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Editorial Note

As we present the second issue of Volume IX, Issue II (2023) of the *JSS Journal for Legal Studies and Research*, we are pleased to offer our readers a timely and thought-provoking compilation of articles that address the dynamic and evolving landscape of law across various disciplines. In this issue, we continue our tradition of highlighting innovative research and diverse perspectives on issues that are central to both contemporary legal thought and practical application.

Our contributors have meticulously examined an array of pertinent topics—from the implications of international law and tax regulations to emerging challenges in technology and gender equality. The articles in this issue represent a broad spectrum of legal discourse, reflecting not only the ongoing advancements in global legal frameworks but also the nuances of specific national and regional contexts.

The first article by Mr. Jally Willy Mongo explores the domestication of the Rome Statute in Tanzania, examining whether this process is an option or an obligation. In his comparative analysis, Mr. Sayed Qudrat Hashimy discusses the general anti-avoidance rules (GAAR) provisions in India and Australia, shedding light on the different approaches to tax avoidance in these two jurisdictions.

Aakriti Gupta's article provides an insightful discussion on the role of alternative dispute resolution (ADR) in international military conflicts, presenting it as a potential tool for crafting sustainable peace. In a similarly contemporary vein, Kavitha L., Bhagyamma G., and Saba Firdose address the critical issue of menstrual leave in Indian educational settings, advocating for policies that balance health needs with gender inclusivity.

In the rapidly evolving sphere of technology and law, Miss Deepthi P. D. and Smt. Sheela Ganesh analyze the intersection of artificial intelligence and information technology within the justice system, offering an informed perspective on how these advancements are reshaping legal processes. Dr. N. Vani Shree and Ms. Pramila Jain, in their work on workplace gender issues, focus on the legal preclusion of "voluptuous exasperation" of women in the workplace, urging a more robust legal framework to address workplace harassment.

Finally, Mrs. Ashwini P. and Ms. M. S. Lolitha Reddy conclude this issue with an exploration of transformative constitutionalism and its impact on the rights of the LGBT community, examining how constitutional frameworks can foster social change and human rights protections.

This issue underscores the Journal's commitment to advancing legal scholarship that not only reflects current trends but also anticipates the challenges of the future. We hope that these articles will stimulate thoughtful reflection and meaningful discourse among our readers, contributing to the ongoing development of legal theory and practice.

We extend our sincere gratitude to all the contributors, reviewers, and readers for their continued support. We look forward to your engagement with the content and invite you to share your thoughts and feedback.

Prof. K.S. Suresh

Editor-in-Chief

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Domestication of the Rome Statute by Tanzania: An Option or Obligation?

Mr. Jally Willy Mongo[1]

ABSTRACT

For the Rome Statute of the International Criminal Court 1998 to have legal force on the territory of States Parties to it, enacting legislation domesticating its norms in order to exercise their primary jurisdictions over investigation and prosecution of the international crimes (which are genocide, war crimes, crimes against humanity and crime of aggression) instead of the ICC is necessary. Tanzania is a State Party to the Rome Statute and has not passed legislation domesticating it. Being an international treaty, the Rome Statute does not form part of source of law in Tanzania, unless article 63(3) (d) of the Constitution of the United Republic of Tanzania 1977 ('the Constitution of Tanzania') is complied with. Through documentary analysis, this article examined as to whether Tanzania, a State Party to the Rome Statute has an option or obligation of domesticating the Rome Statute in order to give legal force to it. It has been revealed that Tanzania has an obligation of enacting legislation domesticating the Rome Statute in order for the Rome Statute to be one of sources of law in Tanzania. The article has recommended that Tanzania has to enact single legislation applying reference method of domestication to ensure clarity and comprehensiveness. This will be a means of performing her international obligations in order to fulfill her desire to investigate and prosecute the international crimes and punish the perpetrators and cooperate with the ICC.

Key Words: Domestication; Rome Statute in Tanzania; Option; Obligation.

[1] **Jally Willy Mongo** is an Advocate of the High Court of Tanzania, Assistant to Counsel of the International Criminal Court and Counsel of the International Residual Mechanism for Criminal Tribunals. He is also a Member of the Tanganyika Law Society, East Africa Law Society, International Criminal Court Bar Association, Association of Defence Counsel Practicing before the International Courts and Tribunals and an Assistant Lecturer in Law-University of Iringa in Tanzania.

Disclaimer: This article is based from the author's dissertation of Mater of Laws in International Criminal Justice and Human Rights titled 'Examining Legal Constraints of Domestication of the Rome Statute: The Case of Tanzania' submitted to the University of Iringa, 2023.

1.1 Introduction and Historical Background of the Rome Statute

The Rome Statute of the International Criminal Court (henceforth 'the Rome Statute')[2] was adopted by States in writings at Rome in Italy on 17 July 1998 by a vote of 120 entered into force on 1 July 2002 after the treaty's ratification by 60 States;[3] hence, it is an international treaty. For the Rome Statute to have legal force to States Parties to the Rome State, enacting legislation to domesticate the Rome Statute is necessary. Domestication of international treaty also known as incorporation of treaty, means enacting legislation transforming international treaties into national law.[4] Enacting legislation domesticating the Rome Statute serves two purposes: - First, empowers States Parties to exercise their primary jurisdictions of investigating and prosecuting the international crimes under the Rome Statute (which are genocide, war crimes, crimes against humanity and the crime of aggression) in order to put end impunity for the perpetrators of the crimes and to contribute to the prevention of the crimes. Second, empowers States Parties to have legal capacity of cooperating with the International Criminal Court (herein 'the ICC') established under preambular 10 read together with article 1 both of the Rome Statute which has complementary and supplementary jurisdiction to national courts in investigating and prosecuting the crimes committed within its jurisdiction by individuals.[5]

Tanzania signed and deposited her instrument of ratification of the Rome Statute on 29 December 2000 and 20 August 2002 respectively;[6] hence, a State Party to the Rome Statute. In Tanzania, international treaties do not apply directly unless article 63(3) (d) of the

[2] The Rome Statute of the International Criminal Court 1998 was adopted at Rome on 17 July 1998, entered in force on 1 July 2002 as amended through Resolution RC/Resolution 6, annex 1 of 11 June 2010 available at https://www.icc-cpi.int (accessed 18 November 2024).

[3] Malcolm Shaw, *International Law* (6th edn. CUP, Cambridge 2008) 411. *See* also Muhammed Ladan, 'An Overview of the Rome Statute of the International Criminal Court: Jurisdiction and Complementarity Principle and Issues in Domestic Implementation in Nigeria' (2013) 1 Journal of Sustainable Development Law and Policy at p. 37 available at https://www.ajol.info (accessed 18 November 2024); David Armstrong (ed.), *Routledge Handbook of International Law* (Routledge, New York 2009) 241.

[4] Gerhard Kemp, "The Implementation of the Rome Statute in Africa" in G Werle et al (eds.), *Africa and the International Criminal Court* (International Criminal Court Series 1, University of Stellenbosch, Stellenbosch 2014) 64; Daley Birkett, 'Twenty Years of the Rome Statute of the International Criminal Court: Appraising the State of National Implementing Legislation in Asia' (2019) 18 Chinese Journal of International Law 353 at pp. 353-354 available at https://academic.oup.com (accessed 18 November 2024).

[5] *AG v. Kenyans for Justice and Development Trust* [2019] 2 E. A. 77 at p. 79. *See* also Daley Birkett, 'Twenty Years of the Rome Statute of the International Criminal Court: Appraising the State of National Implementing Legislation in Asia' (2019) 18 Chinese Journal of International Law 353 at p. 354 available at https://academic.oup.com (accessed 18 November 2024); Sascha Von Bachmann and Eda Nwibo, 'Pull and Push- Implementing the Complementarity Principle of the Rome Statute of the ICC within the AU: Opportunities and Challenges' (2018) 43 Brooklyn Journal of International Law 457 at p. 463 available at https://brooklynworks.brooklaw.edu (accessed 18 November 2024).

[6] Available at https://asp.icc-cpi.int (accessed 18 November 2024).

Constitution of the United Republic of Tanzania 1977 (the Constitution of Tanzania)[7] is complied with by enacting legislation giving legal force an international treaty.The idea of the existence of the Rome Statute was well-received by Tanzania with a high level of expectations to fill in the impunity gap by prosecuting the international crimes. Tanzania together with Botswana, Lesotho, Malawi, Swaziland and South Africa as delegations of the Southern African Development Community (SADC) participated in the efforts to establish the ICC as early as in 1993 when the International Law Commission presented a draft statute to the General Assembly's Sixth Committee for consideration.[8] SADC was founded with the signing of the Treaty in Windhoek Namibia on 17 August 1992 and as of 31 July 1998; SADC had a number of 14 member States.[9] SADC adopted principles of consensus on the ICC in 1997 and another decision was adopted the following year by SADC Ministers of Justice/Attorneys-General.[10]

Among the principles and objectives of SADC are: - promotion and defence of human rights, peace and security as provided for under article 4(c) and 5 (1) (c).[11] Further, Tanzania played key roles in the negotiation process the Rome Statute and establishment of the ICC by participating fully the United Nations Diplomatic Conference held from 15 June-17 July 1998.[12] In 1999, the 14 SADC member States reaffirmed their commitment to the ICC process through the adoption of the Pretoria Statement of Common Understanding on the

[7][Cap. 2 R.E. 2002] as amended. Domestication of the Rome Statute is a Foreign Affair as provided for under item 2 to the First Schedule of the Constitution of the United Republic of Tanzania 1977 [Cap. 2 R.E. 2002] as amended; hence, falls within the jurisdiction of the National Assembly of Tanzania as provided for under article 64(1) of the Constitution of the United Republic of Tanzania 1977 [Cap. 2 R.E. 2002] as amended and not within the House of Representatives of Zanzibar as provided for under article 64(2) of the Constitution of the United Republic of Tanzania 1977 [Cap. 2 R.E. 2002] as amended read together with article 78(1) of the Constitution of Zanzibar of 1984 as amended in 2010.

[8]Embassy of Botswana, Note No. 118/11 EB 9/3/4 IX (13) B 8 (Brussels 14 September 2011) 4 available at https://asp.icc-cpi.int (accessed 10 July 2023). *See* also Sascha Von Bachmann and Eda Nwibo (n 6) 523.

[9]Malawi, Lesotho, Angola, Swaziland, Botswana, Zimbabwe, Mozambique, Namibia, Zambia, the United Republic of Tanzania, South Africa, Mauritius, Congo and Seychelles.

[10]Daniel Nsereko, 'Triggering the Jurisdiction of the International Criminal Court' (2004) 4 African Human Rights Law Journal at p. 257 available at https://asp.icc-cpi.int (accessed 18 November 2024). *See* also Sascha Von Bachmann and Eda Nwibo (n 6) 523.

[11]Treaty of the Southern African Development Community, done on 17 August 1992, came in force on 30 September 1993 amended on 14 August 2001 available at https://www.sadc.int (accessed 18 November 2024).

[12]United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998, Official Records, Vol. I; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998, Official Records, Vol. II; Statement by the Representative of the United Republic of Tanzania at the United Nations Diplomatic Conference of Plenipotentiaries to the Establishment of the International Criminal Court, Rome Italy on 16th June 1998 available at https://legal.un.org (accessed 18 November 2024).

ICC. The Pretoria Statement affirmed a continued support to the ICC process, accelerated ratification and adopted implementing legislation of the Rome Statute and committed Parties to further participation in the processes of the ICC.[13]

Tanzania joined hands SADC's movement and support over the negotiation process of the Rome Statute, establishment of the ICC and affirmed her strong support to the ICC jurisdiction at the Conference by providing her oral views and a written statement.[14] As well, later on Tanzania signed the Rome Statute on 29 December 2000[15] and deposited her instrument of ratification of the Rome Statute on 20 August 2002.[16] Being a State Party to the Rome Statute, Tanzania became entitled to a right of representative in making decisions in the Assembly of States Parties (herein 'the ASP') which meets once in every year.[17] Tanzania has attended several sessions of the ASP since the Rome Statute came into force to mention but few: - the 10th session,[18] the 12th session,[19] the general debate of the ASP to the Rome Statute,[20] the general debate of the 15th session[21] and the 19th session.[22]

[13]*See* Daniel Nsereko (n 11) 257.

[14]United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998, Official Records, Vol. I at pp. 68, 74-75; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998, Official Records, Vol. II at pp. 38, 45, 74-75; Statement by the Representative of the United Republic of Tanzania at the United Nations Diplomatic Conference of Plenipotentiaries to the Establishment of the International Criminal Court, Rome Italy on 16th June 1998 available at https://legal.un.org (accessed 18 November 2024).

[15]Available at https://asp.icc-cpi.int (accessed 18 November 2024).

[16]Ibid.

[17]Article 112 of the Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, in force on 1 July 2002 as amended through Resolution RC/Resolution 6, annex 1 of 11 June 2010.

[18]Statement by Ambassador Ombeni Sefue, Permanent Representative of the United Republic of Tanzania to the United Nations during the Tenth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (New York 12-21 December 2011) available at https://asp.icc-cpi.int (accessed 18 November 2024).

[19]Statement by Honourable Mathias M. Chikawe (MP), Minister for Constitutional and Legal Affairs, the United Republic of Tanzania, during the General Debate of the Twelfth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (The Hague 20 November 2013) available at https://asp.icc-cpi.int (accessed 18 November 2024).

[20]*See* Statement by Irene Kasyanju Director for Legal Affairs, Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania, During the General Debate of the Assembly of States Parties to the Rome Statute of the International Criminal Court (New York 11 December 2014) 5 available at https://asp.icc-cpi.int (accessed 18 November 2024) p. 5.

[21]Statement by H. E. Irene F. M. Kasyanju, Ambassador of the United Republic of Tanzania to the Netherlands, during the General Debate of the 15th session of Assembly of States Parties to the Rome Statute of the International Criminal Court (The Hague Netherlands, Thursday November 2016); Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifteenth Session, the Hague, 16-24 November 2016 (Official Records, Volume I) at p. 7 available at https://asp.icc-cpi.int (accessed 18 November 2024).

[22]Remarks by Irene F. M. Kasyanju, Ambassador of the United Republic of Tanzania to the to the Netherlands, on Agenda Item 9 on the General Debate of the 19th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (The Hague, The Netherlands, 14-16 December 2020) available at https://asp.icc-cpi.int (accessed 18 November 2024).

In those attended sessions of the ASP, Tanzania has recognized the role of the ICC in fighting for impunity, affirmed her efforts in supporting the ICC to fight for impunity, encouraged other States to give support the ICC, urged other States Parties to enact criminal legislation implementing the Rome Statute to exercise their primary jurisdictions of prosecuting the international crimes and to cooperate with the ICC in its investigation and prosecution of the crimes.[23] Another effort was in 2013, the Attorney General of Tanzania (herein 'the AG') submitted an application to the ICC to file an *amicus curiae brief* on the prosecutor's appeal against the decision on Mr. Ruto's request for excusal from continuous presence at trial.[24] The application filed by the AG aimed to facilitate and assist the ICC in deciding the case fairly as the issue brought under article 63 of the Rome Statute was a new to the ICC as it had not been given consideration prior. Moreover, at the general debate of the ASP to the Rome Statute held in 2014, Tanzania informed the ASP that, she was at her initial stages of enacting legislation implementing the Rome Statute in order to exercise her primacy jurisdiction of investigating and prosecuting the international crimes under the Rome Statute as her principal obligation and to accord the ICC with fully cooperation.[25] Apart from the affirmation of 2014 given by Tanzania at the general debate of the 19th session of the ASP to the Rome Statute held at the Hague Netherlands from 14-16 December 2020, Tanzania reaffirmed her firm commitment to the Rome Statute system.[26] In spite of her great role and contribution towards the Rome Statute and the ICC, Tanzania has not enacted legislation domesticating the Rome Statute in order to exercise her primary jurisdiction of investigating and prosecuting genocide, war crimes and crimes against humanity as the international crimes and legally cooperate with the ICC.

[23]*See* also Statement by Tuvako N. Manongi, Ambassador and Permanent Representative of the United Republic of Tanzania to the United Nations, at the Sixth Committee of the 67th Session of the United Nations General Assembly on Agenda item 83: The Rule of Law at the National and International Levels (New York, 10 October 2012) available at https://www.un.org (accessed 18 November 2024).

[24]Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania, CGA 135/291/01 (Dar Es Salaam, 09 September 2013) available at https://www.icc-cpi.int (accessed 18 November 2024).

[25]*See* Statement by Irene Kasyanju (n 21) 5.

[26]*See* Remarks by Irene F. M. Kasyanju (n 23) 4.

The main objectives of this article are to: - explain whether it is an option or obligation by Tanzania to domesticate the Rome Statute in order to exercise her primacy duty of investigating and prosecuting the international crimes. More so, significance of domesticating the Rome Statute and disadvantages of lacking legislation domesticating the Rome Statute, reasons for Tanzania to enact legislation domesticating the Rome Statute will be discussed. Lastly, approaches and methods applicable in domesticating the Rome Statute will be discussed as guidelines to Tanzania in case she decides to domesticate it, she may have wider choice of approaches and methods to adopt.

1.2 Obligations of Tanzania to Domesticate the Rome Statute

Preambular 4, 5, 6 and 10 read together with article 1 and 17[27] amongst others; provide a duty of each State Party to enact legislation in order to exercise its primacy jurisdiction of prosecuting the international crimes of genocide, war crimes and crimes against humanity established under the Rome Statute over those responsible for the crimes. Also, under the principle of complementarity, the ICC only complements and supplements national jurisdictions in exercising its jurisdiction of prosecuting the perpetrators of the international crimes. Thus, the ICC acts as a Court of last resort in exercising its jurisdiction over the crimes. The cited preambular and provisions of the Rome Statute require States Parties to the Rome Statute to exercise primacy duty of effective prosecution of the international crimes whereas the ICC supplements in case States Parties fail effectively to investigate and prosecute them. The cited preambular and provisions of the Rome Statute may be concluded as providing that, States Parties have obligations to enact legislations implementing the Rome Statute[28] in order to exercise their fully primacy jurisdictions of investigating and prosecuting the international crimes. Tanzania being a case study in this research, has no capacity to exercise primary jurisdiction of investigating and prosecuting genocide, war crimes and crimes against humanity as international crimes under the Rome Statute because Tanzania has no enacted legislation implementing the Rome Statute. Under international law, Tanzania being a State Party to the Rome Statute is bound to domesticate the provisions of the Rome Statute, perform them in good faith and respect as she freely consented to be bound by the provisions of the Rome Statute.[29]

[27]Of the Rome Statute of the International Criminal Court 1998, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010; Item 1 of the Declaration RC/Decl.2, Adopted at the 9th plenary meeting, on 8 June 2010, by consensus.

[28]Item 3 of the Declaration RC/Decl.2, Adopted at the 9th plenary meeting, on 8 June 2010, by consensus.

[29]Article 26 of the Vienna Convention on the Law of Treaties1969, done at Vienna on 23 May 1969, entered into force on 27 January 1980.

Failure of Tanzania to enact legislation implementing the Rome Statute, the Rome Statute remains to be an international treaty with no legal force as it cannot be relied upon by any individual or authorities in Tanzania in deciding any right or duty provided for under it. An example of implication of failure to enact legislation enforcing international treaties like the Rome Statute may be drawn from *Reliance Insurance Company (T) Ltd v. CMA CGM Societe Anoyme and Another case.*[30] The Court of Appeal of Tanzania rejected the applicability of the United Nations Convention on Carriage of Goods by Sea 1978 (The Hamburg Rules) in deciding the case on the best reason that, though Hamburg Rules are ratified by Tanzania, they are not directly applicable in Tanzania because they have not been domesticated[31] hence, lacking legal force in Tanzania.

To back up its position of rejecting the applicability of Hamburg Rules for failure to enact legislation enforcing the Hamburg rules, the Court of Appeal of Tanzania made reference to L. X. Mbunda in an article titled "Tanzania and International Conventions on Carriage of Goods by Sea: A Historical Study" published in the Journal of Indian Law Institute, October-December 1988 at page 473 as follows: -

> *It is well known that international conventions/covenants are not binding per se within a sovereign state. International legal obligations only become enforceable by domestic courts if a competent legislature implements them within its institutional jurisdiction. In essence what is enforced by the domestic court is not the international legal obligation per se but the domestic Act of Parliament implementing the obligation.*

Therefore, Tanzania has international obligation to domesticate the Rome Statute criminalizing the norms of the international crimes under the Rome Statute. The legal effect of the Rome Statute lacking legal force in Tanzania is that, international crimes of genocide, war crimes and crimes against humanity established under the Rome Statute become non-punishable international crimes in Tanzania as prohibited by article 13(6) (c) of the Constitution of Tanzania read together with sections 3(1) (a) and (b) and 5 of the Penal Code and article 12(6) (c) of Zanzibar Constitution read together with sections 2(1) (a) and (b) and

[30](Civil Appeal No. 179 of 2020) [2023] TZCA 205 (27 April 2023) at p. 11 available at https://tanzlii.org (accessed 18 November 2024).
[31]Ibid, p. 12.

3(2) of Zanzibar Penal Act. More so, article 13(6) (c) of the Constitution of Tanzania and article 12(6) (c) of Zanzibar Constitution are in conformity with the principle of *nullum crimen sine lege or* prohibition of analogy.[32] Thus, Tanzania has no capacity to exercise primacy jurisdiction of prosecuting genocide, war crimes and crimes against humanity as international crimes established under the Rome Statute once allegations of commission are raised or known to law enforcement agencies as well Tanzania has no legal capacity to cooperate with the ICC once requested.

1.3 Significance of Domesticating the Rome Statute and Disadvantages of its Failure.

The Rome Statute vests jurisdiction of prosecuting the international crimes established thereunder to both the ICC and States Parties. However, the primary responsibility of prosecuting the said international crimes is vested to States Parties. The ICC has been given only a complementary jurisdiction to deal with such crimes provided that, States Parties to the Rome Statute are unable or unwilling genuinely to prosecute them. The rationale of conferring jurisdiction to both the ICC and States Parties to prosecute the international crimes is to ensure that, both the ICC and States Parties exercise their duties to put an end to impunity for the perpetrators of the crimes and to contribute to the prevention of such crimes. Therefore, the significance of domesticating the Rome Statute benefits both States Parties and the ICC and the same, failure to domesticate the Rome Statute affects negatively both the ICC and States Parties as herein below explained as follows: -

1. Empowers States Parties to the Rome Statute to cooperate with the Court.[33]

Article 88 of the Rome Statute requires States Parties to the Rome Statute to ensure that, there are procedures available under their national laws for all of the forms of cooperation with the ICC. It is so required because; the ICC has no police force machinery which can identify, arrest and surrenders the perpetrators of the crimes before the ICC to face trials. As the ICC depends much upon the States Parties' cooperation to identify, arrest perpetrators and submit them before the ICC to face trials in respect of the commission of the crimes, failure to enact legislation implementing the provisions of the Rome Statute is a bar to cooperate with the ICC in case there is a request for cooperation in exercise of its jurisdiction. Therefore, the ICC cannot exercise its jurisdiction of prosecuting the international crimes effectively.

[32]Morten Bergsmo and Ling Yan (eds.), *State Sovereignty and International Criminal Law* (TOAEP, Beijing 2012) 186.
[33]*See AG v. Kenyans for Justice and Development trust case* (n 6) 79.

2. Enables States Parties to exercise their primary jurisdiction over the core international crimes, thereby giving meaning to the principle of complementarity.[34]

Preambular 4, 5, 6 and 10 read together with article 1 and 17 of the Rome Statute vest primary jurisdiction of prosecuting the international crimes to States Parties whereas the ICC has been vested with jurisdiction to prosecute the crimes as a Court of last resort to national jurisdictions. States Parties to the Rome Statute are further required to take necessary measures at their national levels to ensure that, there is effective prosecution of the international crimes within their States and by enhancing international cooperation with the ICC. Therefore, without enacting legislation domesticating the provisions of the Rome Statute, States Parties cannot exercise their primary duties of prosecuting the crimes thus, the ICC cannot act as a Court of last resort but will intervene and act as its primacy jurisdiction to prosecute the crimes, the duty which it does not have.

3. Domesticating the Rome Statute is in conformity with the spirit and broad aim of the Rome Statute namely to end impunity for the most serious crimes under international criminal law.[35]

The chief aim of establishing the Rome Statute by States Parties was to establish the international crimes and put an end to impunity for the perpetrators of international crimes and to contribute to the prevention of such crimes in order to guarantee lasting respect for and the enforcement of international justice to children, women and men who have been victims of unimaginable atrocities. In line with ending the impunity, each State Party under the Rome Statute has been put under primary obligation of prosecuting the crimes. To ensure each State Party prosecutes the crimes, the Rome Statute vests obligation to States Parties to take measures at their national levels by enacting legislations domesticating the Rome Statute and to cooperate fully with the ICC in its prosecution of the crimes. Thus, failure of enacting legislation domesticating the Rome Statute, States Parties cannot achieve the chief aim of ending impunity for the most serious crimes hence, States Parties become in violation of the

[34]Ibid.
[35]*See* Gerhard Kemp (n 5) 63.

provisions of the Rome Statute and article 26[36] which provides that, a treaty is binding upon the parties to it and must be performed by the parties in good faith.

Also, failure to enact legislation enforcing the Rome Statute by States Parties, allows the ICC to intervene in prosecuting the crimes, thus States Parties' sovereign may become at jeopardy. Nonetheless, the exercise of primacy jurisdiction by the ICC in prosecuting the crimes once the States Parties fail to exercise may not be achieved well by the ICC as States Parties may not accord fully cooperation to the ICC which has no police force of identifying, arresting and surrendering the perpetrators for trial before it.

4. Enacting legislation domesticating the Rome Statute enables efficiency and effectiveness of investigation and prosecution of the international crimes by States Parties and by the ICC in case the States are unable or unwilling genuinely to prosecute the crimes.

States Parties are in a better position to have the best access to evidence, witnesses and the resources to carry out proceedings[37] as the crimes are committed within their territories by the perpetrators of the international crimes. Thus, prosecuting the crimes once are committed within the jurisdiction of States Parties will require less resources in terms of money, personnel and time as States Parties have police force in identifying, arresting the perpetrators, collecting evidence and surrendering the perpetrators before courts while the ICC has no police force.

Investigation and prosecution of the crimes by the ICC as her supplementary obligation will not be the best means taking into account that, the ICC has no direct enforcement mechanism and always relies upon cooperation by the States in order to fulfill its mandate.[38] The ICC depends much cooperation from States Parties in investigating, identifying and arresting the perpetrators, submitting them before the Court and for collection of evidence. Further, prosecution of the crimes by the ICC will require witnesses to be transferred from States Parties to the location of the ICC which is located at The Hague-Netherlands, hence will be so costly in terms of money and personnel of which the ICC budget depends upon States Parties annual contribution to run its business.

