The Constitution of Nepal (1962) 2019 BS art. 15.

[23] Constitution of the Kingdom of Nepal (1990) 2047 BS has Art. 11 Right to Equality, Art. 12. Right to Freedom, Art. 13, Press and Publication Right, Art. 14. Right Regarding Criminal Justice, Art. 15. Right against Preventive Detention, Art. 16, Right to Information, Art. 17. Right to Property, Art. 18. Cultural and Educational Right, Art. 19. Right to Religion, Art. 20. Right against Exploitation, Art. 21. Right against Exile, Art. 22. Right to constitutional remedies.

[24] Constitution of the Kingdom of Nepal (1990) 2047 BS art. 17(1).

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

acquired, or encumbered by the state for in the public interest will be prescribed by the laws.[25]

The Interim Constitution of Nepal (2007) 2063 BS: Part III stated Fundamental Rights in Article 12-32.[26] The constitution has the provisions of the property which are: every citizen has the right to acquire, own, sell, and otherwise dispose of property[27]; the State will not acquire, or create any encumbrance on the property of any person, except in the public interest, But, this provision does not apply to property acquired through illegal means[28]; The compensation is given for any property encumbered, requisitioned, acquired, by the State in implementing scientific land reform program or in public interest by law. The amount and basis of compensation, and relevant procedure are as stated in law[29].

The Constitution of Nepal (promulgated in 2015 AD, 2072 BS): Part III has a provision about the Fundamental Rights and Duties in Articles 16-46. Article 25 consists of property which also includes intellectual property. It states that every citizen has the right to acquire, own, sell, dispose of, acquire business profits from, and otherwise deal with property.[30] But, the State may levy tax on the property of a person, and tax on income of a person by the concept of progressive taxation. And in the explanation: "property" means any form of property including movable and immovable property and includes an intellectual property right. In the evolution of the constitution, intellectual property is incorporated as a fundamental right in the Constitution of Nepal (2015).

III. Existing Domain and Widening Scope of Intellectual Property in Nepal

[25] Constitution of the Kingdom of Nepal (1990) 2047 BS art. 17(3).
[26] The Interim Constitution of Nepal (2007) 2063 BS, Art 12. Right to freedom, Art13. Right to equality, Art 14. Right against untouchability and racial discrimination, Art 15. Rights regarding publication, broadcasting and press, Art 16. Rights regarding environment and health, Art 17. Education and cultural rights, Art 18. Rights regarding employment and social security, Art 19. Right to property, Art 20. Rights of women, Art 21. Right to social justice, Art 22. Rights of children, Art 23. Right to religion, Art 24. Rights regarding justice, Art 25. Right against preventive detention, Art 26. Right against torture, Art 27. Right to information, Art 28. Right to privacy, Art 29. Right against exploitation, Art 30. Right Regarding labor, Art 31. Right against exile, Art 32. Right to constitutional remedy.
[27] The Interim Constitution of Nepal (2007) 2063 BS, art. 19(1).
[28] The Interim Constitution of Nepal (2007) 2063 BS, art. 19(2).
[29] The Interim Constitution of Nepal (2007) 2063 BS, art. 19(3).
[30] Nepal Const. art. 25.

There are two pieces of legislation on intellectual property in Nepal the Copyright Act, of 2002 AD for the protection of copyright and related rights, and the Patent, Design, and Trademark Act, of 1965 (PDTA) for the protection of the patent, design, and trademark and there is the Collective Mark Registration Related Directive 2010 for the registration of the collective marks in Nepal. The directive in its section 6 has stated that the limitation to use the collective mark, the time of collective mark, if the collective mark is used illegally, the procedure to renew the collective mark and amount shall be applicable as of the PDTA[31]. The five collective marks have been registered to comprise Sindhuka Advertising, Sindhuka Dairy Products, Everest Big Cardamom Spice, Sindhuka Grain and Foodstuff, and Himalayan Nepalese Carpet[32] up to 13 years. Similarly, there is the National Intellectual Property Policy 2017 AD, which has stated collective marks policy[33] and geographical indications policy[34].

Now, the question is how the IP scope is widening in Nepal. IP scope is widening from the core copyright, patent, design, and trademark to other intellectual property as the National Intellectual Property Policy of 2017 AD has included geographical indication (GI), trade secrets, plant species, integrated circuit, traditional and indigenous knowledge, layout design, traditional cultural expression and folklore as the intellectual property.[35] A GI is a sign indicating a product's specific geographical origin and information associated with that origin. [36]

Nepal is a party to international instruments like Trade-Related Aspects of Intellectual Property, 1995 AD (TRIPS) on April 23, 2004, and the Paris Convention 1883 on January 22, 2001. The countries that are parties to the TRIPS must make them compatible with the TRIPS agreement. The country must protect its geographical indication either through the sui generis GI laws or trademark laws especially collective marks and laws focusing on business practices. Nepal is protecting its GI through the directives and has also brought the policy requiring bringing the laws including the geographical indications and collective marks. More than all, Nepal is

[31] *Collective Mark Registration Related Directive 2010 AD, section 6.*
[32] Laxmi Sapkota, *Necessity of Sui Generis Geographical Indication Laws in Nepal*, *NJA Law Journal,* 125-142 (2022).
[33] National Intellectual Property Policy of 2017 AD, number 8.2(d*)*, Acts of Parliament, 2017 (Nepal).
[33] The National Muluki Civil Code, 2017, sec. 254 (e), Acts of Parliament, 2017 (Nepal).
[34] National Intellectual Property Policy of 2017 AD, *number 8.2(e)*, Acts of Parliament, 2017 (Nepal).
[35] National Intellectual Property Policy of 2017, Acts of Parliament, 2017 (Nepal).
[36] PAUL L.C. TORREMANS, INTELLECTUAL PROPERTY AND HUMAN RIGHTS ENHANCED EDITION OF COPYRIGHT AND HUMAN RIGHTS 384 (Wolters Kluwer Law & Business 2008).

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

graduating to the developing countries in 2026 AD, therefore, there is an additional requirement to update its laws according to international laws and agreements.

IV. CHANGING DIMENSION OF OWNERSHIP OF INTELLECTUAL PROPERTY

There are two types of ownership of property. One is private ownership of property and community ownership of the property. According to section 254 of the National Muluki Civil Code, 2017 intellectual property is the moveable property.[37] Property received as intellectual property or royalty is considered as private property.[38] And the person can enjoy one's private property at one's own sweet will.[39]

Intellectual property used to be private property before the inclusion of geographical indications. However, after the inclusion of the geographical indication property. the ownership not only rests on the private person. The ownership rights extended to the community. Once there is geographical indication then the intellectual property is also the community property.

Nepal has to promulgate the laws on GI, but the question is what kinds of GI laws are required for Nepal is it collective mark protection laws or the sui generis GI laws? If it is seen in the South Asian Association Regional Corporation (SAARC) countries only three countries have the sui generis GI laws that are Bangladesh, India, and Pakistan but other countries *Afghanistan, Bhutan, Maldives, Nepal, and Sri Lanka* are protecting their GIs through other laws.[40] Nepal has to bring the sui generis GI laws to protect its GI goods[41] as there are the prospects than the challenges in bringing the GI laws[42]. Nepal has ratified the international documents to bring the GIs laws, similarly, it has the national laws which are also inclined towards bringing the GIs laws, there is international pressure as Nepal has to show its stand in international trade as it is

[37] The National Muluki Civil Code, 2017, sec. 254 (e), Acts of Parliament, 2017 (Nepal).
[38] The National Muluki Civil Code, 2017, sec. 256 (1)(e), Acts of Parliament, 2017 (Nepal).
[39] The National Muluki Civil Code, 2017, sec. 256 (2), Acts of Parliament, 2017 (Nepal).
[40] Laxmi Sapkota, *Comparative Study of Sui Generis Geographical Indications Laws in South Asian Countries: A Way Forward to Nepal*. JOURNAL OF GLOBAL RESEARCH & ANALYSIS, (2022).
[41] Laxmi Sapkota, *Necessity of Sui Generis Geographical Indication Laws in Nepal*, *NJA Law Journal,* 125-142 (2022).
[42] Laxmi Sapkota, *Prospects and Challenges of Protecting the Geographical Indications Through Sui Generis Law in Nepal*. NEPAL BAR COUNCIL LAW JOURNAL, (2022).

visible in the Basmati Rice case, similarly, there are plenty of goods that are capable to get the GIs recognition.[43]

The ownership of intellectual property should shift from the private to the community in case of geographical indications because Nepal has the preamble promise which states that Nepal is committed to socialism to build it prosperous[44]. Further Article 4 states that Nepal is a socialism-oriented states[45] which means it has to make laws that benefit the community, not a person or a handful of the person.

The main difference between collective marks or trademark protection and geographical indication protection is that the ownership rights of the geographical indication are given to the community in sui generis GI protection and the entire community benefits from it and their traditional knowledge and the traditions are also protected,[46] the most important thing is that the rights cannot be transferred[47] in the GI whereas it could be done in the collective marks[48]. Also, GI includes topography, and environment nevertheless TM includes human creation.[49] Similarly, the ownership lasts longer[50] in the GI but it does not happen in the collective marks. Geographical indication is gained from the traditional knowledge[51] like the Yogurt or Juju Dhau in Nepal[52] whereas, the collective mark can be created overnight.[53] . Similarly, the right to

[43] Laxmi Sapkota, *Necessity of Sui Generis Geographical Indication Laws in Nepal*, *NJA Law Journal,* 125-142 (2022).
[44] Constitution of Nepal. Preamble.
[45] Constitution of Nepal, art 4.
[46] N. LALITHA & SOUMYA VINAYAN, REGIONAL PRODUCTS AND RURAL LIVELIHOOD, A STUDY ON GEOGRAPHICAL INDICATIONS FROM INDIA, (Oxford University Press) (2019) 33.
[47]Melissa A Loucks, *Trademarks and Geographical Indications: Conflict or Coexistence?* [Western Graduate and Postdoctoral Studies, The University of Western Ontario] (2004). https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=2044&context=etd.
[48] Michael Blakeney, *The Protection of Geographical Indication*, *Law and Practice*, Elgar Intellectual Property Law and Practice series (2014).
[49] Laxmi Sapkota, *Comparative Study of Sui Generis Geographical Indications Laws in South Asian Countries: A Way Forward to Nepal*. JOURNAL OF GLOBAL RESEARCH & ANALYSIS, (2022).
[50]Laxmi Sapkota, *Necessity of Sui Generis Geographical Indication Laws in Nepal*, *NJA Law Journal*, 125-142(2022).
[51] Zografos, Daphne, *Geographical Indications & Socio- Economic Development*, Working Paper p. 67. (December 2008).
[52] Laxmi Sapkota, "*Significance of Geographical Indications Laws in Nepal: A Comparative Study of Bhaktapur 'Juju Dhau' and Greece 'Greek Yogurt'"* Kathmandu School of Law Review, (2022), https://doi.org/10.46985/kslr.v11i1.2216.
[53] Laxmi Sapkota, *Necessity of Sui Generis Geographical Indication Laws in Nepal*, *NJA Law Journal,* 125-142 (2022).

protect a GI from a wrongful appropriation is enjoyed by all traders from the particular GI[54]. Yet, the trademark is protected from a wrongful appropriation at the suit of the registered proprietor of that mark.[55]

The name and fame of the country are also associated with the GI therefore, the changing dimension of the intellectual property especially of the GI is welcoming. Therefore, Nepal needs its own kinds laws (*Maulik Kanoon)*[56] to protect its GIs. [57]

V. CONCLUSION

Fundamental rights are inalienable, indivisible, interrelated, equality, and justice-oriented. They can be enforced through the courts against the government; they are binding on the part of the government and provide a remedy against the state; they constitute restrictions and limitations on government actions, and they cannot be voluntarily waived. Before the end of the Rana regime in 1951, the Rana Prime Minister Padma Shumsher declared the Government of Nepal Act on 15 January 1948 which is the first constitution of Nepal. Nepal has by now already experienced 7 constitutions enacted in 1948, 1951, 1959, 1962, 1990, 2007, and 2015. There are all together 31 fundamental rights mentioned in the constitution and thus these rights reflect high priority aimed at enhancing the living standards. Article 25 has the property right, and it includes intellectual property as a fundamental right. Article 46 mentions the Right to constitutional remedies, Article 133 or 144 can be referred to as those articles, which help in the enforcement of fundamental rights and Article 47 is about the implementation of fundamental rights.

Previously, Knowledge was considered as a powerful tool not as a property. Knowledge is power (coined by Francis Bacon in 1597)[58] but in modern times, Knowledge has been recognized not

[54] Daphne Zografos, *Geographical Indications & Socio-Economic Development*, Working Paper 3 (December 2008).
[55] WANG, SZU-YUAN, *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 2013).
[56] Laxmi Sapkota, Paper Presented on the topic, Nepal's Position on the Geographical Indications Protection Debate of North and South at the South Asian Post Graduate Conference 2023 organized by Faculty of Law, University of Colombo, Sri Lanka, Maharashtra National Law University Mumbai, India, Jindal Global Law School, O.P. Jindal Global University Mumbai, India, Symbiosis Law School, Nagpur, India, Eastern University, Jigme Singye Wangchuk School of Law, Bhutan, Kathmandu School of Law, Nepal from on 27 and 28 November 2023.
[57] Laxmi Sapkota, Evolution of the *Geographical Indication Laws in Nepal*, Nepal Bar Council *Law Journal*, (2021).

only as a source of power but also as the primary source of property.[59] The Constitution of Nepal has given a list of federal powers in which number 24 of the list states that the Federal government has the power of work area of intellectual property (including patents, design, trademarks, and copyrights). [60]

The *Muluki Civil Code, 2017* has listed intellectual property as movable property and private property. Now the very challenge has been raised to the Constitution and the *Muluki* Civil Code stating if intellectual property is private property, then where would it fit the concept of GI? GI is a community right held by the community.

The Patent, Design, and Trademark Act has not mentioned the collective mark, but according to the *Collective Mark Registration Related Directory 2010 (2067 B.S)*, some of the provisions of the trademarks like the provision relating to registration apply to collective marks too. Local Governance Operation Act, 2018 (2074) has stated that the protection promotion, and recording of the local intellectual property (geographical indication) falls under the works, duties, and rights of local bodies like municipality[61]. *The National Intellectual Property Policy 2017 (2073 B.S) has the provision of* copyright, patent, industrial design, trademark, and other new IP areas like geographical indication[62], plant species, trade secrets, integrated circuit, layout design, traditional and indigenous knowledge, traditional cultural expression and folklore, biodiversity, and genetic resource according to the need of the country. *Collective Mark Registration Related Directory 2010 (2067 B.S)*, states about the registration of collective marks. It has incorporated the provision about the collection mark registration in Nepal.

The intellectual property right (IPR) is limitless to core IPR and the concept of intellectual property is wider than the monopoly rights. The conventional concept of property includes moveable and immovable property but does not include intellectual property. Lately, property includes property with monopolistic rights.

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[58] José María Rodrígez García, Knowledge is Power: Francis Bacan to Michel Foucault, (2001) https://link.springer.com/article/10.1023/A:1011901104984#:~:text=The%20now%2Dfamous%20equation%2C%20%E2%80%9C,by%20Francis%20Bacon%20in%201597.
[59] GB Reddy, *The New IPR Statutes and The Trends of Developments*, CB Raju, *Intellectual Property Rights*, Serials Publication New Delhi, P. 268.
[60] Nepal Const. sch. 5.
[61] Local Governance Operation Act, 2018 (2074), s. 11 (2)(j) Acts of Parliament, 2018 (Nepal).
[62] The National Intellectual Property Policy, 2017 (2073), s.8(2)(e) Acts of Parliament, 2017 (Nepal).

TRIPS Agreement states three ways to protect the GI by obtaining protection directly in the jurisdiction concerned. They are protected through the Trademark System (Collective Marks, Certification Marks), Sui generis System (making their 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.[63]

Sui Generis GI laws should prevail over the collective mark (CM) or trademark protection which is as follows: GI does not belong to a particular enterprise and can be used by several enterprises at the same time[64] and as owned by governing bodies of groups of producers within a region. the collective ownership of GIs as a right that cannot be licensed or transferred out of the region. Conversely, CM belongs to a person, either an individual or a corporation. The terms of protection are unlimited in their duration as TRIPs and the European Union also states the unlimited duration. The terms of protection differ from country to country; seven may be renewed one or two times. However, the *TRIPS Agreement* limits trademark protection to "no less than seven years," although indefinite renewal is possible if one meets a condition.[65] Also, GI is not freely transferable from one owner to another. Then CM can be transferred. Equally, GI is often based on traditional processes and formulas. Nonetheless, that is not in the case of CM.

The most important point is the introduction of the Sui Generis GI laws makes the GIs as the community rights not the monopolistic rights of a person or association or the group, unlike the collective marks. Hence, Nepal needs the sui generis GI laws or its laws then the scope of the intellectual property will be also widened and the ownership of the intellectual property will be transferred to the community from the private in case of the geographical indications.

[63] Laxmi Sapkota, *Necessity of Sui Generis Geographical Indication Laws in Nepal*, *NJA Law Journal*, 125-142 (2022).
[64] V.K Ahuja, *Protection of Geographical Indications: National and International Perspective. Journal of the Indian Law Institute*, 269-287 (2004), http://www.jstor.org/stable/43951907\\\\.
[65] V.K Ahuja, *Protection of Geographical Indications: National And International Perspective*, Journal of the Indian Law Institute, (2004) .http://www.jstor.org/stable/43951907\\\\ .

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

CITIZENSHIP IN MOTHER'S NAME: WILL CONSTITUTIONAL PROMISES BE KEPT OR OVERRULED?

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ABSTRACT

After many trials and tribulations, finally on May 31, 2023, Nepal Citizenship (First Amendment) Bill, 2079 BS received authentication from the President. In fact, the recent enactment deserves positive interpretation and appreciation especially regarding allowing the children of citizens by birth and single mothers, to obtain citizenship by descent. Hence, it could be inferred that the state is eventually gearing towards realizing the constitutional provision under Article 12 of the Constitution that guarantees citizenship by descent with gender identity in the name of mother or father. However, issuing citizenship in mother's name has not yet become a willful choice but the one that rather transpired only when the father is untraceable or undesirable, and it further needs to be corroborated by producing an affidavit on the part of the mother. Unfortunately, if the details are otherwise, she will be penalized up to three years of imprisonment and the citizenship, thus issued is revoked. However, considering this from gender justice perspective, the researcher strongly feels that the obligation to produce an affidavit, in fact is prejudiced, insensitive, and regressive. It reflects male supremacy with the attitude as if this is a special right endowed out of benevolence. It is so heart wrenching to see that the father in Nepal was never supposed to identify the mother while exercising this right, whereas a mother is harassed as she receives the right, and further her privacy and dignity itself is compromised.

Keywords: Affidavit, benevolence, citizenship by descent, compromised dignity, constitutional guarantee, gender justice, male supremacy.

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Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

I. INTRODUCTION

It is generally held that citizenship rights are serious constitutional entitlements conferred upon the people for consolidating their identities in a defined geographic territory and that further ensures shared values and belongingness. As such, citizenship, more than any other identity, is able to satisfy the basic political impulse of humans, which Hegel has termed the need for recognition. The status of citizen implies a sense of inclusion into the wider community.[1]

Given the identity, their physical existence is acknowledged by the state and in turn valued as resources, which could be tapped for the nation's development. It recognizes the contribution a particular individual makes to that community, while at the same time granting him or her individual autonomy. This autonomy is reflected in a set of rights which, though varying in content enormously over time and space, always imply recognition of political agency on the part of the bearer of those rights. [2] Their rights then become a matter of serious concern in a welfare state.

However, there are exceptions wherein a lot of people are denied citizenship and thus rendered stateless just because they do not exactly fit into the nationality legal framework, which very subtly excludes them for having complex and mixed parentage and lineage.

Presently, Nepal is issuing citizenship certificate based on descent, birth, naturalization and honor; and therefore, tentatively looks liberal in its nationality laws. The present Constitution ensures that no Nepali citizen shall be denied the right to acquire citizenship. [3] However, citizenship by descent always remains the bone of contention. Article 12 of the Constitution guarantees citizenship by descent with gender identity in the name of mother or father. Any person whose father or mother was a citizen of Nepal at the birth of such a person, he/she is deemed citizen of Nepal by descent.[4]

Such provisions were heavily applauded and it was assumed that it would ease especially single mothers to confer citizenship to their children, whose fathers were untraceable, immoral, or irresponsible that they eventually denied to the parentage. However, with the passage of time,

[1] Keith Faulks, *Citizenship*, Routledge, USA, 2000, p.4.
[2] Ibid.
[3] *Nepalko Sambidhan* (Constitution of Nepal), art.10.
[4] Ibid, art. 11(2 b).

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

issuing citizenship in mother's name has not yet become a normal and willful choice. Rather the law requires them to disclose the information that the father is unidentifiable and thus required to produce an affidavit on the part of the mother. Unfortunately, if the details are otherwise, she will be penalized up to three years of imprisonment and the citizenship, thus issued is revoked.

Nationality laws which do not grant women equality with men in conferring nationality to their children are a major cause of statelessness. UNHCR in 2016 has identified 27 nations that still have discriminatory laws that foresee a different treatment between men and women, affecting especially women's right to confer nationality to their children.[5] Nepal is no exception.

Further, the government has estimated that there could be around 400,000 people who have been deprived of citizenship by descent despite their parents possessing citizenship by birth.[6] Similarly, though Nepal tacitly denies statelessness, there are estimates that there are over 4 million people living in Nepal with unrecognized citizenship - this figure is almost a quarter of the entire adult population of the country. Stakeholders have pointed out that the future of some 1.7 million children has become uncertain due to the lack of a system to grant citizenship to them through the names of their mothers.[7]

It is surely appalling that such a huge population is devoid of legal identity rendered as a prerequisite for acquiring passport, driving license, voter ID card, birth registration, land ownership and so on. People without such cannot open bank account, register to vote or pursue higher education, or get a mobile SIM card or obtain security allowances.[8]

Considering this intriguing situation from gender justice and equality perspective, the researcher strongly feels that the obligation to submit an affidavit in fact exposes the harsh realities of the women's lives and situations, and still render them as second class citizens in the patriarchal world, reflecting male supremacy and domination as if they are bestowed with this special right to transfer citizenship to her children out of benevolence, and that they should not demand more.

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[5] 'Background Note on Gender Equality, Nationality Laws and Statelessness', *UN High Commissioner for Refugees UNHCR*, 2016, available at: http://www.refworld.org/docid/56de83ca4.htm, accessed on Oct 10, 2023.
[6] Tika Ram Pradhan &Tufan Neupane, 'Stateless in Nepal', *The Kathmandu Post*, Sep 3, 2023, available at https://kathmandupost.com/national/2022/09/03/stateless-in-nepal, accessed on Oct 11, 2023.
[7] 'Future of 1.7 million children uncertain as they fail to get citizenship from their mother's name', *myRepublica*, March 27, 2023, available at https://myrepublica.nagariknetwork.com/news/future-of-1-7-million-children-fall-uncertain-as-they-fail-to-get-citizenship-from-their-mother-s-name, accessed on Sep 23, 2023.
[8] *Saroj Nath Pyakurel v. Government of Nepal*, NKP 2068 (2011), No. 1, Decision no. 8536.

Rather, owing to the inherent connection between a mother and her child, the woman indeed should be undeniably given the first chance to exercise her right over her child. It is so heart wrenching to see that when the father in Nepal was never supposed to identify the mother while exercising this right, here the mother held back this right for such a long time, and as they receive it, her privacy and dignity itself is compromised.

Tracing the root cause of this prejudice, it could be assumed that the image of the civil individual - the citizen - has been constructed in the male image-in opposition to women and all that they symbolize.[9] Citizenship is awarded on blood rights-that is, fathers pass citizenship to their sons and daughters. In Nepal, as both men and women after 16, apply for a citizenship certificate, the process is relatively simple and straightforward for a young man, however, it is not so for a woman, whose application must be supported by either her father or her husband. This deepens women's dependence on male relatives, and renders them more vulnerable to discrimination and violence within the family.[10]

Particularly, the situation of single mothers who want to get the citizenship certificates issued to their children in their names needs a sensible and sensitive consideration. Their life situations and pregnancy conditions might be various: married to foreign men, raped while being in labour migration to foreign countries (usually Middle East), being victims of sexual exploitations and even fraud marriages. So far the local and district administrative units have the tendency to overlook or insensitively handle such serious concerns while those women approach them for registering the birth of or passing on citizenship to their children without male support. Hence, delegitimizing of women's concerns about their lived realities and the imposition of explanatory categories from above, reveals the dis-empowering manner in which ostensibly "democratizing" principles or objectives are actually wielded in Nepal.[11]

The right to citizenship, unrecognized as a right by the former constitution has been acknowledged, conceded and defined by the Supreme Court as a fundamental right in several rulings. Consequently, discourtesy and denial of citizenship right to eligible persons by the

[9] Carole Pateman "The Fraternal Social Contract," in John Keane (ed), *Civil Society and the State: New European Perspectives*, Verso, New York, 1988, p.122.
[10] Mona Laczo, 'Deprived of Individual identity', in Caroline Sweetman (ed), *Gender Development and Citizenship*, Oxfam Focus on Gender, 2010, p. 77.
[11] Seira Tamang, *Gender State and Citizenship in Nepal*, Degree of Doctor of Philosophy, American University, 2000, p.7.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

concerned authority ipso facto creates substantial grounds for the applicant to file a public interest litigation (PIL) in the court and seek remedy invoking the extraordinary jurisdiction of the Court.[12] In the process, the Supreme Court has rendered many landmark judgments and set noteworthy precedents with regard to citizenship in mother's name, where the offices concerned were issued directive orders to provide citizenship to the eligible applicants. Furthermore, the Ministry of Home Affairs has also issued circulars in order to implement the decisions of the Supreme Court and laws on citizenship in a similar fashion.

