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ITMU LAW REVIEW

VOL. 1, ISSUE 2 (JULY – DECEMBER 2015)

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ITMU Law Review (ISSN 2321–9904) is a peer-reviewed biannual academic publication of the Centre of Post-Graduate Legal Studies (CPGLS) at School of Law, The NorthCap University (NCU), Gurgaon (formerly ITM University, Gurgaon). This publication is an endeavour to serve as a forum for the promotion and circulation of views on contemporary legal issues among members of the legal profession, academicians, and students. The Law Review aims legal research centres, policy makers and government organisations. The views expressed in this publication are those of the authors and not necessarily those of the Editorial Board of the Law Review, CPGLS or NCU.

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EDITORIAL NOTE

The second issue of ITMU Law Review received tremendous response with submissions across the country. We are overwhelmed by such a response and thank every scholar, researcher, faculty member, practitioner and student for their invaluable contributions. The Editorial Board has put in lot of time and effort towards selecting, categorizing, checking for plagiarism, facilitating peer review and finally selecting the articles. The Board is delighted to place on record the enormous contribution made by the three student editors, namely, Ms. Sunethra Sathyanarayanan, Ms. Gabriella Ruhil and Ms. Garishma Bhayana for their sincere all-round efforts in this regard.

This edition carries scholarly contributions in various areas of law, varying from e-voting to sexual harassment to corporate governance. The authors have done considerable justice with their respective topics and we are confident that the articles published in this edition would generate significant interest in those areas of law. The issue also includes couple of case comments.

First, Prof. (Dr.) A. S. Dalal, in his article, *Voting over the Internet: A Critical Study of Concept of E-Voting*, discusses the problems with the present voting mechanism and provides an alternative in the form of e-voting with reference to the experiences in the context of the Presidential elections in the US.

In the article, *Globalization, Masculinity and the Law: The Case of Honor Killings in North India*, Ms. Preeti Pratishruti Dash presents the disturbing practice of honor killings in North India and explains as to how the khap or caste panchayats implicitly supports such heinous crimes in the name of preserving the honor of their community.

Dr. Sapna S., in *Feminist Perspective towards Institutional Child Sexual Abuse*, presents the grim picture of child sexual abuse in the country and investigates the deficiency of the current legal construction from a critical perspective.

Mr. Biranchi Narayan P. Panda, in his article, *Corporate Governance & Fraud under the Companies Act 2013: An Analysis*, notes the basics of the relevant legislation, challenges and explains as to how the present laws have tried to deal with corporate fraud ensuring better governance.

Ms. Samia Khan, in *The Problem of Sexual Harassment of Women at Workplace: An Impediment to Women's Self Realization*, has undertaken a detailed analysis of legal provisions and court judgments to elaborate the challenges in combating the menace and threat it poses in undermining years of

success achieved in struggle for women's rights besides decreasing workforce productivity.

Mr. Shubham Srivastava, in his article, *Compromise in Cardinal Principles of Criminal Law under the Garb of Juvenile Justice*, has expressed concern about the violation of fundamental principles of criminal law relating to children in the name of providing justice to juvenile offenders and thus, urges the State to take a holistic view in this matter.

Ms. Priya Mathur in her article, *Citizenship Rights and Transgender Community: Evaluating the Impact of Section 377 and NALSA Judgment*, has attempted to understand the impact of discriminatory laws like Section 377 on the status of transgender persons in India and analyse whether, after NALSA judgment that declared 'hijras and eunuchs be treated as third gender', any positive change has come in their lives.

In the case comments section, Mr. Pradyumna Kibe has critically commented about the evidentiary value of confessions made before a customs officer in the Patna High Court judgment in the case of *Irsad Alam v. The State of Bihar*. Ms. Vasundhara Kanoria has analysed the judgment of the Chhattisgarh High Court in *Rajesh Boyra v. State of MP* to explain the importance of performance of the essential ceremonies for the second marriage in cases of bigamy.

We are grateful to Hon'ble Members of the Governing Body, NCU; Prof. (Dr.) Prem Vrat, Hon'ble Pro-Chancellor, NCU; Brig. (Retd.) S.K. Sharma, Hon'ble Pro Vice Chancellor, NCU; Col. (Retd.) Bikram Mohanty, Registrar, NCU for their invaluable guidance and encouragement at every step of this journey. We are also thankful to many other important actors who made this issue possible including the reviewers, the dedicated staff of the University and ABC Printers, New Delhi. Last but not the least; the Editorial Board is indebted to the authors and other members of our fraternity and look forward to further academic endeavours.