[36]Of the Vienna Convention on the Law of Treaties of 1969, done at Vienna on 23 May 1969, entered into force on 27 January 1980.
[37]Robert Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (2nd edn. CUP 2010) p. 153.
[38]*The Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09, 11 July 2016) at p. 8 para. 16 available at https://www.icc-cpi.int (accessed 18 November 2024).

Even if witnesses may be heard by the ICC through video conference, the means may be costly as the same requires money and expert personnel to run the operation. More so, once the ICC is denied cooperation by States Parties, the ICC may fail to identify, arrest and surrender the perpetrators of the crimes to its jurisdiction to face trials. Examples may be drawn from South Africa[39] which disobeyed to arrest, detain and surrender the President of Sudan Omar Hassan Ahmad Al Bashir after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union despite the fact that, the Pre-Trial Chamber of the ICC had issued two warrants for his arrest. Also, disobedience by Uganda to arrest, detain and surrender him.[40]

The first warrant was issued on 4 March 2009 and related to charges of war crimes and crimes against humanity and the second warrant was issued on 12 July 2010 for charges of genocide.[41] The warrants were forwarded to all countries that are Parties to the Rome Statute, South Africa and Uganda including with a request that they co-operate under the Rome Statute and cause President Al Bashir to be arrested and surrendered to the ICC to face his trial. The two examples above cited, show how cooperation by States Parties to the ICC is crucial.

5. Enacting legislation domesticating the Rome Statute for States Parties to investigate and prosecute international crimes is a means of protecting human rights.[42]

Enacting legislation domesticating the Rome Statute is an obligation under International Criminal Law of which International Criminal Law is one of the branches of international law. Thus, International Criminal Justice is a means of protecting human rights through criminal punishment to those individuals who commit egregious human rights violations in the form of international crimes of which human rights has to be ensured through and during criminal prosecution.[43] The protection of human rights is to the accused persons,[44] the victims

[39]*See The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) at pp. 5-6 available at www.saflii.org (accessed 18 November 2024);
[40]*See The Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09, 11 July 2016) at p. 8 para. 16 available at https://www.icc-cpi.int (accessed 18 November 2024).
[41]Ibid, p. 3 para. 2.
[42]*See* Christopher Gevers *et al*, *Curriculum on International Criminal Justice* (Institute for Security Studies 2012) 44.
[43]Ibid.

and the witnesses.[45] The rights to the accused persons include; rights of persons during crimes investigation such as right not to be compelled to incriminate himself to confess guilty, not subjected to any form of coercion, duress or threat or torture[46] and the rights of the arrested persons such as right to be questioned in the presence of a counsel, right to free legal assistance where necessary, right to remain silence, right to have an interpreter in case of interrogation, right against arbitrary arrest and detention.[47] There are also other rights of the charged persons during trial[48] such as right to fair trial which includes; right to full hearing, right to be tried without undue delay and right to be given sufficient time to prepare defense, right to presumption of innocence[49] and right to compensation for unlawful arrest or conviction.[50] During investigation and prosecution of the international crimes, the victims and witnesses have the right to their protection of safety, physical and psychological well-being, dignity and privacy which is not prejudicial to the rights of the accused person and a fair and impartial trial.[51] The victims of the international crimes are entitled to remedies; restitution, compensation and rehabilitation arising from any damage, loss and injury.[52] The remedies of restitution, compensation and rehabilitation may be recovered directly from the accused or where appropriate from the Trust Fund.[53] Thus, failure to enact legislation implementing the Rome Statute by States Parties (the United Republic of Tanzania inclusive) in order to exercise primary jurisdiction to prosecute the international crimes in case of commission, the perpetrators of the crimes will walk free from their evil deeds whereas the victims will be left without remedies hence, a failure to protect, preserve and promote human rights, peace and security in the world.

[44]Article 67 of the Rome Statute of the International Criminal Court 1998, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010.
[45]Ibid, article 68.
[46]Ibid, article 55. *See* also Christopher Gevers *et al* (n 43) 45.
[47]Article 59 of the Rome Statute of the International Criminal Court 1998, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010. *See* also Christopher Gevers *et al* (n 43) 45.
[48]Articles 63, 64 and 65 of the Rome Statute of the International Criminal Court 1998, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010.
[49]Ibid, article 66. *See* also Christopher Gevers *et al* (n 43) 45.
[50]Article 85 of the Rome Statute of the International Criminal Court 1998, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010. *See* also Christopher Gevers *et al* (n 43) 45.
[51]Article 68(1) of the Rome Statute of the International Criminal Court 1998, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010.
[52]Ibid, article 75(1).
[53]Ibid, article 75(2).

1.4 Reasons for Tanzania to Domesticate the Rome Statute.

Many extrajudicial killings, torture, abductions, arbitrary detentions, disappearances to elderly people, people with albinism, religious leaders specifically Islamists and political leaders/members have been reported to have been committed in different parts of Tanzania. In 2018, it was reported that, about 380 Islamists were missing since 2017 and members of parliament were pushing for formation of a team to investigate the allegations as the Government officials (security forces) were accused in abducting the Islamists.[54] Killings and brutal torture by amputations of albinism; children and young people began to spread in Tanzania in the late 2000's as the perpetrators believe that, the bodies of people with albinism can bring them good luck.[55] Elders have not been left from being killed over witchcraft suspicions. It was reported that, between 2005 and 2011 an average of 500 elderly people were killed due to suspicions that, they were witches.[56]

Further, it was reported that, in 2012, 630 elderly people were killed due to witchcraft beliefs, a figure that rose to 765 (505 of them being women) in 2013.[57] In 2020, the Amnesty International urged Tanzanian authorities to launch a prompt, thorough and independent investigation into allegations of unlawful killings and torture of opposition members and supporters arrested and arbitrarily detained following the 28.10.2020 general elections.[58] It was so urged following the accusations by members of civil societies and opposition groups to have accused security forces of indiscriminately using excessive force in killing at least 22 people.[59] It was further reported that, according to lawyers acting for opposition parties, at least 77 opposition leaders and supports were arbitrary detained since Election Day.[60]

[54]Available at https://theeastafrican.co.ke of Saturday 05.05.2018 (accessed 18 November 2024).
[55]Available at https://hrw.org of 09.02.2019 at 03:01AM EST (accessed 10 July 2023). *See* also Anna Henga and Felista Mauya (eds.), *Human Rights Reports 2021, Legal and Human Rights* (Dar Es Salaam, March 2022) 7-10; Speech by the Minister for Constitutional and Legal Affairs, Hon. Dr. Asha-Rose Mtengeti Migiro (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2015/2016 (Dododma, May 2015) at pp. 5-6 available at https://www.sheria.go.tz (accessed 18 November 2024); Oyeniyi Abe, *The State of Business and Human Rights in Africa* (The Friedrich-Ebert-Stiftung African Union Cooperation Office, August 2022) 39.
[56]Available at https://thecitizen.co.tz of Sunday 15.06.2014 updated on 22.04.2021 (accessed 18 November 2024).
[57]Ibid. *See* also Anna Henga and Felista Mauya (n 56) v-vi, 9-10.
[58]Available at https://amnesty.org of 20.11.2020 (accessed 18 November 2024).
[59]Available at https://amnesty.org of 20.11.2020 (accessed 18 November 2024).
[60]Available at https://amnesty.org of 20.11.2020 (accessed 18 November 2024).

Tanzania's authorities were urged to launch independent, impartial and thorough investigations into all allegations of killings, torture and hold suspects into account. More so, after the General Election of 28th October 2020, formal complaints alleging commission of crimes against humanity by Tanzania Government top officials against civilians were lodged before the ICC requesting for special inquiry and the ICC confirmed receipt of two formal letters alleging human rights violations.[61] The two letters were from The Alliance for Change and Transparency (ACT-Wazalendo) an opposition party and the other was from Maria Sarungi Tsehai an independent human rights activist. However, it has been reported by Human Rights Watch that, the Government authorities have not conducted meaningful investigations into serious abuses that marred the 2020 general elections.[62] The Tanzania 2021 Human Rights Reports,[63] report that, "… according to opposition leaders and NGOs, there were at least 100 opposition activists and supporters who were detained or abducted on the mainland Tanzania prior to and after the 2020 general elections." These few cited examples of criminal allegations fall within the ambit of crimes against humanity and crimes of genocide.

Therefore, Tanzania needs to enact legislation domesticating the Rome Statute on the following reasons: - One, to fulfill her international obligations in good faith bestowed under preambular 4, 5, 6, article 1 and 17 of the Rome Statute read together with article 26[64] as doing so, Tanzania will be acknowledging the obligations under the Rome Statute and the outcry of the international community. Two, criminalization of the international crimes of genocide, the war crimes and crimes against humanity under the Rome Statute, Tanzania will demonstrate commitment to enforce the crimes as international crimes and assure smooth realization of human and peoples' rights.

Moreover, criminalization of the crimes as international crimes will be in compliance with article 63(3) (d) of the Constitution of Tanzania which requires enacting legislation domesticating international treaties read together with article 13(6) (c) of the Constitution of Tanzania and article 12(6) (c) of Zanzibar Constitution which forbid applicability of retroactivity of legislation. Three, enacting legislation domesticating the Rome Statute will

[61]Available at https://.theeastafrican.co.ke of Saturday 14.11.2020 (accessed 18 November 2024). *See* also https://thecitizen.co.tz of Sunday 10.01.2021 (accessed 18 November 2024).

[62]Available at https://hrw.org (accessed 18 November 2024).

[63]Country Reports on Human Rights Practices for 2021, United States Department of State (Bureau of Democracy, Human Rights and Labor) at p. 11 available at https://www.state.gov (accessed 18 November 2024).

[64]Of the Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010.

enable Tanzania to have fully primacy jurisdiction of investigating and prosecuting the crimes as international crimes in case of commission as a means of preventing them. Letting the crimes not be investigated and prosecuted will compel the ICC to intervene in prosecution an act which may interfere with national security and sovereignty of Tanzania. As well, letting the ICC to investigate and prosecute the international crimes may not be possible as the ICC acts as a Court of last resort and depends upon States Parties' cooperation in identifying, arresting and surrender of offenders to the ICC for trials.

1.5 Approaches in Domesticating the Rome Statute

The Rome Statute does not provide any approach as to how States Parties should enact criminal legislation domesticating the Rome Statute into their national legal systems. States Parties have been left with their own choice on how the Rome Statute should be domesticated.[65] The following are some of the approaches which are applied in domestication of international treaties like the Rome Statute: -

1.5.1 Single Act Approach

States parties may implement the Rome Statute by drafting a single and comprehensive piece of legislation covering all relevant provisions to be domesticated as the approach creates one point of reference for legal actors in searching of information.[66] Examples of States Parties to the Rome Statute which have adopted this approach are: - The Republic of Trinidad and Tobago[67] and Uganda.[68] Also, Germany, Lithuania and Bangladeshi are said to have adopted this approach.[69]

1.5.2 The Amendment Approach

Instead of enacting a new single national legislation, a State Party to the Rome Statute may opt to incorporate the provisions of the Rome Statute by amending the existing penal and

[65] *See* Fatuma Silungwe, *A Comparative Study on the Implementation of the Rome Statute by South Africa and Germany: A Case of Fragmentation of International Criminal Law* (LL.M Dissertation, The University of the Western Cape 2013) 13 available at https://www.researchgate.net (accessed 18 November 2024); 15-16.

[66] *See* Olympia Bekou and Katerina Mairiti, *International Criminal Law Guidelines: Implementing the Rome Statute of the International Criminal Court* (Centre for International Law Research and Policy 2017) 18. *See* also Fatuma Silungwe (n 66) 17; Saidat Nakitto, *The Implementation of the Rome Statute of the International Criminal Court in Uganda and South Africa: A Critical Analysis,* (PhD Thesis in Law, Brunel Law School, Brunel University London 2017) at 31 available at https://bura.brunel.ac.uk (accessed 18 November 2024).

[67] *See* section 181(1) of the International Criminal Court Act, Act No. 4 of 2006 of 21st February 2006.

[68] The International Criminal Court Act No. 11 of 2010 of 25th June 2010.

[69] *See* Saidat Nakitto (n 67) 31.

procedural laws within the legal system of the State Party. It is argued that, the method is useful where national legislation already covers some elements typically some of the core international crimes and can therefore be amended to incorporate further aspects without the need for significant re-drafting.[70]

As well, Norway[71] has followed this approach by amending her respective criminal legislation (known as General Civil Penal Code) to incorporate additional elements including – but not limited to the crimes against humanity, the crime of genocide and the war crime. Moreover, Senegal has followed this approach by amending her Code of Criminal Procedure through Act No. 2007-05 of 12th February 2007[72] concerning domestication of the Rome Statute where the crime of genocide, the war crimes and the crimes against humanity among others have been incorporated. The Senegalese national courts have been vested with criminal jurisdiction to try the mentioned international crimes.

1.5.3 The Model Approach

The Commonwealth Secretariat,[73] the South African Development Community and the League of Arab States,[74] among others, have attempted to prepare model laws to the Rome Statute implementation as they provide a template that States Parties may use in drafting their own national implementing legislation.[75] Samoa is one of the States Parties which has chosen the model approach for its court legislation.[76]

1.5.4 The Combination Approach

A combination approach is followed by States when incorporating international criminal law norms by enacting a new specific legislation to incorporate the core international crimes into domestic law and the same by amending the existing penal and criminal procedure

[70]*See* Olympia Bekou and Katerina Mairiti (n 67) 18. *See* also Saidat Nakitto (n 67) 27-28.
[71]Act of 20 May 2005 No. 28 (in force from 1 January 2006 pursuant to the Decree of 21 December 2005 No. 1580). *See* also Olympia Bekou and Katerina Mairiti (n 67) 18-19; Saidat Nakitto (n 67) 28.
[72]See Ministry of Justice of the Republic of Senegal, Information and Comments by Senegal on General Assembly Resolution 74/192 of 18 December 2019, entitled "The Scope and Application of the Principle of Universal Jurisdiction at p.1; Directorate of Human Rights of the Ministry of Justice of the Republic of Senegal, Information and Observation on the Scope and Application of Universal Jurisdiction, p. 2; Opening Address by Mr. Sidiki K, Minister of Justice of the Republic of Senegal, Plenary Discussion on Cooperation at the Twelfth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court on Protection of Witnesses: Strengthening States' Support of the Court (The Hague, 22 November 2013) p. 2, para. 2 available at https://www.un.org (accessed 10 July 2023).
[73]Model Law to Implement the Rome Statute of the International Criminal Court (2017).
[74]Decree Regarding the Arab Model Law Project on Crimes within ICC Jurisdiction, Decree No. 598-21d of 29th November 2005.
[75]*See* Olympia Bekou and Katerina Mairiti (n 67) 19.
[76]Ibid. See also International Criminal Court, Act No. 26 of 2007 of 09th November 2007.

legislations or entails combining various methods discussed above depending on the specific needs and local circumstances of each State.[77] Examples of States Parties which have adopted the approach are: - Canada which has enacted a new specific penal legislation[78] and amended criminal and procedure legislations,[79] South Africa which has enacted new legislation[80] and amended some existing laws,[81] Germany,[82] Ireland,[83] Kenya[84] and United Kingdom.[85]

1.6 Methods of Domesticating the Rome Statute

States Parties wishing to domesticate the Rome Statute may follow replication or reference methods of domestication. The two methods are said to reduce resources and little expert knowledge of international criminal law and that the ICC might exercise its jurisdiction because of an inaccurate domestication of the ICC crimes is considerably reduced, if not eliminated.[86] The two methods are discussed below: -

1.6.1 The Replication Method

The method is adopted by States Parties in domesticating the Rome Statute by copying the words of the provisions creating the crimes identically or verbatim to the provisions of the Rome Statute.[87] Examples of States Parties to the Rome Statute adopted the method are;

[77] *See* Olympia Bekou and Katerina Mairiti (n 67) 19. *See* also Fatuma Silungwe (n 66) 21; Saidat Nakitto (n 67) 32.

[78] The Crimes Against Humanity and War Crimes Act of 29th June 2000. *See* also Olympia Bekou and Katerina Mairiti (n 67) 19.

[79] Criminal Code (R.S.C., 1985), Canada Evidence Act (R.S.C., 1985), Mutual Legal Assistance in Criminal Matters Act (R.S.C., 1985) and Seized Property Management Act (S.C. 1993).

[80] The Implementation of the Rome Statute of the International Criminal Court Act, 2002, Act No. 27 of 2002 of 18th July 2002.

[81] *See* section 39 and Schedule 2 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, Act No. 27 of 2002 of 18th July 2002 where Criminal Procedure Act, 1977, Act No. 51 of 1977 and Military Discipline Supplementary Measures Act, 1999, Act No. 16 of 1999 are listed to have been amended.

[82] The Code of Crimes against International Law (CCAIL) of 26 June 2002 whereas article 2 amended the Criminal Code of 13th November 1998 (Federal Law Gazette I page 3322).

[83] Section 65 of the International Criminal Court Act, Act No. 30 of 2006 of 31st October 2006 whereas International War Crimes Tribunals Act 1998 is indicated to have been amended.

[84] *See* section 174 of the International Crimes Act No. 16 of 2008 of 1st January 2009 where the Privileges and Immunities Act, Cap. 179 is said to have been amended.

[85] The International Criminal Court Act 2001, Cap. 17 of 11th May 2001, a new legislation which applies in England, Wales and Northern Ireland was enacted and the same under section 74 amended some armed forces legislation.

[86] *See* Olympia Bekou and Katerina Mairiti (n 67) 21-22.

[87] Ibid, 22. *See* also Gerhard Kemp (n 5) 63; Fatuma Silungwe (n 66) 20; Saidat Nakitto (n 67) 30.

South Africa[88] has replicated the definitions of the war crimes, crimes against humanity and genocide,[89] the Republic of Trinidad and Tobago[90] where the explanations of genocide, crimes against humanity and the war crimes have been copied. Germany[91] replicated the explanations of genocide, crimes against humanity and war crimes under the Rome Statute. Netherlands, Lesotho and Malta have adopted this approach as it enables national authorities to prosecute similar conducts as set out in the Rome Statute.[92]

1.6.2 The Reference Method

Is a method of domesticating the Rome Statute by referring the meaning of the international crimes as defined under the provisions of the Rome Statute as the method ensures clarity and comprehensiveness.[93] Examples of States Parties which have adopted this method are:- Kenya,[94] Ireland,[95] Uganda,[96] Samoa,[97] United Kingdom,[98] New Zealand, Mauritius, Bosnia and Herzegovina[99] which have referred the definitions of the crimes against humanity, war crimes and crime of genocide as explained under the Rome Statute.

1.7 Conclusion

Tanzania being a State Party to the Rome Statute is under obligation to enact legislation domesticating the Rome Statute in order to exercise her primacy jurisdiction to investigate and prosecute genocide, war crimes, crimes against humanity and aggression as international crimes. Domesticating the Rome Statute will also empower Tanzania to have legal capacity to cooperate effectively with the ICC in exercise of its jurisdiction under the principle of complementarity. Failure by Tanzania to domesticate the Rome Statute is a violation of her international obligation provided for under preambular 5, Article 1 and 88 of the Rome Statute and the principle requiring her to perform the provisions of the Rome Statute in good

[88]Section 1(i), (ii) and (iii) of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, Act No. 27 of 2002 of 18th July 2002.
[89]*See* Olympia Bekou and Katerina Mairiti (n 67) 22.
[90]*See* sections 9(2), 10(2) and 11(2) all of the International Criminal Court Act, Act No. 4 of 2006 of 21st February 2006.
[91]Sections 6, 7 and 8 all of the Code of Crimes against International Law (CCAIL) of 26th June 2002.
[92]*See* Saidat Nakitto (n 67) 30.
[93]*See* Olympia Bekou and Katerina Mairiti (n 67) 22-23. *See* also Gerhard Kemp (n 5) 63; Fatuma Silungwe (n 66) 19; Saidat Nakitto (n 67) 29.
[94]Section 6(4) of the International Crimes Act, Act No. 16 of 2008 of 1st January 2009.
[95]Section 6(1) of the International Criminal Court Act, Act No. 30 of 2006 of 31st October 2006.
[96]Articles 7(2), 8(2) and 9(2) all of the International Criminal Court Act, 2010, Act No. 11 of 2010 of 25th June 2010.
[97]Sections 5(2), 6 (2) and 7(2) all of the International Criminal Court Act, Act No. 26 of 2007 of 9th November 2007.
[98]Section 50(1) of the International Criminal Court Act 2001, Cap. 17 of 11th May 2001.
[99]*See* Saidat Nakitto (n 67) 29.

faith and respect (*pacta sunt servanda*) provided for under Article 26 of the Vienna Convention on the Law of Treaties1969. The article recommends that Tanzania has to enact legislation domesticating the Rome Statute as a means of performing her international obligations in order to fulfill her desire to investigate and prosecute the international crimes and punish the perpetrators and cooperate with the ICC. Lastly, the article recommends that, in case the process of domestication of the Rome Statute takes its motion in Tanzania, enacting single legislation applying reference method of domestication is the best means of ensuring clarity and comprehensiveness.

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A Tale of Two Tax Systems: A Comparative Analysis of General Anti-Avoidance Rules Provisions in India and Australia

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ABSTRACT

General Anti-Avoidance Rules (GAAR) is designed to curb tax evasion through legal loopholes, is explored in depth, shedding light on both jurisdictions' statutory intricacies and judicial decisions. While the overarching goals of GAAR align in both countries, notable disparities exist in their scope and application. In India, GAAR provisions extend to all arrangements, whereas in Australia, their application is limited to schemes. Notably, the Indian GAAR mandates a lack of commercial substance for the arrangement, a requirement absent in the Australian provisions. This paper examines a comprehensive comparative study of General Anti-Avoidance Rules (GAAR) in India and Australia, examining the legislative frameworks and judicial interpretations governing these provisions. The paper also scrutinizes judicial interpretations, revealing a more restrictive approach adopted by Indian courts in contrast to the comparatively liberal stance embraced by Australian counterparts. Drawing on the comparative analysis, the paper emphasizes the necessity of a nuanced, case-specific approach to the application of GAAR provisions, recognizing the distinct facts and circumstances of each situation. This paper contributes to a more profound understanding of the multifaceted nature of anti-avoidance principles in these jurisdictions by dissecting the divergences and convergences in India and Australia's statutory frameworks and judicial attitudes.

Keywords: *General Anti-Avoidance Rules, GAAR, India, Australia, tax avoidance, tax laws, statutory provisions, judicial interpretations*

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PROLOGUE

General Anti Avoidance Rules (GAAR) refer to a set of laws or regulations implemented by governments to prevent individuals or corporations from using tax laws in a manner that was not intended by the lawmakers, to avoid paying taxes.[2] The GAAR typically apply to situations where a taxpayer engages in a transaction or a series of transactions that, although legal, are considered to be artificial or abusive in nature, with the primary purpose of obtaining a tax benefit. In such cases, the GAAR give the tax authorities the power to disregard the tax benefit obtained and to reclassify the transaction for tax purposes. The goal of GAAR is to ensure that taxpayers pay their fair share of taxes and to prevent tax evasion and aggressive tax planning. The application of GAAR is usually determined on a case-by-case basis, taking into account the specific facts and circumstances of each situation. Many countries have introduced GAAR in their tax legislation, including Canada, the United Kingdom, Australia, India, and several others. However, the scope and application of GAAR can vary significantly across different jurisdictions.

In India, the GAAR was introduced in the Income Tax Act, 1961, in 2012, with the objective of countering aggressive tax planning and tax avoidance. The GAAR provisions empower the tax authorities to disregard any arrangement or transaction that is considered to be an impermissible avoidance arrangement, where the main purpose is to obtain a tax benefit, and it lacks commercial substance. The provisions are applicable to all arrangements entered into on or after April 1, 2017.

In Australia, GAAR is referred to as the Part IVA of the Income Tax Assessment Act, 1936.[3] The provisions were introduced in 1981 and have undergone several amendments since then. The objective of the provisions is to prevent taxpayers from obtaining tax benefits by entering into arrangements that are considered to be artificial or contrived. To invoke Part IVA, the arrangement must have been entered into with the sole or dominant purpose of obtaining a tax benefit, and the arrangement must be deemed to be a scheme. Both India and Australia have statutory provisions in place to counter tax avoidance, and the provisions are broadly similar in their objective. However, there are differences in the scope and application of the provisions. The Indian GAAR provisions apply to all arrangements, whereas the Australian provisions

[2] *'Understanding Basics of General Anti-Avoidance Rule (GAAR)' <https://taxguru.in/income-tax/understanding-basics-general-anti-avoidance-rule-gaar.html> accessed 13 April 2023.*

[3] *Richard Krever and Peter Mellor, 'Australia, GAARs – A Key Element of Tax Systems in the Post-BEPS World' (1 June 2016) <https://papers.ssrn.com/abstract=2800009> accessed 13 April 2023.*

only apply to schemes. Additionally, the Indian GAAR provisions require the arrangement to lack commercial substance, whereas the Australian provisions do not require such a test.

The approach taken by the judiciary in both countries is also significant. In India, the Supreme Court has held that the GAAR provisions should be invoked in cases of tax evasion and not tax avoidance. The court has emphasized the importance of commercial substance and has held that the provisions should not be invoked in cases where the transaction has economic substance. In Australia, the courts have adopted a more liberal approach and have upheld the application of Part IVA in several cases involving complex tax arrangements.

Thus, the GAAR provisions in India and Australia are similar in their objective but differ in scope and application. The judiciary in both countries has played a crucial role in interpreting and applying the provisions, and their approach has varied across jurisdictions.

CROSS-JURISDICTIONAL STUDY

India

The need for General Anti Avoidance Rules (GAAR) arose after the Vodafone deal with Hutchison-Essar, which took place in the Cayman Islands. Due to this deal, the government estimated a loss of over USD 2 Billion in taxes. GAAR was introduced in India through the Union Budget for 2012-13. The Finance Act of 2012 introduced Chapter X-A in the Income Tax Act 1961, which contains the provisions related to GAAR.[4] The purpose of GAAR is to prevent aggressive tax planning and curb taxpayers' use of abusive tax avoidance schemes. It empowers the tax authorities to look beyond the legal form of an arrangement to its substance and to disregard an arrangement if it is found to be entered into with the main purpose of obtaining a tax benefit.[5]

The Westminster principle, which was established in the case of *IRC vs Duke of Westminster*, has been the dominant principle in India for a long time. This principle is based on the idea that taxpayers have the right to structure their affairs to minimize their tax liability as long as the transactions are legal and not fraudulent.

General Anti Avoidance Rules (GAAR) were introduced in India through the Finance Act 2012. The rules provide the tax authorities with the power to scrutinize and deny tax benefits obtained through a transaction that is deemed to be an 'impermissible avoidance arrangement' (IAA).[6]

[4] *Sukumar Mukhopadhyay, 'General Anti-Avoidance Rule in Income Tax Law' (2012) 47 Economic and Political Weekly 24.*
[5] *Finance Act 2012-13.*
[6] *Mukhopadhyay (n 3).*

Under GAAR, an arrangement can be deemed to be an IAA if it satisfies any one of the following conditions:

i) It results in the misuse or abuse of tax laws.
ii) It lacks commercial substance or is not carried out in a bona fide manner.
iii) It is entered into with the primary purpose of obtaining a tax benefit.
iv) The introduction of GAAR has been a significant development in India's tax law framework. It has given the tax authorities greater powers to challenge and scrutinize tax arrangements that are deemed to be abusive or lack commercial substance.