However, the implementation of the judgment and precedent rendered by the Court has benefited the concerned applicants only, while the doctrine of precedent that mandates the lower court to take into account the decisions laid down by the Supreme Court in cases where the facts are similar, has often not been considered by the lower courts and decision makers at the ward, municipality, and district level.[13]

Hence, from the perspective of gender jurisprudence, theoretically there have been adequately rich constitutional, legislative and precedential developments favoring citizenship in mother's name. The SC in a recent ruling in *Kristina Maharjan's* case[14] reinforced, "It is not appropriate to create uncertainty for a qualified individual (woman petitioner) to be a Nepali citizen by imposing lengthy delays for obtaining citizenship certificate for any reason or under any pretext (not having father). In case an authority with the legal duty fails, it means not only a violation of equality but also a violation of justice."

Nevertheless, the social reality speaks otherwise, thereby restricting single mothers in particular, to exercise and enjoy their citizenship right. Every time it is a hard-fought battle in the court of law.

II. Skeptical and Ambiguous Legal History of Citizenship from a Feminist Perspective

[12] Sabin Shrestha and Subin Mulmi, 'Legal Analysis of Citizenship Law of Nepal', *Forum for Women Law and Development, FWLD*, 2016, p.20.
[13] Ibid.
[14] 'Refusing to grant citizenship in name of mother is unconstitutional: SC', *myRepublica*, 24 Sep, 2023, available at https://myrepublica.nagariknetwork.com/archive/146001/Refusing-to-grant-citizenship-in-name-of-mother-is-unconstitutional:-SC, accessed on Oct 15, 2023.

The Citizenship Act enacted on May 8, 1952, for the first time formally laid down the qualifications of becoming a Nepali citizen. The Act specified that the following persons born in Nepal; persons whose father or mother was born in Nepal; and persons with permanent residence in Nepal living with their families could acquire the citizenship of Nepal.[15]

The Nepal Citizenship Act was further amended in 1964, 2006 and 2023, and similarly, Nepal has already witnessed seven constitutions, which in several ways attempted to fill the gaps in citizenship issues. However, throughout the legal and constitutional history of Nepal, women and men have had different and unequal access to citizenship rights which unfortunately still continues upto the existing constitution of 2015 AD. Hence, citizenship in Nepal is still gendered; it contradicts the concept of modern citizenship, which is propagated as inherently egalitarian, and further with the onset of modernity, it received such universal application.[16]

More specifically, gender discrimination regarding citizenship rights was quite blatant in the Constitution of 1990 AD, which stated in Article 9, Section 1 that "a person who is born after the commencement of this Constitution and whose father is a citizen of Nepal at the birth of the child shall be a citizen of Nepal by descent." Hence, the possibility of attaining citizenship through mothers, whether by descent or through naturalization, was entirely absent from the document. Even in the case of children whose parents' whereabouts were unknown, the child was presumed to be a Nepali citizen only "until the father of the child was traced" (Article 9, Section 2). The child's citizenship could then be revoked if the father was not a Nepali citizen. According to Article 9, Section 5, a foreign woman who married a man with Nepali citizenship could acquire Nepali citizenship provided that she renounces any foreign citizenship, but the reciprocal case of a foreign man marrying a Nepali woman was not addressed. Thus, while Nepali men retained the right to pass on their citizenship to both their children and their spouses, Nepali women could not pass on their citizenship to either their children or their spouses under the 1990 constitution.[17]

The decade long Maoist insurgency that ended in 2006 with the second people's movement, further pushed to destabilize old social hierarchies. It eventually culminated into an Interim

[15] Shrestha & Mulmi, (n 13), p. 1.
[16] Faulks, (n 2), p.3.
[17] Barbara Grossman Thompson & Dannah Dennis, 'Citizenship in the Name of the Mother: Nationalism, Social Exclusion, and Gender in Contemporary Nepal', *Duke University Press*, p.795, volume 25:4, 2017, p. 802.

Constitution in 2007, that apparently sought to deliver on people's aspirations, and also made it feasible for women to pass citizenship onto their children. Article 8 (2) (b) of Part 2 of the Interim Constitution stated that if father or mother of a person was a citizen of Nepal at the time of his/her birth, such person shall be a Nepalese citizen by descent. However, a prohibitory clause superseded this provision stating that persons born to Nepali mothers and foreign fathers could only acquire a naturalized citizenship certificate. This provision resulted in preventing children of single mothers and those whose fathers refused to acknowledge their relation from obtaining citizenship certificates.[18]

In 2008 AD, Nepal was declared a secular democratic republic, and after few years of deliberation, the second Constituent Assembly could promulgate the new constitution in 2015 AD. Fundamental right under Article 18 of the Constitution regarding the right to equality was assumed as a bold proclamation, a right to be exercised by all the citizens without discrimination. In Article 18 (1), it is guaranteed that all citizens shall be equal before law and nobody shall be deprived of the equal protection of law. Similarly, Article 18 (2) guarantees non-discrimination, based on gender. Similarly, Article 38 (1) (Rights of Women), declares that every woman shall have the equal lineage right without gender- based discrimination. Successor of the lineage and the right of identity based on this also fall within equal lineage right.[19]

Article 10 (1) of the constitution makes provision that no Nepali citizen shall be deprived of right to obtain citizenship and Article 11 (2) (b) further ensures that in case the father or mother of newly born has been Nepali citizen at the time of birth, the person as such shall be held Nepali citizen on the basis of descent. Article 11 (5) of the constitution guarantees that the person who is born in Nepal to a woman, who is a citizen of Nepal, has resided in Nepal and whose father is unidentified shall be provided citizenship of Nepal by descent. However, as per the provision, a mother has to declare that her husband is "unidentified" for her children to get citizenship. Thus, an in-depth analysis of the Constitution shows that these two provisions are in contradiction which further contradicts with Article 18, that guarantees the fundamental right to equality and

[18] Shrestha and Mulmi, (n 13), p. 1.
[19] *Kopila Magar v. Government of Nepal*, 2016, Writ no. 070- WO0178, cited at Compilation of Selected Decisions of The Supreme Court on Citizenship and Birth Registration, Forum for Women, Law and Development FWLD, 2021, p. 168.

non-discrimination by the state based on gender and Article 38(1) which establishes equal lineage rights for women, presumed to be a magic wand for women empowerment in Nepal.

Critiquing the discriminatory outlook the Constitution adopted towards Nepali women at large, Manjushree Thapa, a prominent Nepali author contended "not only can women not confer citizenship to their children independently of men, the children of Nepali women and foreign men will be barred from high office. No such restriction applies to the children of Nepali men married to foreign women. And Nepali men can, as ever, confer citizenship to their children independently of women".[20]

Hence, it resonates that the issue of citizenship in the context of Third World countries in the late capitalist period holds much more ambiguous and contradictory implications.[21] It is the passive "subject" and not the active "citizen" which is being created in Nepal, who is largely agency less.

However, citizenship is an active rather than passive status…it is incompatible with domination, whether the source of that domination be the state, the family, the husband, the church, the ethnic group, or any other force that seeks to deny us recognition as an autonomous individual, capable of self-governance.[22]

Being a State Party, Nepal still needs to fully domesticate the principles and provisions under Article 15 of the Universal Declaration on Human Rights 1948; Article 24 of the International Covenant on Civic and Political Rights 1966; Article 9 of the Convention on the Elimination of all Forms of Discrimination against Women 1979; and Article 7 of Convention on the Rights of the Children 1989.

III. Recent Developments around Citizenship Issues: progressive or State Patriarchy Exposed?

Nepal Citizenship (First Amendment) Act came into force on June 22, 2023 following a tumultuous legislative journey. After many trials and tribulations, finally, on May 31, 2023,

[20] Amish Raj Mulmi, 'In Nepal, men are more equal than women', *Observer Research Foundation*, July 03, available at https://www.orfonline.org/expert-speak/in-nepal-men-are-more-equal-than-women, accessed on Nov 10, 2023.
[21] Tamang (n 12), p.iii.
[22] Faulks, (n 2), p. 4.

Nepal Citizenship (First Amendment) Bill, 2079 received authentication from the President which the former President had refused twice to formalize, merely on the ground of clashing political ideologies as how to regulate citizenship issues, given the fact that it shares open border, socio-cultural ties with India.

The bill which sought to amend the 2006 Citizenship Act, was tabled in June 2018. However, it attracted widespread criticism from activists and lawmakers for its failure to address unequal provisions in the current Act. Some amendments to the Act were introduced in Parliament in 2018, but the proposed amendment turned controversial after the then Nepal Communist Party members inserted a seven-year waiting period for foreign women to acquire Nepali citizenship after marrying Nepali men. Eventually, the bill was subsequently withdrawn after protests by the Nepali Congress and Madhes-based parties against the cooling-off period. Again, a revised bill was submitted in Parliament in July 2022, which removed this period for matrimonial naturalized citizenship for women.[23]

The revised bill was passed by both the houses of Parliament, but then President Bidya Bhandari had refused to endorse the bill twice. However, President Ram Chandra Paudel who took office after the 2022 general elections, authenticated the bill in its existing form after a recommendation by the Cabinet, and a series of consultations with legal and political experts. Unfortunately, it was then followed by the filing of a writ petition not to enforce the new amendment; hearing on the same, the Supreme Court (a single bench) issued an interim order on June 4, 2023 halting its implementation. It resulted in a series of protests by stateless youths, demanding otherwise. A stateless individual even tried to self-immolate. Afterwards, the division bench of justices Ananda Mohan Bhattarai and Kumar Regmi on June 22, 2023 decided not to give continuity to the interlocutory interim order earlier issued by the single bench.[24] The amendment particularly paves the way for hundreds of thousands of Nepalis who had obtained citizenship by birth to transfer citizenship to their children by descent.

Thus, it is expected to provide some relief to around 400,000 people who have been relegated to statelessness due to restrictive citizenship rules. Likewise, the new provision now also

[23] Mulmi (n 21), para. 8.
[24] 'Top court clears way for implementation of Citizenship Act amendment', *The Kathmandu Post*, June 23, 2023, available at https://kathmandupost.com/national/2023/06/22/supreme-court-clears-the-way-for-implementation-of-amendments-to-citizenship-act, accessed on Oct 1, 2023.

allows non-resident Nepalis, except for those who live in South Asia, to acquire dual citizenship, but without the right to vote. Foreign women married to Nepali men can acquire naturalized citizenship as soon as they give up the citizenship of their country of origin, but no similar provision exists for foreign men married to Nepali women.

Children born to single Nepali mothers can now get Nepali citizenship by descent, but only if their mothers sign a declaration stating the father cannot be identified. If the declaration is proven to be false, the mother will be criminally charged. However, these rules do not apply to single Nepali fathers. A child born to a Nepali man married to a foreign woman can obtain citizenship by descent very easily, but a child born to a Nepali mother and a foreign father will only be eligible for naturalized citizenship provided the state deems it okay. A naturalized citizen is not eligible to hold any of the highest elected or appointed public offices such as the president, prime minister and chief ministers, chief justices, parliament and provincial assembly speakers, and chiefs of security bodies. Such a blatant discrimination is perpetrated on the basis of sex on the part of the state especially when the Constitution makes high promises of gender equality.

Now Nepali women are in a position to confer citizenship to their children only if they meet four conditions: They must have been born in Nepal; they must be residing in Nepal; the father of the child is either 'unidentified' or 'untraceable'; and they must officially declare that the father is 'unidentified' or 'untraceable'. This discrimination stems from what scholars have noted as the patriarchal nature of the Nepali state which fears that the women could threaten the ethnic and cultural purity of the nation. In a democratic practice, the political opposition is expected to counter such moves; nevertheless, in Nepal's case, despite widespread public criticism of the discrimination between the sexes, the legislative debate centered around the matrimonial citizenship clauses, thereby overlooking the structural inequality between the sexes. Nepali nationalists are okay with designating women as inferior citizens. That, unfortunately, is the hard reality. Hence, the citizenship amendment act paves the way for thousands of stateless Nepalis to become citizens, but women continue to be considered second-class citizens.[25]

[25] Mulmi (n 21), para. 1.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

IV. SEXISM AND MISOGYNY UNLEASHED DURING LAW-MAKING

The fact that after the bill was tabled in the House, lawmakers had registered 23 amendments to the bill itself reveals how contentious women's citizenship issues are in Nepalese society, especially when it comes to conferring citizenship in the mother's names.

In Brennan and Pateman's words, this was an ironic, and tragic, development for women since at one and the same time, and as part of the same social process, liberal individualist ideas emerged that held out a promise of freedom and equality for women, yet socio-economic changes denied that promise and reinforced patriarchy.[26] Similar fate Nepal's legislature witnessed during the new law-making phase. Pateman, in a perceptive critique of liberalism, argues that the social contract that classical liberals see as forming the basis of political authority, is in fact built upon a predetermined sexual contract. In liberalism, men are seen as political and economic actors, whereas women are seen as carers rather than citizens.[27]

Locke describes man as the 'master' of his family. Similarly, social liberals like Marshall and Green also either ignore important differences between the experiences of men and women, or seek to naturalize those differences.[28] It is clear, then, that women are not considered to be rational political agents, capable of practicing citizenship. Such patriarchal attitudes pervade liberalism and make a mockery of the alleged neutrality of the public-private divide.[29] Feminist commentators have exposed the apparent neutrality of this divide as a sham.

"Why should we issue citizenship if they can't provide evidence that the identity of the father is unknown?" Dilendra Badu, a Nepali Congress lawmaker told the committee. "How can we trust a woman's declaration that the father's identity is unknown?"[30] "We can't trust a woman's verbal declaration that the father's identity is unknown, so we have to have it on record," Badu said.

[26] Teresa Brennan & Carole Pateman, 'Mere Auxiliaries to the Commonwealth: Women and the Origins of Liberalism', *Political Studies*, volume 27: 2, 1979, p.187.
[27] Ibid.
[28] Faulks (n 2), p.59.
[29] Ibid, p.60.
[30] Tsering D Gurung, 'Debate over Nepali women's right to pass on citizenship to children reignites as House Committee holds discussions on controversial provisions' *The Kathmandu Post*, March 7, 2019, available at https://kathmandupost.com/national/2019/03/07/debate-over-nepali-womens-right-to-pass-on-citizenship-to-children-reignites-as-house-committee-holds-discussions-on-controversial-provisions, accessed on Nov 10, 2023.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

Jhapat Rawal of the Nepal Communist Party was more sexist and blatant when he said, "If a child born out of rape doesn't have to identify their father, then rape cases will increase. Children will lose their right to know their father's identity and this will also lead to women indulging in immoral acts."[31]

"Why are there so many "ifs" and "buts" attached to a woman's right to pass on citizenship to her children? Why are women of this country treated like second-class citizens?"[32] While constitutionally, a child born to a Nepali female citizen can obtain citizenship in mother's name, the law has been peppered with several conditions that make it virtually impossible to be able to get a citizenship in the mother's name.

For instance, a child born to a Nepali female citizen from marriage with a foreign citizen in Nepal may be granted naturalized citizenship, but only after producing proof that the child has not acquired the citizenship of his father's nation. However, these conditions do not exist for a child born to a Nepali male citizen from marriage with a foreign national.

Lawmaker Binda Pandey said the law's failure to recognise a woman's lineage goes against the values enshrined in Nepal's constitution. "If we are to make laws in accordance with the constitution, then we should acknowledge that both mother and father are equal in terms of lineage," said Pandey. "Just as children can easily get citizenship through their father's name, the same should be the case for mothers. Theoretically, they support gender equality, but they can't bring themselves to believe that men and women can be equal". [33]

V. CONTROVERSIES AROUND CITIZENSHIP IN MOTHER'S NAMES

A. Women Forced from Keeping Family Honour to Defending Borders

It is argued that the Nepali state's gender-discriminatory approach to citizenship is rooted in the historical, social, and geopolitical tensions between Nepal and India, especially nationalistic fears about Indian encroachment into Nepali territory and politics. Such resistance to equitable citizenship laws reflects both hegemonic Hindu patriarchal norms and a nationalist reactive

[31] Ibid.
[32] Ibid.
[33] Ibid.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

stance against Indian influence as embodied by the real and potential coupling of Nepali women and Indian men whose children would further "Indianize" Nepal. We suggest that constitutionally restricting Nepali women's right to bestow citizenship on their children is a form of policing the boundaries of the state body via policing women's bodies, especially their sexual and reproductive capabilities. [34]

Through this rhetoric, it follows that Nepali women have a responsibility to protect the borders of the nation through their reproductive choices, and that women who fail to do so have nobody but themselves to blame when their children cannot obtain citizenship. The traditional form of patriarchy required that they become submissive, limit herself to domestic chores, maintain family prestige and hence provide comfort to their male counterparts. This means women are objects to be maintained and protected. However, simultaneously, her reproductive roles are assumed so strong that if it is undermined, it could push a country's future at stake. Now, the question arises, is it entirely women's responsibility to defend the borders whereas the state's institutions can afford to remain irresponsible, ill-informed and unaccountable?

B. Laws' Failure to Recognize Women's Citizenship, Lineage, and Property Rights

The existing Constitution has guaranteed equal lineage right to women and equal rights in family matters and property under Art 38. However, the Nepalese society, social and political institutions still doubt whether women are capable to practice lineage right. This becomes evident when the local authorities often refuse to issue citizenship certificates to the children of single Nepalese women including, widows, victims of rape, or sexual exploitation, without the father's presence to support the child's application [35]. Kinship is not a mere set of moral principles but something that is rooted in material conditions. The ideology of kinship cannot be separated from property and production relations, which it governs. It also provides the principles that govern the distribution and control of resources, the formation of groups and the placement of individuals in them, and the nature of group membership.[36] Men, as individuals and owners of their property in their own persons, are assumed to be self-governing whereas women are indirectly constituted as citizens and as the dependents of the real workers, the men. They

[34] Barbara (n 18), p.2.
[35] 'Analysis of Nepalese Citizenship Laws from Gender Perspective', *National Women Commission* & *Forum for Women Law and Development,* Kathmandu p.15.
[36] Leela Dube, *Anthropological Explorations in Gender*, Sage Publications, New Delhi, 2001, p.182.

are incorporated in the public sphere, but in a very specific manner and according to patriarchal needs. Women are not expected to make the same "contribution" to the welfare state as men. The 'welfare' that women are expected to provide is that which is unpaid and takes place within the home in accordance to private tasks deemed appropriate to their sex.[37]

A number of communities in South and Southeast Asia and Africa lived by matrilineal principles of descent, inheritance and succession and were rooted in matrilineal ideology----looking for multiple sources of authority and their balancing.[38] Unilineal kinship systems have conflict inherent in them. Lakshadweep, a group of islands in the Arabian Sea off the coast of Kerala, is a fascinating instance of matrilineal ideology. Descent was traced through the mother; female links alone were recognized for membership in matrilineal group and for a right in its resources.

More specifically, it could be inferred that amendment in law including the ostensibly progressive Citizenship Act amendment mentioned above pertaining to women and the family are shown to result in a transformation from "family patriarchy" (paternal/traditional) to "state patriarchy" (fraternal/patriarchal civil society/modern). Walby has developed this point in her discussion of the transition from private to public patriarchy. In a private system of patriarchy, through their control of economic and political institutions, and as 'masters' of their families, men are able to dominate the women in their lives very effectively. With the onset of public patriarchy, the ideals of citizenship now begin to be extended to women and enhance the opportunities for women to develop separate economic and political lives. Though the public profile of women has undoubetedly increased in the twentieth century,…women still lack important rights and suffer from oppression..[39]

Rousseau in *The Social Contract* regards marriage as the foundation-stone of the civic life. In *Emile,* he writes that the entry into civic life is restricted to men only. Women and children are connected to society only indirectly through a father/husband/brother…the family is connected to society through its head, and finally when you become the head of a family, you will become a citizen of your country.[40]

[37] Tamang (n12), p.73.
[38] Analysis of Nepal's Citizenship Laws (n 36), p.182.
[39] Faulks (n 2), p. 61.
[40] Jean-Jacques Rousseau, *Emile,* Dent and Sons, London, 1972, p.370.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

C. Citizenship Praxis Undermining Motherhood

As Pateman points out, the patriarchal political meaning of 'motherhood' stems from a state's interest in the quality and quantity of its population. Therefore, the function of 'motherhood' is deemed vital for the health of the state; yet it lies outside the ambit of citizenship discussions. Somehow, "motherhood is seen as the antithesis of the duties of men and citizens."[41]

Women's roles involves the bearing, caring and rearing of children and the provision of the emotional and physical well-being of her husband; women's role is merely to reproduce the conditions necessary for the continuation of culture. The most important aspect of these tasks, according to Rousseau, is that they be undertaken in a spirit of chastity, modesty and submission.[42]

The submission of women to this role is further rationalized by the necessity of reason (of men) to govern passion (or women bodies). The basic duality in Western patriarchal society is that between masculine and feminine: culture and nature, mind and body, control and uncontrollability, power and weakness… [43] Feminism exposes oppressive hierarchical relationships, and the process of feminization, which is cultural and political rather than biological.

For citizenship to have greater meaning for women, we must address the problem of how the egalitarian values of citizenship can be translated into the personal relationships of the private sphere, and how the resources can be made available to enable women to fully participate as citizens, free from the unequal burden of care for children and other dependents.[44]

VI. LIST OF PROGRESSIVE PRECEDENTS, IGNORED AND THEN REVIVED

A. Is this not a contempt of court?

The following list of precedents set in different times favoring the issuance of citizenship in mother's name seems quite promising. However, despite constitutional guarantee and the court's

[41] Carole Pateman, 'The Disorder of Women: Women, Love and the Sense of Justice', *The University of Chicago Press Journals*, volume 91:1, 1980, p.11.
[42] Moira Gatens, *Feminism and Philosophy, Perspectives on Difference and Equality*, Indiana University, UK, 1991, p.13.
[43] Deborah L. Madsen, *Feminist Theory and Literary Practice*, Pluto Press, USA, 2000, p.123.
[44] Faulks (n 2), p.61.

ruling, the ground reality has not changed. Apart from the fact that one case law became useful in bringing forth another and some individual petitioners might have been benefited with citizenship in their mothers' names, Nepalese women in general have not developed confidence in approaching authorities to exercise this right. In a way, this could largely be presumed as a contempt of court since the Supreme Court has been persistently issuing similar judgments, yet the government stakeholders and authorities concerned paying no heed to them.

B. Nakkali Maharjan v. Office of the Prime Minister and the Cabinet of Ministers et al, 2008[45]

The Court issued a mandamus order to Kirtipur Municipality to issue citizenship recommendation letter without discrimination on the basis of gender and marital status, stating that married women also have the right to acquire citizenship through the father. Article 9(1) of the Constitution of the Kingdom of Nepal, 1990 and Section 3 of Nepal Citizenship Act, 1963 have provided that a person shall be deemed to be the citizens of Nepal by descent if his or her father or mother was a citizen of Nepal at his or her birth.

C. Ranjeet Thapa v. Government of Nepal, Office of the Prime Minister and the Cabinet of Ministers et al, 2009[46]

The Court held that persons eligible to acquire the citizenship certificate of Nepal have the right to choose whether to acquire the citizenship certificate through the address of the father or the mother.

D. Sabina Damai v. Government of Nepal, Prime Minister's Office and Cabinet of Ministers et al, 2011[47]

The Court held that the Article 8(2) of the Interim Constitution clearly stated that citizenship can be acquired through mother. Consequently, the Court ordered the District Administration Office

[45] *Nakkali Maharjan v. Office of the Prime Minister and the Cabinet of Ministers et al*, NKP 2065, No. 11, Decision no. 8035, cited at Compilation of Selected Decisions of The Supreme Court on Citizenship and Birth Registration, Forum for Women, Law and Development FWLD, 2021, p. 13.
[46] *Ranjit Thapa v. Office of PM and Council of Ministers*, NKP 2066, No. 6, Decision no. 8175, cited at Compilation of Selected Decisions of The Supreme Court on Citizenship and Birth Registration, Forum for Women, Law and Development FWLD, 2021, p. 17.
[47] *Sabina Damai v. Government of Nepal, Prime Minister's Office and Cabinet of Ministers et al*, NKP 2068, No. 2, Decision no. 8557, cited at Compilation of Selected Decisions of The Supreme Court on Citizenship and Birth Registration, Forum for Women, Law and Development FWLD, 2021, p. 45.