Editorial Board

ITMU LAW REVIEW

MESSAGE FROM THE PRO VICE-CHANCELLOR, NCU

Motivated by the rave reviews that the first issue of the ITMU Law Review has received, we enthusiastically proceed in our journey in promoting enlightened research in law by releasing the second issue of the law review under the aegis of the Centre of Post-Graduate Legal Studies (CPGLS) at School of Law.

I congratulate everyone involved; especially the Editorial Team, for undertaking the arduous journey of coming out with this publication. I would also like to congratulate the scholars whose articles have been published in this issue. I sincerely hope that the readers would enjoy reading the well-researched and insightful articles covering wide range of legal issues.

I take this opportunity to inform the readers that to further expand our vision and to take our University to greater heights, I am happy to announce that ITM University, Gurgaon has rebranded itself as 'THE NORTHCAP UNIVERSITY' or 'NCU' for short. The new name, we believe captures the essence of our vision, our guiding principles and our mission for excellence. It is inspired by our geographical location in the north of the country in the National Capital Region. Keeping in view the new name, we are engineering a change in the name of ITMU Law review to NCU Law Review.

The change is functional; our pursuit for excellence in research would remain undaunted as ever. I sincerely believe that the Law Review will continue to attract the attention of all concerned in the academic and research world.

Brig. S.K. Sharma (Retd.),
Pro Vice-Chancellor,
NCU, Gurgaon

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VOTING OVER THE INTERNET: A CRITICAL STUDY OF CONCEPT OF E-VOTING

*Dr. A. S. Dalal**

ABSTRACT

The article addresses the problems with the present voting mechanism and provides an alternative in the form of e-voting. With the backdrop of American Presidential elections, the traditional methods of voting are analysed and prerequisites of an ideal voting system are identified. The idea of an internet voting mechanism is tested against these prerequisites. The article further illustrates the different forms in which Internet voting system can be implemented and highlights the drawbacks of each. The article aims to debunk the myths related to internet voting system and provides potential solutions for successful implementation of the same. It provides a viable alternative to the traditional voting system, all the while keeping in mind the needs of the 21st century electorate along with the concerns of security and reliability of the system.

I. INTRODUCTION

In the 2000 United States Presidential election, a lack of preparation among electoral administrators, the widespread use of outdated and inadequate voting technology, poorly developed procedural rules, and a lack of uniform standards combined together to send the once infallible American democracy into a state of emergency. The world watched as officials drifted from one crisis to crisis another in the days following the election. The world was still watching when even the numerous lawsuits, state and federal, failed to resolve the dilemma or determine the presidency. Finally, the Supreme Court ended the fiasco with a

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pragmatic, yet much criticized decision.¹ Not only did the 2000 U.S. Presidential election embarrass the nation before the watching world, it also served to infuriate and further alienate many Americans from the electoral process.

The majority of the problems behind the 2000 US Presidential debacle were caused by a long-ignored aspect of electoral governance - the method by which the people cast their ballots.² This administrative aspect of the electoral system has been overlooked and allowed to decline into a state of extreme disrepair without anyone taking notice.

Even more demoralizing to the people has been that democracy has been bombarded with reports of lost, stolen, bought, and misplaced votes.³ Democracy depends on free and fair elections, but as it stands today, voters have no real assurance that their votes are properly cast or that their votes will not get lost or go uncounted for any of number of reasons. The system by which we exercise our democratic right has repeatedly proven itself to be untrustworthy and dysfunctional. As a result, voter confidence in the system is at an all-time low. The time is now ripe to thoroughly investigate alternative methods of casting ballots as a way to restore our fledgling democracy.

Using the Internet to assist the electoral system is one possible option that is currently being considered to remedy many of the defects within the electoral process. Internet voting has the capacity to enhance the electoral process in numerous ways, such as preventing over-votes, reducing invalid votes, increasing participation in the electoral process, and eliminating the tons of waste generated from unused ballot papers. The endless capabilities of Internet voting do come with a caveat: Internet voting is untested and less transparent than traditional voting.

¹ *Bush v. Gore*, 531 U.S. 98 (2000)

² Stephen Ansolabehere & Charles Stewart III, Voting Technology and Uncounted Votes in the United States, Cal Tech-MIT Voting Technology Project 1, 3 (*hereinafter* Cal Tech-MIT Report).

³ *What Really Happened, Election Fraud* (2002), <https://whatreallyhappened.com/WRHARTICLES/VOTEFRAUD/index.html> (last visited Jan. 12, 2016)

This article seeks to evaluate the ability of Internet voting to improve the electoral process by comparing it against traditional methods of voting currently used. In order to clearly understand electoral issues, it briefly describes the criteria needed in order to conduct a successful election. It then introduces and defines the different forms of “Internet voting”. Further it introduces and analyses the major faults with the present election system and evaluates the promise of Internet voting as a solution to these faults. It reviews and substantially discredits the perceived problems with implementing Internet voting and also puts forward several proposals for the gradual introduction of Internet voting in the electoral landscape.