However, the implementation of GAAR has also been a subject of debate and controversy. Critics have argued that the rules are vague and can be interpreted arbitrarily by tax authorities, leading to uncertainty for businesses and investors. The Indian government has taken measures to address some of these concerns, such as providing guidelines and setting up a panel to provide clarity on the application of GAAR. Nevertheless, this principle has been subject to judicial scrutiny in India, and the courts have developed certain limitations to prevent taxpayers from engaging in abusive tax avoidance practices. Three landmark cases in India have played a significant role in shaping the jurisprudence of anti-avoidance measures in the country.

Firstly, ***In McDowell & Co. Ltd. vs Commercial Tax Officer***[7], the Supreme Court held that tax planning is legitimate as long as it is within the framework of the law, but colorable devices cannot be part of tax planning. The court also held that the form of a transaction is not as important as its substance and that courts can look beyond the legal form of a transaction to determine its true nature.

Secondly, In ***W.T. Ramsay Ltd. vs Inland Revenue Commissioner***[8], the House of Lords departed from the Westminster principle and held that taxpayers could not rely on the form of a transaction to avoid tax if its substance is different from what it appears to be. The court also held that anti-avoidance measures should not be interpreted narrowly but given a broad and purposive interpretation to prevent taxpayers from exploiting loopholes in the law.

Thirdly, In ***Vodafone International Holdings B.V***. vs ***Union of India***[9]**,** the Supreme Court held that the acquisition of shares of an Indian company by a foreign company is not taxable in India if the transaction takes place outside India. The court also held that the government cannot impose tax retrospectively on already completed transactions. These cases and others

[7] *1977 AIR 1459*
[8] *1981 AC 300 (HL)*
[9] *2010 ITR 329 126*

have influenced the development of GAAR in India and have led to legislative measures to prevent tax avoidance practices.[10]

The legislation was brought in by amending the Income Tax Act 1961 and bringing in a new chapter X-A, which contained sections 95 to 102. The primary feature of the GAAR in Indian law is that if an arrangement has been made whose main purpose is to obtain a tax benefit and if it satisfies any of the one condition in s. 96 then that arrangement becomes an 'impermissible avoidance agreement'. The conditions under s. 96 are –

i) the arrangement creates rights and obligations which are not normally created between parties dealing at an arm's length, or

ii) it leads to a misuse or abuse of the provisions of the tax law, or

iii) It lacks commercial substance or is deemed to lack commercial substance, or

iv) it is entered into or carried out in a manner which is not for a bonafide purpose.[11]

Additionally, Section 96 in its sub-clause (2) also shifts the burden of proof on the taxpayer to establish that the main purpose of the arrangement was not to avoid tax benefits once the tax department has made a prima facie case against the assessee.[12]

Section 97 lays down conditions when an arrangement can be deemed to lack commercial substance. It is a comprehensive section capable of bringing into its purview several ways companies try to evade taxes.[13]

Section 98 deals with the consequences that will happen if an arrangement is declared to be an impermissible avoidance agreement.[14] Section 99 lays down what treatment would be meted out to connected persons and the accommodating party of an arrangement.

Subclause (iv) of section 99 empowers courts and the income tax authority to pierce the corporate veil when ascertaining whether an arrangement is an impermissible avoidance agreement.[15] Section 102 provides definitions for several key terms used in the above sections like – arrangement, connected person, tax benefit etc.[16]

The first major case was *McDowell & Co Ltd vs CTO*,[17] is significant as it marked a shift in the jurisprudence of tax avoidance in India. The Court held that tax planning may be legitimate but that the avoidance of tax through dubious means is not acceptable. The Court further

[10] *Inland Revenue Commissioners v. Duke of Westminster, 1931 A.C. 1 (H.L.)*
[11] *Section 96, Income Tax Act 1961.*
[12] *Ibid.*
[13] *Section 97, Income Tax Act 1961.*
[14] *Section 98, Income Tax Act 1961.*
[15] *Section 99, Income Tax Act 1961.*
[16] *Section 102, Income Tax Act 1961.*
[17] *McDowell & Co Ltd vs CTO, 1985 (3) SCC 230.*

observed that it is not relevant whether the tax statute should be construed literally or liberally, or whether the transaction is real or prohibited, while dealing with a tax avoidance device. The Court emphasized that it is the duty of every citizen to pay taxes honestly without resorting to subterfuges.[18] These observations have been relied upon in subsequent cases and have significantly impacted the interpretation and application of anti-avoidance provisions in India. Justice Ranganath Mishra, who wrote one of the opinions for the majority, addressed the Westminster principle, which was adopted in earlier case laws like *CIT vs A. Raman & Co.*[19] Justice Mishra states that – 'Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning, and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. He further observed that to determine whether a transaction is genuine, one needs to take a holistic approach and consider all relevant factors, including the commercial substance of the transaction and the legal rights and obligations of the parties involved. He also stated that the taxpayer has the burden of proving that the transaction is genuine and not a sham. These observations have been widely cited in subsequent cases and have influenced the development of the doctrine of substance over form in Indian tax law.

In the case of ***CIT vs B.M. Kharwar***.[20]Justice Mishra's opinion, in this case, reiterated the importance of distinguishing between legitimate tax planning and abusive tax avoidance. He emphasized that while taxpayers are entitled to arrange their affairs in a tax-efficient manner within the framework of the law, they cannot use artificial or sham transactions to avoid taxes. His observations helped shape the understanding of the difference between tax planning and tax avoidance in Indian jurisprudence and were later relied upon by courts and tax authorities in subsequent cases.

The Supreme Court, in this case, was willing to move away from the traditional Westminster principle and take a more nuanced approach to anti-avoidance cases, especially in light of the various dubious ways used by taxpayers to exploit tax laws and avoid paying taxes. Justice Reddy's concurring opinion, which critiqued the Westminster principle and emphasized the need to examine the purpose behind the transaction, has been widely used by tax authorities in India as a favourable judgment in anti-avoidance cases.[21]

[18] *'Eastern Book Company - Practical Lawyer' <https://www.ebc-india.com/lawyer/articles/2003v5a5.htm> accessed 13 April 2023.*
[19] *CIT vs A. Raman & Co., 1968 67 ITR 11 (SC).*
[20] *CIT vs B.M. Kharwar, 1969 72 ITR 603.*
[21] *W.T. Ramsay Ltd. vs IRC, 1982 AC 300.*

The decision in ***McDowell & Co.*** v. ***Commercial Tax Officer***[22] marked a departure from the traditional approach of relying solely on the form of a transaction and gave greater importance to the substance of the transaction and the intended effect. This shift in approach was later reflected in the introduction of General Anti-Avoidance Rules (GAAR) in the Income Tax Act in 2012, which allow tax authorities to disregard transactions that have been undertaken for the sole purpose of avoiding tax, even if they are technically legal.

Justice Reddy's opinion in the McDowell case emphasized the need to look into a transaction's true nature and purpose rather than just its form or appearance. He argued that the court should examine whether the transaction has been carried out with the sole purpose of avoiding taxes and whether it is such that the judicial process would approve of it. According to him, the Westminster principle was inadequate to deal with the complexities of modern tax planning, and a more realistic approach was needed to counter tax avoidance.

Additionally, the court observed that tax planning is legitimate and taxpayers are entitled to arrange their affairs in a manner that would minimize their tax liability. The court also emphasized that the tax authorities have to respect the treaty obligations entered into by India with other countries and cannot override them by issuing circulars or notifications. Furthermore, the court stated that the burden of proof lies on the tax authorities to establish that the taxpayer is not entitled to the treaty's benefits and that tax avoidance was the main purpose of the transaction. It also clarified that the residence of the Mauritius company was not conclusive and that the tax authorities could examine the genuineness of the transaction and the commercial substance of the arrangements to determine the entitlement of the taxpayer to the benefits of the treaty. Overall, this case was a significant development in the area of international tax law and provided clarity on the validity of circulars issued by the CBDT and the entitlement of taxpayers to the benefits of double taxation treaties.

Regarding the Vodafone case, it is important to note that it was a landmark judgment that had significant implications for the taxation of cross-border transactions in India. The Supreme Court held that the transfer of shares between two foreign companies, which resulted in the transfer of a controlling interest in an Indian company, did not give rise to any taxable income in India. The Court reasoned that India's tax jurisdiction did not extend to transactions that occurred offshore between two non-resident entities.

[22] *'Mcdowell & Company Ltd. v. Commercial Tax Officer, Vii Circle, Hyderabad ., Supreme Court Of India, Judgment, Law, Casemine.Com' (https://www.casemine.com) <https://www.casemine.com/judgement/in/5609abbbe4b014971140d27a> accessed 13 April 2023.*

The Vodafone case had far-reaching consequences and sparked a debate on the validity of India's tax laws and their impact on foreign investment. The Indian government responded to the decision by amending the tax laws to provide for retrospective taxation, which was criticized by investors and international organizations. The case highlights the need for clarity and consistency in tax laws, particularly in cross-border transactions, to avoid uncertainty and disputes.

The Indian tax authorities held that this transfer of shares was a taxable event in India as it resulted in the transfer of controlling interest in an Indian company. The Supreme Court, however, held that the transfer of shares between two foreign companies which lead to the extinguishment of controlling interest in the Indian company held by one foreign company to another foreign company cannot fall within the jurisdiction of the Indian tax authorities. The court observed that the transaction took place outside India, and the Indian tax authorities did not have jurisdiction over the same. The court also noted that the Indian tax authorities could not tax a transaction merely because it had an indirect effect in India. The decision was controversial and led to amendments to the Income Tax Act by the Finance Act, 2012 to clarify the scope of the tax authorities' jurisdiction over offshore transactions.[23]

The Vodafone case was a landmark decision that had significant implications for the taxation of cross-border transactions in India. The case highlighted the importance of carefully structuring transactions to ensure tax efficiency, while also demonstrating the limits of India's tax jurisdiction in the context of cross-border deals. It also raised important questions about the role of tax planning and the use of tax havens in structuring cross-border transactions. The decision has had far-reaching implications for global corporations operating in India, and has underscored the need for careful tax planning and compliance in this complex and rapidly evolving area of the law.

In the case of ***Vodafone India Services Pvt. Ltd***. v. ***Union of India*** **(2012)**[24] was a landmark judgement in India's jurisprudence on GAAR. The judgement had important implications for the interpretation of GAAR provisions and provided clarity on several issues that were previously unresolved. The case laid down the conditions under which the corporate veil can be pierced and also reaffirmed the importance of the dominant purpose test. Despite the Finance Act of 2012 nullifying some of the key observations made by the Supreme Court in this case, it remains an important precedent for courts to refer to when dealing with GAAR cases.

[23] *Vodafone International Holdings B.V. vs Union of India, 2012 (204) Taxmann 408.*
[24] *'Vodafone India Services Pvt .Ltd. vs Union Of India' <https://indiankanoon.org/doc/177723533/> accessed 13 April 2023.*

Overall, the Vodafone case represents a significant milestone in the development of India's anti-avoidance regime and provides a roadmap for the future interpretation and implementation of GAAR provisions in the country.

The above analysis highlights the similarities and differences between the Indian and Australian jurisprudence with respect to GAAR provisions. Both countries have adopted comprehensive anti-avoidance laws, but their origin and interpretation differ significantly. While India relied heavily on judicial precedents to develop GAAR, Australia had a legislative approach. Both countries, however, have struggled with balancing the need to prevent tax avoidance with the right of taxpayers to engage in legitimate tax planning. The analysis also points to the need for courts to provide clear and consistent interpretations of GAAR provisions to avoid confusion and ensure their proper implementation. As countries around the world continue to grapple with the issue of tax avoidance, the insights gained from the comparative analysis of India and Australia's GAAR provisions can provide valuable guidance.

India and Australia have adopted their own unique approaches towards tackling anti-avoidance measures through the implementation of GAARs. While similarities exist in terms of the adoption of the dominant purpose and commercial substance tests, there are notable differences such as the absence of a legislative act in India until 2012 and the empowerment of courts to pierce the corporate veil. Furthermore, the dominance of the Westminster principle in both jurisdictions has led to a complex jurisprudential history that requires careful consideration and implementation by the courts. Despite these challenges, the implementation of GAARs in both India and Australia represents an important step towards curbing tax avoidance and promoting fairness in their respective tax systems.

Australia

In the case of Australia, GAAR provisions can be analysed by dividing it into two phases. The pre-1981 phase and the post-1981 phase.[25] In the pre-1981 phase, section 260 of the Australian Income Tax Assessment Act (ITAA) was used to combat tax avoidance. Section 260 gave the Commissioner of Taxation wide powers to disregard or recharacterize transactions entered into for tax avoidance purposes. The courts applied the section strictly, and its use had several limitations. However, with the introduction of Part IVA in the ITAA in 1981, the scope of GAAR provisions was significantly expanded. Part IVA sets out a comprehensive scheme that targets tax avoidance arrangements. The section provides the Commissioner with the power to

[25] *Barbara Conradt, Yi-Chun Wu and Ding Xue, 'Programmed Cell Death During Caenorhabditis Elegans Development' (2016) 203 Genetics 1533.*

cancel tax benefits if the arrangement was entered into for the sole or dominant purpose of obtaining the tax benefit. The test for determining the dominant purpose is subjective, and the courts have adopted a case-by-case approach in interpreting the provisions.[26] dealt with anti-avoidance rules. Section 260 reads – 'Every contract, agreement or arrangement writing, whether before or after the commencement as it has or purports to have the effect of

a. *altering the incidence of any income*
b. *relieving any person from liability to pay return;*
c. *defeating, evading or avoiding any duty person by this Act; or*
d. *preventing the operation of this Act*
e. *be absolutely void as against the Commissioner, proceeding under this Act but without may have in any other respect or for any other purpose.'*

Section 260 of the Australian Income Tax Assessment Act (ITAA) addressed GAARs by scrutinizing the purpose behind a transaction,[27] making those done with the intention of avoiding taxes being noncompliant. The courts established three tests to mitigate its broad language: the predication test, the choice principle (Westminster principle), and the antecedent transaction doctrine. The predication test, established in the case of Newton vs Federal Commissioner of Taxation, determined that the section is not concerned with the subjective motive of the individuals to avoid tax. Instead, it evaluated the objective purpose of the transaction and predicated whether it was implemented in a particular way to avoid tax. If it cannot be predicated so and is an ordinary way of doing business, the section is not attracted. Conversely, the choice principle, first introduced in Australia in the case of ***WP Keighery Pty. Ltd*** vs ***Federal Commissioner of Taxation*** stated that if the Act provides two express choices to a taxpayer, and they choose an option purely for tax purposes, their actions cannot be in violation of section 260. The courts preferred the choice principle over the predication test as it evaluated the subjective motive of the participant and aligned with commercial reasoning. The case involved a taxpayer who had sold a company with significant accumulated profits for a non-taxable gain, whereas if the taxpayer had opted to liquidate the company instead, the profits would have been taxable. The tax authorities argued that this transaction fell under the purview of section 260, but the court disagreed and upheld the taxpayer's right to choose the option that resulted in a non-taxable gain. The court held that the taxpayer's fundamental right

[26] *Section 260, Income Tax Assessment Act 1981.*
[27] *INCOME TAX ASSESSMENT ACT 1936 - SECT 260 Contracts to Evade Tax Void' <http://classic.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s260.html> accessed 13 April 2023.*

to make a choice should be respected and that section 260 could not be used to impinge on that right.

The choice principle was further affirmed by the Australian courts in the case of ***Slutzkin*** vs ***Federal Commissioner of Taxation***.[28] In this case, the taxpayer had entered into a scheme to reduce his tax liability by creating a trust and transferring his shares to it. The court held that the taxpayer was entitled to choose the form of the transaction as long as he had not entered into a sham transaction or one lacking in commercial substance. This case further solidified the choice principle as a key component in the analysis of GAAR provisions in Australia.[29]

The ***Cridland*** vs ***Commissioner of Taxation*** case further reinforced and applied the choice principle in Australia. In this case, the taxpayer created a trust and transferred shares to the trust to avoid paying dividend taxes. The tax authorities argued that this tax avoidance scheme fell under the GAAR provisions. However, the court ruled that the taxpayer had made a genuine choice to transfer the shares to the trust and that this choice was not solely based on tax reasons. Therefore, section 260 did not apply to this arrangement. This case highlighted the importance of the choice principle in determining the validity of tax arrangements in Australia.[30]

The application of the choice principle became a concern for the tax authorities as it could potentially allow taxpayers to engage in numerous tax-motivated transactions as long as the statute presents two choices. Such an interpretation would render section 260 of the statute useless as it is intended to prevent tax avoidance.

In the case of ***Mullens*** vs ***Federal Commissioner of Taxation***,[31] the Australian courts developed a new doctrine called the antecedent transaction doctrine. This doctrine was developed to curb the choice principle's excesses and ensure that GAARs could be applied in cases where there was only one choice available to the taxpayer. Under this doctrine, if a series of transactions are carried out in such a way that they achieve a particular tax result, then the court may look beyond the immediate transaction and examine the antecedent transactions to determine whether the tax result was intended. This allows the court to ignore the taxpayer's choices in individual transactions and look at the larger picture of the series of transactions as a whole to determine whether the overall purpose was tax avoidance.

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[28] *'SLUTZKIN v. FEDERAL COMMISSIONER OF TAXATION' <https://staging.hcourt.gov.au/assets/publications/judgments/1977/065--SLUTZKIN_v._FEDERAL_COMMISSIONER_OF_TAXATION--(1977)_140_CLR_314.html> accessed 13 April 2023.*

[29] *Slutzkin vs Federal Commissioner of Taxation, (1978)7 A.T.R. 166 (H.C.A.).*

[30] *Cridland vs Commissioner of Taxation, 1977 140 C.L.R. 330 (H.C.A.).*

[31] *Mullens vs Federal Commissioner of Taxation, (1976) 6 A.T.R. 504, 135 C.L.R. 290 (H.C.A.)*

In the post-1981 phase, the Australian government introduced Part IVA to the ITAA in order to address the issues arising from the three tests. According to the explanatory memorandum to Part IVA, the provisions were designed to apply when it was objectively determined that an arrangement was entered into with the sole or dominant purpose of obtaining a tax deduction or excluding an amount from assessable income. Part IVA essentially codified the concept of GAAR into the Australian tax law. Unlike the previous Section 260, Part IVA provided a more structured approach to identifying tax avoidance arrangements. The provision required the Commissioner of Taxation to examine all the relevant circumstances of the arrangement and determine whether it had been entered into for the dominant purpose of obtaining a tax benefit. If the Commissioner was satisfied that the arrangement had been entered into for such a purpose, he could disallow the tax benefit or adjust the taxpayer's liability accordingly.[32]

Part IVA was enacted to overcome the problems created by the three tests that had severely curtailed the effectiveness of section 260 of the ITAA. It consists of three basic requirements - the existence of a scheme, the taxpayer deriving some benefit from the scheme, and the scheme being entered into for the dominant purpose of obtaining a tax benefit. The dominant purpose test is an objective determination that can be determined from eight exhaustive factors as laid down in section 177D of the ITAA. These factors include the manner in which the scheme was implemented, its form and substance, the timing of the scheme, the result that would be achieved by the scheme but for Part IVA, any change in the financial position of the relevant taxpayer or any other person, and the nature of the connection between or among parties to the scheme. Part IVA was enacted with the predication test in mind, and it aims to prevent taxpayers from engaging in artificial or contrived transactions solely for the purpose of obtaining a tax benefit.

In the case of *Federal Commissioner of Taxation vs Spotless Services Ltd*, the Australian High Court provided guidance on the application of Part IVA. The case involved Spotless Services Ltd, which had entered into a scheme to sell its business to a newly formed subsidiary for a high price and then lease the business back at a much lower rent, resulting in a significant tax benefit. The Court found that the scheme was entered into for the dominant purpose of obtaining a tax benefit and that the arrangement lacked commercial reality. The Court also rejected the argument that the arrangement was an ordinary commercial transaction that happened to have tax consequences. The case established the principle that Part IVA applies to

[32] *Austl., Explanatory Memorandum to Income Tax Laws Amendment Bill (No 2) (1981).*

schemes that lack commercial reality, even if they are implemented in a legally effective manner.[33]

Therefore, the development of anti-avoidance rules in Australia has been a complex process. The court's initial interpretation of Section 260 led to the formulation of the choice principle and the antecedent transaction doctrine, which severely limited the statute's effectiveness. The enactment of Part IVA brought in a self-objective standard with three basic requirements and eight exhaustive factors. The recent decision in the Spotless case disregarded the jurisprudential history of Australia and held that the new provision should carry a self-objective standard. The Australian jurisprudence has also been influenced by the Westminster principle, which has been partially accepted in the new statute.

Recent Expansion of GAAR in Australia

Recently, Australia amended its GAAR to address specific base erosion and profit shifting (BEPS) concerns. Also, as part of the 2023-2024 Budget, the government announced an expansion of the GAAR for income tax. The expanded GAAR includes schemes that reduce tax paid in Australia by accessing a lower withholding tax rate on income paid to foreign residents. Also, the schemes that achieve an Australian income tax benefit, even if the dominant purpose was to reduce foreign income tax.

Comparison and Analysis

The similarity between the two countries is the existence of anti-avoidance rules in their respective tax laws. In India, a specific provision in the Income Tax Act 1961, known as section 37(1), allows the tax authorities to disallow expenses incurred to avoid tax. Similarly, in Australia, Part IVA of the Income Tax Assessment Act, 1936 contains anti-avoidance provisions that allow the tax authorities to disregard arrangements that have been entered into for the dominant purpose of obtaining a tax benefit.

One key difference between the two countries is the scope of the anti-avoidance rules. In India, the anti-avoidance provision applies to any arrangement that has been entered into with the sole purpose of avoiding tax, while in Australia, the provision applies to arrangements that have been entered into with the dominant purpose of obtaining a tax benefit. This difference in scope reflects the different approaches that the two countries have taken towards combating tax avoidance.

Additional difference between the two countries is the way in which the courts have interpreted and applied the anti-avoidance provisions. In India, the courts have generally taken a strict view

[33] *Federal Commissioner of Taxation vs Spotless Services Ltd, (1996) 96 A.T.C. 520.*

of tax avoidance and have upheld the validity of the anti-avoidance provision in section 37(1). In contrast, the Australian courts have been more willing to apply a purposive approach to the interpretation of Part IVA, and have been more willing to look at the substance of transactions rather than their form.

Hence, while there are similarities and differences between the Indian and Australian jurisprudence and laws with regard to anti-avoidance rules, both countries recognize the importance of preventing tax avoidance and have taken steps to address the issue.

Prof. Aakash Singh Rathore raises this larger philosophical concern in his book Rethinking Indian Jurisprudence: An Introduction to the Philosophy of Law. He argues that despite gaining independence in the literal sense, countries like India and Australia have not been able to fully decolonize their jurisprudence and continue to be colonized by the legacy of British rule. This legacy is evident in the continued use of the Westminster principle, which has been a central tenet of British legal philosophy and continues to shape the legal systems of these countries. According to Rathore, this raises important questions about the nature of legal philosophy and the extent to which it is influenced by historical and cultural factors.

India and Australia have anti-avoidance provisions that follow the dominant purpose and commercial substance tests. In India, the General Anti-Avoidance Rule (GAAR) was introduced in 2012, which provides for the application of the "main purpose" test, i.e., if the main purpose of a transaction is to obtain a tax benefit, then GAAR can be invoked to deny such benefit. Similarly, in Australia, Part IVA of the ITAA provides for the application of the dominant purpose test to determine the genuineness of a transaction. Both these tests have been developed over time and have become an integral part of the tax jurisprudence of these countries.

Secondly, the scope of GAAR in India is much broader than in Australia. Under Indian law, GAAR can apply to any arrangement entered into with the main purpose of obtaining a tax benefit. On the other hand, in Australia, Part IVA of the ITAA applies only if the dominant purpose of the scheme is to obtain a tax benefit. Additionally, the Australian law provides a list of eight factors to be considered in determining the dominant purpose, whereas Indian law gives broad discretion to the tax authorities to determine the main purpose. Another difference is in the consequences of violating GAAR. In India, if the tax authorities invoke GAAR, they have the power to declare the entire arrangement as void, and the tax consequences of such an arrangement will be determined based on the substance of the transaction. In Australia, however, the tax consequences are adjusted, rather than the entire arrangement being declared void.

India introduced a provision to grandfather investments made before a certain date, while Australia does not have any such provision. This means that investments made before the introduction of GAAR in India are not affected by GAAR provisions, while in Australia, all arrangements are subject to Part IVA regardless of when they were entered into.

In India, courts have generally given more importance to the right of taxpayers to do tax-planning and have been cautious in applying GAAR. The Supreme Court, in the case of *Vodafone International Holdings BV v. Union of India*, held that tax planning is not illegal and that taxpayers are entitled to organize their affairs in such a manner as to minimize their tax liability. However, the court also recognized that tax planning cannot be used as a colorable device or a subterfuge to avoid tax liabilities.

On the other hand, in Australia, the courts have been more willing to disregard tax planning arrangements that are entered into for the dominant purpose of obtaining a tax benefit. The introduction of Part IVA in the ITAA in 1981 was a legislative response to court decisions that were perceived to have placed too much emphasis on the form of transactions rather than their substance. Part IVA seeks to focus on the substance of transactions and applies a subjective test to determine whether the scheme was entered into for the dominant purpose of obtaining a tax benefit.

Indeed, the similarities and differences between the Indian and Australian jurisdictions in terms of GAAR are worth noting. While both countries follow the dominant purpose test and commercial substance test, the origins of the GAAR law are different in both countries. In India, it was created through judicial interpretation, while in Australia, it was a purely legislative act that was extrapolated by the judiciary. Additionally, the right to tax planning is declared to be a fundamental right in Australia and a legal right in India, which can have different implications. Finally, the Indian GAAR rules empower the courts to pierce the corporate veil, while there is no such provision in Australian law. These differences highlight the unique nuances in the application of GAAR in both jurisdictions.

CONCLUSION

In conclusion, the adoption of GAAR provisions has become a common trend globally in response to the growing complexity of tax structures and the increasing use of tax avoidance measures by global corporations. India and Australia, both former British colonies, have adopted comprehensive laws to deal with anti-avoidance measures, with some similarities and differences. While the Westminster principle continues to influence jurisprudence in both countries, the ways in which GAAR provisions have been introduced and implemented differ

significantly. It is crucial that the courts interpret and implement these laws correctly to avoid confusion and ensure that the goals of these provisions are achieved. Furthermore, it is important to note that while GAARs can be an effective tool in combating tax avoidance, it can also be a double-edged sword if not implemented and applied correctly. There is a fine line between legitimate tax planning and aggressive tax avoidance, and the interpretation of these laws by the courts can greatly impact the business environment and economic growth of a country. Therefore, it is crucial for the judiciary to strike a balance between preventing tax avoidance and ensuring that legitimate tax planning activities are not unduly curtailed. In conclusion, the development and implementation of GAARs require a delicate balance between effective tax administration and the promotion of legitimate economic activities.