Dolakha to issue citizenship and also ordered the Ministry of Home Affairs to issue a circular to all the District Administration Offices of Nepal to provide citizenship certificates to persons whose mother is a Nepali citizen and the father is not traced, fulfilling the procedures laid down in Nepal Citizenship Act, 2006 and Nepal Citizenship Rules, 2006.

E. Bhola Nagarkoti et al v. Government of Nepal et al, 2014[48]

The Court stated that the Interim Constitution of Nepal in Article 8(2) has mentioned, Father *or* Mother, rather than Father *and* Mother. Consequently, this also applies to cases where the mother is a Nepali citizen and the father has, namely, disappeared. The Court thus ordered the District Administration Office of Kathmandu to issue the citizenship certificate to the Applicants.

F. Deepti Gurung v. Government of Nepal et al, 2015[49]

The Court, relying on the principle that registering the birth of a child is the duty of the state, and that this applies not just to nationals but also to foreigners, held that children of Nepali mothers and whose fathers cannot be traced, must not be denied to register their births at the relevant authorities. A mandamus was issued to the Lalitpur Sub-Metropolitan City to issue the birth registration of the daughter of the applicant.

The Special Bench also ordered not to refuse the children including the children of *Badi* (presumably lowest ranking untouchables in the Western region of Nepal practicing prostitution as a traditional profession) community, with fathers unidentified, to register their births. Local Registrars had already been given directives on January 26, 2006 AD to register births on the basis of mother's citizenship.[50]

[48] *Bhola Nagarkoti et al v. Government of Nepal et al,* Writ no. 069- WO-880, cited at Compilation of Selected Decisions of The Supreme Court on Citizenship and Birth Registration, Forum for Women, Law and Development FWLD, 2021, p. 67.
[49] *Deepti Gurung v. Government of Nepal et al*, Writ no. 070- WO0932, cited at Legal Analysis of Citizenship Law of Nepal, Forum for Women, Law and Development FWLD, 2016, p.71.
[50] Ibid. p.74.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

G. Sajda Sapkota v. Government of Nepal, 2016[51]

For the sake of obtaining citizenship through mother, an application was lodged at Kathmandu District Administration Office fulfilling the requirements under Article 8 (2) (b) of the Interim Constitution, Section 3 (1) of Nepal Citizenship Act, 2006 and Rule 3 (3) of Nepal Citizenship Rule, 2006. The unnecessary lingering by the duty bearers in the sensitive issue of citizenship wherein the petitioner's mother already possessed Nepalese citizenship (but the father had remained untraceable) was deemed unjust. A mandamus was issued in the name of the Government of Nepal to confer citizenship in mother's name without causing unnecessary hassles. It was also ordered to set up complaint hearing mechanism under the Ministry of Home Affairs to respond and monitor such complaints.[52]

H. Latest on the Scene: Kristina Maharjan's Case and the Recent Ruling[53]

Very recently, the Supreme Court (SC) has ruled that refusing to grant citizenship in the name of the mother is against the constitution, and therefore, issued a mandamus in the name of the government. A joint bench of justices Anil Kumar Sinha and Nahakul Subedi decided in favour of those who do not want to include the name of their father after providing a valid reason.

Kristina cited that her biological father had not fulfilled the responsibilities of a father and therefore, she expressed unwillingness to mention his name in her birth certificate, citizenship, and other official documents. Accordingly, as she applied, Mahalaxmi Municipality (her mother's permanent address) had denied issuing the necessary certificates. Overturning the decision of the municipality, the SC directed the Government of Nepal, Ministry of Home Affairs, and Lalitpur District Administration Office to issue a citizenship certificate to Kristina Maharjan based on descent, in accordance with Article 11 (5) of the Constitution of Nepal and Section 3(5) of the Nepal Citizenship Act of 2063 BS (first amendment, 2079 BS).[54]

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[51] *Sajda Sapkota v. Government of Nepal*, Writ no. 068-WO -0731, cited at Compilation of Selected Decisions of The Supreme Court on Citizenship and Birth Registration, Forum for Women, Law and Development FWLD, 2021, p. 97.
[52] Ibid, p.127.
[53] Bhasa Sharma, 'Refusing to grant citizenship in name of mother is unconstitutional: SC', Sep 24, 2023, available at https://myRepublica.nagariknetwork.com/news/refusing-to-grant-citizenship-in-name-of-mother-is-unconstitutional-sc/, accessed on Nov 1, 2023.
[54] Ibid, para.4.

The judgment not just provides solace to Kristina but also gives a detailed explanation of how local municipalities should provide the necessary recommendations for citizenship applications, even when individuals choose not to mention their father's name, based on the constitutional provisions and case law practices.

"It is neither fair nor reasonable to force a person who is not in physical or emotional contact or relationship to accept the child by introducing him as the father. If the state apparatus also does this, there will be no justice towards those children," the judgment reads.

VII. CITIZENSHIP IN MOTHER'S NAME: MY WILLFUL CHOICE OR STATE'S IMPOSITION WAY FORWARD

The principle of gender justice is meant to capture the nature of a very wide range of injustices based on gender …grounded in the values at the core of liberal egalitarian justice: equality of access and the good of individual choice.[55]

When publishing her book entitled "Feminine Mystique", Betty Friedan aimed to highlight what she termed the problem that has no name; Friedan claimed to identify a deep malaise among her female peers, a problem she diagnosed as based in between women's own sense of their needs and potential in life, and the feminine roles of wife and mother to which their society-husbands, doctors, experts, schools, politics and professions- consigned them. Similarly, subsequent thinkers have also named the problems at the heart of feminism in different ways: oppression, exploitation, subordination, discrimination, inequality, exclusion, sexism, misogyny, chauvinism, patriarchy and phallism. Yet all of these terms circle around a common terrain: that of the restrictions associated with women's social opportunities.[56]

Simone de Beauvoir's main concerns in *The Second Sex,* she asks, from the perspective of existential philosophy, 'what is woman?' and 'why is she defined as the Other?' Clearly from the perspective she employs, a woman cannot be defined by a changeless essence. Her second concern, 'why is woman the perpetual Other?' is the more complex one. To this she maintains that 'Otherness is a fundamental category of human thought' …the subject (man) can be posed

[55] Ishita Chatterjee, *Gender Justice and Feminist Jurisprudence*, Central Law Publications, Allahabad, 2021, p.1.
[56] Peta Bowden & Jane Mummery, *Understanding Feminism*, Rawat Publications, New Delhi, 2012, p.13.

only in being opposed-he sets himself up as the essential, as opposed to the other, the inessential, the object.[57]

Hence, to the passive feminine subjects which is more of a social construct, rather than biological distinction, choices are rarely accorded. Pateman notes "our own momentous transition from the traditional to the modern world - a transition which the contract stories encapsulate theoretically - involved a change from a traditional (paternal) form of patriarchy to a new specifically modern (or fraternal) form: patriarchal civil society.[58] Aligning with this perspective, it would not be wrong to say that Nepal as a welfare state, as of the date, in the guise of reformatory liberal ideals has, in fact maintained status-quo and inequality with discriminatory and restrictive citizenship related legal framework.

VIII. CONCLUSION

The existing situation and the cumulative effects of all those constitutional and legal developments mentioned above around women's citizenship issues definitely ignite hope amidst the Nepali women that they could see themselves not just theoretically equal to their male counterparts but practically also in some ways while acquiring citizenship and then conferring it to their children in their names. However, as Seira Tamang mentions the transition from "subject" to "citizen" is fraught with ambiguities.[59] In the past also, there have been progressive decisions for issuing citizenship in mother's names. However, it could be alleged that they were deliberately ignored citing the lack of corroborating legislation. Therefore, a lot of women could not exercise their constitutionally guaranteed rights, and at least by now, there has come some clarity while conferring citizenship in the mother's name. Such mother is required to produce an affidavit citing that the father is "unidentified", is itself ambiguous, insensitive and also reflects parochial attitudes as if this is a special right endowed out of benevolence. In fact, it hurts to see that the father in Nepal was never supposed to identify the mother while exercising this right, whereas a mother is harassed while interrogating about the whereabouts of the father of the child unnecessarily. She could be posed questions like in which situations she got pregnant and how gullible she could be for inviting trouble to herself, her children, family and society at large.

[57] Simone De Beauvoir, H.M. Parshley (ed), *The Second Sex*, Penguin, Harmondsworth, 1975, p.28.
[58] Pateman (n 10), p. 104.
[59] Tamang (n 12), p. 8.

Although constitutionally Nepalese women are guaranteed safe motherhood and reproductive health rights, equal lineage, familial and parental property rights, such verifications and cross-examinations are in fact, an infringement upon woman's identity, personality, her right to privacy and dignified life. She should be allowed free agency in doing so, and that further needs to be respected.

However, the researcher is not against protecting the nation's sovereignty by checking the influx of outsiders by promulgating strict laws, if deemed necessary and substantiated by the valid information. But it is absolutely wrong to attack the dignity of single women influenced by the xenophobic attitudes, who in fact possess Nepalese citizenship and are also constitutionally eligible to transfer citizenship to their children in their names. They could be deserted women, sexual violence victims, ambitious single mothers who just want to enjoy the motherhood without depending so much on their partners. If they are already granted equal constitutional and legal rights along with men, no authority should otherwise retain the power to abuse constitutional right and cause double victimization of women.

Going by the majority of the incidents of the single mother, they are mostly deserted wives of the immoral husbands and in such a situation, it is neither fair nor reasonable to force a person who is not in physical or emotional contact or relationship to accept the child by introducing him as the father. If the state apparatus also does this, there will be no justice towards those children. Hence, in Nepal's case, to curb existing inequality around citizenship issues, firstly it is essential to understand the gender dynamics of citizenship.

On the part of the state, it is just sufficient that she is reminded and held liable for future consequences that may arise in her children's lives relating that with property inheritance and others, in case they prefer the mother's name, but not harass her or the children with illegitimate and undignified inquiries or even impose her to sign an affidavit. Presumably, the patriarchal society may deem this a very normal demand to maintain societal values, but considering the fundamental notion of equality and egalitarianism that the Constitution rests on, this discrimination is unsettling resonating Betty Friedan's the "problem that has no name".

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

POLICING IN THE PANDEMIC: THE ROLE OF INDIAN POLICE IN MANAGEMENT OF LAW & ORDER AND ENFORCEMENT OF HUMAN RIGHTS IN INDIA DURING COVID-19

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ABSTRACT

The COVID-19 pandemic took the world by storm. Governments across the world were caught unaware and had to resort to emergency measures to combat the rapid spread of the coronavirus. The measures commonly adopted for the prevention of the Pandemic were the imposition of lockdowns and movement restrictions in several countries across the globe. India, too, imposed stringent restrictions on movement as a measure to control the spread of the virus. To impose the lockdown measures and ensure that the people are following the rules laid down for territorial mobility, the role of the Police was pivotal as well as crucial. They had to perform twin functions of securing brassbound lockdown arrangements as well as making essential and emergency services which included food, sanitation, and healthcare accessible to the common people. The primary role of the police is the regulate and maintain the law and order. The catastrophic situation required the police force to look beyond its traditional role and perform additional duties of assisting with supplies of essential goods, enforcement of mask mandates, social distancing measures and regulation of crowds in the hospitals. They ensured assistance when the patients required critical assistance in securing medical aid and life-saving equipment like oxygen cylinders. However, there were also reports of police brutality and excessive usage of force for the enforcement of public health and social measures. This paper analyses how the police performed its role in the maintenance of law and order when the COVID-19 pandemic struck India. The police performed several tasks which included the enforcement of the lockdown, ensuring access to vaccines and facilitating the access of people during health emergencies. However, there were also unfavourable aspects to the police response where

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they engaged in brutality with the general public. The paper also provides suggestions as to how the negative aspects of policing during the Pandemic can be improved in the future.

Keywords: Pandemic, Police, Lockdown, Covid-19, Law and Order.

I. INTRODUCTION

"The police are the public and the public are the police; the police being only members of the public who are paid to give full time attention to duties which are incumbent on every citizen in the interests of community welfare and existence."

-Robert Peel

The police force of India has been performing a plethora of roles during the COVID-19 pandemic as the draconian virus engulfed the country with full force. The most challenging task of the police force has been the enforcement of lockdowns. India had imposed a country-wide lockdown for multiple months in its initial response to the Pandemic. The role of the police with regard to the maintenance of law and order includes controlling the crowd, ensuring public order, investigation of criminal acts and identification of perpetrators and ensuring that the population is deterred from indulging in acts contrary to the law. This role was under immense pressure during the Covid-19 Pandemic as the role of the police was expanded beyond its ordinary functions and they also had to become facilitators in addition to enforcing the law.

The common crimes committed by people during the lockdown were disobeying quarantine requirements, not following the orders to stay at home or in the hospitals and concealing their contact history if they have been infected. Such activities necessitated police intervention. Therefore, the police force across the nation was tasked with the responsibility of imposing the lockdown measures as well as providing assistance in contact tracing. This was particularly challenging as evidenced by data from a report by *Lokniti-CSDS and Common Cause*. It found that the nature of policing was changed during the lockdown with 88% of the surveyed policemen feeling that there was a change in the nature of police compared to normal times.[1]

[1] FE Online, "Covid-19: Pandemic changed police's nature of work, relations with public" *Financial Express*, 2021*available at*: https://www.financialexpress.com/lifestyle/covid-19-pandemic-changed-polices-nature-of-work-relations-with-public/2320940/ (last visited June 19, 2022).

In the times of crisis, the Indian State also had a duty towards its citizens to fulfil their essential needs during the time of crisis. In order to fulfil this role, it turned to the police. This involved assisting the vulnerable population by providing urgent transportation to the poor and helpless, supplying essential commodities like food and medicine and providing adequate resources for relief. In some instances, the police even facilitated the ferrying of dead bodies and facilitating the last rites. For example, when a deceased lawyer died due to Covid-19, a police man performed the last rites since the family was unable to come to receive the body.[2]

Moreover, they even faced the risk of public outrage and anger. The police and the health workers have been collectively targeted by the general population during the Pandemic multiple times. They had to ensure that they kept their cool and went about doing their jobs. In one case, some members from the Nihang Community in Punja, perpetrated brutality on the police, when they were stopped the police during a routine check which was common during the Pandemic. The Police officers were attacked with swords and even a hand of one of the police officers was severed by them.[3] The police had the duty to ensure that there were no large mob gatherings during the Pandemic. However, when they attempted to disperse the crowd in Jharkhand's Godda, they were attacked by the mob and several policemen suffered injuries.[4] Despite this, the police carried out their job in an effective manner and ensured that they played a key role in the fight against the Pandemic.

A. Provisions applied to tackle the Pandemic

The only laws related to medical health emergencies such as Covid-19 were the colonial *Epidemic Diseases Act, 1897* and *Disaster Management Act, 2005*. The responsibilities were distributed between the States and the Central Government. The Police are a subject of the State Government. The State Government utilized the police force to tackle the Pandemic. The responsibilities related to *"port quarantine, inter-state migration and quarantine"* rest with the Union Government. The State Governments were responsible for *"Public Health and*

[2] Staff Reporter, "Policeman performs last rites of victim who was away from kin" *The Hindu* (New Delhi, 24 April 2021), section Delhi.
[3] India Today Web Desk, "Punjab: Weapons recovered from Gurudwara where Nihang Sikhs hid after attacking cops" *India Today*, 2020 *available at*: https://www.indiatoday.in/india/story/policeman-s-hand-chopped-off-two-others-injured-in-attack-by-nihangis-in-pun-1666075-2020-04-12 (last visited June 9, 2022).
[4] India Today Web Desk, "Police Attacked by Crowd" *India Today*, 2020 *available at*: https://www.indiatoday.in/coronavirus-outbreak/story/police-attacked-crowd-covid-jharkhand-godda-1798373-2021-05-03 (last visited June 9, 2022).

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

Sanitation." The provisions of the Acts which involved the role of the police have been discussed below.

a. Disaster Management Act, 2005

The aim of the Act was to provide a mechanism to deal with natural disasters like floods, earthquakes and cyclones. Its legislative intent is to *"provide for the effective management of disaster and for matters connected therewith or incidental thereto."* The Covid-19 Pandemic was also classified as a 'disaster' so that the provisions of the Act could be invoked to tackle it. The **National Disaster Management Plan, 2019** deals with the issues of Biological Disaster and Health Emergency extensively which was a key factor in the classification of the Covid-19 Pandemic as a *'disaster'*.

Section 34(c) of the Act empowers the district authority to *"control and restrict the entry of any person into, his movement within and departure from, a vulnerable or affected area."* Similarly, **Section 34(b)** allows the District Authority to *"control and restrict vehicular traffic to, from and within, the vulnerable or affected area."* **Section 34(m)** provides a wide scope of power as it provides that the authority may *"take such other steps as may be required or warranted to be taken in such a situation."* The movement restrictions were imposed on the general public and enforced by the police under this provision.

Chapter X of the Act provides for punishment in the cases where there is either a violation of the Provisions of the Act or an action taken by any person can be dangerous in the efforts taken against the disaster. **Section 54** of the Disaster Management Act provides that, *"Whoever makes or circulates a false alarm or warning as to disaster or its severity or magnitude, leading to panic, shall on conviction, be punishable with imprisonment which may extend to one year or with fine."* The Supreme Court in the case of ***Alakh Alok Srivastava* v. *Union of India***[5] also acknowledged that, *"**Section 54** of the Disaster Management Act can be used to keep a check on the spread of misinformation and fake news."* This was used to curb the spread of fake news and prevent misinformation which created fear to the general population.

Section 51 provides for the *"punishment for obstruction."* It provides that in case there is a person who obstructs the work of officials or employees of the Government, Disaster

[5] *Alakh Alok Srivastava* v. *Union of India*, 2020 SCC OnLine SC 345.

Management Authorities or the State or District Authority under this act or *"refuses to comply with any direction given by or on behalf of the Central Government or the State Government or the National Executive Committee or the State Executive Committee or the District Authority under this Act shall on conviction be punishable with imprisonment for a term which may extend to one year or with fine, or with both, and if such obstruction or refusal to comply with directions results in loss of lives or imminent danger thereof, shall on conviction be punishable with imprisonment for a term which may extend to two years."*

B. Accountability for Government Officials

Section 55 fixes the responsibility on the head of the concerned Government Department unless the head is able to prove that, *"the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence."* If another officer is found to have the knowledge of the offence and it had been done with his or her connivance, such officer will be deemed guilty under the offence. **Section 56** necessitates that an officer should perform his duty as per the provisions of the Act. It provides that, *"Any officer, on whom any duty has been imposed by or under this Act and who ceases or refuses to perform or withdraws himself from the duties of his office shall, unless he has obtained the express written permission of his official superior or has other lawful excuse for so doing, be punishable with imprisonment for a term which may extend to one year or with fine."*

Therefore, the Disaster Management Act, 2005 has comprehensive provisions which empower the Government and police personnel to undertake measures for countering the Pandemic of Covid-19. The police officials had to ensure that they used the provisions in an appropriate manner and provided support and assistance to the State Governments and Central Government in their fight against the Covid-19 Pandemic. Moreover, the Act also requires the police officials and the Government personnel to Act in accordance with its provisions and not take excessive measures which can compromise the rights of the citizens.

C. Epidemic Diseases Act, 1897

The Act was drafted in the colonial era with a view to *"prevent the spread of dangerous epidemic diseases."* Its main purpose is to be utilized in circumstances where an urgent response by the Government Is required when there is a rapidly spreading epidemic. The Act empowers

the State Governments and the Central Government under Section 2 and Section 2 A respectively to undertake specific measures and prescribe temporary regulations to be observed by the public or any class of persons, it deems to be necessary to prevent the outbreak of such a disease. The Act allowed Governments at both the State and the Central level to undertake the measures they deemed fir to tackle the Pandemic. This included announcement of lockdowns, quarantine measures and social distancing. The police also derived power as an institution under the control of the State Government under this Act.

D. Indian Penal Code, 1860

It is the major law consisting of penal provisions in India. It played a pivotal role in providing legal basis to the restrictions imposed during the Pandemic and the remedies which could be resorted to for tackling the same. Some section of the Indian Penal Code, 1860 which were used during the Pandemic have been discussed below. **Section 269** of the Indian Penal Code, 1860 provides that, *"Any person unlawfully or negligently commits any act that is likely to transmit the infection of any life-threatening disease and that he knows or has reason to believe to be, shall be punished with imprisonment of any kind for a period of up to six months, or with fine or both."* **Section 270** further provides that, *"Someone who malignantly commits any act that is, and that he knows or has reason to believe to be, likely to transmit the infection of any life-threatening disease shall be punished with imprisonment of any kind for a period of up to two years, or with fine, or both."*

Section 271 provides that, *"Whoever knowingly disobeys any rule made and promulgated by the Government for putting any vessel into a state of quarantine, or for regulating the intercourse of vessels in a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both."* The provisions were invoked when persons broke the quarantine or acted in violation of the mask mandates.

Covid-19 required that a number of orders be issued by public servants to mitigate its spread. Section 188 seeks to ensure that such orders are followed by the general public. It provides that, *"Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to*

promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or trends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both." In order to be prosecuted under this section, it is only required that the offender is aware of the order which has been disobeyed by him. The provisions under the **Indian Penal Code, 1860** also played a pivotal role in management during the Covid-19 Pandemic. It acted as a deterrent and also provided the grounds on which the offenders could be punished. The police had the responsibility of enforcing these provisions and undertaking measures which could serve as a deterrent. It played a commendable role during the Pandemic, some facets of which have been discussed further.

E. Provision of assistance to the vulnerable segments of the population during the Pandemic

The task of police underwent a transformation during the Pandemic. Their role changed from stringent enforcers to the ones offering compassionate services to the public. They understood their roles and duties considering the position they were in during the crisis. The police were right in the middle of the agony, misery, vulnerability and poverty brought upon by the Pandemic. Along with the medical staff, they were the only ones who faced the situation head on. The plight of the migrant workers and labourers further resulted in evoking the spirit of responsibility in the police force.

The police sought to undertake measures to address the vulnerableness faced by the migrants during the Pandemic and address the same. The police in addition to their official duties, went out of the way by facilitating feeding programs for the poor and susceptible. This was done by them through providing a channel between the community kitchens run by the governments and charities and being the means to allow distribution. They became involved with both governmental and non-governmental organisations involved in relief works. In *Manesar*, the

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

police staff prepared meals in the police station and distributed it daily to nearly 500 workers who were out of jobs as a consequence of the lockdown. The SHO of the station said that, *"We follow all Covid-19 protocols while distributing food. Also, anyone can come to the police station and collect as many food packets as needed at any hour.*[6] The Commissioner of the Gurgaon police also added as to how the police force was working round-the-clock to help people in addition to performing their regular police duties. This improved the relationship between the police and the public as they started to be seen as saviours.

II. AWARENESS DRIVE FOR THE PANDEMIC

The outbreak of the COVID-19 pandemic in 2020 presented governments and authorities worldwide with unprecedented challenges in educating their populations about the virus and its preventive measures. The police forces stepped up to this challenge by adopting creative and engaging approaches to raise awareness among the public about the pandemic. This essay explores the various strategies employed by Indian police and their effectiveness in conveying vital information during the early stages of the pandemic.

In the face of a rapidly spreading virus, traditional methods of public service announcements and awareness campaigns often struggled to reach all segments of the population effectively. Recognizing this, Indian police forces turned to unconventional methods to capture public attention and promote adherence to health protocols. One such approach involved officers donning eye-catching costumes in the shape of the coronavirus itself. This visual representation aimed to emphasize the seriousness of the virus and the need for everyone to take it seriously.[7]

Moreover, the police creatively utilized theatrical performances and skits to educate the public about COVID-19. Officers acted out scenarios illustrating the consequences of not following safety guidelines, helping people understand the risks associated with non-compliance. These performances brought a human touch to the information, making it relatable and impactful to the audience.

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[6] Bagish Jha, "Police station turns community kitchen, feeds 500 daily | Gurgaon News - Times of India" *The Times of India*, 2021*available at*: https://timesofindia.indiatimes.com/city/gurgaon/police-station-turns-community-kitchen-feeds-500-daily/articleshow/82723357.cms (last visited June 19, 2022).

[7] Shefali Anand, "India's Police Galvanize Public to Follow Lockdowns" US News, 2020 available at: https://www.usnews.com/news/best-countries/articles/2020-04-15/police-across-india-get-creative-to-educate-about-the-coronavirus-pandemic (last visited July 30, 2023).

In addition to costumes and skits, the police leveraged the power of music to spread awareness. They composed and performed catchy songs with lyrics that emphasized the importance of washing hands regularly, wearing masks, and maintaining social distancing. These songs became popular and were shared widely on social media platforms, reaching a broader audience and reinforcing the message of preventive measures.[8]

The effectiveness of these innovative initiatives in capturing public attention and fostering a sense of community responsibility was remarkable. By breaking through communication barriers, the police ensured that vital information about the pandemic reached a wider audience, transcending age, education, and socioeconomic barriers. This approach was particularly crucial in a country as diverse as India, where effective communication with various cultural and linguistic backgrounds is essential.