II. CRITERIA FOR A SUCCESSFUL ELECTION

In order to ensure free and fair elections, any new voting measure must satisfy certain fundamental standards of elections. When reading the list of fundamental standards detailed below, it is important not only to consider whether Internet voting (or any new election system) meets a substantial portion of the criteria, but also how the new system relates and interacts with other aspects of democracy such as access by demographic groups, election logistics and administration, deliberative and representative democracy, and the political culture of elections. The criteria for a successful election are set out below:⁴

- AUTHENTICATION AND ELIGIBILITY: only authorized and eligible voters should be allowed to cast ballots;
- ACCURACY: votes should be recorded and counted correctly, to ensure that the will of the people is represented;
- UNIQUENESS: voters should only be allowed to cast one ballot each;
- INTEGRITY: votes which are forged, modified or deleted should be detected;

⁴ Internet Policy Institute (IPI), *Report of the National Workshop on Internet Voting: Issues and Research Agenda 11* (2001), <http://e-voto.di.fc.ul.pt/docs/InternetVotingReport%20-%20March%202001.pdf> (*hereinafter* IPI Report)

- VERIFIABILITY AND AUDITABILITY: verification that all the votes have been accounted for in the final tally and that reliable and authentic records exist to that effect;
- RELIABILITY: election systems should ensure against the loss of any votes, even when faced with electoral failures;
- SECRECY AND NON-COERCION: voting is done in secret without voters ever having to reveal how they cast their respective ballots;
- FLEXIBILITY: election equipment should allow for a variety of platforms and technologies and should be accessible to all voters, including those with disabilities;
- CONVENIENCE: voters should be able to quickly cast their ballot without undue delay;
- CERTIFIABILITY: election systems should be regularly tested and certified to ensure against electoral failure;
- TRANSPARENCY: voters should possess a general understanding of the voting process and should not be deceived into voting a certain way; and
- COST-EFFECTIVENESS: election systems should be affordable while still being efficient and effective.

III. INTERNET VOTING: MEANING AND FORMS

“Internet voting” or “electronic voting” (e-voting) is an online form of voting. The term “Internet voting” has become synonymous with voting remotely through internet which could mean any form of voting which uses the internet, whether at home, the polling station, voting kiosk, or any other place in which the Internet is accessible. And the benefits and burdens of Internet voting depend upon which version of Internet voting is on offer.

Confusion also exists within the term “electronic voting”. While the term can be used broadly to describe any form of mechanical voting, such as punch card

machines or voting at the polling station using a computer terminal or any similar touch-screen or mouse activated machine which stores votes and may or may not have the ability to tabulate votes, these forms of e-voting are not online forms of voting, meaning the systems are not connected to Internet lines and there is no chance of outside interference (e.g. hackers). This article will not discuss offline e-voting, instead this article focuses on Internet-based online voting.

With this background in mind, electoral commissions considering implementing online e-voting have two very distinct forms to consider:

A. REMOTE INTERNET VOTING

Modern life has wholeheartedly embraced the accessibility, relative low cost, and seemingly endless capabilities of the Internet. Home computer ownership and Internet use has risen exponentially in recent years and a large number of people do a variety of time-consuming tasks, such as banking, shopping for clothes or groceries, or paying bills online in a matter of seconds.

Remote Internet voting would provide this extra convenience for voters, as it would allow voters the opportunity to cast their ballots in the comfort of their own homes, at an Internet café, or anywhere else where the Internet is accessible. Proponents of remote Internet voting envision voters logging onto the voting website via secure means, establishing their identity and then voting in a real-time transaction at any time convenient to the voter on Election Day. This formula is simple to understand and similar to any other web-based transaction. However, remote Internet voting will be the most difficult form of e-voting to implement, as cost, security, and policy-related issues must be adequately addressed before its full-scale implementation.

In 2000 Arizona Democratic Primary garnered considerable media attention. In that election, voters could voluntarily choose to cast their ballots online or by traditional means. The trial, trumpeted as “the first-ever, legally-binding public

election over the Internet,” succeeded in increasing voter interest and suffered no breach of security or electoral failure.⁵

The U.S. Department of Defence’s Federal Voting Assistance Program also developed and trailed an Internet voting system for military personnel located outside the U.S. While the trial took some years to develop and the cost incurred proved considerable, the end result was a successful trial at the 2000 Presidential election.⁶

The Alaska Republican Party also conducted a straw poll over the Internet in 2000. Alaska is a sparsely populated state where travel in the winter is severely limited, making it difficult for a number of potential voters to get to a polling station to cast their ballots. Such a situation almost certainly dissuades people from voting and lowers the overall participation rate in Alaska. The Republican Party recognized this problem and decided to trial Internet voting as a possible way of increasing voter participation. The trial, conducted without the support of the Alaska Division of Elections, proceeded without delay or any security problems.⁷