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Alternative Dispute Resolution and International Military Conflicts: Crafting a Sustainable Peace

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ABSTRACT

This article explores the expanding role of Alternative Dispute Resolution (ADR) in managing and resolving international military conflicts, highlighting its effectiveness as a non-violent approach to peacebuilding. As geopolitical tensions escalate and traditional warfare continues to bring devastating consequences, ADR mechanisms such as mediation, negotiation, and arbitration have gained prominence in the management of military disputes. The paper examines recent cases where ADR played a critical role, such as the India-China border skirmishes, the Minsk Agreements between Ukraine and Russia, and the Philippines' arbitration case against China over the South China Sea. These examples demonstrate how ADR can facilitate dialogue, reduce the risk of full-scale war, and address territorial and legal disputes. However, the paper also identifies significant challenges to ADR's success in military contexts, including deep mistrust between conflicting parties, disparities in power, and political influences from third-party actors. The role of international organizations, notably the United Nations, in promoting ADR is emphasized, with a call for reform to enhance the effectiveness and enforcement of ADR strategies. The article concludes with recommendations for expanding the use of ADR in conflict prevention, strengthening international legal frameworks, and fostering trust through education and dialogue to ensure sustainable peace in an increasingly volatile world.

Keywords: Alternative Dispute Resolution (ADR), Military Conflicts, Peacebuilding International Organizations and Geopolitical Tensions

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Prefatory Note

In this time marked by fast escalation of geopolitical conflicts and military skirmishes, traditional warfare generally triumphs, causing devastation behind it. Nevertheless, throughout these disputes, an alternative dispute resolution system Alternative Dispute Resolution (ADR) has arisen as an essential means to support peaceful outcomes. ADR isn't just for civil or commercial matters anymore; its usefulness in conflict management and resolution for military and international issues has grown. This article investigates the increasing tendency to use methods of alternative dispute resolution (ADR), including mediation, negotiation, and arbitration, to control military conflicts. The paper will stress current achievements, difficulties, and the growing part played by international organizations in fostering peace via ADR mechanisms.

The Function of ADR in Conflict Situations Involving the Military

ADR, known as Alternative Dispute Resolution, includes approaches like mediation and negotiation, along with arbitration, that collectively form coordinated strategies for handling complaints in ways distinct from violent approaches. As a consequence of military tensions, these methods are important tools for stopping total war, for easing tensions, and for addressing major issues, such as land claims or rapid access to resources. Traditionally escalating conflicts can now find mitigation in ADR methods that stress diplomacy, mutual advantage, and talk. During the recent conflicts on the Line of Actual Control (LAC) between India and China, a variety of military and diplomatic conversations has taken place in an attempt to prevent a major war. The negotiations function as supporting evidence that ADR is an essential tool for managing intense military disputes between leading nations.[2]

Central Mechanisms of ADR Related to Military Controversies

ADR does not adapt to all situations equally. Forms of ADR mediation, negotiation, and arbitration each have a unique contribution to deescalating Military conflicts.

1. Mediation

Developing venues for interaction with impartial third parties exists now. Of all the ADR mechanisms, mediation is probably the most frequently applied in military disputes. It generally comprises a disinterested third party, usually an international organization, helping to promote interaction among enemy factions. The motivation behind this is to encourage candor in discussions that don't quickly intensify the stakes, which eventually creates an environment

[2] Uppsala Conflict Data Program, UCDP Conflict Encyclopedia (2023).

conducive to a shared understanding. Efforts to mediate include the Minsk Agreements; reached in 2015, they attempt to settle the continuing conflict between Ukraine and separatists backed by Russia in the East of the country. Through their collaboration with the Organization for Security and Cooperation in Europe (OSCE), France and Germany have dedicated resources to mediation, assiduously seeking ceasefires and starting conversations. Even with existing tensions, the Minsk agreements proved that mediation can operate as a pause mechanism to diminish violence and build the required groundwork for detailed negotiations for peace. The Comprehensive Peace Agreement from 2005 stresses the requirement for mediation to resolve the many years of civil conflict in Sudan. In 2011, South Sudan gained independence because of a deal supported by IGAD and backed by the United Nations. Absence of mediation could have caused a lasting conflict that might have triggered major increases in regional instability.

2. Negotiation: Direct Diplomatic Engagement

ADR includes negotiating as an important aspect, which features either direct contact between opposing parties or a third party mediation. Accomplished negotiation demands that both participants are willing to embrace diplomacy and to compromise, a remarkably difficult task in the course of extended military conflicts. To illustrate, during the 2020 India-China border skirmishes, numerous bilateral talks took place comprising high-level military negotiations, designed to reduce tensions. Although the border tension has not yet been resolved, these negotiations prohibited a full-scale war between the two nuclear armed countries. Reports state that over 10 discussions occurred between Indian and Chinese military commanders, which resulted in disengagement accords along a number of areas of the disputed frontier.

3. Arbitration: A Resolution Binding Territorial and Legal Conflicts

The essential distinction between arbitration and other forms of ADR is that it gives a decision that is binding, provided by an unbiased arbitrator or panel, usually in disputes related to borders or the law. In spite of the fact that it happens infrequently in blatant military conflicts, arbitration can address the foundational sources of these disputes. In 2013, the Philippines took the step of beginning arbitration actions focused on China in the South China Sea. China's claims in a vast section of the South China Sea do not have a legal basis, the Hague's Permanent Court of Arbitration ruled in 2016 based on the United Nations Convention on the Law of the Sea (UNCLOS). While China is not recognizing the verdict, this case points to the value of arbitration as a diplomatic means to adjudicate important International Organizations in ADR Therapy

Various international and regional organizations such as the United Nations (UN), NATO,[3] African Union (AU), and European Union (EU) are active in the promotion of ADR especially as an alternative in the resolution of military conflicts.[4]

The United Nations: A Dipolomatic Juggernaut

The UN has been in the forefront in advocating ADR more so with the peace keeping operations and the political processes. For instance, countries in crises, most of the time, UN's Department of Political and Peacebuilding Affairs assumes a position of the third party in order to resolve problems. Since its creation in 1945 to the present date, the organization has been involved in more than 50 conflicts as mediator all of these more-often being justified in the maintenance of peace and stability between nations.[5]

The Camp David Accords that were successful after several mediation by the UN between Egypt and Israel in 1978, was one of the most remarkable interventions through ADR. This case enjoyed the various forms of dispute resolutions available, not because it was a military conflict per se, but because it is one of the recent histories where the UN engaged in diplomacy to stop wars before any escalated violence occurred. More recent, the Civil war in Yemen has seen the warring parties remain in contact thanks to the mediation efforts of the UN.[6] On the other hand, the UN-sponsored Stockholm Agreement of 2018, while tenuous, represented a turning point in the ongoing violence in the country that has witnessed years of war. This civil war which reported to have killed more than 230,000 people and became the worst humanitarian crisis in history of humankind,[7] almost spiraled into something worse without the help of the United Nations.

NATO Approach to Conflict Management

NATO may be viewed as a military organization; however, the organization also resorts to third party intervention and the resolution of disputes. For example, the collective defense organization NATO refocused its efforts towards Kosovo in 1999 where not only military intervention was planned but also active diplomacy was conducted.

[3] Ibrahimy, H. (2023) The American War in Afghanistan concluded precisely as it had begun, but the outcome was war crime, SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4350363 (Accessed: 15 November 2024).
[4] Wasiq, M.R. (2022) 'Responsibility to protect (R2P) and its implementation: A glance on Kosovo, Chechenia, Libya, and Syria', SSRN Electronic Journal [Preprint]. doi:10.2139/ssrn.4314789.
[5] The World Bank, Preventing Violent Conflict Through Mediation: The Role of International Financial Institutions (2022).
[6] United Nations, The Stockholm Agreement (2018).
[7] UN Human Rights Office, Yemen Conflict: Death Toll Exceeds 230,000 (2020).

Obstacles to the Execution of ADR in the Armed Forces

In theory, ADR can be applied in respect of any conflict situation. However, it is especially the case with military conflicts that there are many obstacles to employing ADR.

1. Trust Deficit and Ingrained Hostilities.

Trust is one of the main conditions needed for the effective implementation of ADR. However, when it comes to military conflict, more often than not, a culture of trust is absent due to deep mistrust and historical issues. [8] As stated previously, mediators have been brought into the Israel-Palestine conflict in an attempt to make some progress; the effort has, however, been futile as both parties refuse to budge regarding core issues; for instance, borders and Jerusalem.

2. Disparity in Strength between the Parties

There are cases when the parties to a dispute can be involved in a conflict and one of the parties is much stronger than the other where the stronger side has little if no motivation to go through the ADR process. In the case of the Russia-Ukraine conflict,[9] for example, there were times when peace talks had to be put on hold because of the tendency of the Russian military superiority to be brought down forcing other players willing on mediation to back off.

3. Political Influences of Third Countries

Third parties are commonly responsible for the escalation and the extension of the hostility period. For example in the Syrian Civil War ,[10]– in addition to the numerous nations involved (United States, Russia, Turkey), such competition has made mediation impossible and a political outcome quite difficult to reach.

Going Beyond: Enhancing ADR Towards Lasting Peace

To make ADR effective in non-violent conflicts and military disputes, there needs to be reform of the international laws and policies that achieve accountability and enforceability. The primary focus should be on preventive diplomacy,[11] which is aimed at resolving disputes before they lead to violence. The example here is that the United Nations Security Council (UNSC) under such a

[8] UNDP, Addressing Trust Deficits in International Peacebuilding Efforts (2020).
[9] European Council, Ukraine Crisis: Timeline of EU Action (2022).
[10] United States Institute of Peace, The Syrian Civil War: Competing Interests and Mediation Challenges (2021).
[11] United Nations Peacekeeping, Preventive Diplomacy: UN Efforts to Prevent Conflicts (2022).

provision may be more pre-emptive and demand the engagement of mediation or arbitration as a precondition to military action.[12]

The Place of ADR in Contemporary Conflict Resolution

At the beginning of the 21st century new threats emerged in the field of peace and security but ADR gives a way out of it. Assuming nations stand firm and international organizations remain supportive, ADR has the potential of becoming a more active mechanism for solving military confrontations, preventing war, and establishing a permanent peace. It is true that there are still problems, nevertheless the Minsk Agreements and the Camp David Accords 13 are examples of how even the most general conflicts can have ADR applied to their resolution. The challenge remains to sharpen and widen the scope of these methods so that diplomacy and talk conquers war. In order to realize this aim, it is vital to consider ADR as part and parcel of conflict resolution methods of any magnitude; be it a local conflict or a global one. It is important for governments, military factions as well to realise the importance of having one's issues resolved through ADR, rather than through conflict.

Furthermore, the UN and other international bodies must be empowered to apply ADR strategies prior to the outbreak of hostilities. Also, in that civil society and NGOs present social capital in conflict resolution and transformation, peace education could be promoted, and trust among the conflicting parties enhanced as well as dialogue engendered even in the highly contentious environments sustained by the most poles apart conflicting parties. Communication can also be improved through the use of technology for the purpose of ensuring transparency, provision of conflict de-escalation techniques in the course of the conflict and urgent situations where face to face interaction cannot be achieved.

Furthermore, accountability has to go hand in hand with the prolonged efforts for the institutionalization of ADR in armed conflicts. For this purpose, comprehensive systems for ensuring adherence to mediation or arbitration outcomes and imposing penalties for breaching them should be developed. One innovation coupled with one subvention policy cannot work for ADR this has to find a long lasting solution in the contemporary society which is still riddled with military operation threats. In the end, how well or effectively approach will replace the particular one constitutes a crucial question for the future of international peace. In this respect, it is not only

[12] Security Council Report, The Role of the UN Security Council in Mediation (2020).
[13] United Nations, Camp David Accords: A Historical Overview (1978).

the solution for existing disagreements but also a leeway, such as getting into an advance bowl installed in a footpath, to avoid getting drenched in the future. As ever, it is the global community that must put resources in these peaceful approaches and prioritise the use of diplomacy rather than destruction.[14]

Conclusion

In conclusion, the growing role of Alternative Dispute Resolution (ADR) in international military conflicts offers a promising avenue for reducing violence and fostering sustainable peace. As demonstrated by recent cases such as the India-China border skirmishes, the Minsk Agreements, and the Philippines' arbitration case against China, ADR mechanisms—whether through mediation, negotiation, or arbitration—can significantly mitigate tensions and provide pathways to resolution that avoid the catastrophic consequences of full-scale warfare. However, the effectiveness of ADR in military conflicts is not without challenges, including deep mistrust, power imbalances, and the complex political dynamics involving third-party actors. These obstacles underscore the need for reform in international legal frameworks and enhanced support from international organizations like the United Nations to ensure the success of ADR strategies. For ADR to become a more reliable tool in conflict prevention and resolution, it must be integrated into the global security framework as a standard mechanism for addressing military disputes before they escalate into violence. This requires not only a commitment from governments and military factions to prioritize dialogue and compromise over conflict but also a concerted effort to promote trust-building, transparency, and education in peacebuilding processes. Furthermore, strengthening international systems for accountability and enforcing the outcomes of ADR agreements will be crucial in ensuring long-term stability. Ultimately, while ADR alone cannot guarantee the cessation of all military conflicts, it provides a viable and constructive alternative to the destructive nature of war. By investing in ADR and supporting its widespread application, the international community can make significant strides toward achieving lasting peace in a world increasingly defined by geopolitical tensions and military confrontations. As we look to the future, the challenge lies in broadening the scope of ADR and embedding it into the fabric of global conflict resolution efforts, ensuring that diplomacy and dialogue replace violence as the preferred means of resolving disputes.

[14] Wasiq, M.R. (2023) United Nations Security Council Powers, practice, and effectiveness of Security Council, SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4344596 (Accessed: 15 November 2024).

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2. European Council, Ukraine Crisis: Timeline of EU Action (2022).
3. Ibrahimy, H. (2023) The American War in Afghanistan concluded precisely as it had begun, but the outcome was war crime, SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4350363 (Accessed: 15 November 2024).
4. European Council, Ukraine Crisis: Timeline of EU Action (2022).
5. Security Council Report, The Role of the UN Security Council in Mediation (2020).
6. The World Bank, Preventing Violent Conflict Through Mediation: The Role of International Financial Institutions (2022).
7. Security Council, SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4344596 (Accessed: 15 November 2024).
8. Security Council Report, The Role of the UN Security Council in Mediation (2020).
9. United Nations, The Stockholm Agreement (2018).
10. UN Human Rights Office, Yemen Conflict: Death Toll Exceeds 230,000 (2020).
11. Uppsala Conflict Data Program, UCDP Conflict Encyclopedia (2023).
12. UNDP, Addressing Trust Deficits in International Peacebuilding Efforts (2020).
13. United States Institute of Peace, The Syrian Civil War: Competing Interests and Mediation Challenges (2021).
14. United Nations Peacekeeping, Preventive Diplomacy: UN Efforts to Prevent Conflicts (2022).
15. UNDP, Addressing Trust Deficits in International Peacebuilding Efforts (2020).
16. United States Institute of Peace, The Syrian Civil War: Competing Interests and Mediation Challenges (2021).
17. United Nations Peacekeeping, Preventive Diplomacy: UN Efforts to Prevent Conflicts (2022).
18. United Nations, Camp David Accords: A Historical Overview (1978).
19. Wasiq, M.R. (2023) United Nations Security Council Powers, practice, and effectiveness of
20. United Nations, Camp David Accords: A Historical Overview (1978).
21. Wasiq, M.R. (2022) 'Responsibility to protect (R2P) and its implementation: A glance on Kosovo, Chechenia, Libya, and Syria', SSRN Electronic Journal [Preprint]. doi:10.2139/ssrn.4314789.

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Menstrual Leave in Indian Educational Settings: A Need for Bridging Health Needs and Gender Inclusivity

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ABSTRACT

The discourse on menstrual leave policies in educational settings and workplaces highlights the intersection of health needs and gender inclusivity. Despite national dialogue and legal challenges, several Indian universities have implemented menstrual leave policies, underscoring efforts towards gender inclusivity and student welfare. However, disparities persist across institutions, with some yet to adopt such policies, impacting students' rights and educational equity. This paper examines the constitutional and legal frameworks supporting menstrual health as a fundamental right in India, addressing issues of equality and health under Articles 14, 21, and other relevant provisions of directive principles of state policy. Drawing on international frameworks and feminist perspectives, this study explores the broader implications and recommends policy advancements for inclusive menstrual health management in educational institutions.

Keywords: *Period Leave, Menstrual Leave, Gender inclusivity, Right to Health, Menstrual Leave in Educational Institution.*

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INTRODUCTION

In India, discussions around menstruation leave policies have become national discourse,[4] and the voices of girls and women, both in educational institutions and the workforce, ring with a call for recognition and support. This demand is anchored not just in personal health and hygiene but also in broader issues of equity and economic stability, resonating deeply with constitutional principles enshrined in the Indian legal framework.[5] Central to this discussion are the Directive Principles of State Policy, woven into India's constitutional fabric. Article 14 guarantees equality before the law, shielding against discrimination rooted in biological realities such as menstruation. Article 21 extends the right to health, encompassing menstrual health within the ambit of a dignified life.[6] Moreover, Articles 39, 41, and 42 underscore worker welfare, including provisions for sick leave and humane working conditions that encompass menstrual leave as a critical component of reproductive health and dignity.[7] However, recent statements by Union Minister Ms. Smriti Irani that *"menstruation is not a handicap"* have injected controversy into this discourse.[8] Ms. Irani's argument against menstruation as a disability has sparked a challenging views on women's health benefits and reproductive rights. Despite several Public Interest Litigations seeking mandated menstrual leave being dismissed by the Supreme Court of India,[9] there have been instances where various High Courts across the country have ruled in favor of granting menstrual leave to women. These judicial pronouncements underscore the evolving nature of legal interpretations surrounding gender equity and workplace rights in India.[10]

Ultimately, the debate on menstrual leave policies continues to navigate between constitutional imperatives of equality and health on one hand, and practical considerations of workplace dynamics and economic impact on the other. As India progresses towards ensuring

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[4] Jyothsna Latha Belliappa, *Menstrual Leave Debate: Opportunity to Address Inclusivity in Indian Organizations*, 53 INDIAN J. IND. RELAT. 604 (2018), https://www.jstor.org/stable/26536484 (last visited Jul 6, 2024).

[5] Sayed Qudrat Hashimy, *Legal Paradigm of Menstrual Paid Leaves Policy in India: A Jurisprudential Discourse*, AVAILABLE SSRN 4383915 (2023), https://www.researchgate.net/profile/

[6] JSA, *Right to Health as a Fundamental Right Guaranteed by the Constitution of India*, JSA (Mar. 22, 2020), https://www.jsalaw.com/covid-19/right-to-health-as-a-fundamental-right-guaranteed-by-the-constitution-of-india/ (last visited Jul 6, 2024).

[7] Kimberly Peacock, Karen Carlson & Kari M. Ketvertis, *Menopause*, *in* STATPEARLS (2024), http://www.ncbi.nlm.nih.gov/books/NBK507826/ (last visited Jul 6, 2024).

[8] Menstruation not handicap, no need for paid leave: Smriti Irani, THE TIMES OF INDIA, Dec. 15, 2023, https://timesofindia.indiatimes.com/india/menstruation-not-handicap-no-need-for-paid-leave-smriti-irani/articleshow/105970964.cms (last visited Jul 6, 2024).

[9] Krishnadas Rajagopal, *It's Centre's Call, Says Supreme Court on Menstrual Leave Policy*, THE HINDU, Feb. 24, 2023, https://www.thehindu.com/news/national/supreme-court-refuses-to-entertain-pil-seeking-menstrual-pain-leave-for-female-students-and-working-women/article66548297.ece (last visited Jul 6, 2024).

[10] Damini Chopra, *A Demand That Could Hamper Gender Equality*, THE HINDU, Feb. 14, 2024, https://www.thehindu.com/opinion/op-ed/a-demand-that-could-hamper-gender-equality/article67845843.ece (last visited Jul 6, 2024).

comprehensive gender equality, the debate over menstrual leave remains a pivotal battleground in the quest for women's rights and dignity.[11]

In recent years, menstrual leave policies at Indian universities have evolved significantly, recognizing menstrual health as vital to gender equity and well-being.[12] Leading institutions like NALSAR University of Law, Hyderabad,[13] allow menstruating students one day off per working month based on self-declaration, aiming to support their needs[14]. Similarly, Dharmashastra National Law University and Maharashtra National Law University have adopted similar policies,[15] while NLIU Bhopal includes transgender women, ensuring inclusive support for all menstruating students.[16] These initiatives set benchmarks for others to follow in promoting inclusivity and accommodating biological realities.[17] Nevertheless, majority of Public and Private University stands out as an institution yet to implement a formal menstrual leave policy.[18] This stance contrasts with the voices of its student body, as evidenced by a recent study where a majority of respondents expressed a desire for menstrual leave, citing feelings of discrimination and discomfort in discussing the topic openly. The legal landscape surrounding menstrual leave policies in universities presents a complex terrain.[19] While some institutions have embraced these policies to promote student welfare and gender equality, others lag behind.[20] Challenges such as ensuring fair implementation, addressing potential misuse, and navigating legal frameworks remain pertinent. Moving forward, policy

[11] Sayed Qudrat Hashimy, *Menstrual Paid Leave Policy and Women Empowerment in the Shadows of Equality Under the Aegis of Indian Legal Landscapes*, 13 BANGALORE UNIV. LAW J. 34 (2024), https://papers.ssrn.com/abstract=4892203 (last visited Aug 2, 2024).
[12] Stephanie R. Psaki, Katharine J. McCarthy & Barbara S. Mensch, *Measuring Gender Equality in Education: Lessons from Trends in 43 Countries*, 44 POPUL. DEV. REV. 117 (2018), https://www.jstor.org/stable/26622795 (last visited Jul 6, 2024).
[13] NALSAR University Of Law Implements Menstrual Leave Policy, https://www.livelaw.in/news-updates/nalsar-university-of-law-implements-menstrual-leave-policy-240738 (last visited Jul 6, 2024).
[14] Bhumika Indulia, *NALSAR Introduces Menstrual Leave Policy for Students of All Academic Programmes*, SCC TIMES (Oct. 23, 2023), https://www.scconline.com/blog/post/2023/10/23/nalsar-introduces-menstrual-leave-policy-for-students-of-all-academic-programmes/ (last visited Jul 6, 2024).
[15] Bhavya Singh, *In A Historic Move, Dharmashastra National Law University Jabalpur Allows Menstrual Leave for Female Students*, (2023), https://www.livelaw.in/news-updates/dharmashastra-national-law-university-jabalpur-implements-menstrual-leave-for-female-students-239004 (last visited Jul 6, 2024).
[16] Jelsyna Chacko, *DNLU Jabalpur Introduces Menstrual Leave Policy for Students*, BAR AND BENCH - INDIAN LEGAL NEWS (2023), https://www.barandbench.com/news/dnlu-jabalpur-menstrual-leave-policy-students (last visited Jul 6, 2024).
[17] *Id.*
[18] Sayed Qudrat Hashimy, *Exploring Menstrual Leave in Islamic Jurisprudence: Cultural and Religious Perspectives*, 6 3457 (2023).
[19] Sayed Qudrat Hashimy, *Exploring Menstrual Leave in Islamic Jurisprudence: Cultural and Religious Perspectives*, 6 INT. J. LAW MANAG. HUMANIT. 3457 (2023).
[20] Kavya Mittal & Naren Maran, *Paid Menstrual Leaves: A Legal Enigma*, RSRR (2024), https://www.rsrr.in/post/paid-menstrual-leaves-a-legal-enigma (last visited Jul 6, 2024).

recommendations should focus on harmonizing existing practices, ensuring consistency across institutions, and addressing the specific needs of all students who menstruate, including transgender individuals. Legal frameworks should evolve to support these initiatives, safeguarding rights while promoting inclusivity and dignity.

MENSTRUAL LEAVE AND GENDER INCLUSIVITY

The Menstrual Leave Policy safeguards a significant number of menstruators, encompassing a diverse range of gender identities, beyond those who identify as transgender.[21] Menstruation is associated with a biologically essentialist conception of corporeality, if one were to make the opposite claim.[22] Menstruating persons come in many different forms, represent a wide range of political perspectives, identify as female or male, and can be at any stage of life, including youth, adulthood, perimenopause, and menopause.[23] A large sect of 1.9 billion people menstruate yet the natural biological phenomenon is a taboo or a stigma to address.[24] Menstruation is not a uniform experience but rather multifaceted. Just as transgender theory challenges binary understandings of gender, critical menstruation scholars challenge simplistic notions of menstruation as a purely biological process.[25] Instead, they argue that menstruation is influenced by social norms, cultural beliefs, and individual experiences.[26] Generally, the Adolescent girls begin to experience menstruation at the tender age of 10-12 and the cycle becomes a major process during the reproductive phase from 20-35 years.[27] It is necessary to note that the diversity in genders need to be considered to secure the rights of rather Menstruating 'person' than a menstruating woman.[28] The variable experiences of all genders during menstruation are an untouched area for the policymakers to legislate upon gender sensitisation and right of access to sanitation and menstrual products to all the identities.[29]

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[21] Klara Rydström, *Degendering Menstruation: Making Trans Menstruators Matter*, *in* THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES (Chris Bobel et al. eds., 2020), http://www.ncbi.nlm.nih.gov/books/NBK565621/ (last visited Apr 18, 2024).

[22] Sally King, *Menstrual Leave: Good Intention, Poor Solution*151 (2021).

[23] Dani Jennifer Barrington et al., *Experiences of Menstruation in High Income Countries: A Systematic Review, Qualitative Evidence Synthesis and Comparison to Low- and Middle-Income Countries*, 16 PLOS ONE e0255001 (2021).

[24] Menstrual Leave Dissent and Stigma Labelling: A Comparative Legal Discourse, INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES, https://ijlmh.com/paper/menstrual-leave-dissent-and-stigma-labelling-a-comparative-legal-discourse/ (last visited Aug 2, 2024).

[25] Rydström, *supra* note 20.

[26] *Id.*

[27] Amy E. Lacroix et al., *Physiology, Menarche*, *in* STATPEARLS (2024), http://www.ncbi.nlm.nih.gov/books/NBK470216/ (last visited Jul 6, 2024).

[28] Elizabeth M. Whelan, *Attitudes toward Menstruation*, 6 STUD. FAM. PLANN. 106 (1975), https://www.jstor.org/stable/1964817 (last visited Jul 6, 2024).

[29] Sayed Qudrat Hashimy, *The Legal Paradigm of Menstrual Leaves Policy in the United Arab Emirates, Kuwait, and Afghanistan*, J. DIS. GLOB. HEALTH 16 (2023), https://ikprress.org/index.php/JODAGH/article/view/8159 (last visited Aug 2, 2024).