The contribution of law enforcement to public health education during the COVID-19 crisis highlighted the broader role that police can play beyond maintaining order and enforcing laws. Their involvement in disseminating critical information demonstrated their commitment to the well-being of the communities they serve. By taking on a proactive role in public health education, the police instilled a sense of trust and collaboration between law enforcement and the public.

III. THE POLICE ROLE IN ENFORCEMENT AND PROTECTION OF PUBLIC HEALTH DURING THE PANDEMIC

The police played a critical role in Pandemic Management by using their investigative skill and intelligence. Their expertise in forensics and investigation was significant in the process of contact tracing. The health sector did not possess sufficient resources to carry out the task at a broad scale. The police provide extra resources and help the health sector to undertake the gigantic task of health assistance with great ease.

The police force coordinated proactively at the pan-Indian level to ensure greater input into contact tracing. They even played a crucial role in helping to trace the manner of catching the

[8] *Ibid*.

infection and identification of the persons who came into contact with the infected persons. This was possible due to two reasons:

- The basic investigation skills possessed by the police as a result on the nature of their job.
- The increased ability of the Indian police in cybercrime investigation which is a result of capacity development in this field over the last two decades.

There was further usage of the ***Call Details Record (CDR) analysis*** which is related to the tracking of records of the call details of the mobile phones of the infected people. This in conjunction with other tools related to cyber forensics played a key role in the contact tracing process. Once the individuals have been traced, the police physically traced the individuals and accompanied the health staff for reaching out to such people. Further, the individuals were informed by the police of the requirement to undergo mandatory testing and quarantine. They could further be hospitalised if required.

In such situations the police and the health personnel even had to face the wrath of the identified affected persons and their families who even resorted to violent attacks at times. For example, in *Mumbai* the police faced the wrath of a mob for ensuring that the people were following lockdown restrictions. The eyewitnesses of the incidents stated that, *"A 30-member strong crowd, including two women, had gathered at the intersection, flouting lockdown restrictions. They pelted stones at the police personnel and also shouted slogans against them."* There were 412 incidents related to attack on healthcare workers out of which 128 occurred in India. A majority of such incidents were carried out by protesters, patients and their relatives, and police as per data provide by the ***Safeguarding Health in Conflict Coalition***.[9]

Such incidents further highlighted the necessity of the police personnel for ensuring their own safety and the safety of the healthcare workers and ensuring that the process is carried out in a cordial manner. The skills developed by the police in dealing with emotionally charged mobs, patience in dealing with abusive behaviours and firmly dealing with situations to effect order and compliance were used. They have to ensure compliance of the regulations while ensuring the safety of the healthcare workers and other staff. A large majority of this situation has been

[9] Christine Murray, "COVID-19: Globally, India's Health Workers Were the Most Attacked" *The Wire*, 2021*available at*: https://thewire.in/health/covid-19-globally-indias-health-workers-were-the-most-attacked (last visited June 19, 2022).

handled without retaliatory action by the police and they prioritized the use of their convincing powers. The police handled the situation using their expertise. They showcased abilities of patience, dedication and service orientation.

IV. STEPS TAKEN BY THE POLICE TO PREVENT THE SPREAD OF COVID 19

In addition to the protection of public order and ensuring safety of the personnel engaged in the Pandemic, the police played a key role on containing the spread of the Pandemic. This was done through the following steps.

A. Border Sealing

Implementing strict border controls and sealing off district boundaries constituted the initial and most crucial step. In rural districts of India, merely setting up checkpoints at external entry points is inadequate. In landlocked districts, there are several paths enabling people to traverse multiple internal village paths between them. To prevent the movement of unscreened individuals from infected regions of the states, the police identified and dug up such routes.[10]

B. Setting up of Gram-Suraksha Dals

Even with efforts to completely seal district borders, it remains challenging to entirely restrict people's access to villages within the district. To address this issue, a village-level intelligence mechanism was established, comprising the Sarpanch, the Police Patil, and the Tantamukta Adhyaksh (elected village officials). This committee promptly notified the police whenever an unscreened individual arrived in their village. Subsequently, these individuals underwent symptom testing and were placed in quarantine.[11]

C. Area Domination

Apart from managing the borders, it was crucial to impose restrictions on the interactions among people. Over a period of more than two months, the lockdown was enforced using various strategies. The police identified locations of frequent public gatherings and maintained control through fixed points and regular patrolling. Aerial surveillance with drones was employed to

[10] By Harssh A. Poddar, "Policing a Pandemic in Rural India: From Enforcement to Engagement – KENNEDY SCHOOL REVIEW" *Kennedy School Review*, 2023 *available at*: https://ksr.hkspublications.org/2023/04/26/policing-a-pandemic-in-rural-india-from-enforcement-to-engagement/ (last visited July 30, 2023).
[11] *Ibid*.

monitor the internal roads of each city. This approach allowed for coordinated patrols in areas where strict lockdown enforcement was most needed.[12]

Through these comprehensive measures, the police successfully contributed to the containment of the pandemic, safeguarding public health and ensuring the safety and well-being of India's residents. They faced a number of risks during the implementation of the measures which have further been discussed.

V. DISTINCTIVE DANGERS FACED BY THE POLICE

The police were exposed to a number of personal risks during the crisis. They faced physical assaults and were at risk of being exposed to the virus and contracting it. The risks can be classified into three categories:

A. Risk of Violence

The people who were reprimanded by the police turned violent at times which created a risk to the physical well-being of the police personnel. They were attacked using weapons and hurled stones at and abused. A police officer in Kochi suffered fractures on the skull when he stopped a person who was not wearing a mask from throwing stones at him. This led to him needing a six-hour long surgery and his movement of right hand and leg were also affected due to the incident.[13]

B. Risk of exposure

When the police carried out the task of contract tracing and quarantining the exposed and infected persons, they faced violence from the ones who do not wish to be hospitalized or quarantined as per the health protocol. Moreover, they faced the danger of contracting infection from them as well. They were not always provided with the first responder gear and the expectations of them from their job role increases their interface with the infection.

C. Risk to families

The police personnel were not only putting their lives at risk but also their families who they came in contact with daily after fieldwork. There were several instances where the virus spread to the families of the police members as well. In Delhi, out of a total police force of 80,000, there

[12] *Ibid*.
[13] Special Correspondent, "Civil police officer, who was attacked while on COVID duty, discharged from hospital" *The Hindu* (Kochi, 24 June 2021), section Kerala.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

were 1,000 police personnel who were affected by the coronavirus.[14] In *Kolkata*, there was a report of a police member and several of his family members testing positive for Covid-19.[15]

VI. PERCEPTION OF POLICE AMONGST THE GENERAL PUBLIC

The Covid-19 pandemic led to widespread lockdowns worldwide, resulting in significant governance challenges. Law enforcement agencies were given the responsibility of enforcing these restrictions, which led to negative interactions between the public and the police. A study titled 'Policing in the Covid-19 Pandemic' was conducted in ten states, including Delhi, Uttar Pradesh, Bihar, West Bengal, Andhra Pradesh, Tamil Nadu, Kerala, Karnataka, Maharashtra, and Gujarat. It was undertaken by *Lokniti-CSDS-Common Cause* and was focussed on understanding the response of the police to the Pandemic as perceived by the public. Conflict between civilians and the police was reported by one in three people (33%). Moreover, 55% of common people expressed fear of the police during the lockdowns, with concerns of being fined (57%) or subjected to police violence (55%). Additionally, the study revealed that nearly half of police personnel (49%) reported frequently using force against migrant workers attempting to return home, while one-third (33%) of police personnel prevented migrants from entering shelters with force when they were trying to do so.

However, they also discovered that 40% of the participants believed that the police showed high efficiency when it came to controlling the Pandemic. While 46% of the participants responded that they believed that the police were somewhat effective in controlling the Pandemic. There were only 11% of the people who were left unsatisfied with the response of the police. Moreover, over 65% of the participants stated that the perception of the police improved post the outbreak of the Pandemic.[16]

The positive response shows great work on the part of the police, when one considers that the police is understaffed and underfunded. The lack of strength in the police force is evidenced by the fact that more than 78% of the police personnel reported that they worked for more than 11

[14] PTI, "Nearly 1,000 Delhi Police personnel infected with Covid" *The Economic Times*, 10 January 2022.
[15] PTI, "Coronavirus | Police officer tests positive; family members, colleagues on quarantine" *The Hindu* (Kolkata, 18 April 2020), section National.
[16] Manjesh Rana, "Threat, fear were most common police tools during Covid lockdown, study finds" *ThePrint*, 2021*available at*: https://theprint.in/opinion/threat-fear-were-most-common-police-tools-during-covid-lockdown-study-finds/721616/ (last visited June 9, 2022).

hours a day in the initial phases of the lockdown. While 25% of the personnel worked over 15 hours a day and 52% of the police personnel reported '*shortage of staff*' to be a major challenge while dealing with the outbreak. Moreover, 23% of the police personnel suffered from some sort of respiratory disorder, cardiovascular diseases, hypertension and diabetes. Over 72% of such police personnel reported that they worked over 11 hours a day, which put them in a vulnerable position where they can potentially contract the virus.[17]

Their mental health was also severely impacted with 87% of the police personnel stating that they were greatly impacted by the covid centric situation. They were working non-stop with no scope of seeking any leave. This shows the monumental challenge which was present before the police and their efficiency in tackling the same. The public too was satisfied with the measures undertaken and they were able to manage the situation. A survey by CVoter tracker found that, *"While in 2018 only about 29.9 percent of respondents expressed a "lot of trust" in the police, during the COVID-19 pandemic in 2020 this figure has shot up to an overwhelming 70 percent Indians expressing the same feeling."*[18]

The police faced formidable challenges, including understaffing and long working hours, impacting their mental and physical well-being. Despite this, the public expressed satisfaction with the police measures during the pandemic, with a significant increase in trust. It indicates the resilience and dedication of law enforcement personnel during a crisis, while also highlighting the need to address their well-being. The findings can inform future crisis management strategies, improve community-police relations, and enhance public trust in the police force.

VII. POLICE VIOLENCE DURING THE PANDEMIC

The remarkable role of the police in controlling the spread of the virus has been appreciated. However, there were several instances where the police were found to be abusing their power and working against the goal of public welfare. These incidents were primarily the result of the excessive usage of force by the police. One such incident occurred on June 19, 2020, where the

[17] Manjesh Rana, "Threat, fear were most common police tools during Covid lockdown, study finds" *ThePrint,* 2021*available at*: https://theprint.in/opinion/threat-fear-were-most-common-police-tools-during-covid-lockdown-study-finds/721616/ (last visited June 9, 2022).

[18] Yashwant Deshmukh and Sutanu Guru, "COVID-19 Impact: How People's View of Police Improved Due to Virus" *The Quint,* 2020 *available at*: https://www.thequint.com/voices/opinion/coronavirus-police-survey-cvoter-covid19-popularity-opinion-poll#read-more (last visited June 19, 2022).

police took a father-son duo of shopkeepers, named Jeyaraj and Beniks for enquiry. They had opened their shop beyond the permitted hours. In the police custody, they were subject to torture and violence which resulted in their deaths.[19] This was one of the incidents which highlights the dark side of the police response during the Pandemic.

In the year 2020, the number of deaths as a result of Custodial Torture, registered by the National Human Rights Commission was ninety. The maximum prevalence of such instances was in the state of *Uttar Pradesh*.[20] In *Pune*, an ambulance driver was allegedly killed by the police through beating when he was suspected of the illegal transportation of passengers. There were even incidents where the supply of essential goods like food and services was temporarily halted due to the delivery personnel being harassed by the police.[21]

These incidents show the misuse of the discretionary power given to the police. The police have the right to make decisions to ensure the law and order of a place. However, such actions need to be measured and should not result in the infringement of the Constitutional Rights of the general public. This inconsistent usage of power results in a dent in their reputation. This makes it more difficult to seek the cooperation of the public. There was a need for the police to ensure that this image changes so they can work with the public in dealing with the Pandemic in a better way. The humanitarian interventions done by the police helped to rebuild the trust.

VIII. CONCLUSION AND SUGGESTIONS

The police personnel along with the frontline healthcare staff formed the backbone of India's response to Covid-19. They were faced with a situation they had never faced before and managed it efficiently. The burden of expectations was shouldered by them effectively and efficiently despite being greatly understaffed and lacking sufficient facilities to tackle the Pandemic. They had to face scrutiny and violence from the public and engage in several activities which they were not prepared or trained for.

[19] Arun Janardhanan, "Explained: How Tamil Nadu Police's brutal act of revenge claimed lives of a father and son" *The Indian Express*, 2020*available at*: https://indianexpress.com/article/explained/explained-tamil-nadu-police-custodial-torture-father-son-killed-thoothukudi-6479190/.
[20] NCAT, *National Campaign against Torture India: Annual Report on Torture 2020*, 2021.
[21] Abhishek Acharyya and Ashwin Jangallapali, *Policing in a Pandemic*, 2021.

The success of contact tracing and understanding transmission patterns also depended on the trust and cooperation of the public. In many cases, the police had to overcome scepticism and misinformation, working to build rapport with communities and educating them about the importance of contact tracing and following health guidelines. Their ability to navigate these challenges and build bridges of understanding was critical in gaining the public's support for pandemic response measures. They not only played the role of enforcers and regulators but also provided humanitarian assistance and showed sensitivity towards the needs of the people. There were some instances where the police personnel were involved in excessive usage of force and overusing their power. However, the police ensured that they were able to dissuade the cruel image by cooperating and assisting the general public.

The investigating abilities and powers of the police played a critical role in the Pandemic response. They were effective in contact tracing, understanding the patterns of spread and tracing of the infected and exposed persons. The efforts were carried out despite the police being understaffed and exposing themselves to great risks on an everyday basis. They were at the forefront of enforcing lockdowns, conducting checkpoints, and ensuring compliance with safety protocols. This constant exposure to the public put their health and well-being at risk, yet they continued to serve with unwavering dedication and commitment to public safety.

The following *suggestions* can be applied to dealing with Disasters in a better manner in the future.

A. Learning from Vulnerabilities:

Analysing the challenges faced during the pandemic can identify vulnerabilities in the response system. Governments should use this knowledge to build resilience and implement necessary reforms, ensuring better readiness for future crises.

B. Disaster Management and Response Schemes

There are lacunae of teams specifically dedicated to the management of the Pandemic in most States. The COVID-19 pandemic has shown the susceptibility of the human population to such events. Therefore, there is a need to build a joint team of police officers, medical personnel and

administrators who are trained to handle such situations. This will help in effective regulation along with ensuring rapid mental support.

C. Revamping the control rooms of the police

There were certain control rooms which were revamped to handle Pandemic situations. This measure can be carried out at an all-India level. The guidance as to the process of carrying out the same can be taken from the Nationwide Emergency Response System (NERS) of the Ministry of Home Affairs.[22]

D. Regular Drills and Simulations

Conducting regular disaster drills and simulations involving all stakeholders can improve response efficiency and identify areas for improvement. These exercises provide an opportunity to test response plans, evaluate strengths and weaknesses, and refine protocols for better outcomes.

E. Providing the police with greater digital capability

The police force is still using traditional methods for investigation, probation and other management functions. The integration of advanced digital technologies in the policing process can help a great deal in making their jobs more efficient and effective.

F. Stricter penalties for violence against police during Pandemics/ Outbreaks/ Epidemics

The Pandemic was a time when the police and medical staff were overburdened with work. In such scenarios, the violence against such personnel greatly hinders the fight against the Pandemic and also dissuades the personnel from performing their role to the fullest extent. The provisions were specifically made for the healthcare personnel by the amendment of the Epidemic Diseases Act, 1897, and similar amendments can also be brought forth for the police force.

[22] Ministry of Home Affairs, *Nationwide Emergency Response System (NERS) Guidelines*, 2015.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

FREE LEGAL AID AS A FUNDAMENTAL RIGHT IN INDIA: A DISTANT DREAM

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ABSTRACT

The strategy used to make sure that no one is refused access to justice because of lack of money is known as legal aid. The incorporation of Article 39-A in the Constitution has clarified doubts about the competency of the Parliament to legislate on matters related to legal aid. The Legal Service Authorities (LSA) Act, 1987 enacted in pursuance of Article 39A of the Constitution was a legislative impetus to the legal aid cause since the entitlement sweep of legislation relegates the other legislative strands of the statutory law regime of legal aid to the backdrop rendering them redundant. However, protecting the rights of the marginal poor and oppressed is a difficult task for the stakeholders. Therefore, securing basic rights became a distant dream for the vulnerable people in India. The current imperative is to concentrate on the appropriate and efficient use of existing rules rather than enacting new ones to turn legal aid from a myth in the eyes of the people into a reality. It is in this spirit that the present study through this paper has been undertaken.

Keywords: The Indian Constitution, Legal Aid, Judicial Activism, access to Justice Fundamental Rights, Governments.

I. GENERAL INTRODUCTION

The legal aid idea is not a new phenomenon in India. It is as old as the Vedic Civilization. The Indian Constitution confirms certain fundamental rights to people because those are fundamental for sustenance.[1] Utilization of justice and free legal aid as fundamental rights coming within the right of personal liberty. An essential tool is Legal aid to secure justice for the poor and underprivileged. However, due to certain social conditions providing legal to a vast segment of

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[1] The Constitution of India guarantying 'social & economic justice' and equality of status and of opportunity' emphatically provides for legal aid as part of the Fundamental Right under Article 22 (1) by declaring that no person shall be denied the right to consult, and to be defended by a legal practitioner of his" choice.

people became a huge task. We have many hurdles and problems like unprecedented population growth, abject poverty, illiteracy, myriad new legislations, delayed adjudication, etc. Thus, securing justice becomes a distant dream for the deprived, oppressed, and weaker sections of society. The notion of social justice along with equal rights protection is the hallmark of our constitutional ethics. Protecting the rights of marginal poor and oppressed is a difficult task for the stakeholders.[2] *Therefore*, securing basic rights became a distant dream for the vulnerable people in India. The Constitutional Forty Second Amendment Act, 1976 inserted Article 39A, which is mainly concerned with legal aid. The main motive for introducing the Article is to empower the government to secure social justice for weaker & poorer sections of society. The LSA Act, 1987[3] enacted in pursuance of Article 39A of the Constitution was a legislative impetus to cause legal aid since the entitlement sweep of the legislation relegates the other legislative strands of the statutory law regime of legal aid to the backdrop rendering them redundant. Thus, the statutory right to legal aid has been granted to the eligibility bracket in all Courts. For the effective realization of rights, the Act laid special emphasis on the organization of legal literacy camps to rip apart the dark curtain of ignorance among the masses about their rights under the Constitution and substantive laws including the right to legal aid.[4] Again the Act has been amended by The LSA Act (Amendment), 2002. The NALSA (National Legal Services Authority) was established as the supreme Central Authority under the Act. Meanwhile, then, legal assistance organizations were established nationwide at the levels of districts, states, union territories, and taluks.

The competence of the federal and state governments to enact laws pertaining to legal aid is so clear.[5] Article 282 of the Constitution also permits grants for public purposes, such as providing legal aid to the underprivileged, to be made by the Union or State Governments. It is important to note that one of the recommendations of the Constitution Review Committee is that Article 39-A in Part IV should be shifted to Part III as a new Article 30-B thereby making it a specified fundamental right.[6] Accordingly, since the judiciary is also a State,[7] it should be the judiciary's

[2] Dr. "Bikram Kumar das, Right to legal Aid-Some Truth, Some Myth 44(1) *Indian Bar Review* 155-56(2017).
[3] The Act was brought into force with effect from 9-11-1995 after making some Amendments by way of the Legal Services Authorities (Amendment) Act, 1994.
[4] J.S.Bisht, Right to Legal Aid: A Basic Human Right 12 *Nyaya Deep* 80-81 (2012).
[5] S.K.Sharma, Jurisprudence of Legal Aid: A Constitutional Juridical Perspective 13 *ACALR* 170 (1989).
[6] *Summary of Recommendations of the Constitution Review Committee, 2002* at 353.
[7] Mathew J in *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC" 1461.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

duty to apply the legal aid principle in its decision.

II. FREE LEGAL AID AND ITS DIMENSIONS OF IMPLEMENTATION

Offering a free legal service to the underprivileged & destitute who could not afford to find a lawyer to represent them in court, before a tribunal, or before an authority is known as legal aid. Legal aid is known to be an approach that is utilized to make sure that no one is refused access to knowledgeable counsel along with assistance because of a shortage of finances. Thus, the primary goal is to ensure that the underprivileged, marginalized, and weaker segments of society have access to equitable justice. Judge P.N. Bhagwati correctly noted in this regard that:[8]

> Legal aid entails establishing a social structure that makes the mission of administering justice easily accessible and not out of reach for those who must resort to it to enforce their legal rights. This way, the impoverished and illiterate can approach the courts and their poverty and ignorance won't prevent them from receiving justice from the courts. The impoverished and illiterate who lack access to courts ought to be able to receive legal aid. Using legal assistance does not need one to be a litigant.

Therefore, through the provision of a government funding mechanism for individuals unable to pay for legal representation, legal aid is to be made available to the underprivileged and destitute.

As per the Act, a Court might be a criminal, civil, & revenue court. It encompasses any kind of tribunal or other institution established under an existing law to perform judicial & quasi-judicial activities.[9] Advising on any legal topic as well as providing assistance in the conduction of a case or any other legal process before an authority, tribunal, or court is considered legal service under the Act.[10]

All the States have a State LSA established to conduct Lok Adalats, give legal services to the public, and implement the directives and policies of the Central Authority (NALSA). As Patron-in-Chief of the State HC, the Chief Justice leads the State LSA. The Executive Chairman of HC is chosen from

[8] Speaking "through the Legal Aid Committee formed in 1971 by the State of Gujarat on Legal Aid with its Chairman, Mr. P.N. Bhagwati along with its members, Mr. J.M. Thakore, A.G., Mr. VV Mehta, Deputy Speaker, Gujarat Vidhan Sabha, Mr. Madhavsinh F. Solanki, M.L.A, Mr. Girishbhai C. Patel, Principal, New Lal College, Ahmedabad. His Lordship answered to the question of inequality in the administration of justice between the rich and the poor.
[9] Section 2(1) (a), *Legal Service Authority Act, 1987*.
[10] Section 2(1) (c), *Legal Service Authority Act, 1987*.

among nominations made by active or retired judges. Every district establishes a District Legal Services Authority to conduct district-wide legal aid programs along with schemes. Its "ex-officio chairman is the District's District Judge. Taluk Legal Services Committees have also been created for every Taluk, Mandal, or group of Taluks & Mandals to organize the legal services offered in the Taluk and to establish Lok Adalats. Each Taluk Legal Services Committee is headed by an ex-officio Chairman, a senior Civil Judge who practices within the Committee's jurisdiction".[11]

The NALSA (Free & Competent Legal Service) Regulations, 2010 have been created by the NALSA to provide free along capable legal service. The regulation's key component is the use of senior, qualified attorneys in certain situations, such as when a person's life or liberty is in danger, in exchange for regular fees.[12] The SC of India formed the SCLSC (Supreme Court Legal Services Committee) in compliance with the LSA Act to confirm that the illiterate & poor receive free legal assistance. It is led by a SC of India judge and consists of eminent individuals appointed by India's Chief Justice. Having at least a few years of experience on record, a panel of experienced advocates hears issues before the Supreme Court on behalf of the SCLSC. Apart from this, the SCLSC employs a full-time legal consultant who visits low-income litigants in person or sends letters with legal guidance.[13]

III. ELIGIBILITY TO RECEIVE LEGAL AID AS A MATTER OF RIGHTS

The LSA Act lays forth the requirements for qualifying for legal aid. The individual needs to be (a) a member who belongs to a scheduled tribe or caste; (b) a beggar as defined by Article 23 of the Constitution, or a human trafficking victim; (c) A mother & her child (d) an individual having a disability as defined in clause (i) of the Persons having Disabilities (Equal Opportunities, Protection of Rights, and Full Participation) Act of 1995, section 2; (e) an individual experiencing unjustifiable hardship, for example being a victim of an industrial disaster, flood, earthquake, drought, ethnic violence, or caste atrocity; (f) an industrial workman: (g) in the custody, which includes detention in a juvenile home as defined by clause (1) of Section 2 of the Juvenile Justice Act, 1986, a protective home as defined by clause (g) of Section 2 of the Immoral Traffic (Prevention) Act, 1956, a psychiatric nursing home & psychiatric

[11] G. Mallikarjun, Legal Aid in India and the Judicial Contribution7 *NLR* 239-40 (2013).
[12] *Id.* at 240.
[13] *Ibid.*

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

hospital as defined by clause (g) of Section 2 of the Mental Health Act, 1987;(h) being eligible to receive free legal help if their annual income was less than Rs. 1 lakh. If the appropriate authority determines that a person has a viable case to pursue & defend, then those who meet the conditions above are qualified to receive legal services. An individual's affidavit regarding their income may be considered adequate to qualify them for legal services.[14] Apart from this provision, Lok Adalats has jurisdiction to determine disputes of the litigants in any pending cases to avoid delay and make a platform for easy dispensation of justice. Besides the Act, the higher judiciary has widened the scope for legal aid by analyzing the constitutional rights of the people.[15]

IV. JUDICIAL ACTIVISM TOWARDS FREE LEGAL AID

The Hussainara Khatoon vs. State of Bihar case provided the SC of India with a noteworthy opportunity to make a strong statement on the rights of the impoverished and indigent.[16] In this matter, the petitioner informed the SC that the majority of those still in custody had already received far worse sentences than they would have if they had been found guilty right away. Due to their poverty, the parties involved were unable to hire legal representation to defend them in court, which resulted in the delay. Consequently, the Court observed that Article 39A emphasized that having access to free legal services was vital for a reasonable, fair, and just process and that Article 21's guarantee of the right to such services inherently guaranteed such access.[17] After 2 years, in the matter of Khatri vs. the State of Bihar,[18] The right of impoverished or destitute accused people who are unable to hire attorneys to get free legal help was addressed by the Court. The decision held that the State must provide this kind of support as mandated by the Constitution not only during the trial phase but also when the suspects are initially brought in front of the magistrate or are periodically remanded. This right cannot be denied due to a lack of funding, ineffective administration, or the accused's inability to make a request. Magistrates and session judges have an obligation to inform the accused of their legal rights. According to the Constitution, the State must give an accused individual legal representation if the facts of that case and the demands of justice justify it. One essential element of a reasonable, equitable, and

[14] Legal Service Authorities Act, 1987.
[15] *Supra* note 2 at161.
[16] (1980) 1 SCC 98.
[17] G. Mallikarjun, Legal Aid in India and the Judicial Contribution 7 *NLR* 235 (2013).
[18] *Khatri v. State of Bihar*, AIR 1981 SC 262.

just process for an accused person is the right to free legal representation. This right must be interpreted as implied in Article 21's guarantee. The State cannot get out of this duty by claiming that it is administratively or financially incapable or because none of the resentful inmates requested legal representation.