Physical labour forms an inevitable part of the work culture of women in the unorganised sector. It becomes pertinent to note how these women associate physical labour with menstruation. Physical labour in this case is referred to hard physical activities. They believe that, woman should necessarily take rest during her bleeding days or may perform light activities but must avoid carrying heavy loads, long distance walking or travelling. With reference to the estimation that about 50 per cent of women mature normally,[30] the mentioned that menstruation is moderate and free from discomfort, and the person's activities are in no way handicapped. Most of the women workers expressed that they were told to take rest during menstruation. In practice, barring women who are incapacitated to work due to menstrual disorders, women who experienced normal menstrual periods do not take rest. It is their responsibility of earning for the family that takes the priority and though they think rest should be taken by a menstruating woman, they were hardly able to follow it. Moreover, due to the unorganised nature of their work i.e. 'No work no pay', women are bound to continue working without rest. Associating physical labour with menstrual periods, two contrasting opinion emerged from the women workers. First group of workers believed that hard physical activities during menstrual periods leads to problems of heavy bleeding, cramps and other complications, hence is to be avoided. [31]The second group of women workers believed heavy works is good for health and it eventually leads to easy delivery of children and should not be avoided. However, hard physical labour is commonly regarded as the perceived cause of heavy bleeding problems and cramps. Regarding health complaints, irregular periods, menstrual cramps, heavy bleeding with solid discharge and scanty bleeding that vary from dark spotting to bleeding for one day only.[32] Early menopause before the age of 40 was reported by some of the women workers. While there is a concern regarding early menopause due to associated health problems,[33] it is also seen as liberating from the social obligations of menstrual taboos. Hence, women look forward to menopause so that they can carry on their responsibilities without having to manage the hassles of monthly periods.[34]

[30] Radhika Kapur, *Women Workers in the Unorganized Sector* (2018).
[31] Rachel B. Levitt & Jessica L. Barnack-Tavlaris, *Addressing Menstruation in the Workplace: The Menstrual Leave Debate*, *in* THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES (Chris Bobel et al. eds., 2020), http://www.ncbi.nlm.nih.gov/books/NBK565643/ (last visited Jul 6, 2024).
[32] Belliappa, *supra* note 3.
[33] Jang Bahadur Prasad, Naresh K. Tyagi & Pradyuman Verma, *Age at Menopause in India: A Systematic Review*, 15 DIABETES METAB. SYNDR. CLIN. RES. REV. 373 (2021), https://www.sciencedirect.com/science/article/pii/S1871402121000151 (last visited Jul 6, 2024).
[34] Hashimy, *supra* note 28.

Thus, in this regard it can be said that belief and attitude towards menstruation, do not correlate with their practices. Rather, their practices were largely determined by the financial conditions of the family.

They largely ignore their health as financial condition and toil of life takes the priority. In reality life is so mundane and rigorous for them that they have no time to ponder over such facts of life. They live with the feeling that women had to endure problems and wait for the time to pass still shouldering other family responsibilities.[35]

Though a natural phenomenon, women are bounded by socially prescribed norms of menstrual behaviour validated by their deep-rooted beliefs that menstruation is "pollution", the result of "curse" and excrete of the waste products of the female body. The Socio-Cultural Taboos continue to exist due to lack of knowledge of Reproductive health, Puberty and medical facts about Menstruation.[36] Keeping the social norms, women street vendors selling flowers and religious items outside temples avoid vending during menstruation.[37] The menstruating girls face restrictions and discrimination. [38]

Feminism Approach

Feministic perspective cannot be excluded in this research to explore further.[39] It is believed that the menstrual cycle was treated with dignity in a matriarchy rather than in patriarchal society.[40]

Menstruation is a vital component for the birth of life through a woman and highly regarded for nurturing life. There are no rules for men restricting their movement whatsoever in a patriachal society. Women today who are taking the primary role of earning a living and making decisions for the family are but expected to do all this within the dictates of feminine behaviour. The menstrual taboos and behaviour constantly remind the woman of her inferior position in society. The media campaign, Period Positive challenges negative media representations of menstruation and hopes to encourage menstrual education.

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[35] Jitumoni Baishya, *Menstruation And Menstrual Hygiene: A Study On Knowledge, Attitude And Practices Of Women In The Unorganised Sector Of Guwahati City, Assam*, 2017.

[36] Sayed Qudrat Hashimy, *Menstrual Leave Dissent and Stigma Labelling: A Comparative Legal Discourse*, 5 ISSUE 6 INTL JL MGMT HUM. 1270 (2022), https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/ijlmhs20&section=114 (last visited Aug 2, 2024).

[37] Hashimy, *supra* note 17.

[38] Suneela Garg & Tanu Anand, *Menstruation Related Myths in India: Strategies for Combating It*, 4 J. FAM. MED. PRIM. CARE 184 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4408698/ (last visited Jul 6, 2024).

[39] R. D. Koeske, *Lifting the Curse of Menstruation: Toward a Feminist Perspective on the Menstrual Cycle*, 8 WOMEN HEALTH 1 (1983).

[40] Miren Guilló-Arakistain, *Challenging Menstrual Normativity: Nonessentialist Body Politics and Feminist Epistemologies of Health*, *in* THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES 869 (Chris Bobel et al. eds., 2020), https://doi.org/10.1007/978-981-15-0614-7_63 (last visited Jul 6, 2024).

INTERNATIONAL FRAMEWORKS

The International Conventions and Treaties ratified by numerous countries protect assemblage of rights that are basic for a human being's dignity and protection. These rights encompass Good Health, Standard of Living, Working in dignified conditions, Non-Discrimination and Equality, Dignity and safety of Women, Education and more.[41] Though the provisions encapsulate protection of Reproductive rights there is lack of discussion on Menstrual Rights and Equity under these documents[42]

1- World Health Organization (WHO)

WHO promotes menstrual health and reproductive rights on Menstrual Hygiene Day, urging countries to improve water and sanitation services in schools, improve hygiene facilities, and educate on menstrual health.[43] WHO emphasized menstrual health as a health and human rights issue during the UN Human Rights Council's 50th session, focusing on hygiene management, human rights, and gender equality.

2- Universal Declaration of Human Rights 1948

The "Right to Equality," which encompasses gender equality for men and women regardless of gender, is a component of Article 7.[44] Similarly, Article 25 covers employment security, protected healthcare, and health and wellness protection.[45] This clause subtly requests that members declare that a woman should not be excluded or subjected to discrimination due to her menstrual leave. It implies that women should receive health and wellness benefits, just as transgender students and female girls do at educational institutions. Thankfully, the majority of National Law Universities have taken

[41] Menstrual Leave Dissent and Stigma Labelling, *supra* note 23.
[42] Isobel Day, *Menstruation, Human Rights and the Patriarchy: How International Human Rights Law Puts Menstruating People at Risk*, (Apr. 3, 2024), https://journals.law.harvard.edu/hrj/2024/04/menstruation-human-rights/ (last visited May 29, 2024).
[43] WHO statement on menstrual health and rights, https://www.who.int/news/item/22-06-2022-who-statement-on-menstrual-health-and-rights (last visited Jul 6, 2024).
[44] United Nations, *Universal Declaration of Human Rights*, UNITED NATIONS, https://www.un.org/en/about-us/universal-declaration-of-human-rights (last visited Jul 6, 2024).
[45] Navanethem Pillay, *Right to Health and the Universal Declaration of Human Rights*, 372 THE LANCET 2005 (2008), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(08)61783-3/abstract (last visited Jul 6, 2024).

the initiative to balance women's rights and give consideration to motherhood and '*womanhood'* without bias or condition. [46]

3- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

This convention aims to prevent discrimination against women in various aspects such as health, employment, and public life, regardless of whether the discrimination is related to menstruation or not. However, it does not explicitly address issues like menstrual leave or the rights to health and leave in educational institutions or workplaces. It is suggested that the convention should recommend to all member states, WHO, ILO, and UDHR to implement policies regarding menstrual leave.

INDIAN LEGAL FRAMEWORK

Constitutional Provisions

Indian Constitution encapsulates that fundamental rights, including equality, life, personal liberty, and dignity, are enshrined in Articles 14, 15, and 21. The concept of paid menstrual leave is rooted in these rights, ensuring women can enjoy them meaningfully. Aristotle's concept of equality suggests equal treatment of similar persons prevents discrimination. The Supreme Court's Ram ***Krishna Dalmia*** v. ***Justice Tendolkar*** [47]and ***Anjali*** Roy v. ***State of West Bengal*** have emphasized equality.[48] India's Constitution emphasizes equal opportunity for all citizens, empowering them to achieve their goals without discrimination.[49] The concept of 'Protective Discrimination' under Article 15 helps disadvantaged persons live meaningful lives. Article 15(5) provides special provisions for socially and educationally backward citizens, ensuring equal platform access.[50]

Statutory Provision

[46] Sayed Qudrat Hashimy, *Menstrual Leave Dissent and Stigma Labelling: A Comparative Legal Discourse*, 5 Issue 6 INT. J. LAW MANAG. HUMANIT. 1270 (2022), https://heinonline.org/HOL/Page?handle=hein.journals/ijlmhs20&id=1269&div=&collection=.

[47] Law Essentials, *RAM KRISHNA DALMIA v. JUSTICE TENDOLKAR, AIR 1958 SC 538*, LAW ESSENTIALS, https://lawessential.com/case-comments-1/f/ram-krishna-dalmia-v-justice-tendolkar-air-1958-sc-538 (last visited Jul 6, 2024).

[48] Anjali Roy v. The State Of West Bengal & Ors., Calcutta High Court, Judgment, Law, casemine.com, HTTPS://WWW.CASEMINE.COM, https://www.casemine.com/judgement/in/5ac5e3444a93261a1a74765d (last visited Jul 6, 2024).

[49] ANJALI ROY Vs. STATE OF WEST BENGAL, https://www.the-laws.com/Encyclopedia/Browse/Case?caseId=502591420000&title=anjali-roy-vs-state-of-west-bengal (last visited Jul 6, 2024).

[50] Hashimy, *supra* note 10.

The Equal Remuneration Act of 1976 mandates equal pay for men and women performing equal work under similar conditions.[51] However, menstruating women are not working under similar conditions, only when granted paid menstrual leaves due to uncontrollable bodily phenomena. The Act's objective to promote employment opportunities for women contradicts concerns about paid menstrual leave policy implementation. The Act should be interpreted based on the employee's circumstances, ensuring equal opportunities for women based on their capacity to work, ensuring women's fundamental rights are not violated.

Bills

Several Bills have been tabled to address the Reproductive Health and Menstrual Issues:

Bihar Menstrual Leave Policy 1992

In Bihar, the All-India Progressive Women's Association organized a three-month-long strike for women. According to a government order dated January 2, 1992, in response to demands from various employee unions, all women government employees would be granted two days of special casual leave each month until the age of 45.[52] The Right of Women to Menstrual Leave and Free Access to Menstrual Products Bill of 2022 expands Article 21, allowing three days of paid menstrual leave for menstruating women. This aligns with Article 21's concept of'meaningful existence' and is part of India's legislative initiatives.[53]

Implementation of Menstrual Leave in Indian Institution

No.	Institution	Implementation Date	Number of Leave in a month	Condition to Such Leave	Medical Support

[51] Manupatra, *EQUAL PAY FOR EQUAL WORK: A STUDY ON GENDER WAGE GAP AND EQUAL REMUNERATION ACT, 1976*, https://articles.manupatra.com/article-details?id=undefined&ifile=undefined (last visited Jul 6, 2024).

[52] When Lalu Prasad gave nod for leave during menstruation, THE INDIAN EXPRESS (Aug. 30, 2020), https://indianexpress.com/article/opinion/columns/when-bihars-women-got-period-leave-6575393/ (last visited Jul 6, 2024).

[53] Sayed Qudrat Hashimy, *Menstrual Paid Leave Policy and Women Empowerment in the Shadows of Equality Under the Aegis of Indian Legal Landscapes*, 13 SSRN ELECTRON. J. 42 (2024).

01	Coachin University of Science and Technology	CUSAT-MLP[54] Enforced from January 11 2023.	Subject to 73% attendance.	No	Medical Assistance
02	Kerala Univeristy	KU Special Menstrual Leave order issued on March 2023.[55]	Subject to getting 73% attendance	No	Medical Assistance
03	NALSAR University of Law	NALSAR Menstrual Leave Act 2023,[56] declared on October 5th 2023.	ONE DAY	No condtion and no proof required	Workshop and Public Awareness porgramme Full Medical support and Free Medical facilities.
04	Dharmashatra National Law University Jabalpur	DNLUJ Menstrual Leave, Circulated 29/ 09/2023.[57]	Menstrual Leave i.e. 6 classes per subject in each semester[58]		
05	The National Law University and Judicial Aacademy, Assam	NLUJA Menstural Leave			

[54] Menstrual leave for students will be extended to all state universities in Kerala: Minister, THE INDIAN EXPRESS (Jan. 23, 2023), https://indianexpress.com/article/cities/thiruvananthapuram/menstrual-leave-students-extended-state-universities-kerala-minister-8399532/ (last visited Jul 6, 2024).
[55] The Hindu Bureau, *Kerala University to Implement Maternity, Special Menstrual Leaves*, THE HINDU, Mar. 4, 2023, https://www.thehindu.com/news/national/kerala/kerala-university-to-implement-maternity-special-menstrual-leaves/article66581113.ece (last visited Jul 6, 2024).
[56] THE MENSTRUAL LEAVE POLICY, 2023.
[57] Singh, *supra* note 14.
[58] Chacko, *supra* note 15.

		circulated on 3rd Novemeber 2023.[59]			
06	Maharashtra National Law University	MNLU Menstrual Leave Act 2024, declared on April 2024[60]	ONE DAY	Self Declartion Subject to securing 67% attendance[61] Special proceudre is required to be followed.	Full Medical Supports and Medical support is provided under the MNLUMLA 2024
07	National Law Institute University Bhopal	April 2024	Six classes per subject per semester	Subject to 65% of attendance Medical Certiticate is required.[62]	
08	Punjab University The first university in the region approved leave for the female students.[63]	PU – Menstrual leave April 2024.[64]	At least fifteen days must pass between classes, and students may		

[59] Bhumika Indulia, *NLUJA, Assam Introduces Menstrual Leave Policy*, SCC TIMES (Nov. 6, 2023), https://www.scconline.com/blog/post/2023/11/06/nluja-assam-introduces-menstrual-leave-policy/ (last visited Jul 6, 2024).
[60] Menstrual Leave Policy, 2024.pdf, https://www.nlunagpur.ac.in/PDF/2024/Menstrual%20Leave%20Policy,%202024.pdf (last visited Jul 6, 2024).
[61] *Id.* at 4.
[62] Jelsyna Chacko, *NLIU Bhopal, MNLU Aurangabad Introduce Menstrual Leave Policy for Students*, BAR AND BENCH - INDIAN LEGAL NEWS (2024), https://www.barandbench.com/apprentice-lawyer/nliu-bhopal-mnlu-aurangabad-introduce-menstrual-leave-policy-students (last visited Jul 6, 2024).
[63] PU committee accepts recommendations on one menstrual leave in one month, THE TIMES OF INDIA, Mar. 13, 2024, https://timesofindia.indiatimes.com/city/chandigarh/panjab-university-committee-approves-recommendation-for-one-menstrual-leave-per-month/articleshow/108447274.cms (last visited Jul 6, 2024).
[64] Panjab University V-C okays menstrual leave for students, HINDUSTAN TIMES (2024), https://www.hindustantimes.com/cities/chandigarh-news/panjab-university-v-c-okays-menstrual-leave-for-students-101712783385459.html (last visited Jul 6, 2024).

			take up to four leaves of absence in a given calendar month each semester.[65]		

REFLECTION AND DISCOURSE

Menstrual leave debates involve considerations of employer biases, gender discrimination, privacy rights, and potential benefits to employee well-being, retention, productivity, and women's economic empowerment. Despite cultural stigma, introducing menstrual leave policies can challenge social norms that perpetuate shame and secrecy around menstruation, empowering women to manage their health with dignity. Swiggy, Zomato, and The Mavericks India, among others, announced in 2020 their support for menstrual leave, but this initiative did not progress into law by Indian Parliament. Kerala became the first state to institute menstrual leave across all colleges, ensuring female students are entitled to leave during menstruation.[66]

Reflecting on the implementation of menstrual leave policies across various universities reveals a significant shift towards recognizing and accommodating menstrual health needs. Each institution has tailored its policy to varying degrees, reflecting different conditions, support mechanisms, and procedural requirements. CUSAT and Kerala University, for instance, require 73% attendance and offer no specific medical support. These policies emphasize regular attendance while acknowledging menstrual health needs. On the other hand, universities like NALSAR, DNLUJ, and NLUJA have introduced more progressive policies. NALSAR's unconditional one-day leave and comprehensive medical support demonstrate a commitment to addressing menstrual health holistically through workshops and awareness

[65] Menstrual Leave: Panjab University Committee Approves Recommendation for One Menstrual Leave per Month | Chandigarh News - Times of India, https://timesofindia.indiatimes.com/city/chandigarh/panjab-university-committee-approves-recommendation-for-one-menstrual-leave-per-month/articleshow/108447274.cms (last visited Jul 6, 2024).

[66] Navya Benny, *Menstrual Leaves For Students In All Universities Across Kerala Under Consideration: State Higher Education Minister R. Bindu*, (2023), https://www.livelaw.in/news-updates/period-leave-cusat-menstrual-benefits-kerala-minister-r-bindu-menstrual-leave-all-universities-state-219148 (last visited Jul 6, 2024); Kerala shows the way: Menstrual leave for students to be extended to all state universities, INDIA TODAY (2023), https://www.indiatoday.in/india/story/kerala-shows-the-way-menstrual-leave-for-students-to-be-extended-to-all-state-universities-2322428-2023-01-16 (last visited Jul 6, 2024).

programs. DNLUJ's approach of allowing six classes of menstrual leave per semester recognizes the need for flexibility in academic schedules.

MNLU and NLIU Bhopal's policies also highlight evolving practices. MNLU's self-declaration policy with a 67% attendance requirement and full medical support under the MNLUMLA 2024 reflects efforts to simplify the process while ensuring adequate support. NLIU Bhopal's requirement of a medical certificate for six classes of leave per subject per semester balances flexibility with verification. Punjab University's initiative, allowing up to four leaves per month with specific timing requirements between classes, signals proactive steps in accommodating menstrual health needs in the region.

The Karnataka government has begun consultations to offer one-day paid menstruation leave for individuals working in factories, information technology, the garment industry, and multinational corporations where several lakh women are employed, amid a national discussion about implementing provisions for menstrual leave.[67]

In India, granting menstrual leave remains voluntary, lacking statutory provisions mandating government departments or academic institutions to implement such policies. Nonetheless, the Karnataka government has taken steps to implement a one-day leave for employed women. It remains unclear whether it is going to be implemented by the all the educational institution including private and public or not.

Implementing a paid menstrual leave policy in India faces legal complexities regarding potential employer discrimination. It must align with constitutional principles and labor laws to effectively protect women's rights. Supporters argue that menstrual leave promotes gender equality and workplace inclusivity, while critics raise concerns about operational challenges and unintended consequences.[68] A balanced approach, addressing stigma, discrimination, and educational gaps, is essential.

Suggestion

Menstruation, a natural biological process, should be accommodated for school-aged girls, colleges and universitites. Implementing government-mandated school leave and universitiies could include additional study sessions to ensure understanding of academic concepts. This initiative aims to foster a culture that values menstrual health, which can transition into

[67] Sharath Srivatsa, *Consultations on Providing Menstrual Leave in Karnataka under Way*, THE HINDU, Jun. 17, 2024, https://www.thehindu.com/sci-tech/health/consultations-on-providing-menstrual-leave-in-karnataka-under-way/article68300678.ece (last visited Jul 6, 2024).
[68] Hashimy, *supra* note 10.

workplaces offering paid menstrual leave, tailored to meet employer needs. The paper advocates for government safeguards in the unorganized sector, such as paid menstrual leave and non-discriminatory leave entitlements, to uphold women's rights and prevent exploitation by employers.

Introducing menstrual leave can be a sensitive matter due to cultural considerations. Parameters for the policy could include offering a fixed number of leave days per month or annually, determining whether a doctor's note is necessary, or providing the option to study from home. Establishing a clear reporting structure ensures proper implementation, confidentiality safeguards protect students' privacy, and fair appraisal processes guarantee equitable treatment for all employees. These steps are essential to responsibly introducing and managing menstrual leave policies within any educational institution. Additionally, if educational institutions do not offer leave or medical support like free sanitary products, the government could implement tax-free menstrual products and make them available at affordable prices for students. In order to educate the public about menstruation as a normal biological occurrence, high schools and universities must host seminars and conferences.

CONCLUSION

In conclusion, the discourse on menstrual leave policies in Indian educational settings reflects a pivotal juncture in the journey towards gender inclusivity and health equity. While several universities have taken commendable steps to implement menstrual leave policies, disparities persist across institutions, impacting students' rights and educational equity. These policies are rooted in constitutional principles such as equality, dignity, and the right to health under Articles 14, 21, and other relevant provisions, which highlight the evolving legal landscape supporting menstrual health as a fundamental right in India. The implementation of menstrual leave policies varies widely, from basic attendance requirements to more progressive measures like unconditional leave with comprehensive medical support. Such initiatives not only acknowledge the biological realities of menstruation but also aim to foster inclusive environments where all students, regardless of gender identity, can access necessary support. However, challenges remain, including the need for uniformity in policy implementation, addressing cultural sensitivities, and navigating legal frameworks to ensure effective protection of women's rights in educational institutions. The debate surrounding menstrual leave underscores broader societal attitudes towards menstruation and the ongoing struggle for gender equality.

Moving forward, it is imperative to advocate for harmonized policies that uphold the dignity and rights of all menstruating individuals, encompassing transgender students and others

beyond traditional binary gender norms. Ultimately, menstrual leave policies are not merely about providing time off but about recognizing and affirming the diverse experiences and needs of individuals. By advancing these policies with sensitivity and inclusivity, India can further its commitment to gender equity and ensure that menstruation is treated with the respect and support it deserves in educational settings and beyond.

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5. ANJALI ROY Vs. STATE OF WEST BENGAL, https://www.the-laws.com/Encyclopedia/Browse/Case?caseId=502591420000&title=anjali-roy-vs-state-of-west-bengal (last visited Jul 6, 2024).
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Interface Between Artificial Intelligence and Information Technology in The Justice System: An Analysis

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ABSTRACT

Artificial Intelligence in Information Technology is an aspect that determines everything that future holds. As the world is in the era of digitization, all industries are expected to be smarter and accelerate innovations combating with the side effects of traditional infrastructures. Recently AI has been gaining a lot of traction in the IT sector across various jurisdictions of the world. In today's ever increasing digital world, AI is seen capable of playing a vital role in the legal domain as well. This has provided various tools for the lawyers in their field and in other governing sectors. Supporting this, policies and charters are framed. However, there is no sign of any legislation which would accommodate AI in its sphere including the present Information Technology Act of 2000 and its amendment in the year 2008 which is limited to electronic data interchange and communication ignoring to recognize Artificial Intelligence in its ambit. The use of AI in the justice systems are being explored across various fields. From holding a trial to giving a final judgment is a lengthy procedure and adopting AI in this process has been an economical method if adopted and coupled with a legal framework. However, the challenges also exist while adopting AI based technology in certain aspects. Upon consideration of swift developments in this domain, the opportunities, challenges and initiatives and their implications on justice delivery system is analysed. The emergence of AI in the worldwide judicial systems are providing great help to the lawyers in analysing large data, identifying precedents and enabling administrations in streamlining judicial processes on certain issues. Linking AI and IT framework in the legal field is a huge evolving point and this precisely assures that the system would be much simpler and benefits of it does not limit to cost effectiveness in the procedure but a lot which are analysed in this paper. The study adopts doctrinal method.

Keywords: AI, Digitization, Algorithms, Predictive justice

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INTRODUCTION

The advent of information technology and artificial intelligence with the objective of universal computerization and general intelligence has made the Department of Justice to consider reshaping the fundamental aspects of the justice delivery system. The information technology in general provides rapid improvements in hardware and processing ability, efficiency and effectiveness of organization's core capabilities. Legal systems are based on formal logic in form of various statutes, precedents or customary practices. AI can be a promising tool to improve procedural and administrative efficiency if introduced in the justice system. The integration of AI in the judicial system raises certain ethical and practical questions such as;

a) Whether algorithms are capable of deciding questions of law?
b) How is the accountability for semi- automated decisions determined?
c) Whether the AI enabled programmes capable of deriving the exact position of law from a mass of precedents?

Disruptive technology can change the way judges work and provides for different forms of justice. That is where processes change and predictive analytics may reshape the adjudicative role. Currently AI has made a lot of inroads within justice systems pertaining to robot judge, real time speech transcription system and strategic subject list across the globe. However, the jump from human powered justice to electronic justice is huge. The whole system involves powerful language models like Generative Pre- trained Transformer (GPT) which is a deep learning model, which generates natural language with a high degree of accuracy and fluency.

AI products such as Natural Language Processing tools, chatbots, automation tools, that detect good code and bad code are broadening the horizons of Artificial Intelligence technology within IT landscape. AI systems are involved in handling crucial private and public functions such as counting of votes, approving loans, online advertising, autonomous transportation, etc. The development and the subsequent commercialization of AI systems raise the question of how liability risks will play out in real life. Since even the best technology is not error-free and as the interaction between humans and robots increases, domestic robots, self-driving cars, and other autonomous systems will inevitably cause harm to people and property[1].

[1] Criminal Justice, Artificial Intelligence Systems and Human Rights by Ales Zavrsnik available at https://doi.org/10.1007/s12027-020-00602-0.

i) ARTIFICIAL INTELLIGENCE

The most relevant definition of AI in the context of justice systems is given by the Commissioner for Human Rights: "An AI system is a machine- based system that makes recommendations, predictions or decisions for a given set of objectives. It does so by-

i) Utilizing machine and/ or human based inputs to perceive real and/or virtual environments.
ii) Abstracting such perceptions into models manually or automatically and
iii) Deriving outcomes from these models, whether by human or automated means, in the form of recommendations, predictions or decisions"

The 116th Congress (2019-2020) in National Artificial Intelligence Initiative (NAII) Act 2020 defines "artificial intelligence" as a machine based system that can, for a given set of human- defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.[2]

ii) ARTIFICIAL INTELLIGENCE AS A TOOL FOR JUSTICE DELIVERY

As stated by the Chief Justice of India D.Y. Chandrachud, "technology is relevant in so far as it fosters efficiency, transparency and objectivity in public government. AI is present to provide a facilitative tool to judges in order to recheck or evaluate the work, the process, and the judgments". An intelligent computer uses AI to think like a human and perform tasks on its own. Machine learning is how a computer system develops its intelligence. One way in which a computer is trained to mimic a human reasoning is to use a neural network, which is a series of algorithms that are modelled after the human brain.[3]

AI can be used in categories like advanced case law search engines, online dispute resolution, assistance in drafting deeds, analysis (predictive), categorization of contracts according to different criteria and detection of divergent or incompetable contractual clauses and chatbots to inform litigants or support them in their legal proceedings.

[2] https://www.congress.gov/bill/116th-congess/house-bill/6216
[3] https://www.mondaq.com/india/new-technology/1263638/assessing-the-intelligence-of-the-artificial-intelligence-in-law-prospects-in-india

Application of AI in various sectors of law like document drafting via legal zoom and LISA, contract review, management and providing standard clauses when drafting through COIN/ Kira Systems/ LawGeeks/ Leverton/ KM Standards and smart contracts via Open Law.

iii) CONCERNS IN ARITIFICIAL INTELLIGENCE DRIVEN PREDICTIVE JUSTICE

As the AI system grows, the legal system has to deal with questions about how AI affects human rights, surveillance and liability, among other things. Also AI is being used in the judicial system to make decisions, which has raised concerns about fairness, accountability and transparency in decisions made by automated or AI enabled systems.

The technology has evolved from obeying pre-designed and pre-configured codes into a more sophisticated end product, imbued with human-like cognition. AI in order to work needs big data. Using the corpus of pertinent precedent and the case facts as inputs, a few AI teams are creating machine learning models to predict the outcomes of pending cases. These predictions will significantly affect legal practice as they are refined. They are being used by law firms to streamline settlement negotiations, decrease the number of cases that must go to trial, and plan out their litigation strategy in advance. Although the result in the legal process will be solely based on the algorithms used in the program of the system, the power of deciding cases will be in the hands of the programmer. If decisions are based on algorithms, the purpose of providing distributive and equitable justice will be defeated and in such cases there are chances of non-acceptance and end up being a controversial issue. However, the AI enabled systems could be proven to be efficient in analysing and summarizing large documents in much less time than humans. By this, solving the issues and reaching to a conclusion could be made quick and effective. Further, not limiting to summarization, since the AI systems use Natural Language Processing technology, it can also translate the documents including scanned, printed or handwritten, accurately in less time.

AI acts as a tool in selecting an appropriate arbitrator for a particular type of dispute after analysing the prior records of the arbitrator which deals with his experiences in such type of disputes. Doing this may reduce the burden of appointing arbitrators for the case and positively, there are chances of equitable justice when a highly experienced arbitrator deals with the case. Also, it could be a combination of human arbitrators and AI enabled system.

Further, to avoid costs and errors by the transcriptionist in a tribunal, a machine might be able to record the hearing via microphone and an immediate transcript can be expected. The award has to be passed appropriately and through AI drafting of an award will be timesaving.[4]

iv) BRIDGING OF ARTIFICIAL INTELLIGENCE WITH INTERNET DATA

A deep learning neural network model called the GPT uses internet data to generate human-like texts. With its ability to quickly process and analyse, it can help with a swift legal research. Especially in a legal system like India's this could be of vital importance as there exists large volume of precedents and statutes. Along with legal research, it helps in drafting legal documents be it contracts, briefs, pleadings and memorandum by providing suggestions pertaining to the arguments and citations. Furthermore, GPT can help lawyers in document classification by quickly sorting or organizing large documents. However, the documents need not be in its digital format but a hard copy of a document could be converted using a technology called Optical Character Recognition (OCR) which basically converts images or scanned documents into a textual form. Hence, GPT can assist lawyers using physical documents to classify them.

However, using this technology expects the lawyers to be more diligent and has to review and verify the information generated by the model before concluding or relying on that aspect. The chatGPT model operates only based on the data on which it is trained and the biases in such data will certainly reflect in its output and it may result in ambiguousness. Hence it is important to note that the model can only be an assistant and not a replacement to human lawyers.[5]

Contextual information about the cases is also important as it could help AI in coming to conclusions faster. But, AI cannot be a quick fix for solutions that legal firms seeks even if the structured data is available.

[4]https://www.mondaq.com/india/arbitration--dispute-resolution/956956/ai--its-effects-on-aritration#:~:text=AI%20can%20aid%20inn%20selecting,%2Dappointment%20of%20the%20arbitrator)
[5]https://www.barandbench.com/law-firms/view-point-how-can-lawyers-leverage-chatgpt-for -their-practice

In respect of accountability, AI has to be treated like a child and trained to talk in a certain way or not talk to someone. When children make mistakes, they learn and the same applies to AI.[6] The law firms should take baby steps in linking AI to increase efficiency and cut costs.

vi) ARTIFICIAL INTELLIGENCE EXPERIENCES IN MULTI-JURISDICTIONS[7]

a) *Estonia:* In the year 2018 developed a legal framework for AI. On taking into account the technology's ethical implications and potential economic incentives a National Artificial Intelligence Action Plan was formulated. Subsequently, a robot judge was designed to adjudicate small claims and disputes.

b) *China:* In 2019, China announced that millions of legal cases would be decided by internet courts where the citizens were not required to appear in person before the court. The "smart court" includes non-human judges, powered by artificial intelligence (AI) and allows participants to register their cases online and resolve their matters via a digital court hearing. In some areas of China AI robots greet visitors to the court, house and guide them to the appropriate location. A practical example, include a robot called Xiao Fa which was put into operation at the law suit centre at Beijing No.1 intermediate people's court which can answer questions verbally or take queries on its screen with a keyboard and the AI enabled robot chatbot Fa Xiaotao using which Wusong technology is working on digitizing the way courts function.

c) *USA*: **Correctional Offender Management Profiling for Alternative Sanctions** (**COMPAS**) is a case management and decision support tool used to access recidivism risk and thus, help in parole and sentencing decisions. US also makes use of e-discovery as an automated investigation of electronic information before the start of court procedure. In this regard, the judgment of the case called Loomis v Wisconsin (2016) can be referred. The algorithm identified Loomis as an individual who presented a high risk to society and the first instance, court decided to refuse his request to be released on parole. In the appeal, the supreme court of Wisconsin decided that recommendation from the COMPAS algorithm was not the

[6] https://www.nishithdesai.com

[7] Dr. Raju Narayana Swamy, (IAS), 'From Robot Judges to Transcribers of Court Hearings in Real Time: Arificial Intelligence as a tool to aid the delivery of Justice', 2023 (1) KLT, Journal Section, pg 1-10.

sole ground for refusing his request to be released on parole nd hence the decision of the court did not violate Loomis due process right. The court was in fact neglecting the strength of the automation by us. By claiming that, the lower court had the possibility to depart from the proposed algorithmic risk assessment, the court ignored the social psychology and human –computer interaction research on the biases involved in all algorithmic decision making systems which shows that once a high tech tool offers a recommendation, it becomes extremely burdensome for a human decision maker to refuse such a recommendation.

d) *United Kingdom*: The AI based technology, Harm Assessment Risk Tool called HART algorithm was used in classifying individuals based on low, medium or high risk of committing future offences in a two years period. UK police are using AI to inform custodial decisions while it uses data from 34 different categories covering a person's age, gender and offending history to rate people against risk.

e) *Brazil*: Victor robot demands a methodological combination of the reasoning of the areas of software engineering, computer science and Law. This Brazilian AI is suitable to conduct preliminary case analysis and point out cases dealing with issues of general repercussions and it recognises the image it receives, splitting the legal reasoning and highlighting the most important of them.[8]

f) *Singapore*: The AI based technology model, the Real Time Speech Transcription system which assisted in replacing the traditionally labour- intensive process with automation, to increase productivity of court staff.

g) *Chicago*: Strategic Subject List (S.S.L) was introduced to predict individuals who are likely to be involved in gun violence crimes.

h) *European Union*: "European Ethical Charter on the use of AI in the judicial systems and their environment" was developed by the European Union through the European Commission for the Efficiency of Justice (CEPEJ). The Charter came up with five principles on use of AI in judicial systems and their environment.[9]

[8] https://sifocc.org/app/uploads/2020/06/Victor-Beauty-or-the-Beast.pdf

[9] https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699

a) Principle of respect for fundamental rights: ensure that the design and implementation of artificial intelligence tools and services are compatible with fundamental rights.
b) Principle of non-discrimination: specifically prevent the development or intensification of any discrimination between individuals or groups of individuals.
c) Principle of quality and security: with regard to the processing of judicial decisions and data, use certified sources and intangible data with models elaborated in a multi-disciplinary manner, in a secure technological environment.
d) Principle of transparency, impartiality and fairness: make data processing methods accessible and understandable, authorise external audits.
e) Principle "under user control": preclude a prescriptive approach and ensure that users are informed actors and in control of the choices made.

vii) ARTIFICIAL INTELLIGENCE IN INDIAN JUDICIAL SYSTEM

The idea of digitalization of courts in India can be traced back to the year 2005 which was based on the "National Policy and action plan for Implementation of Information and Communication Technology in the Indian Judiciary, 2005". Upon the constitution of E-Committee by the Government of India formulated the policy and one of the highlighted element in this was "…uniformity in the use of software at various court complexes shall render the functioning of the judicial system more coherent and in synchronization."

Phase II of the action plan considered the following:[10]

1) Video- conferencing for all courts and legal aid offices
2) Scanning/digitalisation of case record, document management system for digital archiving/ storage/ retrieval
3) Use of computers by all important sections of the Registry for day to day processes and service delivery
4) Unified Case Information System (CIS) for all courts.

In April 2021, the Hon'ble Supreme Court of India for the very first time launched its first AI driven research portal called the *Supreme Court Portal for Assistance in Courts Efficiency (SUPACE)* and the then Chief Justice of India Shri Sharad Bobde launched the

[10] https://www.barandbench.com/columns/need-for-an-ict-uniformly-enabled-indian-judiciary

same and clarified that it will be a blend of human and artificial intelligence and will not be used in decision making and described it as a hybrid system.[11]

Prior to this, a software called SCI-Interact (Sensitive Compartmented Information) was developed and other initiatives like LIMBS and E-courts were also developed. Further, to retain the autonomy of the judge, the Hon'ble Supreme Court would not be using AI unless all the information was meticulously analysed.

The committee also has said that, given the geography, topography, complex customary laws, local special laws, and the high number of cases, it is necessary to investigate the advantages that machine learning and artificial intelligence can bring to the administration of justice. Integration of AI and judicial system can be categorised on the basis of the form of AI such as i) Narrow application of AI : use of machine learning or simple decision making algorithm that can be used to aid the judges. ii) Advanced form of AI : use of AAJI (Advance Artificial Judicial Intelligence) having the potential to shift power from human legal acumen to advanced algorithms.[12]

viii) ADVENT OF AI IN OTHER SPHERES

- Security Exchange Board of India (SEBI) based on AI developed a system that scans various stock market shows and builds a database of recommendations made, with direct knowledge of the matter. It is named as "Picture-based Information News Accumulator and Key Information Analyser (PINAKA)"
- Reserve Bank of India (RBI) with the objective to enhance the data driven surveillance capabilities of the reserve bank is planning to extensively use advanced analytics, ai and ml to analyse its use and database and improve regulatory supervision of banks.[13]

ix) AI TOOLS FOR LAWYERS

[11]https://www.jagranjosh.com/general-knowledge/supace-portal-use-of-artificial-intelligence-ai-in-indian-judiciary-1618316032-1

[12] Artificial Intelligence and Law – Challenges Demystified by Rodney D. Ryder, Nikhil Naren, Law & Justice Publishing Co, New Delhi, 2022, pg. 158.

[13]https://singhania.in/blog/assessing-te-intelligence-of-the-artificial-intelligence-in-law-prospect-in-india-#:~:text=currently%2C%20there%20are%20no%20specific,a%20policy%20framework%20for%20AI

Legal research is a crucial aspect of a lawyer's assignment. It being the retrieving necessary information to support the making of a legal decision by finding answer to questions arising out of facts of the case by studying various sources. India based legal tech venture named LegitQuest run by a versatile team also equips the AI model for legal research.[14]

1) *Smith.ai* – it uses virtual receptionist to answer calls for lawyers and law firms. However, Smith.ai uses AI with its chatbot features and when deciding how to log and route calls.
2) *Gideon* – an AI-powered chatbot tool that can completely replace long and heavy intake forms with a simple conversation that learns how to answer prospect questions and qualify leads effectively.
3) *Casetext* – an AI-powered legal tool which is a legal research platform that helps lawyers find cases quickly and easily.
4) *Diligen* – using machine learning, it helps lawyers to conduct due diligence to review contracts and quickly outputs -convenient summary.

According to the data by the National Judicial data grid on pending cases, a total of 30,398,119 cases have been pending before the Apex court out of which 71.45% cases are more than a year old. It is fortunate that the Indian Judiciary has realized the role of AI to improve the efficiency of administration and expedite the process of justice.[15]

In the year 2019 the beginning of the AI in Indian courts was commenced through the launch of a neutral translation tool called the *Supreme Court Vidhik Anuvaad Software (SUVAS)* which can translate legal papers from English into Vernacular languages and vice versa. Besides, the software also had a search tool to browse through all files and a text and voice enabled chatbot to give a swift summary in minutes and questions could be factual or contextual.[16]

CONCLUDING REMARKS

AI in the justice system is showing promising results in reinventing the legal industry be it optimizing legal research or providing access to justice for all. Enormous cutting edge

[14] https://www.clio.com/blog/lawyer-ai/
[15] https://njdg.ecourts.gov.in

[16] https://analyticsindiamag.com/the-supreme-court-of-iniad-gets-a-new-ai-portal-suvas

developments in the productivity of the lawyers as it gives AI based software which also improves accuracy in the study. However, the following areas raises concern with regard to technological and legislative framework:

- AI can be biased, there could be serious implications on data security when the model fails to point out any malicious activity.
- AI software has the capacity to learn over time yet they could fail to think out of the box.
- Once programmed, AI matrix cannot be re- programmed when it is in service.
- Section 16 of the Information Technology Act, 2000 contains provision relating to Security Procedure for commercial circumstances, however, security procedure for other e-Governance related matters are not adequately addressed.
- The IT Act, 2000 contains provisions for Right to Legal Representation where it authorises only human beings for appeals before the Cyber Appellate Tribunal and AI representation is not currently address.
- Moreover, there is no proper legislative framework for AI and hence, legislators while framing laws pertaining to AI will have to consider the AI with IT laws for its smooth transition and application.
- Predictive justice and other judicial policies linking AI and IT with judicial process shall have to be carefully addressed.

Technology is currently booming in India and is leading the way in adopting new innovations. To anticipate risks across the sector of IT industry, knowledge, experience and common sense will not suffice any longer. Recently, the Ministry of Electronics and Information Technology (MEITY) has constituted four committees to bring in policy framework for AI, which is a welcome step.

It is high time we encourage to inculcate AI enabled systems in the justice system. However, there is a need of some regulations to avoid threats. Irrespective of people liking it or not, AI shall play an imminent role in the legal world. To have an alien form of intelligence, there requires to create and extend laws in this aspect. The output from the AI models may be sophisticated and hence requires in depth scientific studies.

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Preclusion of Voluptuous Exasperation of Women at Place of Work

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-Ms. Pramila Jain[2]

ABSTRACT

This paper explores the phenomenon of "voluptuous exasperation" of women in the workplace in India, focusing on the social, cultural, and institutional factors that contribute to gender-based frustrations and inequities. The term "voluptuous exasperation" is used to encapsulate the complex emotional and psychological strain experienced by women due to pervasive gender discrimination, harassment, and the lack of conducive work environments. Drawing on a multi-disciplinary approach, the paper investigates how gendered power dynamics, societal expectations, and organizational policies intersect to exacerbate the work-related challenges faced by women. Through a combination of qualitative interviews, case studies, and a review of existing literature, this research highlights the systemic barriers that not only limit women's professional advancement but also foster an environment where emotional and mental exhaustion is prevalent. The study also examines the legal and institutional frameworks in India, such as the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act (2013), assessing their efficacy in addressing these issues. Finally, the paper offers recommendations for mitigating the "voluptuous exasperation" of women, emphasizing the need for more inclusive policies, greater awareness, and a shift in organizational culture to ensure gender equity and psychological well-being in the workplace.

Keywords: gender inequality, women at work, workplace harassment, India, emotional labor, organizational culture, legal frameworks.

INTRODUCTION

'You can tell the condition of a nation by looking at the status of its women. The progress of a country can be judged by seeing the status of its women'

- Pandit Jawaharlal Nehru

Though the constitutional commitments of the nation to women were translated through various planning processes, legislations, policies and programs over the last six decades, a situational analysis of social and economic status of women does not reflect satisfactory achievements in any of the important human development indicators. Apathy of the system, poor community-based protection mechanisms and avalanche of crime against women are few of the foremost constraints in the path of women emancipation. Over the centuries, generations of women have suffered due to unwanted sexual attention and

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offensive behaviour at work, based on their gender. The blatant and widespread phenomenon of rape and sexual assault are the more commonly recognized forms of violence against women based on gender, while the more subtle issue of Sexual Harassment can be more repressive and intimidating.[3]

By analysis of the daily reports in the mass media, it becomes quite clear that from being a 'mere' social issue, Sexual Harassment at workplace has metamorphosed into a social malaise. Its multiple devastating effects become visible on the whole weave of the social fabric in bold impressions, both as a cause and an effect. It not only violates their sense of dignity and right to earn a living in healthy work environment but also is against their fundamental rights as well as basic human rights.[4]

Sexual Harassment at work place may be termed as coercive, exploitative, abusive or unprofessional behaviour but it remains a serious affront to human dignity. The issue has become ubiquitous across the world transgressing all limits and borders. It has registered its presence at every workplace across the world. The rise in such incidences may be attributed to increased participation and splendid achievements of women in almost every profession, till hitherto conventionally monopolized by men. The increased influx of women in jobs has also given rise to preoccupation with conflicting ideologies and troubled social conditions. All this has also brought about a sea change, both qualitative and quantitative, in workplace equations, generating and spreading virus of Sexual Harassment at workplace. It is only in the last 30 years that this problem has been discovered and identified.[5]

This article presents the rise and fall of the status of women from Vedic era to the present times. Legal environment governing sexual harassment at workplace, as contained in the International Instruments and the resultant obligation of the Central Legislature, to make domestic law, have been examined. The concern of the Apex Court of India to fill the legislative vacuum in exercise of its plenary powers under the ground law of the country by undertaking the task of legisputation, by structuring comprehensive guidelines to remedy the situation and to operate during the interregnum period as binding law. The article vividly presents the tenacity of the Apex court as to how it is making use of every opportunity to supplement the legal position to make the law much stricter and more pungent. Further, the

[3] Sexual harassment at workplace by Ritu Gupta 2014
[4] ibid
[5] ibid

contemporary issues fastening the strict liability and vicarious liability on the employer for the tortuous acts of theirs against its women employees are highlighted.[6]

HISTORY

In India, there was no statutory definition of Sexual Harassment till1997 though there had been quite a few notable judgments earlier that pinned down and brought to fore the existence of this problem. Before1997, any women facing Sexual Harassment at workplaces had to lodge a complaint under either section 354or section 509 of the IPC. In both these sections, women's modesty and outraging the modesty were to be interpreted by the police officers on the duty at the time of reporting of incident.[7]

Moreover, till Vishaka's case, neither civil nor penal laws in India imposed any obligation on the employees or person-in-charge of the workplace to protect the female employees from Sexual Harassment. The entire scenario changed in the year 1997 with the introduction of SC guidelines, a part of the landmark judgement in the case of Vishaka and others v. State of Rajasthan and others owing to the gang rape of a woman, who was a social worker in a development programme, initiated by State Government of Rajasthan, aiming to curb the evil of child marriages. She was raped by a group of men as she attempted to stop a child marriage in their family. [8]

For the first time in the Indian judicial history, the Court recognized Sexual Harassment at work place a recurring phenomenon. The Hon'ble Supreme Court took initiative to define it in a formal legal manner in Vishaka v. State of Rajasthan. The Supreme Court judgement, which came on 13th August 1997, gave the Vishaka guidelines to prevent sexual harassment of working women and this is how this case marked the first step in the evolution of laws for the protection of women from harassment at the workplace. The court instructed that these guidelines should be implemented until new legislation is passed to deal with the issue. The affirmative action of the Apex Court was indeed laudable as it sought to fill the existing void due to absence of a suitable definition on the issue. The definition was closely in pari materia with that of CEDAW.

[6] Workplace harassment women concerns by R Satyanarayana, 2008
[7] ibid
[8] https://www.gktoday.in/gk/sexual-harassment-at-workplace-developments-post-vishaka-judgement/

The aim of the Supreme Court during the cause of evolving these guidelines was to ensure a fair, secure and comfortable work environment on one hand and completely eliminate situations or possibilities where the protector could abuse his trust and turn predator on the other. The court also justified that these guidelines would not prejudice any rights available under the Protection of Human Rights Act 1993.

The judicial intervention of this sort was quite encouraging. The guidelines had a steady impact on the Government departments and institutions. Gradually, the system started adopting and implementing the said guidelines. The employers or person-in-charge of the work places, in public as well as private sectors, were directed to take appropriate steps to prevent Sexual Harassment.

Legislative and administrative changes - Post – Vishaka's case the most important development after the Vishaka judgement was the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013. This Act was enacted in April 2013 as India's first law dealing with the protection of women against sexual harassment at workplace. Some important features of this Act are as follows:[9]

- This Act aimed to provide every woman, irrespective of her age or employment status, a safe and secure working environment free from all forms of harassment.
- This Act covered both the organized and unorganized sectors in India. The statute applied to all government bodies, private and public sector organizations, non-governmental organizations, organizations carrying out commercial, vocational, educational, entertainment industrial, financial activities, hospitals etc.
- This Act defined 'sexual harassment in line with the Supreme Court's definition in the Vishaka's Judgment.
- The Act extended the meaning of the word sexual harassment to include "presence or occurrence of circumstances of implied or explicit promise of preferential treatment in employment, threat of detrimental treatment in employment, threat about present or future employment, interference with work or creating an intimidating or offensive or hostile work environment, or humiliating treatment likely to affect the lady employee's health or safety could also amount to sexual harassment".
- The Act also introduced the concept of 'extended workplace' since sexual harassment is not always confined to the primary place of employment. Therefore, the Act

[9] https://www.gktoday.in/gk/sexual-harassment-at-workplace-developments-post-vishaka-judgement/

defined 'workplace' to include any place visited by the employee arising out of or during the course of employment, including transportation provided by the employer for the purpose of commuting to and from the place of employment.

- The Act provided for the establishment of Internal Complaints Committee (ICC) at each and every office or branches of the organization employing 10 or more employees, in order to provide a forum for filing complaints to facilitate fast redressal of the grievances pertaining to sexual harassment.
- It also provided for the establishment of local complaints committee (LCC) at the district level by the Government to investigate and redress complaints of sexual harassment of the unorganized sector or from those establishments where the ICC has not been constituted for the reason being, it having less than 10 employees.

Apart from the above act, several provisions of the Indian Penal Code, 1860 were modified via the Criminal Law Amendment Act, 2013 to bring several offenses under its purview including outraging modesty of woman, assault or use of criminal force with intent to disrobe, stalking and voyeurism thus making an exclusive proviso to deal with the issue of sexual harassment.[10]

The Sexual Harassment Act was a much-awaited piece of legislation because prior to this act, there was no law to govern this matter and thus it appeared to be a significant step towards ensuring women a safe and healthy work environment. However, the Act still suffers from some flaws. Firstly, it fails to cover those women working in the agricultural workers and armed forces, which are largely men, dominated sectors. Secondly, the act appears to be gender biased since it only protects women. Thirdly, the act has wide scope for false allegations. There are high chances of these laws getting misused at the hands of women for their personal benefits. Fourthly, the provision regarding the fixing of the monetary compensation according to the economic potential of the person makes it discriminatory since the person with high rank and status will be made to pay more than the person with low status, which from nowhere seems to serve any purpose other than being discriminatory in nature.

[10] https://www.gktoday.in/gk/sexual-harassment-at-workplace-developments-post-vishaka-judgement/

It is not to be denied that the Act marks an important step in recognizing a concern that affects most women however a lot is still needed to be done since for a better safety and protection of women, something more than the regulation of sexual conduct is needed because making regulation to guide the conduct of other person or moral surveillance of women's lives only strengthen the sexual stereotypes and sexual orthodoxy. Therefore, a more stringent law is needed to address the issue of sexual harassment with the support of and not at the cost of women's fundamental rights.[11]

LEGAL FRAMEWORK IN INDIA

Sexual Harassment at work place is not so far recognized as a legally distinct type of prohibited activity in umpteen numbers of countries across the world. Legal systems in such countries tend to bring such acts within the scope of 'existing proscribed behaviour' either under criminal or civil laws.

Until Vishaka's case, India has also been one such country where there are plethoras of legal provisions to identify, recognize and define this problem, may be, under various distinct categories and without identical terminologies. There is no gain saying that each incident of sexual Harassment at the place of work results in violation of the fundamental right to gender equality and the right to life and liberty - the two most precious fundamental rights, guaranteed by the Constitution of India.

In India, The Indian Penal Code, 1860; The Code of Civil Procedure, 1908; The Code of Criminal Procedure, 1973; The Indian Evidence Act, 1872 along with many other special Acts and welfare legislations deal with this issue in one way or the other and provide for specific protection of women from such aberration. Also, various international conventions on the subject, to which India has been a signatory and has ratified, become a source of law. In addition to these, various landmark judicial pronouncements (dealing with sexual Harassment at work place) filled up the vacuum spread on the legal horizon till the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 legislation.

The Constitution of India

"All Constitutions are the heirs of the past as well as the testators of the future. Since all governmental organs, organizations and institutions owe their origin and existence to the

[11] https://www.gktoday.in/gk/sexual-harassment-at-workplace-developments-post-vishaka-judgement/

constitution and derive their powers from its various provisions; jurists' term it as Ground norm of the country. Moreover, it is a conclusive assumption and a legal fiction, which cannot be tested or questioned in any court. The ultimate aim of the makers of our constitution was to have a welfare state and an egalitarian society projecting the aims and aspirations of the people of India who made the extreme sacrifice for attainment of the country's freedom.

Almost all the provisions contained in various international instruments on the issue have already been incorporated in the constitution of India in 1950 itself. The commitment to gender equity is well entrenched at this highest policy making level in certain important provisions which are as follows:

Preamble

According to the Preamble of the Constitution, ours is a Sovereign. Socialist, Secular, Democratic Republic and it shall secure to all citizens, including women, justice, social, economic and political; like of thought, expression, belief, faith and worship: equality of status and of opportunity two purposes have been set out in the Preamble by framers of the Constitution of India:

(1) To constitute India into a Sovereign Democratic Republic (2) To secure to citizens justice - Social, economic, and political; liberty of thought, expression, faith and worship: equality of status and opportunity, and to promote among the people of India fraternity, assuring dignity of the individual and the unity and integrity of the nation.

Although the expressions, 'justice', 'equality', and 'fraternity' may not be susceptible to exact definition, yet they are not mere platitudes. These are given content by the enacting provisions of the constitution particularly by Part III, the fundamental rights and Part IV, the Directive Principles of State Policy."