In Suk Das vs. Union Territory of Arunachal Pradesh,[19] Justice P.N. Bhagwati noted that the majority of Indians living in rural parts are illiterate & unaware of the rights bestowed upon them by the law. He also stressed the requirement of raising legal knowledge in the impoverished, as they are often not aware of their rights, specifically the right to free legal aid. Even those who are literate are unaware of their legal rights and entitlements. As a result of their lack of legal knowledge, they are not seeking legal counsel or assistance from a lawyer. Furthermore, they are unable to be self-sufficient and are even unable to assist themselves due to their ignorance and illiteracy. For this reason, one of the main goals of the nation's legal aid movement's mission has always been to promote legal literacy. I would argue that even the right to education would fall short of its true purpose if individuals were not able to receive legal entitlement education, and our Constitution's guarantee that justice would be delivered to every citizen's doorstep would remain an illusion. The Indian social justice activist Justice Krishna Iyer expressed it well when he: [19]

> The Court has the implicit authority under Article 142 read with Articles 21 and 39A of the Constitution to assign counsel for an imprisoned person in order to provide full justice if the prisoner is virtually unable to exercise his or her statutory and constitutional right of appeal, including special leave to the Supreme Court for lack of legal assistance.

Furthermore, the Supreme Court ruled in Rajoo alias Ramakant vs. State of Madhya Pradesh that neither the Legal Services Authorities Act nor the Constitution distinguishes between a trial and an app in terms of giving free legal aid to a suspect party or someone taken into custody. It was the appellant's responsibility to inform the High Court if he needed legal assistance, and if so, the State should have paid for it.

[19] *M.H. Hoskot v. State of Maharashtra* (1978) 3 SCC 81.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

V. CONCLUSION

There is remarkable progress on the part of legal aid services, yet there is a vast gap between the desired goal and the task accomplished. It has near nearly four decades, but the implementation of legal aid services is not up to the mark. Huge cases are pending in the Canal aid courts that depict the story of the shortcomings of our legal aid programs. We have adequate resources and good administrative machinery, yet the problem of backlog cases indicates the failure. The justice delivery system creates problems for the poor people, and securing justice became a distant dream for undone vast. Globalization and technological advancement have brought new challenges and developed hybrid-type litigation. E-commerce and e-crimes need e-governance and e-adjudication mechanisms. Accordingly, legal aid programs require new strategies and follow-up action to mitigate the predicament of the poor and disadvantaged. The MNCs and big business houses have a heavy hand in undermining the interests and the rights of the timid millions, always found on the corridor, waiting for justice. Many of them are not aware of their rights and legal aid schemes. The complex legal system seems to them like climbing the sky, a futile attempt to grab the potential claims. The academic legal aid clinics gathered dust and failed to achieve the desired result. There is a high need for coordination among stakeholders for implementing various schemes to enrich the goal. The lawyers assigned to provide legal aid at the state cost seldom discharge the duty religiously. The fees paid to the lawyers are not always adequate to meet the incidental charges, hence the quality of legal service defeats the provision of law. Therefore, legal aid aims to make sure that the promise of the Constitution is upheld in form and spirit as well as that the weaker and marginalized society's members have equal rights to the courts. However, although Article 14 holds that free legal aid is an essential complement to the rule of law, the legal aid movement has not succeeded in realizing its motto. Additionally, social as well as structural discrimination against the poor would end when distributive justice is implemented using free legal aid as a crucial tool. Therefore, it is essential to emphasize the laws' efficient and comprehensive application that is already in place instead of drafting new legislation to make legal help in the country a truth rather than just a myth in the public eye.

Legal equality inherently entails the idea that every party involved in a legal proceeding seeking justice should have an equivalent chance to access the court & present their case. However, in most cases, the qualified attorneys assistance is required for the party proper

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

presentation case in a court of law, and access to the courts is legally dependent upon the court fees payment. Justice is rendered unfair and laws, to that extent, are ineffective when someone cannot access the legal system to have their wrongs righted or to be defended against a criminal charge.

The Law Commission of India *in*

14th Report on Reform of Judicial Administration, 1958

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

CONSECUTIVE AND CONCURRENT PUNISHMENTS: LAW AND PRACTICE

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ABSTRACT

The concept of consecutive and concurrent punishments plays a crucial role in the field of law and criminal justice. This paper examines the legal framework and practical implementation of consecutive and concurrent punishments in India. The objective of this study is to analyze the principles, policies, and considerations involved in determining whether multiple sentences should run consecutively or concurrently. It explores the underlying rationales behind these sentencing practices and their implications on offenders, victims, and the justice system as a whole. The paper delves into the historical development of consecutive and concurrent sentencing, tracing their origins and evolution through case law and statutory provisions. It investigates the various factors influencing judicial discretion in imposing these types of punishments, such as the severity of the crimes committed, the defendant's criminal history, and the need for rehabilitation. It also throws light on the need for considering mitigating and aggravating factors while exercising the judicial discretion vested in the judiciary. Furthermore, the study examines the practical challenges and controversies surrounding consecutive and concurrent sentences, including issues of proportionality, uniformity, and potential disparities in sentencing outcomes with the help of analyzing various precedents. It investigates how different jurisdictions approach these challenges and highlights noteworthy legal precedents and landmark cases that have shaped the interpretation and application of consecutive and concurrent punishments. The research draws upon a comprehensive analysis of statutory laws, judicial decisions, and scholarly literature to get a deeper understanding of the issue. Ultimately, this paper aims to contribute to the scholarly discourse on consecutive and concurrent punishments, fostering a deeper understanding of their theoretical underpinnings and practical implications. Examining the law and practice surrounding these sentencing

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Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

mechanisms offers valuable insights for policymakers, legal practitioners, and scholars seeking to enhance the fairness, effectiveness, and consistency of sentencing regimes.

I. INTRODUCTION

"In its function, the power to punish is not essentially different from that of curing or educating"[1]

Usually, there are two different types of offenders who are held guilty for more than one offence. The first are those offenders who offend on more than one occasion despite having faced criminal sanctions before and the second category consists of those offenders who have not faced criminal trial before committing more than one offence or an offender who has faced criminal trial before but is again before the court of law for committing more than one offence. In the cases of second-category offenders, the court has to pass a sentence on one occasion for more than one offence committed by the convict person.

The discretion of sentencing in India lies with the court in the line of tradition of common law and the courts enjoy wide discretion to determine the correct form of sentence on the principles of fairness and proportionality. The decision at the stage of sentencing is very complex as it has consequences in various forms for the convict, the state and the victim as well. The Supreme Court of India in the case of Dilbag Singh v. State of Punjab[2] has observed that "if too short or of the wrong type, it can deprive the law of its effectiveness…if too severe or improperly conceived, it can reinforce the criminal tendencies of the defendant[3]." In another case of State of M.P. v. Saleem @ Chamaru[4], the Supreme Court has cautioned that "if there is more sympathy than required in imposing sentencing, then the public belief in the judicial system would be undermined and also in the law's efficacy[5]". However, the Supreme Court has also observed on the other hand that there are various emotions which result in commitment to crime such as 'heat of passion' or 'hate crimes'. There are various emotions like compassion, anger, vengeance, mercy, hatred etc., which get entry in criminal trials and most of these emotions are to be considered at the time of deciding the quantum of punishment and then these factors can either

[1] Michel Foucault *in* Discipline and Punish: The Birth of the Prison (1975).
[2] 1979 SCR 2 1134.
[3] Ibid.
[4] (2005) 5 SCC 554.
[5] Ibid.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

become mitigating/extenuating factors or aggravating factors.[6]" The above observations by the Supreme Court in different cases show that the court while awarding a sentence has to seek a balance between the rights of all the parties involved in the case. The Apex court in the case of Ravi Ashok Ghumare v. State of Maharashtra,[7] has observed that "The policy of sentencing convicted persons must strike a balance between the two sides and rely upon the twin tests of (i) deterrent effect, (ii) holistic reformation for integrating the convicted person into the society."[8]

II. SENTENCING IN INDIA

Before going into the nuances of sentencing, it is important to refer to the Supreme Court observation in the case of Santa Singh v. State of Punjab[9] about the importance of balanced sentencing in the Criminal Justice System. The court observed that "Modern penology regards crime and criminal as equally material when the right sentence has to be picked out. It turns the focus not only on the crime but also on the criminal and seeks to personalise the punishment so that the reformist component is as much operative as the deterrent element."[10]In India, the Criminal Procedure Code, 1973 is the procedural law relating to criminal trial and it provides the court discretion in determining the quantum of sentence to be passed against a convict and it also grants discretion to courts to determine how multiple sentences awarded to a convict would run, i.e., 'Consecutive' or 'Concurrently'. In the Criminal Procedure Code, 1973 (hereinafter referred as CrPC 1973) there is no specific or distinct chapter for sentencing and the provisions are scattered around the CrPC, 1973.

There are two provisions related to 'consecutive' and 'concurrent' in the code which are:

1. Section 31: 'Sentence in cases of conviction of several offences at one trial'.
2. Section 427: 'Sentence of offender already sentenced for another offence'.

The Supreme Court in the case of Sharad Hiru Kolambe v. State of Maharashtra and Ors[11], while considering both the provisions observed that, "Section 31 deals with cases where a person is convicted at one trial of two or more offences…gives discretion to the court to direct running of

[6] Dinubhai Boghabhai Solanki v. State of Gujarat, (2014) 4 SCC 626.
[7] Decided on 3 October, 2019, Criminal Appeal Nos. 1488-1489 OF 2018.
[8] Ibid.
[9] (1976) 1 SCC 190.
[10] Ibid.
[11] (2018) 18 SCC 718.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

such punishments either concurrently or consecutively. Similar discretion is available in Section 427 which deals with cases where a person already undergoing a sentence is later imposed sentence in respect of an offence tried at subsequent trial.[12]"

The above provisions lay down the general rule of multiple sentences to run consecutively, unless the court awarding the sentence specifically directs otherwise i.e., the running of sentences would be concurrently. However, the Supreme Court has recently ruled in the case of Sunil Kumar @ Sudhir Kumar & Anr. v. The State of Uttar Pradesh[13] that while passing the order of sentence, the trial courts have to specifically lay down whether the sentences would run concurrently or consecutively. The court observed that "for what has been provided in Section 31(1) CrPC read with the expositions of this court, it follows that the court of first instance is under legal obligation while awarding multiple sentences to specify in clear terms as to whether they would run concurrently or consecutively."[14] The Supreme Court also emphasised that if the trial court omits to direct whether multiple sentences would run consecutively or concurrently it would cause 'unnecessary and avoidable prejudice to the parties.'

Now, a holistic reading of both provisions lays down certain situations where the discretion for 'consecutive' or 'concurrent' is exercised by courts in criminal sentencing in India and those are as follows:

SITUATION 1: Multiple Sentences are awarded to a convict at one trial, no sentence being life imprisonment.

SITUATION 2: Sentence for imprisonment or imprisonment for life awarded to a convict already undergoing sentence for another offence, the previous sentence not being life imprisonment.

SITUATION 3: Sentence for imprisonment or imprisonment for life awarded to a convict already undergoing life sentence for another offence.

[12] Ibid.
[13] Criminal Appeal No. 526 of 2021.
[14] Ibid, Para 11.

The law for the above situations has been laid down in Sections 31 and 427 of the Criminal Procedure Code, 1973. Now the above-mentioned situations are dealt with in detail below by engaging with provisions of CrPC and case laws related to the above-mentioned situations.

SITUATION 1: The situation given in this case is dealt with by Section 31(1)[15] of the CrPC, 1973. It lays down that when a convict is awarded a sentence for two or more than two offences, the multiple sentences would run consecutively, unless the court clearly directs that the multiple sentences would run concurrently.

The court in the case of Muthuramalingam and Others v. State, represented by Inspector of Police[16], observed that to attract Section 31(1), two essentials are necessary in any case, the first being, 'a person is convicted at one trial, and the second being, 'the trial is for two or more offences.'

While dealing with the discretion granted in Section 31(1) in the terms of Consecutive or Concurrent sentences, the Supreme Court in the case of Sunil Kumar @ Sudhir Kumar & Anr. v. The State of Uttar Pradesh[17] observed that "…there cannot be any straitjacket approach in the matter of exercise of such discretion by the court, but this discretion has to be judiciously exercised with the reference to the nature of the offence/s committed and the facts and circumstances of the case.[18]"

SITUATION 2: The situation given in this case is dealt by Section 427(1)[19] which lays down that that sentence for imprisonment or imprisonment for life to a person already undergoing a sentence for imprisonment would run consecutively unless the court clearly orders that the subsequent sentence would run concurrently with the previous sentence. Here again, the

[15] Code of Criminal Procedure, 1973 (Act 2 of 1974), s.31(1) reads as: "When a person is convicted at one trial of two or more offences, the court may, subject to the provision of Section 71 of the Indian Penal Code, 1860, sentence him for such offences, to the several punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently."
[16] (2016) 8 SCC 331.
[17] Criminal Appeal No. 526 of 2021.
[18] Ibid, para 102.
[19] Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 427(1) reads: "When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the court directs that the subsequent sentence shall run concurrently with such previous sentence…"

legislature has provided that the consecutive running of sentences is the general rule as discussed in **SITUATION 1**, however, the legislature has also provided the discretion to the court to direct the concurrent running of different sentences.

SITUATION 3: The situation given in this category is dealt with by Section 427 (2)[20], CrPC 1973 which lays down a rule in the case of multiple sentences being in the nature of life imprisonment and provides that if a person is already serving a sentence of life imprisonment and subsequently is awarded a life sentence for another offence, the subsequent sentence would run concurrently with the former sentence. The Supreme Court in the case of Ranjit Singh v. Union Territory of Chandigarh[21] while dealing with the meaning of the phrase, 'imprisonment for life' in the light of Section 427(2) CrPC observed that, "…earlier sentence of imprisonment for life being understood to mean as a sentence to serve the remainder of life in prison unless commuted or remitted by the appropriate authority and a person having one life span, the sentence on a subsequent conviction of imprisonment for a term of imprisonment for life can only be superimposed to the earlier life sentence and certainly not added to it since extending the life span of the offender or for that matter anyone is beyond human might." The above observation by the Supreme Court is in line with the intent of the legislature in section 427 (2), CrPC, 1973 which is that two or more than two life sentences should run concurrently and this role is an exception to the general rule that two or more than two sentences awarded to a single convict would run consecutively as given in Section 31 (1) and Section 427 (1), CrPC, 1973.

III. EXERCISE OF DISCRETION: CONSECUTIVE OR CONCURRENT SENTENCES

The above-discussed provisions of Section 31(1) and 427 (1), CrPC, 1973 provide discretion to the court while awarding a sentence for two or more than two offences and the discretion is with respect to the nature of running of multiple sentences, i.e., Concurrent and consecutive sentence. The exercise of this discretion has to be done judicially by the courts keeping in mind the facts, situation and context of the case and various mitigating factors. Now while dealing with various offences which have resulted in conviction, there can be two general sets of situations where the

[20] Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 427(2) reads: "When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence."
[21] AIR 1991 SC 2296.

exercise of discretion in awarding consecutive or concurrent sentences is to be exercised and these situations are as follows:

1. Where the various offences are resultant of a single criminal conduct.

2. Where the various offences are resultant of different criminal conduct.

Now to deal with these factual situations the Supreme Court and various High Courts of India have developed mechanisms and laid different tests to exercise discretion judicially:

A. Where the various offences are resultant of a single criminal conduct: "Single Transaction Rule".

The Supreme Court in the case of Mohd. Akhtar Hussain v. Asst. Collector of Customs,[22] laid down the test of 'Single Transaction Rule' for awarding concurrent running of sentences. The court observed that "If in a single transaction which consists of two offences under two provisions generally, consecutive sentences is a wrong practice and, in such cases, concurrent sentencing is a proper and legitimate practice. But if there are different transactions related to different offences under different provisions, then this rule does not apply."[23] The 'Single Transaction Rule' was again substantiated in the case of V. K. Bansal v. State of Haryana and Another[24] and the court observed that, "the law related to the discretion of sentencing must favour and benefit the accused in cases where the case of prosecution is based on a single transaction and it is not affected by the fact that there are different complaints have been filed in relation to the matter…"[25].

The rule of a single transaction which has been developed by courts can be said to have adopted a 'convict benefit approach' while awarding sentences as the concurrent running of different sentences reduces the total punishment awarded, which can result in earlier parole and remission of sentence for the convict.

However, this rule raises the question of how to construe the meaning of 'single transaction' and how legitimate or logical it is to award concurrent sentences for different types of offences

[22] (1998) 4 SCC 183.
[23] Ibid.
[24] (2013) 7 SCC 211.
[25] Ibid.

resulting from 'single transaction', for example, if a convicted person commits 'offence against property' (Chapter XVII, Indian Penal Code, 1860) as well as 'offence against the human body' (Chapter XVI, Indian Penal Code, 1860) in a 'single transaction'. Now if the person convicted is awarded a concurrent sentence, does it mean that the two offences committed by the convicted person have been put on equal footing in terms of criminal liability and the punishment arising out of the criminal liability?

A possible answer to the above question has been given by Andrew Ashworth[26] with 'the idea of concurrence'. The author also has laid down that the general principle is that the offences which have been committed in a 'single transaction' or 'concurrently' should receive concurrent sentences. However, the author also argues that if there is an increase in the seriousness of the multiple offences committed by concurrent conduct then the sentencing also needs to be in consecutive nature rather than concurrent. Andrew Ashworth has argued that offences which have been committed concurrently should receive concurrent sentences. However, the author also cautioned that there can be no precise concept of concurrence in time. If the different offences are followed by one another immediately, or just after one another, they can be treated as offences happening at the same time and ought to be constituted as a single transaction, however, if a single transaction is occurring for a longer duration of time, the more serious is the nature of the crime and hence the culpability. In such cases where the nature of offences is graver, the author has argued that it must be treated as "ceteris paribus" i.e., 'all things being equal', and in such cases, the serious manifestation of criminality calls for greater total sentence."[27]

So, it can be argued that though the 'single transaction rule' lays down a general criterion for concurrent punishment, depending on the certain criminal conduct, consisting of different nature of offences, there can be exceptions to this rule.

B. Where the various offences are resultant of different criminal conduct.

There can be situations where an offender may face a criminal trial only after committing multiple offences through different criminal conducts. The Supreme Court in the case of O.M.

[26] Andrew Ashworth, *Sentencing and criminal justice* 243 (Cambridge University Press, 4th edn., 2005).
[27] Andrew Ashworth, Supra, page 244.

Cherian vs. State of Kerala[28] has observed that though in cases of a single transaction, concurrent sentencing can be provided, but Section 31 of CrPC, 1973 can be used to deal with situations where multiple criminal conducts are involved. The court observed that; "…ambit of Section 31 is wide, covering not only a single transaction-based offences but also offences arising out of two or more transactions."[29] The court called for caution in sentencing done by trial courts by further observing, "…by and large, trial courts and appellate courts have invoked and exercised their discretion to issue directions for concurrent running of sentences, favouring the benefit to be given to the accused, however, whether a direction for concurrent running of sentences ought to be issued in a given case would depend upon the nature of the offence or offences committed and the facts and circumstances of the case."[30] The court pointed out that the discretion provided in provisions of CrPC has to be used judicially and no mechanical application of discretion should be done.

Apart from Supreme Court decisions allowing for consecutive sentencing to persons convicted for committing multiple offences, there is a limit on the discretion of trial court judges in terms of total punishment which can be awarded to convicted persons by the language of Section 31 of CrPC, 1973. Section 31(2) provides that in cases of consecutive sentences, the totality of punishment awarded to convicted persons has to be considered.

Section 31(2) reads: "In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:

Provided that—

(*a*) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years;
(*b*) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

[28] (2015) 2 SCC 501.
[29] Ibid.
[30] Ibid.

(*3*) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence.".

The provision of this section mandates that no convicted person can be sentenced to more than 14 years of periods in total. The use of the word 'shall' makes the provision of Section 31(2) mandatory. The proviso also provides the limit to the sentencing period power of the court as no court can pass a sentence which exceeds 'twice the amount of punishment which court is competent'.

Now, the closer scrutiny of Section 31(2) and also the general rule of 'Concurrent sentencing" points out the following observation:

1. The intention of the legislature is 'convict benefit' oriented by limiting the total punishment which can be awarded in case of consecutive sentence.

2. The same intention of the 'convict benefit' oriented approach of legislature has been approved by the judiciary through cases which laid and approved the 'general rule' of concurrent sentencing.

3. The intention of the legislature and the approach adopted by the Judiciary is in line with the concept of the Reformative Justice model which advocates for reforming the convict rather than letting the convict languish in jail for years.

IV. THE INTERESTING CASE OF MULTIPLE LIFE SENTENCES

The law regarding consecutive or concurrent sentences as formulated by the legislature and interpreted by the judiciary lays down the 'general rule' of concurrent sentences with exceptions which can be used to award consecutive sentences as well.

Now, the Section 472(2)[31] provides that when a person is already undergoing a life sentence and he is awarded a life sentence for another offence, then both life sentences would run concurrently. The use of the word 'shall' in the subclause makes the mandate of rule mandatory. There is no exception provided in this rule which can be used to award consecutive sentences in case of multiple life sentences. However, the reading of Section 31 of CrPC, 1973 suggests that

[31] *Supra Note 20.*

the courts have discretion in terms of awarding consecutive or concurrent sentences. This ambiguity in the language of the provision and different lines of interpretation used by the Supreme Court in various cases[32]led to conflicting decisions by the Supreme Court. However, in 2016, in the case of Muthuramalingam v. State[33], a five-judge bench of the Supreme Court laid down authoritative interpretation of the law and ended the ambiguity of law created by the legislature as well as by previous decisions of the Supreme Court.

To have a closer scrutiny of the decision of the Supreme Court in the case of Muthuramalingam[34], it is important to have an analysis of conflicting cases decided by smaller benches of the Supreme Court and the conflict raised by these decisions.

In the light of Section 31 (1) of the CrPC, 1973 and the fact that in case of a life sentence as punishment, the convict is imprisoned till natural death. In some cases, decided by the Supreme Court it was held that a life sentence awarded for more than one offence has to run 'consecutively' and in some cases it was held that they should run concurrently.

In 2005, the Apex court in the case of Kamalanantha v. State of Tamil Nadu[35], while dealing with the issue of two sentences of life imprisonment, ordered that both the sentences had to run consecutively, without any remission. The convicted persons were found guilty of committing the offence of rape on thirteen girls and murder of one girl and were sentenced to life imprisonment for offences under Sections 376 and 302 of IPC. The court's reasoning for allowing consecutive sentence was based on the fact that the trial courts and high courts are competent to pass imprisonment of any nature which includes 'life sentence' as well and there was no legal infirmity in Section 31 of CrPC. Now, in 2013 the Supreme Court followed the line of reasoning of Kamalanantha in the case of Sanaullah Khan v. State of Bihar[36]. The court converted the death sentence awarded by the trial court to life imprisonment. Since the convict was held guilty of three different murders, three life sentences were awarded and directed to run consecutively.