Part III and Part IV, though constitute two entirely separate units of our Constitution, carry the common theme of human rights and rights included therein are equally fundamental. It is beyond any cavil of doubt that they are complementary to each other because together they constitute the human rights regime including respectively the civil and political rights and the social and economic rights. Thus, it can be made out that the tone for

the reformation of the society had already been set in our country through its Constitution. This Constitutional mandate is followed by the legislative intent being expressed in the form of various enactments from time to time.

Article 14: Equality before Law

This Article guarantees to every person the right to equality before the law or the equal protection of the laws. The guiding principle of the Article that all persons and things similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Hence, what it forbids is discrimination between persons who are substantially in similar circumstances or conditions. A classification to be valid must be reasonable and always rest upon some real and substantial distinction bearing reasonable and just relation to the needs in respect of which the classification is made. In order to pass the test of permissible classification two conditions must be fulfilled, namely

(1) The classification must be founded on an intelligible differentia which distinguishes person or things that are grouped together from others left out of the group

(2) The differentia must have a rational relation to the object sought to be achieved by the statute in question.

Bhagwati, J., in Maneka Gandhi's case" quoting himself from Royappa case" very clearly observed the principle of reasonableness in Article 14 as: "Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. The principle of reasonableness, which logically as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence".

Article 14 read along with Articles 15 and 16 embody facets of magnified grandeur of equality.

Article 15: Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth.

According to Article 15(1) the state shall not discriminate on grounds of religion, race, caste, sex or place of birth or any of them.

Article15 (3) - Nothing in this article shall prevent the state from making any special provision for women and children.

The use of the word "only" in Article 15 (1) has enabled courts to segregate sex from gender and uphold blatantly discriminatory legislation in some circumstances when such discrimination may be attributed to other factors in addition to sex. The court justified a special retirement age of fifty for airhostesses, using the provision for test." The Constitution does not prohibit the employer from considering sex in making employment decisions where this done pursuant to a properly or legally chartered affirmative action plan. According to the court, the but for test was developed to me that no less favourable treatment is to be given to woman on gender criterion which would favour the opposite sex and women will n be deliberately selected for less favourable treatment because of the sex. Article 15(3) provides that nothing prevents the State from making any special provision for women and children and if such a law made it cannot be treated as discriminatory against others. Thus, it has correctly been interpreted as an exception to the principle of non-discrimination guaranteed by Article 15(1).

It is evident from such a provision that the framers of the constitution realized the fact that the women needed protection and certain additional provisions in that regard had to be made in their favour. Hence, this unambiguous positive discrimination extended to women is an important aspect of the equality guaranteed.

Article 16: Equality of Opportunity in Matters of Public Employment

The main object of Article 16 is to create a constitutional right in equality of opportunity and employment in public offices." Articles 15 and 16 are instances of the same right in favour of citizens in some special circumstances. This relationship has been further emphasized in N.M. Thomas[12] and the Mandal Commission case.[13]

In yet another case[14] the court noted the purpose of Article 15(3) to be the recognition of the fact that for centuries women have been socially and economically handicapped. As a result, women were unable to participate in the socio-economic activities of the nation on a footing of quality. Article 15(3) is meant to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between

[12] State of Kerala v N.M Thomas 1976 2 SCC 310
[13] Indira Sawhney v Union of India 1992 Supp (3) SCC 217
[14] Government of Andhra Pradesh v P.B Vijay Kumar 1995 4 SCC 520

men and women. The Court in this case also stated that while the object of the provision was to strengthen and improve the status of women, the important limb of this concept gender equality is creating job opportunities for Women." Therefore, making special provisions for women in respect of employment of posts under the state is an integral part of Article 15(3)

In the year 2003, the Supreme Court upheld the classification between male and female for certain posts, providing for the appointment of a lady principal as a proper exercise of constitutional obligation under Article 15(3). The Court also referred to the earlier decision where it was held that "as a result of the joint operation of Article 15(1) and Article 15(3), the State may discriminate in favour of women against men, but it may not discriminate in favour of men against women",

Clause 2 of Article 16 prohibits discrimination on the ground of sex in the matters of public employment. The Court recognized the need to bridge the gap between the constitutional prohibition on sex discrimination in Article 16 and the actual law in practice."

Sex discrimination is prohibited under the Constitution, on a combined reading of the provisions of the equality code' with Articles 15 and 16 being interpreted as facets of Article 14. The Supreme Court has on several occasions held that "gender equality enshrined in Article 14 is one of the basic principles of the Constitution Feminist critiques of violence against women suggest that the issue of sexual Harassment at work place should be seen in the larger context of patriarchy and gender hierarchies which women are constantly subjected to. At the international level, Catherine Mackinnon, a leading feminist and legal scholar, recognized the link between and helped situate sexual Harassment of women at the work place within the larger problem of sex discrimination. At the national level, the Supreme Court of India in Vishaka's Case recognized this linkage.

Article 19: Protection of Certain Rights Regarding Freedom of Speech etc

Gender discrimination in employment adversely affects a woman's freedom to carry out her occupation. The Supreme Court has struck down gender discrimination employment on several occasions. In C B Muthamma, LES v. Union of India, service rules that placed an unfair burden on women were labelled as discriminatory. In Mackinnon Mackenzie and Co. v. Audry D'Costa," the Court held that gender-based discrimination in employment arises when men and women are paid differently for the same work. However, it is important to note that neither of these cases framed sexual Harassment in work place in terms of a violation of the fundamental right to work.

For the first time, the Supreme Court in Vishaka's case held that, one of the logical consequences of incidents of sexual Harassment at work place is the violation of the woman's fundamental right under Article 19(1)(g) to business." The fundamental right to carry on any occupation, trade or profession depends on the availability of a safe working environment. Sexual Harassment of women at their places of work exposes them to great risk and hazard and places them at an unfair position vis-à-vis other employee. This adversely affects their ability to realize their constitutionally guaranteed rights under Article 19(g).

In yet another case[15], the Court referred to the International Covenant on Economic, Social and Cultural Rights and the right of a woman (listed in the Covenant) to fair conditions of work. Accordingly, women should not be subjected to sexual Harassment that places them in an inequitable position by vitiating the safety of their working environment. In a recent judgment, The Division Bench of Delhi High Court has held that if the boss or employer calls an employee at any other place outside the workplace in connection of the office work, whether at his house or a mess, that other place shall amount to workplace if any kind of harassment is meted out to that lady at such place."

Article 21: Protection of Life and Personal Liberty

The Supreme Court in its interpretation of the "right to life" under Article 21" has on many occasions stressed that the right to life could not be equated to living out an animal existence." The right to life would necessarily imply the right to live with human dignity and would include those aspects of life that make life meaningful complete and worth living. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and commingle with fellow human beings. Gender discrimination has been recognized as an obstacle to the full realization of the right to life under Article 21.

In yet another case[16], the Court held that equality, dignity of person and the right to development are inherent rights of every human being. For the meaningful enjoyment of the right to life under Article 21, every woman is entitled to the elimination of obstacles and of

[15] Apparel Export Promotion Council v A.K Chopra 1999 1 SCC 759
[16] C Masilamani Mudaliar v Idol of Sri Swaminathaswam Thirukoli 1996 8 SCC 525

discrimination based on gender. The Court reiterated that Sate has an obligation to eliminate gender-based discrimination and to create conditions and facilities conducive for women to realize the right to economic development, including social and cultural nights.

The Supreme Court stated that women have the right to life and liberty under Article 21; similarly, they also have the right to be respected and treated as equal citizens. The Court held that offences of rape were acts of aggression aimed at degrading and humiliating women. Such offences were crimes against basic human rights and are also violative of the fundamental right to life under Article 21. The judges emphasized that "the... dignity of women cannot be touched or violated." Thereby, the right to life includes the right of women to live with dignity and to lead a peaceful life. The Supreme Court reiterated that physical violence at the hands of government employees who outraged the modesty of women violates the right to dignity of women.

In Vishaka's case the Apex Court held that each incident of sexual Harassment of women at the workplace is a violation of the right to life under Article 21, which implies the right to dignity. According to the Court, the principle of gender equality includes protection from sexual Harassment and the right to work with dignity, which had been reflected in international conventions and norms. The Court went on to hold that it is the primary responsibility for ensuring such safety and dignity of women through suitable legislation, and executive. However, in the absence of existing protective mechanisms, the Court evolved certain guidelines to deal with instances of sexual Harassment resulting in the violation of important fundament rights of women workers under Article 14, 19 and 21.

The Supreme Court in A.K. Chopra case reiterated that the Indian State had an obligation under CEDAW and the Beijing Declaration to prevent sexual Harassment and held it to be beyond the scope of debate that sexual Harassment of a female at the place of work is incompatible with the dignity and honour of female." The Court emphasized that there could be no compromise on the urgent need to eliminate such practices. Sexual Harassment at work place is violation of the right to privacy under Article 21. The right to privacy is an integral part of the right to life and personal liberty guaranteed under Article 21. This right can be traced back to the case in which Subba Rao J. held in his separate judgment:

"Right to personal liberty in Article 21 can be defined as a right to be free from restrictions or encroachments on the person, whether those restrictions or encroachments are

directly imposed or indirectly brought about by calculated measures, "The link between the rights to privacy and the right to personal liberty under Article 21 was further emphasized.

The Court also held that the right of privacy in Article 21 should be interpreted in conformity with India's international obligations in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. An act of sexual Harassment is a violation of the right to privacy of a woman, and therefore of the right to personal liberty and life under Article 21.

The right to privacy includes the right to be let alone. Even so, the Supreme Court has attempted to define the right to privacy to include personal intimacies of the home, family, marriage, procreation, motherhood and child rearing. Elaborating on the right, any questions to a female candidate regarding personal problems such as pregnancy, menstruation etc., which modesty and self-respect may preclude the disclosure of, should be deleted from enquiry by the employer.

In Indian criminal law, there is no chapter specifically dealing with violence against women and available provisions to tackle such issues of organic problems lie scattered under various chapters. Moreover, as far as sexual Harassment is concerned neither there is any offence identified, described or listed as such nor it has ever been enunciated as juridical category of crime. From these propositions, this can and should not be inferred that the Indian Penal Code, 1860 does not recognize sexual Harassment even informally, or that there are no existing laws as such that can be invoked in case such issue arises. There are number of related laws which have been there in the statute books for more than century, though framed to recognize and define particular offences: which by virtue of the definitions therein, also cover the incidents of sexual Harassment. It has been clearly mentioned in Vishaka's case that, excuse the definition given therein is not exhaustive one and that it does not preclude the possibility of other serious manifestations of Harassment being covered under offences that are already defined the penal code.

Following provisions of the Indian Penal Code may be evoked case, act, or incident of sexual Harassment at workplace:[17]

[17] Sexual harassment at workplace by Ritu Gupta 2014

Sections 292-294 of the Indian Penal Code deal with the sale or exhibition of obscene books and objects, as all well as obscene acts a song in public places, which cause annoyance or inconvenience to the public. These activities are defined as offences under these sections the provisions of section 294 may also be applied for the cases of sexual Harassment.

The word "obscene' has not been defined in Indian Penal Code. However, the dictionary defines 'obscene' as 'what is repulsive by reason of malignance, hypocrisy, cynicism, irresponsibility, gross disregard of moral or ethical principles.

Obscene - offensive to chastity or modesty, the expression of something which decency forbids to be expressed, A person who is annoyed by the obscene act, intended for someone else, can also file complaint under section 294 of Indian Penal Code. The word 'obscene' under this provision means offensive to chastity or modesty, the expression of something which decency forbids to be expressed.

The test of obscenity in ultimate analysis is: whether the language complained of would deprave and corrupt those whose minds are open to immoral influences. The form of expression and not the actual meaning is important. Distinction should be drawn between obscenity and frankness of expressions.

Annoyance - For an act to be punished under this section, it must cause annoyance either to a particular person or persons in general. Public Place Obscene act must have been done in a public place or near a public place.

In Zafar Ahmed Khan v. State[18], words used by the harasser therein were held clearly offensive to the chastity and modesty of the girls and were likely to personate the minds of hearers including the girls. Both men and women can complain under this provision. Using bad language out of temper would be punishable.

Section 294 of Indian Penal Code encompasses the offence called in common parlance "eve teasing" (an English phrase) and refers to all forms of harassment women face in public places that are considered routine, funny or trivial. As per this provision those who commit any of these acts would be punishable.

[18]AIR 1963 ALL 105

Sections 339-348: Wrongful Restraint and Wrongful Confinement

Sections 339 and 340 define the wrongful restraint and wrongful confinement while the punishments for these have been laid in sections 341 and 342. For wrongful restraint, the maximum punishment is simple imprisonment for a term, which may extend to one month, or a fine, which may extend to five hundred rupees. For wrongful confinement, the maximum punishment is imprisonment of either description that may extend to one year, or a fine, which may extend to one thousand rupees, or both.

Section 354: Assault or Criminal Force to Woman with Intent to Outrage Her Modesty

In order to constitute an offence under Section 354, there must be an assault or use of criminal force on any woman with the intention or knowledge that the woman's modesty will be outraged. Under this provision, an offence of lesser gravity than rape would be punishable." Culpable intention is an essential ingredient and crux of the matter. M. Melvill. J. observed:

"We believe that in this country indecent assault are often magnified into attempt at rape, and even more often into rape itself, and we think that convention of an attempt at rape ought not to be arrived at unless the court be satisfied that the conduct of the accused indicated a determination to gratify his passion at all events, and in spite of all resistance."

In between a complete rape and attempt to commit rape, there is a grey area covered by Section 354 IPC, assault or criminal force to outrage modesty or indecent assault. The dividing line between attempt to rape and indecent assault is not only thin but also is practically invisible.

One cannot escape prosecution by saying that the allegations are not true. To test the veracity of the allegations and try the case on merits is the responsibility of the court. The safeguard for the accused is that he is presumed innocent until proved guilty. There is no ambiguity regarding the penal provisions that such conduct is forbidden. Such ham, which is expressly declared criminal by penal law, should not be characterized as "slight harm" attracting section.

While the term sexual Harassment entered usage two years later in 1997, the Bajaj's Case witnessed the radical application of the archaic "Outraging of modesty" provision

preparing ground for the provision of harassment. Since the Indian Penal code does not define the term "modesty" which is the crux of Sections 354 and 509, Justice Anand and Justice Mukherjee dealt at length on dictionary meanings of the term which centred on words like "Womanly Propriety", "Shame", "Chastity", "Decency", "Decorous in manner and conduct", "Freedom from coarseness in delicacy and indecency" etc. As per the Dictionary meaning, 'modesty' is the quality of being modest and in relation to woman means "womanly propriety of behaviour, scrupulous chastity of thought, speech and conduct. It may also be defined as "freedom from coarseness, indelicacy or indecency, a regard for propriety in dress, speech or conduct."

In interpreting the expression harm appearing in the section the Court said that it is wide enough to include physical injury as also injurious mental reaction. The Justices then went on to consider Major Singh's case where Mudholkar J. who spoke for the majority deliberated on whether the modesty of a female child of seven could be outraged and concluded that when any act done to or in the presence a woman is clearly suggestive of sex according to the common notions of mankind that must fall within the mischief of these sections. One them further observed that the essence of a woman's modesty is he sex and since birth, she possesses that modesty which is the attribute of her sex.

Justice Anand and Justice Mukherjee, in mapping the meaning of ‘modesty’ and the implications of outraging that modesty, proceeded to reaffirm that "common notions of mankind" must be gauged by "contemporary societal standards". These gendered social notions see sex as the essence of modesty and modesty as the essence of the female sex and men, by virtue of their sex and gender have the prerogative and privilege of access to both sex and modesty and held that the alleged act of Mr. Gill in slapping Mrs. Bajaj on her posterior amounted to "outraging of her modesty" for it was not only an affront to the normal sense of feminine decency but also an affront to the dignity of the lady - sexual overtones or not, notwithstanding. Also, sagacity will be the first casualty and this is not a case of slight harm. The key factor is whether a person of ordinary sense and temper would complain of the harm or not. It is the duty of the police to investigate the matter and of the court to take cognizance of the matter, if a prime facie case is made out. One cannot escape prosecution by saying that the allegations are not true. To test the veracity of the allegations and to try the case on merits is the responsibility of the court. The safeguard for the accused is no ambiguity regarding the penal provisions that such conduct is forbidden. Such harm, which is

expressly declared criminal by penal law, should not be characterized as "slight harm" so as to attract section 95.

Thus, the provisions of this section 354 and a range of situations as listed in Vishaka's judgment criminalize any conduct aimed at insulting the modesty of a woman. Further, entering into a woman's work place or work station with an intention to commit an offence or intimidate, assault or annoy her will not only be covered up by the abovementioned sections but may also amount to criminal trespass.

Rape can be an extreme form of sexual Harassment faced by working women. It may happen on a business trip with colleagues while staying at hotel or any other place or while away at some seminar with the colleagues or superior where she may be called into his room by any of them on the pretext of some urgent official assignment. She may be compelled for sexual intercourse with a threat that if she resists, she will have to lose her job or will have to face adverse circumstances. She may be placed under duress and as a result, she is unable to protest and submits herself involuntarily, to sexual intercourse. Such situations would amount to rape under this section notwithstanding the fact that it simply started as workplace harassment.

As far as the issue of consent is concerned, the sole testimony of the prosecutrix can be relied upon by the courts. Moreover, even if there is no proof or evidence on record to show that she resisted, may not preclude, a conclusion that she was consenting to the Act. Even Vishaka's case, from where this problem got judicial recognition as violation of basic human rights, is an appropriate illustration of the same, where the victim was brutally raped because of the issues pertaining to her work. Moreover, sexual Harassment may appear to be a subtle form of violence as compared to rape, the implications often is no less horrible in extent and gravity. The modesty of the victim of workplace sexual Harassment, is outraged almost daily, may be many times a day, by humiliating conduct or the gestures of the perpetrator who may be her employer or colleague.

Section 499: Defamation

Character assassination is the easiest way to humiliate a woman colleague or employee as one who is out of the safe and secure four walls' of the society becomes prone to

such demeaning practices and it is resorted by those who fail in their repeated attempts to overpower her mind and body. Rumours are spread about her loose moral character and illicit relationships with the fellow employees, colleague or boss as pressure tactics. In this era of Information Technology, graffiti and obscene emails are sent to her and to others portraying her as a willing and consenting party.

The victim of sexual Harassment at work place is, generally, defamed by asking defamatory questions during the course of proceedings or pleadings or false counter cases. In such a situation, she can file a suit for defamation against the offender. The victim may file a case, under this section, against the perpetrator or authors of such stories, where she can ask for the remedies available under this section.

Section 503: Criminal Intimidation

A variety of incidents falling under the category of sexual Harassment may be covered under this section if the woman or her family is threatened for the fear of injury". Section 503 describes the kinds of threat that may trigger this section, such as a threat either to his person, reputation or property. This includes a person's physical and mental space, a threat to a person or to the property of another p person in whom the threatened person has an interest. Thus, this section has very wide scope.

INTERNATIONAL CONVENTIONS AND INSTRUMENTS

The discrimination against women in the form of Sexual Harassment has been rampant all through the ages and has always been a matter of concern for the nations around the world. Much of the impetus for is statute law and judicial decisions that prohibit or constrain sex discrimination and Sexual Harassment stems from the recognition of the equality of sexes in various international instruments and conventions. The international community has, so far, not only exhibited serious concern about the issue, it has also been dealt in several UN treaties, declarations and conventions apart from various regional instruments of the states, wherein most of these contain statements of a principle against discrimination on the basis of sex.[19]

International Covenant on Economic, Social and Cultural Rights (1966)

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) obligates State parties to ensure the equal right of men and Women to the enjoyment of all

[19] Sexual harassment at workplace by Ritu Gupta 2014

economic, social, and cultural rights set forth in the Covenant. It recognizes the right to the enjoyment of just and favourable conditions of work, which includes the right of everyone to the opportunity to gain his or her living by work which he [or she] freely chooses or accepts, and requires States parties to take appropriate steps to safeguard this right.

The covenant also guarantees basis rights regarding employment conditions and remuneration. For example, its Article 7 acknowledges the right to fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men with equal pay for equal work, as well as equal opportunity for promotion and the right to "safe and healthy working conditions.

The International Covenant on Civil and Political Rights (1966)

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) recognizes the right to privacy and to personal integrity. Article 26, on the other hand, recognizes the equality of all people and United before the law and acknowledges the right to equal protection. Sexual Harassment invokes all of these rights since victims have their right to privacy and personal integrity violated, and the state has an obligation to protect all its citizens, both men and women, from having their right violated. Therefore, it follows that under the law, the state has an obligation to provide protection to victims of Sexual Harassment.

International Labour Organization Discrimination (Employment and Occupation) Convention

Adopted in 1958, this convention defines discrimination as "any distinction, exclusion or preference made on the basis of sex which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation" ' It requires State parties to implement a national policy to eliminate all forms of employment discrimination. Even though the convention does not specifically address the issue of Sexual Harassment, the fact that women are disproportionately affected by such behaviour brings it within the convention's definition of employment discrimination. Thus, states that are party to this treaty

are obligated to declare and implement a national policy to combat sex discrimination, including harassment, by employing measures that are appropriate to the local context.

In 1996, the International Labour Organization went on to adopt the General Surveys on Equality in Employment and Occupation Convention that interpreted the Discrimination Convention to include Sexual Harassment in its definition of prohibited forms of employment discrimination. This also defines Sexual Harassment, gives examples of prohibited conduct, and warns of the ramifications if left unattended.

Role of United Nations

The formation of United Nations Organizations in 1945, set the pace for the "attainment of human rights for all' emerged as priority area and the stage was set for realization of this goal with the adoption of the "Universal Declaration of Human Rights' in 1948. During the early 1950's, the struggle for women's rights gained importance as one of the major human rights concerns, which in turn, led to the adoption of vivid specific Conventions from time to time. Convention for the Suppression of Traffic in Persons and the Exploitation of Prostitution 1949, the Convention on Equal Remuneration for Men and Women Workers for Work of Equal Value 1951, the Convention on the Political Rights of Women, 1952 followed by the Convention on the Minimum Age of Marriage and Consent to Marriage, 1962 were steps ahead in the positive direction. The spearheading of women's movement throughout the world towards the protection of women and their empowerment resulted in a landmark initiative when, in 1972, decided to commemorate 1975 as International Year of Women, The state parties were also urged to take each and every possible measure for the development of women in all spheres It was during this period that the landmark "Convention on the Elimination of All Forms Discrimination Against Women (CEDAW) was adopted by the UNO on December 19, 1979.

Further, the UN decade was culminated with the adoption of the "Forward Looking Strategies" documents at the UN Conference held in Nairobi in 1985 giving fitting accolade to the Decade. The "Nairobi Conference" was followed by the "Beijing Conference" (Fourth World Conference on Women), which adopted the Platform of Action Document. These landmarks initiatives by the UN during this period contributed substantially in prioritizing action by the State parties through legislative and other initiatives and proved to be milestones in the journey making the message loud and clear that Women's Rights Are Human Rights.

Charter of United Nations

The United Nations reaffirms its faith in securing fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life enlarge freedom. All UN member states have a responsibility to uphold constitutional guarantees of basic human rights that are compatible international law. The UN Charter, which expresses "faith in fundamental human rights and in the dignity and worth of the human pane and the equal rights of men and women", imposes a duty on member states to promote "universal respect for and observance of man rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion".

Universal Declaration of Human Rights (UDHR) 1948

In 1948, the UN General Assembly adopted and proclaimed the Universal Declaration of Human Rights (UDHR) by its resolution dated 10.12.1948. The Preamble, inter alia, sets out as under:

WHEREAS the recognition of the INHERENT DIGNITY and of the equal and inalienable rights of all members of the human family is the foundation for freedom, justice and peace in the world

WHEREAS the people of the United Nations have in the Charter affirmed their faith in fundamental human rights, IN THE DIGNITY AND WORTH OF THE HUMAN PERSON AND IN THE EQUAL RIGHTS OF MEN AND WOMEN

It further affirms that; all human beings are born free and equal in dignity and rights. Human Rights jurisprudence based on the UDHR has acquired recognition as the 'Moral Code of Conduct having been adopted by the General Assembly of the United Nations.

Article 2 establishes that all people are entitled to the Declaration's enumerated rights and freedoms without distinction, including the based-on sex. The Declaration's Article 23(1) carries significant weight in the context of Sexual Harassment, as it establishes "the right to work, to free choice of employment, to just and favourable conditions of work, and to

protection against unemployment." Although this Declaration is only a morally binding document, it is still important because it establishes clear international norms that human rights violations are unacceptable and must be remediable by law.

Comprising of 30 Articles, which spell out the basic civil, cultural, economic, political and social rights that all human being around the world should enjoy, the Declaration has served as an inspiration not only for the UN in adopting more than 80 Conventions and Declarations on wide range of issues but also stimulated the national governments in incorporation of these principles under their Constitution and other laws. The Indian Constitution, which came into force on January 26, 1950, contains 28 similar provisions out of 30 Articles of UDHR. This was followed by the two international Covenants i.e., Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights. The Universal Declaration, together with the International Covenants and their optional protocols, comprise the international Bill of Human Rights.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

One of the landmark initiatives by the UN, which has contributed substantially towards the protection and empowerment of women, is the adoption of CEDAW on December 18, 1979, which came into force on September 3, 1981.India signed the convention on 3 July 1980 and ratified it on June 25, 1993 with a declaration and reservations in respect of Article 5(a), 16(1), and 16(2) and 29(1). The convention declares that states must act to eliminate violations of women's rights whether by private persons, groups or organizations. More specific international standards in relation to Sexual Harassment at the workplace are embodied in the CEDAW Convention.

Article I of the CEDAW Convention defines discrimination as

'Any distinction, exclusion or restriction made on the basis of ser which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'

Further, under Article 2(e), State parties are obliged to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprises.

The CEDAW Convention imposes an obligation on states to eliminate all types of discrimination against women, and then applies this general principle to the employment

context as well. This way the treaty represents an unambiguous mandate for states to the affirmative steps that are necessary to ensure the substantive quality of women at the workplace, both in treatment and opportunity. To be sure, substantive equality of women in the employment content cannot be achieved without the elimination of Sexual Harassment this represent a barrier to their ability to seek employment, and healthy working environments, and achieve advancement within the workplace through promotions.

More specifically, Article 11 of the convention contains a principal substantive provision on Sexual Harassment in international law. It reads that:

1. State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work is an inalienable right of all human beings:
(b) The right to protection of health and to safety in working conditions...

In 1992, the CEDAW Committee went one step further by formulating and adopting General Recommendation which expressly recognizes Sexual Harassment as a form of violence against women.

This defines Sexual Harassment as "unwelcome sexually determined behaviour [such] as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands whether by words or actions."It further elaborates that such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment". General Recommendation spells out how State parties should bear responsibility for acts of gender-specific violence perpetrated by private actors.

Article 12

1. "State parties shall undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present convention."

The general recommendations of CEDAW in this context in respect of Article 11 are: Violence and equality in employment. Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as Sexual Harassment in the work place.

Furthermore, Article 15 of the convention affirms the general principle that states "shall accord to women equality with men before the law." This means that not only does a state have an obligation to protect women against the violation of Sexual Harassment but also must provide adequate recourse in the event that this right is violated.

Article 24

"State parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present convention."

On 6 October 1999, in a landmark decision for women, the United Nations and General Assembly adopted the optional protocols containing 21 Articles to the CEDAW, which entered into force on 22December, 2000. The state parties, which ratify the optional protocol, recognize the competence of the committee on elimination of discrimination against women to consider petitions from individual women or groups of women who have exhausted all national remedies. The optional protocol also entitles the committee to conduct inquiries into grave or systematic violations of the convention.

Conventions against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

The convention against torture and other cruel, inhuman and degrading treatment or punishment (the torture convention) was adopted by the General Assembly, on December 10, 1984. India signed the convention on 14 Oct. 1997. The convention defines torture in Article I as:

"Any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him (or her) or a third person information or a confession, punishing him (or her) for an act he or she) or a third person has committed or is suspected of having committed or intimidating or coercing him (or her) or a third person, or for any other reason based on discrimination of any kind, when

such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[20]

This convention is predominantly relevant to certain issues concerning women, including female genital mutilation and gang rape.

International Conference on Population and Development (ICPD)

The ICPD held at Cairo in 1994 emphasized on the need to empower women and improve their status for achieving sustainable development, according to the ICPD Programme of action universally recognized human rights standards are applicable to all aspects of population programmes.[21]

Declaration on Elimination of Violence against Women

"Any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."

Violence against women shall be understood to encompass, but is not limited to, the following: Physical, sexual and psychological violence occurring in the general community including Sexual Harassment and intimidation at work. As such, it creates an obligation for states to exercise all due diligence in eliminating such forms of unacceptable behaviour.

Thus, these are the various international conventions and instruments which directly or indirectly has the provision to protect the women specifically prevention of sexual harassment.

COMPARATIVE ANALYSIS

Sexual Harassment at workplace is been faced not just in India but by all the women over the world. It has nothing to do with been a developed nation or a developing one. The Status is just the same everywhere. And as every country has its own story, they have their own laws to deal with such situation. United States though a leader in many fields, has never

[20] Sexual harassment at workplace by Ritu Gupta 2014
[21] Sexual harassment at workplace by Ritu Gupta 2014

been a leader in women's right. The legal Status and treatment of women raise difficult issues. The 1948 Universal Declaration of Human Rights included women when it guaranteed rights to everyone.[22]

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

U.S.A

In USA, Equal Employment Opportunity Commission (EEOC) is a federal agency that administers and enforces civil rights laws against workplace discrimination. An employee who faces sexual harassment can file a complaint at the Equal Employment Opportunity Commission, if dissatisfied with the organisational enquiry of the case. The agency works both for women and men. Sexual Harassment was first recognized in cases where the women lost their jobs because they rejected their employer's sexual overtures. This happened in case Barnes v Costle, 1977. Soon such behaviour was recognised in employment law, and could create an odious condition. Later, the two types of basic forms of harassment were quid pro quo and hostile environment harassment, were summarized in guidelines issued by the Equal Employment Commission.

The Women's Legal Defense Fund (WLDF) advocates public policies that focus on work and family concerns. Sexual Harassment is one of the critical issues the WLDF includes on its agenda. The WLDF provides technical assistance to activists and policy-makers, and participates in targeted litigation to challenge gender bias. The Fund also runs activities to educate the public about the human and social costs of gender discrimination. In 1991, the WLDF published information about Sexual Harassment in the workplace.

U.K

As far as Sexual Harassment at workplace is concerned, similar legislation is available against sexual discrimination all over the UK. The legal definition appears in two Acts-the Commonwealth Sex Discrimination Act (1985) and the Victorian Equal Opportunity Act (1984).

The Women Against Sexual Harassment organization (WASH) offers free and confidential support and advice to anyone who has been sexually harassed at work. WASH

[22]https://www.indialegallive.com

was launched in June 1985 and was the first such specialist advice agency. WASH's current work includes providing general, legal and employment advice as well as support to anyone who has been sexually harassed at work; advising trade unions and employers in both the public and private sectors on procedure and practice for dealing with Sexual Harassment, offering training to employers, staff, trade unions, women's groups and advice agencies on the nature of Sexual Harassment, how to deal with it, preventive measures and the law; delivering lectures in workplaces and educational establishments, to women's groups and at union meetings running conferences on the legal and employment issues relating to Sexual Harassment; acting as an information and resource Centre, and publicizing the serious nature of Sexual Harassment through the media.

A survey published by the EU Fundamental Rights Agency in 2014 found that sexual harassment was the most common form of violence against women across the EU, with 68 per cent of women respondents in the UK saying they had experienced sexual harassment since the age of 15 and 25 per cent having been sexually harassed in the past 12 months. 85% of women aged 18-24 years have experienced unwanted sexual attention in public places.[23]

The recent data of 2019 shows that 40% of managers who are men are uncomfortable participating in common workplace activities with women. This reflects the widespread reports of Sexual Harassment are increasing and men are also afraid of such things. We realise the common growing position in UK when polling was conducted of 1553 women and 52% of them experienced unwanted behaviour at work including groping, sexual advances and inappropriate jokes.[24]

According to a survey conducted by in 2019, 13 percent of women in the United Kingdom have been exposed to visual and verbal harassment at work such as to whistling, rude gestures or comments. In this year, another common type of sexual harassment at work in the United Kingdom was reported by women who were exposed to obscene proposals or messages with a sexual connotation at work.[25]

[23]https://www.indialegallive.com/
[24]https://www.indialegallive.com/
[25] https://www.indialegallive.com/

The National Crime Records Bureau (NCRB) has started collecting data regarding sexual harassment at workplace under Section 509 of IPC — the category of 'insult to the modesty of women at office premises' — since 2014. The total number of cases registered under this category during 2014, 2015 and 2016 were 57, 119 and 142, respectively.

As far as complaints registered with the National Commission for Women (NCW) are concerned, there is an increase in cases registered under the category of 'Sexual Harassment includes Sexual harassment at Workplace'. The number of such complaints registered during the last three years is 539 (2016), 570 (2017) and 965 (2018), according to a statement issued by the Ministry of Women and Child Development.

The Ministry of Women and Child Development has developed an online complaint management system, called Sexual Harassment Electronic–Box (SHE-Box). Complaints related to sexual harassment at workplace by women, including government and private employees, can be registered on the portal. A total of 423 complaints had been registered on SHE-Box till now and 114 of them have been disposed of, according to the ministry.[26]

SUGESSTIONS AND RECOMMENDATIONS

Sexual harassment at the workplace is a social challenge that needs to be addressed.

- ✓ It is important to enhance the awareness of employers and employees on the existence of forms of sexual harassment at the workplace, preventive measures, and legal framework on preventing and addressing sexual harassment.
- ✓ Dissemination and awareness raising activities should be regularly conducted and evaluated in order to improve hest practice on how to address sexual harassment in the workplace, and also to forearm and inform of forms of sexual harassment to enable potential victims to avoid them.
- ✓ Enhancing training courses on sexual harassment and providing documentation or a handbook on the prevention of sexual harassment at the workplace can help in combating it.
- ✓ The training can be organized in modular form, including knowledge, skills, education and communication on the prevention of sexual harassment at the workplace, as well as counselling and proper guidance.

[26] https://www.thestatesman.com/

- ✓ Even though the Act is in force since 2013, the awareness regarding consequences of sexual harassment and its redressal against the same is limited.
- ✓ The effective implementation of POSH Act not only requires creating an environment where women can speak up about their grievances without fear and get justice but sensitization of men towards treatment of women at workplace is equally necessary.

CONCLUSION

Sexual harassment at work place is not just a private problem between harasser and victim: it is an issue, which has implications for all employees and management at the work place. Sexual Harassment at workplace covers a wide diversity of behaviours ranging from flirting, verbal remarks to physical contact and sexual advances. Sexual harassment at workplace can take the form of a power display, intimidation or abuse from a superior or co-workers. The contemned segregation of women in low-paid, low status and precarious jobs contributes to this problem. Moreover, the perception in different contexts and cultures of what constitutes sexual harassment at work place is extremely diverse.

In general, the orientation of a culture or shared beliefs within a sub-culture helps define the limits of tolerable behaviour. To the extent a society does tolerate unwelcome sexual conduct of male members; the values of individuals within that society will develop accordingly. Attitudes of gender inequality are deeply embedded in many cultures and sexual harassment of women at work place can be viewed as a violent expression of the cultural norm. Discrimination against women and gender stereotypes carried in workplace tend to perpetuate sexual harassment of women at work place. The physical, social and economic consequences of sexual harassment at work place are long-term. In many cases sexual harassment brings shame not only to women but to their families and communities. This will bear strongly on women's entitlement to resources marriage and livelihood. Sexual harassment violates a woman's right to job security and equal opportunity. It can create working conditions that are hazardous to the physical and psychological well-being of women workers. It also creates a poisoned work atmosphere that can dis-empower and demoralize women workers. Thus, it needs to be prevented and protected from every place of work.

Everybody Deserves to Feel Safe, Confident and Respected at Work.

Transformative Constitutionalism and the Rights of LGBT Community

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Abstract

The Constitution of India is revolutionary in its aim to transform the society. It is a sad reality that, our society at large, treats LGBT community as outcastes and untouchables. In India they face legal and social difficulties which aren't experienced by the non- LGBTs. In India the harassment and discrimination of the gay and transgender community is resulting from the continues existence of Section 377, affects their rights guaranteed under the Constitution of India including the right to equality, the right to non-discrimination, the right to privacy, the right to life and liberty. Section 377 of the Indian Penal Code, 1860 refers to 'unnatural offences' and punishes the one who voluntarily has carnal intercourse as against the order of nature with any man, woman or animal. The issue on Section 377 was first raised by a NGO, Naaz Foundation, which had in 2001 approached the Delhi High Court for decriminalising sex between consenting adults of the same gender by holding the penal provision as "illegal". The five bench judge of the Honourable Supreme Court on September 06, 2018, has ruled that an adult gay sex between the parties in private is no longer a criminal offence under Section 377 of the IPC[1]. Application of the provision ie section 377 to consensual homosexual sex between adults is unconstitutional, irrational, and manifestly arbitrary. Thus an analysis of the Supreme Court verdict in Navtej Singh Johar & Ors vs. Union of India is inevitable to understand the crumbs of Law in detail and its impact in the modern scenario. It is through this judgement that the apex court opens a window of acceptance and achievement for the LGBT community. This paper emphasises on a critical analysis of the judicial pronouncement on section 377, transformative constitutionalism and the rights of LGBT community, the litmus test for survival of Section 377 IPC, and its impact in the revolutionary democracy.

Keywords: *Transformative Constitutionalism, Sexual Orientation, manifestly arbitrary, consensual homosexual sex, Non-discrimination, Unnatural offences.*

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[1] Indian Penal Code, 1860

Introduction

India has been a country which since the dawn of the vedic period has acknowledged and harmonized with the philosophies of gender fluidity and queerness centuries compared to the western world had even it had attempted to reconcile with these terms[2]. Ayoni of all types are punishable in the Arthashastra. Manusmriti prescribes light punishments for such acts.[3] The important point at issue of the gender disparity crisis is the denial of civil liberties and cultural imperialism has arisen mainly due to the fact that the predominant majoritarian group seeks to enforce their will another being or collective group. Human sexuality is a complex phenomenon[4]. The approval of the distinction between desire, behavior and identity acknowledges the multi-dimensional nature of sexuality. Homosexuality, bi-sexuality and other sexual orientations are equally natural and reflective of expression of choice relying on the consent of two persons who are eligible in law to express such consent. It cannot be treated as physical or mental illness, it is a natural variation of expression and free thinking process, hence criminalising the same is a great discomfort to gender identity. Such sexual orientations are to be considered as an 'order of nature'.

In the year 1992, about 18 men were arrested from a park of New Delhi on the suspicion that they were homosexuals. After a huge protest and demonstration by gays, lesbians and by various groups of human rights, were released from the custody of the police after filing a petty case against them. In fact they were not indicated under Sec. 377 but under the provision of public nuisance under the Delhi Police Act.[5] Authorities often show unwillingness to participate in discussion regarding LGBT rights, regularly expressing their reservations on the issue, and neither of the two main political parties place LGBT issues high on their agenda during the 2008 electoral campaign.[6]

According to the American Psychological Association, that the sexual orientation is a natural phenomenon and attraction towards the same or opposite sex both are naturally equal, the only distinction is that the same sex attraction arises in very lesser numbers. The rights of the lesbian, gay, bi-sexual and transgender community, is comprised of 7-8% of the total

[2] *Jeffrey s.sikar*, Homosexuality and Religion 127(2006)
[3] Vanita, *Introduction, Ruth 2005*
[4] Drescher J, Byne WM, *Homosexuality, Gay and Lesbian Identities and Homosexual Behaviour*
[5] Availble at www.altlawforum.org visited on 12th June, 2021
[6] National commission for the promotion of Equality, (NCPE)

population of India, need to be recognized and protected, sexual orientation is an integral facet of every individual's identity[7]. Therefore, the focus of this paper is to critically analyse of the judicial pronouncement on section 377, transformative constitutionalism and the rights of LGBT community, the litmus test for survival of Section 377 IPC, and its impact in the revolutionary democracy.

Homosexuality and Indian Society

There is no such progressive changes have taken place as regards to the social and legal recognition and so far homosexuals are concerned, they remain victims of violence in different forms supported by the state and society. In India from a scattered group of a few hundred, homosexuals are at present ten crore strong and growing community evolving its own hip and happenings. The number is with gradual increase with more and more such people impending out of the closet. Compared to Delhi and Mumbai (with five lakh gays each) to a lesser extent, Bangalore and Calcutta are considered to be the hub of the gay movement in India, people from smaller towns like Gujarat, Maharashtra and Bihar are also coming out[8]. These gays in India are talking live in chat rooms and looking for their soul mates, falling in love with them, having sex on the net and crossing the cities to be with each other in real world, which shows that homo-sexual relationships are not ignored of in India, but they commonly exist in the country's larger cities where people can be more open about their sexuality.[9]

Sexual Assault and LGBT Community

According centres for disease control and prevention lesbian, gay, bi-sexual and transgender experience sexual violence at similar rates or higher rates than straight people. As a community, LGBTQ people face higher rates of poverty, stigma and marginalization, which put us at greater risk for sexual assault. Within the LGBTQ community, transgender people and bisexual women face the most alarming rates of sexual violence. Among both of these populations, sexual violence begins early, often during childhood.

Transformative Constitutionalism and the Indian Constitution

[7]*Navtej singh johar &ors vs. Union of India*, The Secretary Ministry of Law and Justice, Writ Petition(criminal) no. 76 of 2016

[8] According to Shaleen Rakesh, Coordinator, Milan project, Naz Foundation, New Delhi.

[9] BBC news article dated, 29 May 2001

In declaring Section 377 to be unconstitutional, the Court, was deeply reflective about the fact that State action alone will not be sufficient unless Constitutional rights acquires a meaningful purpose for the marginalised communities . Therefore, the Court did not crumble the words when it stated that it is both, criminality of the law and the '*silence and stigmatization'* of the society towards the LGBT community that orchestrates the marginalization and the exclusion of the former. Implicit in that claim was the understanding that inequality, hierarchy and prejudice transpires as much from State action as it does from societal sanctions, community conventions and private relationships.[10]

Similarly, Section 292 of Indian Penal Code, 1860 refers to obscenity and there is ample scope to include homosexuality under this section. Also Section 294 of Indian Penal Code, 1860, which penalizes any kind of "*obscene behaviour in public*", is also used against gay men. Giving effect to that vision, the Court, held that a substantive understanding of Article 14[11] mirrors '*the quest for ensuring fair treatment of the individual in every aspect of human endeavour and in every facet of human existence'*. Substantive equality enables LGBT people to equal protection of the laws and to participate in both public and private affairs as equal citizens of the country. Likewise, by acknowledging that Section 377 violates Article 15[12] as it *'perpetuates stereotypes'* against the LGBT community that is rooted in traditional gender roles, the Court essentially uncovered the relationship between 'heterosexual expectations of society' and State criminalization of homosexuality. It is this unwholesome nexus between State laws and *'public morality',* that transformative constitutionalism purports to break and imagine instead, 'a transformation in the order of relations' among individuals, society and the State.

Judicial Dictum on Rights of LGBT Community

[10] Abishek Jebaraj, *why the section 377 case raises questions beyond LGBTQ Rights*, July 16th 2018
[11] Equality before Law and Equal protection of Law
[12] Secures the citizens from every sort of discrimination by the state, on the grounds of religion, race, caste, sex, or place of birth or any of them in ensuring equality before law and equal protection of law

National Legal Services Authority vs. Union of India[13]**,** it was held that**,** the Indian transgender community has been the worst sufferer of exploitation amongst the entire LGBT community because of their dishonoured social, educational and economical status. They have never been considered as a part of society and have always been subjected to exploitation, violence and humiliation either in the hands of society or by the authorities in power. The continuous rejection and not having access to resources, these people often resort to beggary or prostitution, making them more vulnerable to discrimination and crimes such as human trafficking. In 2009, the Delhi High Court decriminalised the consensual sex between people of same gender. But this landmark judgment in the history of LGBT which granted equal rights to them was upturned by the Supreme Court of India in 2013.[14]

But in 2014 the Supreme Court through its judgment brought in a new ray of hope for the first time in the history for these transgender people , they were recognised as the third gender. In *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and others, the* Constitutional Court of South Africa opined "*The achievement of equality is one of the fundamental goals, that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one in which there is equality between men and women and people of all races*[15]".

In *K.S. Puttaswamy and another v. Union of India and others*[16] wherein the majority, speaking through Chandrachud J, has opined that, *"sexual orientation is an essential component of rights guaranteed under the Constitution which are not formulated on majoritarian favour"*. Radhakrishnan. J, after referring to judgments and International Covenants, opined that "*gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender person. A person's sex is usually assigned at birth, but a relatively small group of persons may be born with bodies which incorporate both or certain aspects of both male and female physiology*"[17].

Biologically speaking, the difference between a gay man and a straight man is something like how "*a left-handed person and a right-handed person*" differs in their nature. Some are left handed by birth, the same way there are some who are destined to be born as

[13] Writ Petition (Civil) No.604 Of 2013, AIR 2014 SC 1863
[14] *Naz foundation v. Govt. of NCT of Delhi*, 160 (2009) DLT 227 (129)
[15] 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004)
[16] 4 (2017) 10 SCC 1
[17] 1 (2014) 5 SCC 438

gay or one amongst that community. Thus that which is not consensual and unnatural is made punishable after this judgement which shows that the judiciary has taken right step in transforming the society.

Litmus Test for the Survival of Section 377 Indian Penal Code, 1860

As per the Constitution, which is the law of the land, guarantees to its citizens to live his or her life in their own terms and the same "*cannot be taken away except according to the procedure established by Law*"[18]. Article 21 is broader in its scope including within its ambit a variety of such other rights. The sexual autonomy of an individual in terms to choose his or her sexual partner is an important pillar and an in-Segregable facet of individual liberty. When the a person's liberty in the society is smothered under some vague and archival stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his or her liberty notwithstanding the fact that, the exercise of such liberty is within the limits of his or her private sphere, then the signature of life melts and living becomes a bare subsistence and consequently, the fundamental right of liberty of such an individual is abridged.[19]

Section 377 Abridging Article 19 and Article 21of the Indian Constitution

Article 19 of the Constitution guarantees the citizens the freedom of choice. Section 377 Indian Penal Code,1860 amounts to unreasonable restriction as it makes carnal intercourse a criminal offence and it also has a chilling- effect on an individual's freedom of choice as under Article 19. In lieu of the test laid down in the aforesaid authorities, Section 377 Indian Penal Code, 1860 does not meet the proportionality criteria and is violative of the fundamental right of *freedom of expression* including the right to choose a sexual partner. Section 377, has a chilling effect on Article 19(1) (a) of the Indian Constitution which guarantees the fundamental right of *freedom of expression* including that of LGBT persons to express their sexual identity and orientation acknowledgment of relationships or any other means[20]. Likewise, such persons are hesitant to register companies to provide benefits to sexual minorities due to the fear of state action and social stigma. Further, a conviction under

[18] Article 21 of the Indian Constitution
[19] Supra Note 2
[20] Ibid

Section 377 Indian Penal Code, 1860 renders such persons ineligible for appointment as a director of a company[21].

Section 377 IPC is also unreasonable as it becomes a weapon in the hands of the majority or the same said heterosexuals to seclude and harass the LGBT community which generates a fear in them that mars their joy of life and threat to their life. They constantly face social prejudice and are subjected to the shame of being their very natural selves. Hence section 377 that criminalises any consensual activity between two adults whether homosexuals, heterosexuals, and lesbians is unreasonable and unconstitutional[22].

Moreover the said section also violates Article 15 of the Constitution since there is inherent discrimination in it grounded on the sex of a person‘s sexual partner[23], a person can be prosecuted for acts done with an opposite-sex partner without her consent, whereas the same acts if done with a same-sex partner are outlawed even if the partner consents. Reference was made to the *Justice J.S Verma Committee on Amendments to Criminal Law,* where it was observed that, *‘sex’* occurring in Article 15 includes sexual orientation and, thus, taking this stand, Section 377 of IPC is also violative of Article 15 of the Constitution.

Further, Section 377 IPC, deprives the LGBT persons of their right to reputation which is one of the facet of the right to life and liberty of a citizen under Article 21 of the Constitution .This right is being denied to the LGBT persons because of Section 377 IPC as it makes them, apprehensive to speak openly about their sexual orientation and makes them susceptible to extortion, blackmail, and denial of State machinery for protection and enjoyment of other rights on certain occasions, the other concomitant rights are affected.

Effects of Recent Judgement

The *Navtej Singh Johar judgment* emphasizes on the transformative potential of Constitution of India. The court has considered lesbian, gay, bisexual and transgender Indians as individuals, and recognised their humanity, individuality, and autonomy. For the first time, LGBT community directly demanded their rights to be fully recognised as equal

[21]Supra Notes 2
[22] Ibid
[23]Section 376(c) to (e)

citizens in the court. This is the power of India's "*transformative Constitution*'' as the and its heart lies Article 32 of the Constitution[24].

The judgment by Chief Justice Misra and Justice Khanwilkar declared that, "*Any discrimination on the basis of one's sexual orientation would entail a violation of the fundamental right to the freedom of expression." Justice Chandra chud remarked, "The choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation."*

The situation before this judgement was that the LGBT persons were deprived of their rights due to the presence of Section 377 as they fear prosecution and prosecution upon revealing their sexual identities and, therefore, this class of persons never approached the Supreme Court as petitioners, rather they have always relied upon their teachers, parents, mental health professionals and other organizations such as NGOs to speak on their behalf. Section 377 prohibits 'unnatural sex' or carnal intercourse against the order of nature. It is a colonial-era law that prohibits non-penovaginal intercourse and makes it a punishable offence that can earn the accused up to ten years of imprisonment.[25] This judgment has far-reaching consequences, ensuring that LGBT people will enjoy the full extent of rights and liberties guaranteed by the Constitution. Though this judgment is a big relief, yet the Indian society is yet so poor that it cannot tolerate this massive change. They mock upon the judiciary for giving rights to do something that is unnatural and immoral according to their views.

Though the decriminalization of section 377 will give LGBT community a separate and dignified status but at the same time it will have cascading effect on existing laws. The problem is with respect to the interpretation of the terms husband and wife which includes both male and female especially in the matters of divorce and as to who should pay the maintenance which is difficult to be ascertained in case of same gender. Hence the decriminalization of Section 377 of IPC will have a great impact on Indian family laws.

This judgement has become a great foundation for the future transforming the lives of LGBT people by recognising their rights. This judgement also serves to attain the objective of

[24] Abishek Jebaraj, *Why the Section 377 case raises questions beyond LGBTQ Rights*, on July 16th 2018
[25] Supra Note 24.

the Constitution in bringing radical social transformation. The Supreme Court has also reiterated its anti-majoritarian role and the Constitution's commitment to the individual. This is a new dawn, not for LGBT rights alone, but for individual rights and liberties in India.[26]

Suggestions

- Every person must have the right to decide their gender expression and identity, including transsexuals, transgenders, transvestites, and hijras. They should also have the right to freely express their gender identity. This includes the demand for hijras to be considered female as well as a third sex.

- There should be a special legal protection against this form of discrimination inflicted by both state and civil society which is very akin to the offence of practicing untouchability.

- The police administration should appoint a standing committee comprising Station House Officers and human rights and social activists to promptly investigate reports of gross abuses by the police against kothis and hijras in public areas and police stations, and the guilty policeman be immediately punished.

- The police administration should adopt transparency in their dealings with hijras and kothis make available all information relating to procedures and penalties used in detaining kothis and hijras in public places.

- Protection and safety should be ensured for hijras and kothis to prevent rape in police custody and in jail. Hijras should not be sent into male cells with other men in order to prevent harassment, abuse and rape.

- The police at all levels should undergo sensitization workshops by human rights groups/queer groups in order to break down their social prejudices and to train them to accord hijras and kothis the same courteous and humane treatment as they should towards the general public.

Other Measures

[26] Supra Note 1.

- A comprehensive sex-education program should be included as part of the school curricula that alters the heterosexist bias in education and provides judgement-free information and fosters a liberal outlook with regard to matters of sexuality, including orientation, identity and behaviour of all sexualities. Vocational training centres should be established for giving the transgender new occupational opportunities.

- The Press Council of India and other watchdog institutions of various popular media (including film, video and TV) should issue guidelines to ensure sensitive and respectful treatment of these issues.

Conclusion

Decriminalization of section 377 was a major milestone for the LGBTQ community as it gave them the right to reveal their emotions and live a dignified life. The constitutional courts has brought in a transformative judgement on section 377 treating the LGBTQ as natural victims and sensitized the society towards their plight and laid stress on such victimisation. The children would become prey, and protection of the children in all spheres has to be guarded and protected[27] .

Every community and every human being should be treated equally whether they are homosexuals or heterosexuals because we all are god's creation so there should be no discrimination on the basis of sexual characters. Our Indian Constitution provides fundamental rights to all the people including LGBT community[28]. It provides Right to Equality, Right against discrimination on the basis of sex, Right to life, Right to Freedom of Speech and Expression, Right to Privacy and other religious and cultural rights. These rights are not direct rights provided to LGBT but can be interpreted as they are citizens of India. LGBT community in India and in all over the world deserves to be treated equally with dignity and respect. The consent between two adults has to be the primary pre-condition. After 377 we can now work to target the vulnerable queer people and provide them with a safe space, hope and the will to live a happy life[29].

[27] Edited by Aarush Kumar,Will the marriages of the LGBT recognised by the government, September 9th, 2018
[28] Supra note 13
[29] Ibid

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