[32] Kamalanantha v. State of Tamil Nadu, (2005) 5 SCC 194; Sanaullab Khan v. State of Bihar, (2013) 3 SCC. 52; Duryodhan Rout v. State of Orissa, (2015) 2 SCC 783; O.M. Cherian @ Thankechan v. Sate of Kerala, (2015) 2 SCC 501.
[33] (2016) 8 SCC 311.
[34] Ibid.
[35] (2005) 5 SCC 194.
[36] (2013) 3 SCC 52.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

Now, the Supreme Court took a different line in two subsequent cases after the Sanaullah Khan case. In 2015, in the case of Duryodhan Rout v. State of Orissa[37], the Supreme Court again dealt with the issue of consecutive sentence when life imprisonment has been awarded. The convicts in this case were found guilty and were awarded sentences under Section 302, 376 (f) and 201 of the IPC. The Supreme Court in this case relied on the mandate of proviso (a) to Section 31(2) of CrPC which provides that in case of consecutive sentence, the total period of sentence cannot be more than 14 years. The court observed that "The proviso to sub-section (2) of Section 31 lays down the embargo whether the aggregate punishment of prisoner is for a period of longer than 14 years. Since life imprisonment means imprisonment for a complete span of life, the question of consecutive sentences in case of conviction for several offences at one trial does not arise. Therefore, in case a person is sentenced of conviction of several offences, including one that of life imprisonment, the proviso to Section 31 (2) shall come into play and consecutive sentence can be imposed."[38]

Another instance in which the Supreme Court took the opposite view of Kamalanantha and Sanaullah was the case of O.M. @ Thankechan v. State of Kerala,[39] the court observed that in instances of two or more life sentences being awarded, they have to be directed by the court to run concurrently not consecutively. The court's decision was based on the reasoning that "…since sentence of imprisonment for life means jail till the end of normal life of the convict, the sentence of imprisonment of fixed term has to necessarily run concurrently with life imprisonment."[40]

In 2016, a three-judge bench in the case of Muthuramalingam v. State[41] had to deal with various issues of sentencing where the appellant was convicted and ordered to multiple life imprisonment that would run consecutively. The court in the light of conflicting judgments on the issue involved decided to refer to a larger bench for consideration. The legal question which

[37](2015) 2 SCC 783.
[38] Ibid. para 29.
[39](2015) 2 SCC 501.
[40] Ibid, para 13.
[41](2016) 8 SCC 331.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

was referred to the larger bench was, "Whether in cases based on multiple murders, it is legally permissible for the trial court to pass an order of consecutive life sentences in a single trial?"[42]

The five-judge bench led by T.S. Thakur, CJI, said that the correct position of law would be that two or more life sentences should run concurrently and not consecutively. The court agreed with the line of reasoning followed by earlier benches in the case of Duryodhan Rout and O.M. Cherian @ Thankechan. The court referred to various judgments which have established that life imprisonment means 'imprisonment till the last breath of the convict unless commuted or remitted. The court further observed that Section 31 of CrPC has to be interpreted in the light of the above-mentioned meaning of life imprisonment and said that, "…it would be totally anomalous and irrational if any offender is made to go life imprisonment twice as it does not regard the fact that every human being have only one natural life to live, like every other living being".[43]

The court also clarified that a consecutive sentence under Section 31(1) can only be ordered when there is no life imprisonment involved in the multiple sentences as "…that is the only way one can avoid an obvious impossibility of a prisoner serving two consecutive life sentences."[44]

V. LACK OF SENTENCING GUIDELINES IN INDIA

The above analysis of various provisions of CrPC and case laws related to consecutive and concurrent sentencing shows the lack of any concrete sentencing guideline in India to be followed while exercising the discretion given to courts in CrPC, 1973. A closure scrutiny of various case laws discussed above shows that the reasoning used by courts lacks any discussion of sentencing principles or guidelines which can be used as a guiding principle for sentencing the convict persons. For example, in the case of Muthuramalingam[45], for deciding the issue of concurrent and consecutive sentencing in multiple life sentences, the court based its decision on the simple reasoning that it is absurd for a convicted person to serve imprisonment after he/she has died as the life sentence in India runs till the natural life of the convict. The court based its reasoning on Section 427 (2) of CrPC. The court should have delved deeper into sentencing

[42] Ibid.
[43] Ibid.
[44] Ibid. para 17.
[45] *Supra note 41*.

guidelines and should have scrutinized it from various perspectives such as the victim's perspective, as the focus on the victim's role and victims' perspective has increased in the criminal justice system.

The lack of sentencing guidelines in India has been highlighted by Justice S.B. Sinha in his judgement given in the case of State of Punjab v. Prem Sagar and Others[46]. By taking note of 'disparity' in sentencing practice in India, Justice S.B. Sinha observed that the legislature has not attempted to answer the question of sentencing policy and the effect it has on society. There have been various cases before superior courts which show the discrepancies and anomalies in sentencing policy. If a similar type of offence has been committed, then also the quantum of punishment varies from minimum to maximum. Even if the same sentence is being awarded by courts, the principles used by courts for sentencing is different and in cases of fine also, similar discrepancies can be noticed"[47]. The court further observed that there is the necessity of developing guiding principles for sentencing and some guidance can be taken from various foreign countries such as the USA, and the UK regarding their practice of Sentencing.

The various principles of sentencing such as proportional sentencing, deterrent sentencing or reformative sentencing are based on the general premise of awarding a sentence in case of a single offence but the cases of multiple offences by a single convicted person raise the issue of, how to incorporate these cases in the general scheme of various principals developed for sentencing single offence committed by the offender. To answer this issue, a detailed inquiry has been carried out by Andrew Ashworth in his book titled "Sentencing and Criminal Justice"[48]. [J. S.B. Sinha has referred to this book in his judgment in the case of Prem Sagar[49].] Andrew Ashworth has suggested that in cases involving multiple offences, "...a kind of overall proportionality should be maintained…the court ought to usually keep within the specified domain of sentences appropriate for more graver offence of the group for which sentence is being awarded."[50] The author has also referred to the sentencing practice in the UK and has highlighted the general principle of passing concurrent sentences in cases where multiple offences have been committed in a single transaction (similar to single transaction rule laid down

[46] (2008) 7 SCC 550.
[47] Ibid.
[48] Andrew Ashworth, *Sentencing and criminal justice* 243 (Cambridge University Press, 4th edn., 2005).
[49] *Supra Note 46*.
[50] Andrew Ashworth, *Supra Note 48*, 254.

by the Indian Court in the case of Mohd. Akhtar Hussain[51]) but there are various exceptions to this general rule in UK, mainly depending on the kind of charges put by prosecution against the accused, which is lacking in the Indian laws as well as judicial pronouncement related to consecutive or concurrent sentencing as it has been left the discretion of judges, which further raises the need of having a concrete sentencing policy as highlighted by Justice S.B. Sinha in Prem Sagar case.

VI. CONCLUSION

The above-mentioned provisions and case laws related to the subject matter show that the law and practice related to the issue of consecutive and concurrent sentencing is more or less settled. The judicial decisions have settled the laws regarding the same by incorporating principles such as 'Single Transaction", 'No Consecutive Sentences in Multiple Life Sentences' etc. The real issue lies in the reasoning used by courts in these judicial decisions as there is a lack of any scrutiny by courts regarding concrete sentencing policy in India and a wider discretion has been granted to the courts regarding the sentencing of convicts and this lack of policy was rightly noticed by Justice S. B. Sinha in Prem Sagar case. There is a need for deeper judicial scrutiny of reasons being used for sentencing in India as there is a lack of legislative effort regarding the same.

[51] *Supra Note 22*.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

RELOOKING THE TRAGEDY OF COMMONS: NEED FOR CONSERVATION, SUSTAINABLE DEVELOPMENT, AND RESOURCE MANAGEMENT

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ABSTRACT

The increase in environmental degradation at an alarming rate has called for action. The neoliberal economic policies have resulted in the exploitation and overuse of natural resources which are limited in nature The 'tragedy of commons' provides a theory of overusage and depletion of limited resources as a result of the accessibility of common resources to everyone and has disastrous implications for resources and their management such as air, water, and land which are vital to not merely human life but the ecology. The impact of economic policies on the environment calls for a change in the scope of environmental policy and development which requires a nuanced approach to the conservation and protection of the environment, in the framework and implementation of economic policies. Efficient resource management and allocation are paramount to the conservation of the environment. This paper analyses the causes and consequences of the Tragedy of Commons and highlights the interconnection between the theory of the tragedy of commons, economy, and environment, and the judiciary's role in the protection of the environment, it further necessitates the need for environmental law and studies in economic framework and policies of resource management.

I. INTRODUCTION

Environmental law is better understood as a way of managing conflicting and alternate uses of environmental resources which are scarce and limited, rather than plainly as an effort to protect the environment from harm.[1] The root of environmental problems lies in scarcity. Environmental

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[1] Todd S Aagaard, "Environmental Harms, Use Conflicts, and Neutral Baseline in Environmental Law", 60 *Duke Law Journal* 1507 (2011).

harm can be understood as the effects of the usage or misuse of resources. Resources around us are limited in nature, even when inexhaustible it takes aeons to be replenished, these resources also have various and conflicting uses, adding to the problem of scarcity. This can be only addressed by resource management to reduce and regulate conflicting interests and not merely preventing environmental harm which itself is vague and incoherent. Traditional methods of resource management, based on communal practices and informal norms, have proven to be inadequate to address the magnitude and complexity of environmental challenges arising from the common resources. Resource management and allocation are undertaken by private entities or public entities according to their ownership, both have their consequences and problems. The tremors of privatization are now felt more than ever, the race to profits has resulted in the complete destruction of resources. Public resources also face a problem of allocation, especially in situations where these resources are non-excludable for usage and are limited in nature.

A. Garett Hardin: Tragedy of Commons

Garett Hardin, in 1968 published an article named "Tragedy of Commons" explaining the bleak ramifications of the overuse of common resources. Succinctly, he argues that rational individuals pursuing self-interest, who make use of a cost-free common resource will use more than they otherwise would as they can reap all the benefits of their use while paying only a small part of the cost or no cost. This leads to overuse, depletion, and extinction of public resources.[2] Each involved in the usage of a common resource, employ their dominant strategy which is to maximize the utility of the resources, even if they agree upon mutually managing and allocating the resources, one tends to overuse to maximize their benefits. This creates a paradox in the management of these resources. Resources such as air, water, and land are available for everyone and their inability to be excluded from usage as they cannot be owned encounters this tragedy sharply than others. The Tragedy of commons reappears in the problem of pollution. Here it is not a question of taking something out of the commons but of putting something in sewage or chemical, radioactive, and heat wastes into water; noxious and dangerous fumes into the air.[3] This provides an approach to the understanding of human behaviour and its nature in the usage and destruction of nature to further their purposes.

[2] *See* Garret Hardin, "The Tragedy of Commons", 162 *Science*, 1243 (1968).
[3] *Id.*

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

B. Contemporary relevance of Tragedy of Commons

Human actions are no longer small factors in the dynamics of the ecosystems, they occupy the majority of the land on earth and with the increase in human population, it is no longer a marginal concern.[4] In the present, it is well established that every action of humans impacts the ecosystem and both are intrinsically connected with one other, the tragedies here raise concerns ranging from climate change and ecocide. Population exacerbates this situation, with an increase in population there is an increase in the need for energy. All forms of activities require energy, this energy is harnessed from a 'resource', and the rate of depletion increases with the increase of population.[5] The current economic policies promote profit maximization and growth in GDP, development of a country is understood in terms of GDP and GNP. These economic policies and frameworks must undergo a change toward sustainable growth. These economic policies have contributed to the tragedy of common, with fast-paced growth exploiting resources, especially the ones available for consumption and free of cost. The resources are used for present benefits, while the consequent loss may be suffered in the future, or by the future generation. The cost of using common resources or loss is merely shifted or shelved for the generation which may not be present yet.[6] This problem can be tackled by a framework that incentivizes sustainable practices, conservation of resources, and balance between individual rights to resources and collective responsibilities to mitigate environmental degradation. The purpose of this paper is to provide a deeper understanding of the complex relationship between environmental law and sustainable management of shared resources in the face of contemporary environmental challenges.

II. THE TRAGEDY OF COMMONS: CONSEQUENCES AND SOLUTIONS

The tragedy of common is a result of open access to resources where everyone has the right to use a resource, this creates competition over the consumption of scarce resources and has adverse consequences such as overconsumption and complete depletion of resources.[7] Since everyone has access to such resources it creates competition for the consumption of these resources, nothing short of a race to gain the most benefit from the available resource they

[4] See Oran R Young, Land use, "Environmental Change, and Sustainable Development: The Role of Institutional Diagnostics", 5 *International Journal of The Commons*, 66, 76-78 (2011).
[5] Hardin, *supra*, note 2.
[6] Gregory M. Stein, "Environmental Justice and the Tragedy of the Commons", 13 *Calif. L. Rev*. 10, 14-15 (2022)
[7] *See* Princeton University Press, *Property Rights: Cooperation Conflict and Law* 91 (Princeton University Press, New Jersey, 2003).

further have the incentive to be first to appropriate the majority of the resource units while they are abundant, and do so without due attention to the optimal usage of resources over time and consideration of patterns of demand, this aggravates the rate of depletion of resources.[8] This also results in externalities or external costs. Hardin accurately describes the problem, however, fails short in delivering a solution to this multigenerational problem resulting in climate change.

A. Pigouvian Taxes

Arthur Cecil Pigou suggested the imposition of taxes on pollution emissions[9] or the usage of resources to internalize the external effects or externalities. This is a highly popular strategy employed by various institutions and states around the world, it imposes penalties for causing pollution or environmental harm and is also acknowledged in common law and various statutes have been employed for the protection of the environment which impose similar penalties. However, this would imply a rise in the production costs of the firm or industry and also result in a rise in the price at which the product is being sold, invariably making the customers pay taxes for the pollution caused by these industries.

B. Property Rights

Defining and enforcing of property rights is a popular approach to mollify the phenomenon of the Tragedy of Commons. The holder of exclusive and non-transferrable property rights would refrain from the mismanagement of resources as it would result in endangering their property or possession. They are also incentivized to protect and maintain their property, if not would result in a reduction of the value or price of the property when they seek to transfer it. This would result in the internalization of social and private costs. They would prefer to send the pollution onto somebody else's property instead of polluting their land or water, this results in externalities where someone else faces the consequences of the pollution.[10] Further, resources such as air and water, which can be accessed by anyone a common resource and cannot be excluded from usage. Where the common problem stems from air pollution, water pollution, or other ecosystem

[8] *Id.*
[9] *See* A.C. Pigou, *The Economics of Welfare* (Macmillian and Co., New York, 1932).
[10] James E. Krier, *"The Tragedy of the Commons Part Two"*, 15 *Harv. J. L. & Pub. Pol'y* 325, 327 (1992).

impacts, the externality affects some physical space, the dimensions and contours of which cannot be altered by the drawing of property boundaries.[11]

C. Ronald Coase's Private Bargaining

Ronald Coase provides a theory of private bargaining that reduces transaction costs this results in optimal pollution and the tragedy of common will be averted.[12] Coase further suggests the damage is a result of the action of both the damaged and the damaging party. Coase's analysis focuses on the comparative value of the competing interests and suggests solving the problem of externalities, property rights must be ensured to the party that adds the most to the social value of the output produced. However, the calculation of these values becomes difficult as the market price is always not equal to its equilibrium price and may not reflect the opportunity cost.

D. Environmental Trading Markets

Environmental trading markets have emerged as another solution, introduced by J.H Dales. According to this theory, the government prohibits certain activities in the absence of a permit issued by the government. The government sets a ceiling for resource exploitation or pollution by such permit holders. The method of distribution of such permits may vary and they are tradable permits. Hence it creates a market for environment trading.[13] At the core of these solutions lies resource management which provides various methods and strategies for resource management. Environmental issues can be tackled by efficient resource management.

III. THE TRAGEDY OF COMMONS AT A GLOBAL SCALE

Global Commons such as the atmosphere, high seas, water bodies, and outer space which are not under any nation or group of nations are for every nation's benefit and they share a common interest.[14] Applying the principle of the tragedy of commons to the global commons helps us understand global concerns such as ozone depletion, climate change, deforestation, and extinction of species in light of the tragedy of commons and the depletion and overuse of global

[11] *See* Eric T. Freyfogle, *Bounded People, Boundless Lands: Envisioning a New Land Ethic* 3-16 (Island Press, Washington DC, 1998).
[12] *See* Dan Usher, "The Coase Theorem Is Tautological, Incoherent or Wrong", 61 *Econ. Letters* 3, 4 (1998).
[13] *See* Terry L. Anderson, Donald R. Leal, et. al., *Free Market Environmentalism* 27-35 (Macmillian and Co., New York 2001).
[14] Jeffrey L. Dunoff, "Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?", 49 *Wash. & Lee L. Rev*. 1407, 1408 (1992).

commons occurs at an exacerbated rate as these commons lack regulation and oversight, liability for its pollution, and protection becomes cumbersome. The increase in the concentration of greenhouse gases has resulted in ozone depletion, global warming, and climate change. This has disastrous consequences such as permanent inundation of lowlands and increased flooding, rising sea levels that could cause accelerated soil erosion and infertility, increased salinity of limited freshwater sources and threats to man-made structures and infrastructure, and threats to food security. Various multilateral treaties have been entered to protect environmental interests such as the UNCED for cutting national emissions of greenhouse gases, the Montreal Protocol, and the Paris Agreement to address these global issues. These treaties lack enforcement and have failed to protect the environment at economic costs. A conceptual framework that permits and constrains international trade must be harmonized with environmental interests.[15] This can avert the Tragedy of commons at a global scale.

IV. THE ECONOMY AND THE ENVIRONMENT

In the current economic policies natural resources are considered as 'inputs', these natural resources face the problem of scarcity and the economic agents decide their ends.[16] These policies lack foresight in consideration of their impacts on the environment, resulting in inefficient resource management. This is aggravated when the natural resources are available for free to everyone which leads to the tragedy of commons. Environment quality depends on the aggregate decision of these economic agents who weigh the benefits of increasing their production and consumption against the benefits enjoyed when the quality of the environment is better. The tragedy of the commons reflects the close-knit connection between economic policies and their impact on the environment. The tragedy of the commons arises when these individual economic agents overconsume natural resources for the benefit of production at the cost of the environment. The environment provides free inputs to production such as air, water, and other natural resources without which the economy would not sustain and which are open to consumption, and as a result, the production gives out externalities which include pollution, overconsumption, etc. These costs are underestimated or ignored as apart from the private costs and costs of input production including externalities or external diseconomies. Hence the

[15] *Id*. at 1422-1423. Jeffery Dunoff.
[16] Frank J. Dietz, Jan van der Straaten, "Rethinking Environmental Economics: Missing Links between Economic Theory and Environmental Policy", 26 *Journal of Economic Issues* 27, 29 (1992).

solution lies in decreasing these externalities. Ecological disasters and environmental degradation could also result from a lack of insight into ecological relations among the aggregate individual agents and make decisions that might impact the environment adversely. The lack of information on individual preferences in the usage of natural resources could also lead to failure in the optimal allocation of resources. An increase in production results in the degradation of the economy however if it is accompanied by technological change that results in the mitigation of environmental degradation can result in the reduction of externalities. In light of the same, the concept of a green economy was introduced, which aims to strike a balance between economic growth and environmental risks and scarcities.[17] This is achieved by reducing carbon emissions, enhancing resource efficiency, and avoiding loss of biodiversity and ecological systems. This also must ensure that unlike the current calculation of GDP which fails to consider the externalities, the GDP must include the environmental impact of production.[18] It also must include a relook towards growth or green growth which implies analyzing and evaluating the existing growth models and strategies based on their impact on the environment. Not only does the economy have an impact on the environment but it works the other way around, environment degradation as a result of the tragedy of commons could lead to the reduction of GDP, and lower standards of living as lower GDP implies lower income, and inflation in prices of basic commodity as the production becomes costlier when the cost is transferred to the consumers. These policies can also check the scarcity of resources. Economic development should not take place at the cost of the ecology or by environmental destruction and violation it is also necessary that efforts to preserve the economy must not hamper economic development.[19]

V. THE TRAGEDY OF COMMONS AND CONSERVATION AND SUSTAINABLE DEVELOPMENT

Conservation is not limited to protection and development but must go towards restoration and innovation. This results in not only the protection of resources but also the reversal of the Tragedy of the Commons through innovative strategies and measures. Conservation also requires

[17] Doreen Fedrigo-Fazio, Patrick ten Brink, "Green Economy: What do we Mean by Green Economy?", *UNEP Division of Communications and Public Information* 4-5 (May 2012).
[18] Surya Bhakta Pokharel, Bishnu Prasad Bhandari, "Green GDP: Sustainable Development", *The Himalayan Times* (May 05, 2017).
[19] *Indian Council for Enviro- Legal Action v Union of India and Others*, (1996) 5 SCC 281.

collective action if it fails to meet its purpose, the reduction in the use of one resource will trigger the increased usage of another resource which is perceived as an alternative that is also modulated by scarcity. The usage of the alternative resource might also end up creating further social and private costs. The problem with conservation is that until a resource is completely prohibited from usage it will be consumed and exploited.[20] Conservation is intrinsically linked with growth. Resources are used and utilized to further growth and development. These natural resources are utilized for growth and development. To preserve and promote development the idea of sustainable development was proposed which sought to inculcate a strategy of growth such that current needs can be sated, without jeopardizing the needs of future generations. Conservation is integral to sustainable development. Sustainable development appears idealistic by bridging the gap between conservation as well as growth however it necessitates the need for estimating the amount of a particular resource available to us, based upon which usage can be determined. Natural resources can rarely be calculated with mathematical precision to arrive at a plausible amount of resources to be used at present and resources that must be stored or preserved for future use.[21] The preferences of the future generation regarding the natural resources that are essential to them are also known, making sustainable development harder to achieve. The impact of the uses of resources even alternative resources is unknown which exacerbates the situation.

VI. JUDICIARY AND ITS ROLE IN AVERTING THE TRAGEDY OF COMMONS

The Indian judiciary has played a crucial role in the development of environmental law and has taken steps to protect the environment from a multitude of exploitation. The environment as a whole has been susceptible to the Tragedy of Commons, in many instances the court has taken a step towards conservation and reversal of the damage caused.

A. Precautionary Principle

The tragedy of the commons is a result of a lack of foresight to act judiciously in the usage of resources. The precautionary principle is an ideal principle that espouses precautions and preventive measures for the protection of the environment and resources. It states scientific

[20] *See* James L. Olmsted, "Paradoxical Conservation and the Tragedy of Multiple Commons", 22 *Tul. Envtl*. L.J. 103, 113-118 (2008).
[21] *Id.*

uncertainty on a matter should not be used as a reason for failure to take preventive action. It protects and seeks to prevent the violation of ecological rights. This is used in environmental matters as it is easier and more economical to prevent unforeseen environmental disasters than remedy them.

In Vellore Citizens Welfare Forum v. U[22], the court emphasized the need for sustainable development. The case also alluded to the importance of a balance between economic interest and protecting the climate. It failed to recognize the nuanced impact of economic interest on the climate and thought economic improvement was of great importance. The Supreme Court reassessed the precautionary principle in AP Control Pollution Board v. Prof M V Nayadu,[23] the court emphasized the importance of taking preventive measures by foreseeing the damage against natural forces even when the risk is uncertain and even in the absence of logical conviction. The precautionary principle also upholds the conservation and usage of resources cautiously it further prevents the Tragedy of Commons before it is too late by taking effective preventive measures to protect the environment.

The precautionary principle and the tragedy of commons is a complex and significant, both principles address critical aspects of decision-making in situations where shared or common resources are at stake. These two principles promote conservation and the usage of resources cautiously emphasising the need to prevent the Tragedy of Commons before it is too late by taking effective preventive measures in protecting the environment. By placing restrictions on resource use, even in the absence of complete scientific certainty, societies can avoid reaching a critical tipping point where resource depletion becomes irreversible. The Precautionary Principle seeks to prevent the overuse of common resources; however, rational decisions are taken by a cost-benefit analysis. While applying this analysis, the cost of preventing overuse becomes much greater than the benefit derived from it for an individual as the benefits are spread across society. This was because they would overuse for their self-interest rather than seeking to prevent overuse for the greater good of society.

[22] *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647.
[23] *AP Control Pollution Board vs. Prof M V Nayadu*, (2001) 2 SCC 62.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

B. Polluter Pays

The Polluter Pays Principle is a well-known principle and is widely applied to remedy environmental damage. This principle was also opined by the economist A.C Pigou as a remedy for the tragedy of commons and suggested pollution taxes as a remedy to internalize the external costs. The costs here refer to the social cost of negative externalities.[24] This principle was also adopted by the Rio Declaration on Environment and Development in 1992 for the protection of the environment, principle 16 of this declaration states "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."[25] This principle holds the person/organization/industry responsible and accountable for the damage caused and compensates for not only the damage but also the cost of repairing and rehabilitating.

In India this principle is applied through various precedents, it was upheld by the Supreme Court in the Oleum gas leak case[26], the gas leak in Sriram Food and Fertilizer affected the crowded surroundings and people around the factory causing temporary and permanent injury. The principle of strict liability was used to hold the industry accountable for its negligence and the damage caused to the environment and the people. In Indian Council for Enviro - Legal Action v. Union of India, where several industries located in Bicchri village were manufacturing harmful and toxic chemicals, the Supreme Court held, "Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on".

Applying the polluter pays principle to the tragedy of the commons can result in effective solutions for shared resource management. When individuals or industries that contribute to resource degradation are held financially accountable for their actions, the economic incentives shift. The polluter again looks at a cost-benefit analysis to determine the cost of not polluting. Those who might otherwise exploit resources excessively now have the motivation to use them

[24] *See* A.C. Pigou, *The Economics of Welfare* (Macmillian and Co., New York, 1932).
[25] Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M 874 (192).
[26] *MC Mehta v. Union of India* (1987) 1 SCC 395.

sustainably to avoid incurring extra costs. This alignment of incentives helps prevent the tragedy of the commons scenario from unfolding. While this principle is practical and suitable to remedy damages it fails to prevent and protect the environment and provide an efficient deterrent. To avert the Tragedy of the Commons it not only requires damages and compensation but rehabilitation and preventive measures. Where millions of people are affected and irreparable damage is caused to the environment, an effective mechanism for calculation of the damages and steps for rehabilitation must be ensured and the reoccurrence of such incidents must be prevented.

C. The Doctrine of Absolute Liability

The doctrine of absolute liability stems from strict liability but does away with its exceptions. In Rylands v. Fletcher[27], the doctrine of strict liability was upheld which holds a person liable for the damages caused by something likely to cause harm if it escapes, and such a thing is brought or accumulated by the person. This principle is subject to exceptions and was misused by many industries and individuals. To do away with such practices, in M.C Mehta v. Union of India[28], the oleum gas leak case, the Supreme Court rejected strict liability and introduced absolute liability to ensure accountability in a highly industrialized society. In Union Carbide Corporation v. Union of India[29], the court upheld the doctrine of absolute liability to hold UCC absolutely accountable for damages and for the cost of rehabilitation caused by the MIC gas leakage in Bhopal which led to the destruction of the environment and human life in Bhopal. The doctrine of absolute liability averts the tragedy of commons by not merely acting as a remedy but also as a deterrent since it does away with all exceptions and holds any person completely accountable ensuring individuals and industries are cautious.

The doctrine of absolute liability and tragedy of commons has the objective of balancing individual interests with collective well-being. The tragedy of Commons warns against the dangers of unchecked resource exploitation, while the doctrine of absolute liability emphasizes accountability and the necessity of preventing harm. When the unchecked behaviour of individuals contributing to resource depletion is held strictly liable for the harm caused, it can act

[27] *Indian Council for Enviro - Legal Action v. Union of India*, (2000) 2 SCC 293.
[28] *Rylands v. Fletcher*, (1868) 3 HL 330.
[29] *Union Carbide Corporation v. Union of India*, (1989) 2 SCC 540.

as a deterrent against overuse. The potential financial repercussions of resource exploitation align to prevent the tragedy of commons, as individuals become more cautious about their actions to avoid liability. This could also work the other way round, while holding individuals liable for their actions without any exceptions, they might take a risk and conduct their activity in such a fashion, that it yields them more benefit than the cost incurred by the consequences of their action, they become risk loving.

D. Public Trust Doctrine

Natural resources which cannot self-regenerate or have substitutes by man are guarded by the government, it also has a high duty of care and responsibility towards these resources. It also serves as a tool for effective state management of natural resources which has the potential to provide a solution for the tragedy of commons by allocating and utilizing resources efficiently to avoid overuse and exploitation by the public. The state has a duty to preserve this property and must act in good faith and prudently and they must preserve and defend their action against the trust.

The problem of competition in the consumption of resources can also be addressed when the state acts as a fiduciary in handling these resources. It was examined by the court in M.C. Mehta v. Kamal Nath,[30] where Span Motels Private Limited Owned Span Resorts in the Kullu-Manali Valley and diverted the flow of river *Beas* around their motel. This doctrine was utilized to protect natural resources and maintain and restore their inherent condition. It held the State is the trustee of all natural resources and has a duty to protect these resources from private action leading to destruction and exploitation of these natural resources and the public at large was the beneficiary of these natural resources.

When resources are considered public trust assets, governments and regulatory bodies have a legal obligation to oversee their use, prevent overexploitation, and prioritize long-term sustainability. By embedding the public trust doctrine into resource management, and ensuring the accountability of the government and regulatory bodies in the usage and safeguarding of such trust assets, societies can align their actions to prevent the tragedy of commons. In the tragedy of the commons, where situations where shared resources are at risk of overuse and degradation, the

[30] *M.C. Mehta v. Kamal Nath*, (1999) 1 SCC 702.

public trust doctrine provides a legal framework for intervention. By recognizing certain resources as belonging to the public and requiring careful management, this doctrine addresses the potential for tragedy by preventing the unchecked exploitation that can lead to resource exhaustion and imposing safeguards on these trust assets. This way, society can recognize that certain resources are held in trust by the government for the greater good of all.

E. Sustainable Development and Inter-generational Equity Principle

The intergenerational equity principle acts as a legal instrument for the promotion of sustainable development, environmental protection, and resource utilization. This protects interests and rights in regard to natural resources and preserves them for current and future generations. It also ensures fairness in the utilization of resources between all human generations past, present, and future. The supreme court in the State of Himachal Pradesh v. Ganesh Wood Products,[31] The Supreme Court prohibited the establishment of factories that procured their raw materials by felling khair trees, which would have had an adverse impact on the ecology and environment. It held the present generation has no right to interfere with the safety of the future generations.

The principles of sustainable development and intergenerational equity to the tragedy of the commons can yield effective strategies for resource management. By promoting sustainable practices and policies, societies can address the drivers of the tragedy of the commons, unchecked individual actions and ensure that resources are used in ways that benefit both the current and future generations. Regulatory frameworks, technological innovations, and public awareness campaigns can all contribute to the goal of sustainable resource management. In situations where shared resources are at risk of overuse and depletion, the potential consequences extend beyond the present generation. Unchecked resource exploitation can lead to environmental degradation and resource scarcity, impacting the quality of life for future generations. The principles of sustainable development and intergenerational equity provide a framework for addressing these concerns and aligning present actions with long-term goals. However, the ambiguity in the understanding of sustainable development and the lack of economic and financial incentives may not yield the envisaged results. People driven by their self-interest may still be incentivised to overuse the resources for their self-interest rather than preserve them for the future.

[31] *State of Himachal Pradesh v. Ganesh Wood Products*, (1995) 6 SCC 363.

VII. CONSTITUTION IN PROMOTING CONSERVATION AND PROTECTION OF THE ENVIRONMENT

Rights play a major role in regulating human behaviour. The same can be used as a measure to mitigate the Tragedy of the Commons which is a result of a lack of restraint on human behaviour. Apart from the slew of legislation for the protection of the environment and biodiversity, in India the constitution guarantees and provides various rights for the protection of the environment. These provisions relate to fundamental rights as well as directive principles of state policies. Article 48A[32] states "State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country...". Article 51A(g)[33] provides "the duty of every citizen... to protect and improve the natural environment including forests, lakes, rivers, and wildlife, and to have compassion for living creatures...". However, their inclusion in the DPSP makes them a policy directive and is not enforceable. The judiciary has played a major role in the interpretation of fundamental rights as environmental rights giving them an enforceable nature. The judiciary has interpreted Article 21, the right to life and liberty in the widest scope, this also included the protection of the environment and the right to a clean environment. In Subhash Kumar v. State of Bihar[34] The Supreme Court held Article 21 includes the right to a pollution-free water, air, and environment to live a wholesome and fullest life. However, this has not transformed into a right that also ensures the rehabilitation of the environment and the prevention of depletion and destruction of the environment but acts as a remedy or measure after the actions have faced their trajectory.

VIII. CONCLUSION

Garret Hardin's theory of the tragedy of commons is no longer a precautionary tale but a problem affecting the environment, and ecology at a large scale. India is more susceptible to this phenomenon with the staggering increase in the population, as per the 2011 census India's population density was at 382 per sq. km and it has increased ever since according to recent

[32] The Constitution of India, arts. 48.
[33] The Constitution of India, arts. 51.
[34] *Subhash Kumar v. State of Bihar*, (1991) SCC 598.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

estimates by the World Bank India's population density in 2020 was 470 sq km.[35] This makes India more vulnerable to the phenomenon of the tragedy of commons resulting in the depletion of natural resources and other externalities. The entire globe is connected by sensitive networks hence the tragedy of commons is no longer a national phenomenon but also a global phenomenon. To overcome these externalities various economists have given theories including Pigou's pollution taxes, Coase's property rights, and private bargaining, environmental trading markets Dales. All of these are sound theories involving various measures and structures for resource management; however, they are cumbersome to efficiently implement and have certain gaps when it comes to practical application. To overcome the tragedy of commons and prevent further degradation and destruction it is necessary to take immediate steps towards conservation and sustainable development. Economics and the environment are both interlinked, one affecting the other, and we must preserve and ensure growth in both. There is a growing need for environmental law in the economic analysis and framework and policy and economic analysis in the development of environmental law. Development must not take place at the cost of the environment and conservation of the environment must not lead to a decline in economic growth. The judiciary has played a vital role in the development and protection of environmental law and also in the management of resources to prevent their depletion and degradation and has given effect to various principles and doctrines including the polluter pays, precautionary principle, the doctrine of absolute liability, the public trust doctrine and the inter-generational equity principle. Collective action and also political support for environmental protection will go a long way in conservation. Resource management must ensure a balance between conservation goals, and commercial, recreational, and other uses of public resources without putting them at risk of depletion and this would lead to a healthier and greener future.

[35] The World Bank, *available at*: https://data.worldbank.org/indicator/SP.POP.TOTL?locations=IN (last visited July 27, 2023).

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

ENERGY SECURITY IN INDIA: A CALL FOR REGULATING AND MAINSTREAMING RENEWABLE ENERGY

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ABSTRACT

Energy is considered the backbone of the economy of modern times which also has a considerable impact on the Indian economy in the context of its energy security. The balance of a sustainable environment and efficient energy sources particularly needs to focus towards conventional sources of energy usage and the development of alternative energy sources. Coal has been the most significant fossil fuel in domestic production contribution amidst the high carbon emission level of India[1] and can be designated a double-edged sword to retain a sustainable economy. The conceptualization of sustainable energy sources to end consumers has been postulated with potential solutions. The main solution to the problem existing at the level of production, transmission and distribution has been highlighted with the best possible measures which can be taken by the government by altering, subtracting, and adding the legal framework of the energy system of India.

I. INTRODUCTION TO ENVIRONMENTAL ENERGY ECONOMICS

The 26th Conference of Parties was held in Glasgow with an uproar being the world's most important summit marked with initiatives like Green Grids Initiative - One Sun One World One Grid (GGI - OSOWOG) significant to India and UK partnership towards action against climate change. The nationals also adopted the Glasgow Climate Pact to reduce emissions taking into consideration the global average temperature.[2] The gist of all the climate change conferences aims to phase down the fossil fuel dependence amicably derived from the Stockholm conference.

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[1] *Global Energy Review: CO2 Emissions in 2021, Global Emissions Rebound Sharply to Highest Ever Level*, (International Energy Agency).

[2] "The Glasgow Climate Pact – Key Outcomes from COP26 | UNFCCC," *UNFCCC available at*: https://unfccc.int/process-and-meetings/the-paris-agreement/the-glasgow-climate-pact-key-outcomes-from-cop26 (last visited June 13, 2023).

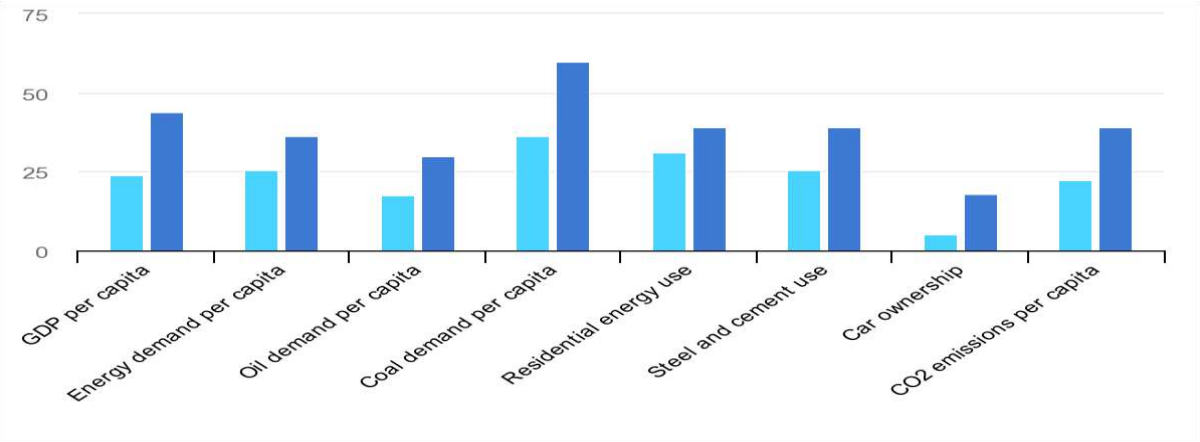
Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

The concern of finding an alternative to conventional source energy arose with the perceivable evidence of climate change, and its adverse effects on humans due to COPD[3], hepatitis A, polio[4], etc.

Furthermore, the ever-increasing demand for energy due to the constant increase in population has adamantly increased the demand for usable forms of energy. The burden is heavy on the government itself with multi-facet demand and limited sources of supply of resources, either nationally or internationally with regard to the inter-governmental relation and inequitable distribution of resources. The world altogether is searching for more effective and efficient sources of energy considering two implications firstly, to meet the increasing demand and secondly, to reduce carbon emissions too. Logically, the application of these two concepts together seems almost inevitably achievable. To examine the same, it is pertinent to analyze the key indicator of change in energy demand and its impact, particularly in India.

II. Analysis of Energy Demand and Environmental Impact in India

If the factor of the population is taken into consideration, it has caused a significant change in the energy demand. The graph represents the energy demand increase from 2000 to 2019, excluding the era of Corona being a contentious situation that disrupted the economic balances of energy demand and supply, as the paper emphasizes the need for substitution to meet the energy demand. The GDP increased by 20% in the period provided appears to be a good indicator as far as economic growth is concerned. However, the demand for energy specifically and majorly



[3] "Household air pollution and health," *World Health Organisationavailable at*: https://www.who.int/news-room/fact-sheets/detail/household-air-pollution-and-health (last visited November 17, 2022).

[4] *Economic and Enviornmental Impact of Coal Washing in India*, (The Energy and Resource Institute, 2020).

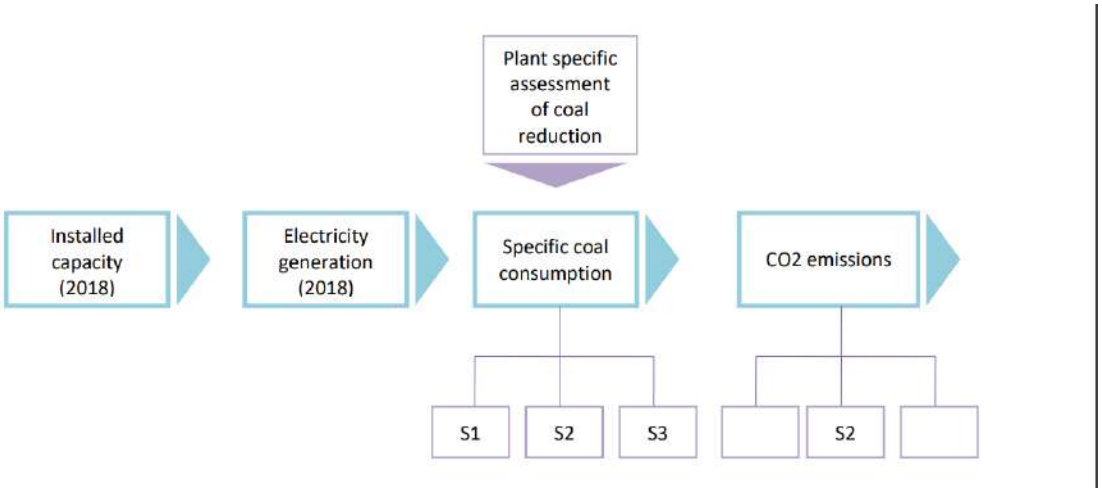
from conventional sources of energy can also be as significantly increasing every year. For example, the highest increment seen in coal demand i.e., 24% should have resulted in multidimensional profits but with implications of environmental damage. Therefore, it leads us to the bar of CO2 emissions per capita which has increased from 22% p.a. to 39% p.a., which is certainly an alarming situation to be looked upon.

Graphical representation of demands in 2000 (light shade) and 2019 (dark shade)[5]

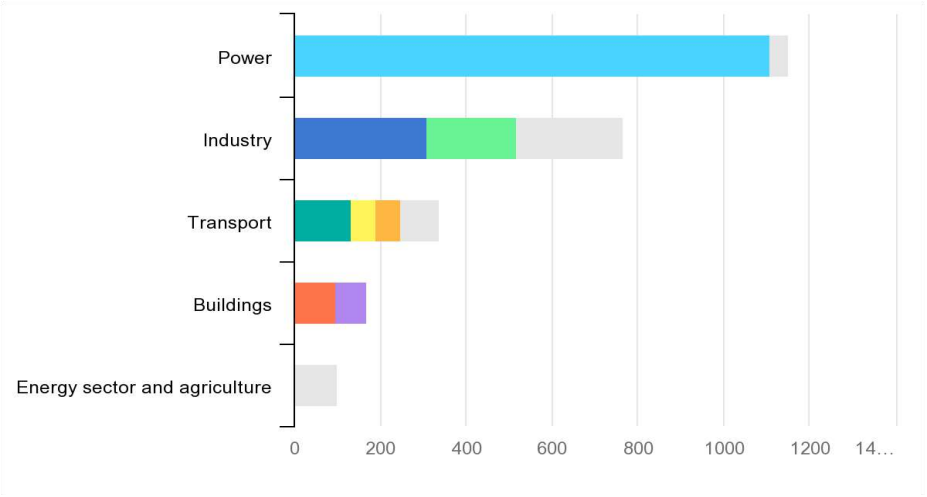
The coal demand has increased from 36% p.a. to 60% p.a., that is to say, coal has become the largest source of fulfilling energy demands. However, this data indicates various adverse environmental effects which are inherently associated with the activities of fossil fuel extraction, refining, and their end-use implications. For example, Mining coal solely has many environmental effects. Many coal mines release greenhouse gases like methane and affect the surrounding air, a large amount of water, and even minerals containing sulphide, movement of rocks impacts the earth's crust and the most crucial implication on the health and safety of workers working there go through the risk of respiratory problem and radiation exposure.[6]

It is important to note that washing of coal is done to improve the specific coal consumption, indirectly related to the amount of coal consumption. According to the data of NITI Aayog, the improvement in specific coal consumption due to the washing of coal has been used to estimate the relationship between the consumption of coal and CO2 emission through the usage of three scenarios. These three scenarios include the BAU scenario, washed coal scenario (having 34% ash), and washed coal scenario (having 30% ash).[7] To elucidate this, the methodology to assess the CO2 emission is as follows at a different level of energy production from coal.

[5] "Key Indicators in India as a percentage of global averages, 2000 and 2019," (Indian Energy Outlook 2021).
[6] Nicolae lanc, Corneliu Boanta, and Ion Gherghe, "Environmental impact of methane released from coal mines" 7 (presented at the 9th International Symposium on Occupational Health and Safety (SESAM 2019), MATEC Web Conf.), CCCV, MMXX.
[7] *Economic and Enviornmental Impact of Coal Washing in India*, (The Energy and Resource Institute, 2020).



Further, as far as the energy demand of India is considered calculated at the disintegrated level of broad categories of sectors. The graph represents the CO2 emissions from Indian energy sectors according to their energy usage:



Source: CO2 emissions from the Indian energy sector, 2019, India Energy Outlook 2021, Energy in India Today, IEA.

The graph gives the implication that coal is the largest source of carbon dioxide emission from the energy sector. On the other hand, coal is the largest source of electricity generation according

to the Central Electricity Authority (CEA)[8] constituting more than 50% of the total share. Therefore, it is almost impossible to replace this source of energy with any other irrespective of the environmental impact. But the economic implication is much more as India's increasing use of imported coal undermines the country's strategy of being 'self-reliant' in the energy security sector.

III. Energy Security and Energy Balance of India

A. Need for Energy Security in India

The universal rule of balance is inevitably avoidable, even if we examine the same from the perspective of the energy security of a country. The energy security of a country is interrelated with its energy system which can be defined as an affordable, accessible and available energy source. As far as the energy system is concerned it can be divided into energy supply, energy demand, energy conversion, and distribution.[9] The source of supply includes domestic produce and import which is further converted into end-use products and therefore, fulfill the demands of sectors as enumerated in the figure above.

The primary concern of the government has always been to extract and produce within the country, however, numerous factors discourage the objectives of a state. As a solution, the sectoral demand is then fulfilled through strategic import techniques to reduce the burden of fiscal deficit.

The fluctuation in the fiscal deficit of a country due to the energy sector is also caused by the risk to energy security. Particularly, this risk of the energy sector is caused by the 'resource curse' and therefore, political and economic consequences of the 'resource curse' impose a heavy burden on imports. For example, the imported inflationary pressure in India with 85% of its oil import affects the macroeconomic growth. The challenges are multi-facet like the concentration of reserves poses a risk to ease of doing business, the adverse impact caused by global

[8] "Power Sector at a Glance ALL INDIA," *Government of India, Ministry of Poweravailable at*: https://powermin.gov.in/en/content/national-electricity-policy (last visited June 13, 2023).
[9] Kapil Narula, B. Sudhakara Reddy and Shonali Pachauri, "Sustainable Energy Security for India: An assessment of energy demand sub-system," 186 126–39 (2017)..

competitors like the Belt and Road Initiative of China,[10] and the advance take-off agreement of mines by international buyers to cater to future demands. In totality, India has the risk of crisis in the energy sector in upcoming years deriving the need to migrate towards energy security.

B. Scope of Energy Security in the Coal Sector

India is the second largest producer of coal after China[11] and sustains the world's hard coal reserves highest in the world after USA and China but the quality of the coal is low in calorific value and high in ash. Ultimately, increasing the demand for coking coal as only 20% of the coal meets the standards. In a report released by the Coal Industry Advisory board of the International Energy Agency[12] following were considered as the main cause of the inefficiency of coal production to meet the domestic demand, becoming a major factor of high imports:

1. Reduced competitiveness of domestic coal due to high cost of transportation and low productivity.
2. Inefficiency to meet the demand of the highest demand sector of electricity.
3. Increasing demand for coal for other sectors like steel and cement.
4. Even after liberalization, the coal industry is dominated by state-owned companies.

The data indicates an alarming situation as per the CSE study highlighting the poor efficiency of the fleet in India found to be 32.8 percent.[13] However, according to reports of the International Energy Agency[14] and analysis of Ecofys,[15] it was found that the average fleet efficiency of India has risen to 37.2 percent. Coincidentally efficiency of the coal in producing electricity is an important indicator of an increased rate of CO2 emission in India. An increase in efficiency can reduce CO2 emission, for instance, the 5 percent improvement led India to reduce 10-15 percent

[10] Priyanshi Chauhan, "Energy Dimension of the Belt and Road Initiative: Implications for India's Energy Security," 32 *JSTOR*.
[11] "Global coal production, 2018-2021," (International Energy Agency).
[12] *Coal in the Energy Supply of India*, 115 (International Energy Agency, France, 2002).
[13] Priyavrat Bhati et al., *Heat on Power Green Rating of Coal-Based Power Plants* (Centre for Science and Enviornment, 2015).
[14] Qian Zhu, *Historic Efficiency Imporvement of the Coal Power Fleet* 85 (International Centre for Sustainable Carbon).
[15] Sam Nierop and Simon Humperdinck, *International Comparison of Fossil Power Efficiency and CO2 Intensity* 90 (Ecofys).

of CO2 reduction.[16] However, we need to progress towards advanced thermal technology to meet our goals of curtailing carbon emissions which again introduces additional costs to the overburdened fiscal deficit of coal use.

IV. UNLOCKING THE POTENTIAL OF RENEWABLE ENERGY IN INDIA

A. Scope of Sustainable Energy Security

The disruption in the demand and supply of coal which constitutes 55% of the energy source in India[17] has been due to high population, limited reserves, and import burden raised the need to bring subsidiary sources for a certain period. Further, harnessing a more efficient, eco-friendly, and abundant source of energy as a mainstream source of energy can bring all environmental and economic problems to a solution. Mainstreaming particular renewable energy in India will help to tilt the dependence on the conventional forms of energy towards renewable forms of energy accessing energy supply mixture to attain the goal of reduced carbon emission. Production and usage of renewable energy within the country will help to be self-reliant and independent in energy supply.

Additionally, the share of renewable energy increase will transfer the market towards sustainable and planned energy sector development. Not only this, the major drawback in the conventional source of energy loss will also resolve with an efficient energy generation system. Another aspect of International Oil pricing is a crucial aspect that considerably affects the economy of not only India but other major economies too. For instance, post-Ukraine-Russia war energy relation inflation in European nations led to 70% in the U.K. and Spain and almost 100% in the Netherlands. Therefore, the resource curse of reserves tends to reduce resulting in ultimate dependence on renewable energy.

Introducing Renewable Energy as the mainstream source of energy would be a difficult task to attain the goals and solutions discussed in COP26 i.e., electricity (non-emitted electricity), carbon capture and storage, or biomass. However, the task needs a long time to attain the specified technological solution discussed. As far as reduction in carbon emission is concerned,

[16] Vinay Trivedi, *Reducing CO2 Footprints of India's Coal-Based Power* (Centre for Science and Environment, New Delhi, 2020).
[17] "Coal-Indian Energy Choice," *Government of India, Ministry of Coalavailable at*: https://coal.nic.in/en/major-statistics/coal-indian-energy-choice (last visited June 13, 2023).

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

it could be only reduced with a deep emphasis on the conservation of biodiversity. According to a report from the Intergovernmental Panel on Climate Change (IPCC), the average global temperature has risen by 1.2C majorly due to human-caused disruptions in biodiversity.[18] Indicates the problem with human consumption tending us to bring a behavioural change in energy consumption to pave a way forward for sustainable, equitable, and regenerative development.

B. Potential in Rooftop Solar Plants

Continuing with the discussion of a more efficient, cost-effective, and eco-friendly source of energy as a highlighted aspect of the paper, rooftop solar panels seem to be one of the advantageous sources of energy in India. The biggest economic advantage offered is the cost saving with respect to tariff rates at the industrial and commercial levels making India a green economy. The lack of electrification in rural and outskirts of urban areas still goes through power deficiency but solar energy with a stable cost of operation potentially helps to access energy. Inherently there lies dynamic potential in solar energy to attain a sustainable source of energy. On such apprehensions, the government created the target to reach 40 GW[19] of electricity but the actual energy produced and utilized approximates to 6GW.[20] Therefore, to bridge the gap between estimation and existence, the energy system needs to overcome some underlying challenges.

C. Challenges to RTS Deployment

Power distribution companies play a vital role in maintaining the quality of power supply which essentially accelerates economic growth by consumer demand satisfaction. However, as far as Roof Top Solar (RTS) power is concerned the DISCOMs face multifaceted challenges affecting energy economics. Firstly, detrimental to DISCOMs' revenue caused due to the net metering and tariff system. Secondly, the inability to consume maximum benefit makes companies reluctant to RTS deployment and lastly, the situation of power surplus created consequently imposes a financial burden on the distribution companies.

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[18] Diasy Dunne, "Can Climate Change and biodiverisity loss be tackled together?" *Carbon Brief Clear on Climate*, 2022*available at*: https://www.carbonbrief.org/explainer-can-climate-change-and-biodiversity-loss-be-tackled-together/ (last visited June 13, 2023).
[19] Government of India, Ministry of New and Renewable Energy, "Grid Connected Solar Rooftop System."
[20] *Ibid.*

In India, Renewable energy attainment occurs through a competitive reverse-auction process tendered by Central Solar Energy Corporation of India. The mode of Power Procurement at the auction of Renewable Energy is done through long-term Power Purchase Agreements or Power sale Agreements between SECI and DISCOMs. The substantial problem of tariff policy discourages potential investors from creating hostile bidding. Such low tariffs would implicitly have an impact on the revenue of discoms and postponement of their agreement with SECI, creating an unstable market.

The intermittent energy production and usage of renewable energy during the period of immediate need during peak hours essentially restrict the maximum utilization of solar energy. The usage of solar storage can mitigate vital problems and reduce energy fluctuations. However, such a technology which can play a significant role in integrated, accessible, and mobile energy is not commonly available.

Such an Energy Storage System can solve challenges faced in the diversification of the energy sector and transition to cleaner energy alternatives.[21] The storage system can have a great impact on accessing smart grids, inter-state transmission, and self-sufficiency (energy security). In line with the aim of 100 percent electric vehicles by 2030[22], it is pertinent to understand the demand for the equipment and investment required for the same. The investment will, however, result in an additional cost to an already expensive solar setup which is more difficult to be subsidized anymore due to the immense shortage of funds to finance projects.

D. The Need for a Robust Legal Framework in India

It is an undeniable fact that the energy sector is very critical to the development of a country like India. Considering the importance of policymaking to enhance generation capacity, expand transmission and improve energy access it is essential to advance technology and appropriate infrastructure there is a need to introduce a robust transformation of the legal framework in the energy sector. Presently, the Energy sector in India is regulated by the Energy Conservation Act, 2001; the Electricity Act, 2003 and the Integrated Energy Policy, 2006. The National Electricity

[21] Amrit Goldar and Charulata Singhal, "Energy Storage Systems and Energy Security - G20 Experience and Opportunities" (ICRIER).
[22] "India aims to become 100% e-vehicle nation by 2030: Piyush Goyal," *The Economic Timesavailable at*: https://economictimes.indiatimes.com/india-aims-to-become-100-e-vehicle-nation-by-2030-piyush-goyal/articleshow/51551706.cms?from=mdr.

Policy of India was formulated under the Electricity Act, of 2003 with the aim of maximum utilization of available energy sources, fulfilment of energy demand, electrification of remote areas, minimum lifeline consumption, etc.

The National Electricity Policy reliability emphasizes the need to reduce the capital cost of renewable energy projects conjoining the technological development of these sources. The policy also aims to improve the percentage of non-conventional generated power purchases percentage by DISCOMs through competitive bidding. However, the policies formulated in consonance with the legislation could be improvised with significant infrastructural and administrative adaptions in the parent act.

E. The purview of the Electricity Act, 2003

Under Section 3 of the Act, the Central Government has the power to prepare the National Electricity Policy from time to time provided in consultation with the State Government. The objective of empowerment is based on the utilization of resources for conservation and moving towards renewable sources of energy. The National Electricity Policy, 2005 was under the provided legislation with an approach of developing rural electrification to accomplish the mission of household electrification in the next five years in the lieu of National Common Minimum Programme. The policy recognized the sustainable recovery of the cost of services and provided affordable electricity to the poor sections of society. It aimed to attract investment opportunities to the private sector to promote competition in the market.

Further, the Electricity Act provides that the central government after consultation with the state government can formulate a policy on a stand-alone system.[23] The provision emphasizes rural electrification on non-conventional energy systems. In the specification of the Solar Energy plants, the formulation of a renewable-centric energy policy lagged in boosting the sector. The Mandate of Section 61 of the Act provides the specification of the terms and policy of tariff determination for the generation of electricity from renewable sources of energy. The method of tariff fixation substantially fails to cover the aspect of technological development in the life span of a solar project. For instance, the tariff for solar energy cannot fit all solar projects. Therefore,

[23] *The Electricity Act, 2003*.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

the tariff policy should take into consideration the multiplicity of factors - technical, financial, and market orientation.[24]

F. Renewable Energy in National Electricity Policy

On 27th April 2021 the Ministry of Power prepared and notified the draft of Electricity Policy, 2021 aims the promotion of sustainable electricity generation to be transmitted with an efficient and adequate transmission system, distribution through revitalized Discoms, and supply of efficient and quality power. In the opinion of the Centre for Energy Regulation, some recommendations in the purview of optimal utilisation were given highlighting the need for governance reforms, development of franchisees, sustainability of microgrids, solarisation of agricultural energy demands etc. It is crucial to understand the serious implications of central sector schemes with minimum power sector reforms. However, alteration of strategy to an alternative set of reforms and sectoral level of governance can come up with significant changes. The burden of cross-subsidy on discoms due to the exploitation of agricultural incentives could be replaced with technical and financial sustainability by "grid-connected solarized agricultural pumps". It is pertinent to develop strategy with special focus on resource mapping, sector-oriented application and technological development. The lack of a legal framework in resource mapping is a crucial aspect which cannot be solely imposed over administrative orders.[25] Central Electricity Authority should prefer the development of distribution plans in consultation with agents of distribution.

V. CONCLUSION

The countries around the world may differ physiologically, economically, or culturally but living together on this planet it is our duty to sustainably utilize the available resources. The commitments made on the global platforms should not only be limited to bare documents, their effective implementation should also be successfully achieved.

The increase in energy demand and the sources of fulfilling the demands in different sectors is alarming as majorly fossil fuels are used to meet the energy requirements leading to high carbon emissions and environmental implications. Coal has become the leading source of energy in

[24] Usha Tandon, *Energy Law and Policy* (Oxford University Press, 2018).
[25] Richard Ottinger, *Renewable Energy Law and Development* (Edward Elgar Publishing Ltd, 2013).

diversified sectors in India, however, in India quality of coal is low in its calorific value and high in ash. Therefore, to reduce carbon emissions and fiscal deficits India needs advanced thermal technology. On the other hand, when the world has solemnly adopted the common Sustainable Development Goals and other particular environmental goals, a developing country like India should instead adopt a long-term strategy putting forward national aspirations of self-sufficiency.

India's strategy shall be policy-oriented where significant modifications in energy regulation should focus on setting renewable sources of energy in the mainstream of the energy sector. Many sources of renewable energy can be harnessed to contribute to the competence of the energy sector of the country globally. However, the intermittent nature of renewable energy is a major drawback that impedes the prevalence of its usage. A reformatory action can potentially turn this disadvantage into an opportunity to move towards a sustainably sound energy sector. Furthermore, a positive implication of energy independence would have a significant impact on the national economy. Therefore, endeavours of energy security could be fulfilled with a comprehensive "National Policy on Renewable Sources of Energy" and positive changes as recommended to the tariff policies, net metering, energy storage, technical upliftment of transmission stage, and decentralization of administrative functions under the Electricity Act.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

RETHINKING AMBEDKARITE JURISPRUDENCE THROUGH ARUNDHATI ROY'S 'THE DOCTOR AND THE SAINT'

ADITYA RAWAT*

Dr. B.R. Ambedkar is synonymous with the epithet, 'father of the Constitution'. However, in addition to this epithet, Ambedkar is conspicuously missing from law schools' jurisprudential discourses despite being one of the most prominent modern Indian thinkers (for anecdotal evidence, I have referred to the course structure of jurisprudence in prominent Central and State universities offering legal education).[1]

Delhi High Court's celebrated judgment on the unconstitutionality of section 377 IPC brought back Ambedkar in the mainstream legal discourse.[2] The judgment authored by Justice AP Shah invoked Ambedkar's 'constitutional morality' to decriminalize consensual sexual acts of adults in private as penalized by Section 377. He stated –

> Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly.[3]

It led to a renewed interest in Ambedkarite jurisprudence, especially in the context of his legacy of constitutional morality which now has been invoked by the judiciary while adjudicating

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[1] University School of Law and Legal Studies (GGIPU), "Scheme of examination and Detailed Syllabus for BA LLB Five Year Integrated Course (w.e.f batch 2014-2019)" 64, available at: http://www.ipu.ac.in/uslls/LawSyllabus/BALLB031116.pdf (last visited on September 03, 2023); Kuruskshetra University, "Syllabus for Jursiprudence" 1, available at: https: // www.kuk.ac.in /userfiles / file / syllabi/Syllabi_ug/syll-I.pdf (last visited on September 03, 2023).

[2] *Naz Foundation Vs. Government of NCT of Delhi and Ors.*, (2009) 160 DLT 277 (Del).

[3] *Ibid*, at pt. 79.

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

rights-based questions on multiple occasions.[4] This is also evident through the e-PG Pathshala paper, Ambedkar and Law in the course, Philosophy of Law (a part of the MHRD initiative to promote ICT-based quality education in the context of higher education).[5]

At the same time, there is a strong argument that to understand Ambedkarite jurisprudence, we must look outside the realm of 'strict' legal discipline and his legacy in law. Hence, it becomes imperative to engage with Ambedkar through the eyes of someone whose primary engagement with Ambedkar is not deification as the 'father of the Constitution'. Arundhati Roy's incisive engagement with Ambedkar and Gandhi in '*The Doctor and the Saint'* provides this avenue.[6] It is almost a decade since the book was published but in terms of richness of disquisitions, it still stands out. It is a novel juxtaposition of two giant icons of Indian thought traditions. For the purpose of this short book review, I have structured it in two parts, i.e. What Roy intends in the work? and critical engagement with the work.

I. PART I- WHAT ROY INTENDS IN THE WORK?

The book was originally written as an introduction for an annotated edition of Ambedkar's iconic *Annihilation of Caste.*[7] In her preface, she laments that Ambedkar (especially the aforementioned work) is not part of school or university syllabi. A thought that on deeper reflections of our own discipline (legal education) might be unfortunately true. Arundhati Roy uses various literary tools ('looking through the prism of the present as well as the past') in this short but intense work. Primarily, she juxtaposes Gandhi and Ambedkar to bring out acutely contrasting stances on the issue of caste through their writings.

She starts by arguing why Ambedkar is essential for us in the 21st century. She states that caste-based atrocities in India have never disturbed our self-imagination of 'market-friendly democracy' or faced similar scrutiny and censure as other 'abominations like apartheid, racism,

[4] *Joseph Shine Vs. Union of India*, W/P (Criminal) No. 194/2017 **(Adultery case)**; *Shayara Bano V. Union of India*, W/P (C) No. 118/2016 **(*Talaq-e-biddat* case)**; *Navtej Singh Johar Vs. Union of India*, W/P (Criminal) 76/2016 **(Section 377 IPC)**; and *Indian Young Lawyers Association Vs. State of Kerala*, W/P (Civil) No. 373/2006 **(*Sabarimala* case)**.
[5] Aakash Singh Rathore and Garima Goswamy, *Rethinking Indian Jurispruence: An Introduction to the Philosophy of Law* (Routledge India 2020); part of it is also available at: https: // epgp.inflibnet.ac.in / Home/ViewSubject?catid=oYPhnOmK5lhY4GGCoKqF5Q== (last visited on September 03, 2023).
[6] Arundhati Roy, *The Doctor And The Saint* (Penguin Books New Delhi 2014).
[7] Dr. B.R. Ambedkar, *Annihilation Of Caste* (Indian Ed', Lexicon Book New Delhi 2021).

sexism, economic imperialism and religious fundamentalism' in the international fraternity. She provocatively substantiates this 'Project of unseeing' by comparing stories of Malala and Surekha Bhotmange (*Khairlanji* massacre). She traces this to the multitude of reasons, one of them being the complete absence of Ambedkar (or dalit voices) in Indian pedagogical universe. She builds upon the existing studies of social scientists, historians, and scholars to substantiate that - "Democracy hasn't eradicated caste. It has entrenched and modernized it. This is why it's time to read Ambedkar".

In the next segment of her essay, she engages with Gandhi's understanding of (i) Caste system (*chaturvarna* system), and (ii) Village republic. She urges the readers to lift the veil of 'Mahatma' to understand his politics wherein religion and religious symbolism are central tenets. An excerpt is reproduced below which succinctly states Roy's entry point of discourse concerning Gandhi –

> How do we reconcile the idea of the non-violent Gandhi, the Gandhi who spoke Truth to Power, Gandhi the nemesis of injustice, the Gentle Gandhi, the Androgynous Gandhi, Gandhi the mother, the Gandhi who (allegedly) feminized politics and created space for women to enter the political arena, the eco-Gandhi, the Gandhi of the ready wit and some great one-liners-how do we reconcile all this with Gandhi's views (and deeds) on caste? (Page 27)

She argues that Gandhi, a devout Hindu, believed the caste system 'represented the genius of Indian Society'. Like earlier Hindu Reformers, Gandhi also took issue with the erroneous religious and cultural practice of untouchability (especially issues of *Bhangis*) rather than deliberating with the question of caste. Roy provokes her readers to unpackage Gandhi's understanding of caste through the lens of his relationship with racism in his prior Mahatma days (South African days). Gandhi's agitation in South Africa was marked by aspirations for Imperial regime to distinguish them, 'Passenger Indians' (which were predominantly rich Indian merchants including upper caste Hindus and Muslims) from 'indentured Indians' and natives, *Kaffirs.* For instance, Gandhi wrote multiple petitions from prison to White authorities for separate prison wards because '*the Kaffir and Chinese prisoners appeared to be wild, murderous and given to immoral ways*'. However, Roy's primary bone with Gandhi is his reconstruction of this narrative to legitimise his sainthood amongst Indian folks. (Page 58)

For Roy, similar contradictions existed in his take on untouchability. She brings out this duality through multiple episodes. As an exemplar, Gandhi's resistance to inter-dining/mixing (she builds on the existing scholarship of Vijay Prasad) was coupled with his claim of representing untouchability.[8] He even argued that Ambedkar and likes are not real representatives of untouchables. Roy accuses him of using the lives of Dalits as a shop window by romanticising the scavenging and denying them any political constituency.

Concerning Gandhi's *Ram-Rajya,* she states that Gandhi's radical critique of Western modernity and consequently, parliamentary democracy stemmed from the romanticization of village republics. Roy tries to dig deeper beyond the rhetoric of eulogizing Gandhi's anti-modernity by stating hard facts such as Gandhi's support from big industrialists who were themselves the product of modernity-informed capitalism (relationship with Tatas and Birlas). On a similar note, Roy attacks Gandhi's valorisation of the village in his seminal work, *Hind Swaraj* on the ground that Gandhi had never visited Indian villages at the time of writing it.[9] Whereas, this very conception of village republic dipped in the ink of 'Brahminism' for Ambedkar and likes was 'a sink of localism, a den of ignorance, narrow-mindedness and communalism'.[10]

Her engagement with Ambedkar has an attitudinal shift towards him as she candidly confesses in the starting that reading *Annihilation of Caste* is like 'somebody had walked into a dim rim and opened the windows'. She gives a brief background about the Mahar community to allow readers to give context to Ambedkar's journey and the ways in which his caste never left him. Roy ensures that Ambedkar is viewed through his lived experiences (sitting apart from other class mates in a gunny sack so that he does not pollute the classroom floors; not allowed to drink from Touchables' water-tap; his colleagues would fling files at him to prevent touching him, etc.) to understand his position on the 'wretched caste system'. For Ambedkar, dismantling the caste system was essential and for that, untouchables should be able to 'organize, mobilize, and become a political constituency with their own representative'. Hence, he pressed strongly for a separate electorate for Untouchables which often pitted him against Gandhi and the Indian National Congress (Refer Ambedkar's submission in First Round Table Conference titled, *A*

[8] Vijay Prasad, *Untouchable Freedom: A Social History of A Dalit Community* (Oxford University Press 2001).
[9] M.K.Gandhi, *Hind Swaraj* (Navjivan Publications 1938 Edition); available at: https :// www . mkgandhi .org / ebks/hind_swaraj.pdf (last visited on September 03, 2023).
[10] Bhagwan Das (Ed.), *Thus Spoke Ambedkar (Vol. I)* 76 (Nayavana Publishers 2010).

Scheme of Political Safeguards for the Protection of the Depressed Class in the Future Constitution of Self- Governing India).[11] The tension reached its zenith during the second round table conference which resulted in the Macdonald Award (MacDonald awarded the untouchables a separate electorate for a period of twenty years). Gandhi announced fast to death unless separate electorates for untouchables are revoked. The British Government stated that they would revoke it only if untouchables agreed. This fast unto death strangulated the untouchables issue and Ambedkar had to succumb in the form of Poona Pact. Though Ambedkar publicly stated later that the fast was "a foul and filthy act…[I]t was the worst form of coercion against a helpless people to give up the constitutional safeguards of which they had become possessed under the Prime Minister's award.." Roy argues that it is primarily *Poona Pact* legacy that Dalits as a political constituency even today have had to align themselves in parliamentary democracy with those whose interests are hostile to their own.(Page 121)

Additionally, Ambedkar fought ardently for the equality of untouchables in Indian civic society. She revisits one of the oft-cited events in Ambedkar's life story, *Mahad Satyagraha* of 1927. A small excerpt from Ambedkar's speech at the Second Mahad Conference is reproduced below to emphasise his understanding of equality –

> We are not going to the Chavadar Lake merely to drink its water. We are going to the lake to assert that we too are human beings like others. It must be clear that this meeting has been called to set up the norm of equality… (Page 92)

Roy also posits ideological differences between Ambedkar and Communists since communists in India followed and endorsed caste hierarchies and had no theoretical tools to locate marxism within Indian civic society. On a similar note, Roy posits a convoluted conceptualisation of Gandhi on class struggles especially his curt dismissal of *Bhangi* strikes. (Page 96)

[11] B R Ambedkar, A Scheme of Political Safeguards for the Protection of the Depressed Class in the Future Constitution of Self- Governing India, Memorandum submitted to Indian Round Table Conference 1930, available at: https://www.lse.ac.uk/library/assets/documents/A-scheme-of-Political-Safeguards-for-the-Protection-of-the-Depressed-Classes-in-the-Future-Constitution-of-a-self-governing-India.pdf (last visited on September 03, 2023).

II. PART II – CRITICAL ENGAGEMENT WITH THE WORK

First and foremost, Roy admits in her preface that this introduction is more about Mahatma Gandhi than Ambedkar. This is unfortunate considering that it originally was published as a gateway to Ambedkar's most seminal work, *Annihilation of Caste*. (Page viii)

Roy's attempt to unpackage Gandhi as a politician as opposed to Mahatma is sincere but falters on multiple accounts. Her version of Gandhi's South African story is filled with inconsistencies to suit her objective of dismantling Gandhi's divine status and hagiographies associated. Her criticism of Gandhi's racism is also sometimes devoid of context. She has on multiple occasions, opted for gross misrepresentation of facts, and wider historical analysis. For instance, Roy uses Gandhi's 1897 interview to *The Natal Advertiser* to cement her arguments about Gandhi's distancing himself from indentured Indians. It becomes worthwhile to reiterate what Roy picked up especially since she does not provide any context or what was the question to which he responded:

> I have said most emphatically, in the pamphlets and elsewhere, that the treatment of the indentured Indians is no worse or better in Natal than they receive in any other parts of the world. I have never endeavoured to show that the indentured Indians have been receiving cruel treatment. (Page 52)

To bring out 'cherry picking' and 'suit my platter' approach of Roy, it becomes imperative to trace the question and reiterate the entire passage. The question asked was: "…[I]n your Indian Campaign what attitude did you adopt towards the indentured Indian Question?". To which Gandhi responded:

> I have said most emphatically, in the pamphlets and elsewhere, that the treatment of the indentured Indians is no worse or better in Natal than they receive in other parts of the world. I have never endeavoured to show that the indentured Indians have been receiving cruel treatment. The question, generally speaking, is not a question of the ill-treatment of Indians, but of the legal disabilities that are placed on them. I have even said in the pamphlet that instances I have quoted show that the treatment that the Indians receive was owing to the

> prejudice against them, and what I have endeavoured to show is the connection between the prejudice and the laws passed by the Colony to restrict the freedom of the Indians.[12]

Reading this in this context would give a completely different picture to the one painted in Roy's work. The above disparity is brought not to discredit her work but to point out other entry points for engaging with someone like Gandhi. Gandhian scholar, Kolge in his response to Roy argues that to appreciate Gandhi's stance on racism and caste requires engagement within the historical context and moreover, his evolution as a human being and politician.[13] Kolge cites numerous incidents and writings to counter-argue to Roy's assertion of Gandhi's belief in *Chaturvarna*.[14]

At the same time, Roy stands apart from other Ambedkarite scholars who have done this juxtaposition earlier. Roy does not hesitate from looking at both, Ambedkar and Gandhi beyond hagiographic lens as done by many biographers (even those of Ambedkar including Academicians like G. Omveldt).[15] He criticizes Ambedkar for reinforcing colonial thought traditions and ideologues when looking at tribals. Roy calls it Ambedkarite Brahminism. For instance, Ambedkar stated in 1945 address in Bombay that –

> "…The Aboriginal Tribes have not as yet developed any political sense to make the best use of their political opportunities and they may easily become mere instruments in the hands either of a majority or a minority and thereby disturb the balance without doing any good to themselves".[16]

III. CONCLUDING REMARKS

Roy laments that history has been unkind to Ambedkar. She stated –

> First it contained him, and then it glorified him. It has made him India's leader of the Untouchables, the King of the Ghetto. It has hidden away his writings. It has stripped away the radical intellect and the searing insolence. (Page 27)

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[12] Mahatma Gandhi, *The Collected Works of Mahatma Gandhi* (Vol. 2) 123; available at: http:// www.gandhiashramsevagram.org/gandhi-literature/collected-works-of-mahatma-gandhi-volume-1-to-98.php (last visited on September 03, 2023).
[13] Nishikant Kolge, "The politician: A Response to Arundhati Roy's The Doctor and The Saint" 36(1) *Gandhi Marg Quarterly* 145 (2014).
[14] *Ibid.*
[15] Gail Omveldt, *Ambedkar: Towards An Enlightened India* (Penguin 2004).
[16] Dr. B.R. Ambedkar, *Communal Deadlock And A Way To Solve It* 375 (1945).

Volume 12 (1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

On a similar strand of thought, legal jurisprudence also paid mere lip service to Ambedkar despite his monumental status as one of India's most prominent thinkers. There is a serious dearth of scholarship or even conversations on Ambedkarite jurisprudence and it becomes more acute when we start taking the assistance of Western legal philosophers to understand the civilizational issues of India.

Volume 12 (1)
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