Internet trials are also occurring outside the U.S., with European countries, such as Switzerland and the United Kingdom (UK),⁸ having trailed remote Internet voting in binding elections and Estonia already having successfully implemented remote Internet voting.⁹ Several other countries around the world

⁵ John O’Looney, *The Implications of Internet Voting*, <http://www.govtech.net/magazine/gt/2000/sept/Internet/implications/phtml> (last visited Jan. 25, 2016)

⁶ The Federal Voting Assistance Program (the agency which administered the trial) reports evaluating the trial is available at <http://www.fvap.gov/voi.html>.

⁷ Sam Diaz, *Arizona Democrats Can Vote Online in Primary*, KNIGHT-RIDDER TRIB. BUS. NEWS (Mar. 3, 2000).

⁸ Electoral Commission, *Modernising Elections*,; Britain Experiments With Early, High-tech Voting, AP WORLD POLITICS (Apr. 25, 2002), <http://www.electoralcommission.gov.uk/about-us/modernisingelections.cfm> (last visited Jan. 25, 2016)

⁹ See Matthew Tempest, *Reformers Skeptical of Online Voting*, THE GUARDIAN.

are also studying Internet voting due to its efficiency, speed, and ability to increase voter participation.¹⁰

B. INTERNET VOTING AT THE POLLING STATION

While the long-term promise of remote internet voting is great, many view another Internet based option, Internet voting at the polling station, as the more viable short-term option. Internet voting at the polling station is similar to the processes voters know and trust. The voter would appear at the polling station on the requested day and have his or her name marked off the role as normal before retiring to a booth which, instead of being equipped with traditional voting apparatus, would have a terminal connected to a closed network server on which the voter would cast a ballot electronically. The computer would then forward the votes via modem to a central location for counting and collating.

Internet voting at the polling station is practical and appealing, as it offers greater convenience and efficiency over traditional voting while also allowing election officials to maintain control over the computer operating system as well as monitor the physical surroundings of the venue, making the security risks more manageable and the risk of electoral failure significantly less than with remote Internet voting. This control would also provide as much guarantee to authentication and privacy as traditional paper voting and, as the voting software would not allow multiple votes, the possibility of anyone voting more than once under the same name would be eliminated.

While voters would not have the convenience of voting away from the polling station, they would get numerous benefits from Internet voting at the polling station, such as fast and simple voting as well as quicker and more accurate election results. Election officials would also benefit from Internet voting at the polling station, from added efficiency and diminished administrative burden. Officials could also use Internet voting at the polling station as an evolutionary system towards remote Internet voting.

¹⁰ Cybervote Project, *Vote in Total Confidence Via the Internet*, http://www.eucybervote.org/press_release.html (last visited Jan. 25, 2016)

Internet voting at the polling station has been successfully trailed in non-binding elections by numerous software companies. The most notable private software companies include VoteHere.net,¹¹ Election.com, and Safevote.com.

In November 2000, Safevote.com conducted one of the most comprehensive mock elections in Contra Costa County, California. Safevote.com invited voters who cast their pre-poll vote to cast a mock vote via the Internet at the same location. Voters participating in the trial were given a PIN and once the system was activated, used a mouse to select their preferred candidates. Once voting was completed, the votes were stored on a completely separate system to prevent the voter's identity from being traced from his or her vote.

In addition, Safevote.com encouraged people to hack into the system and even published the hardware and software details on the Internet, hosted an attack help page, and created an attack hotline to encourage hackers to attempt to crack the security code. The system remained secure throughout voting. Safevote.com attributes their record of security to the use of a constantly changing IP address used to connect the system to the Internet, which made flooding the system and hacking difficult, if not impossible.

Recently, several companies have started conducting shareholder votes via the Internet on a wide range of topics, and many such private companies have been given an opportunity to showcase their voting software.¹² While public elections attract more publicity and passion and have to comply with more rigorous standards, private elections conducted over the internet contribute to the development of better voting software by allowing companies to assess and correct performance after each vote and are a useful platform for election officials to trial Internet voting software.

¹¹ VoteHere.net conducted a trial in the State of Washington at the 1996 Presidential election; VoteHere Partners With Votia to Offer Online Voting in Sweden and Other European Countries, <http://www.votehere.com/news.htm> (last visited Jan. 12, 2015)

¹² Derek Dictson & Dan Ray, *The Modern Democratic Revolution: An Objective Survey of Internet-Based Elections* (White Paper), available at <http://www.securepaper.votingpaper.com> (last visited Jan. 12, 2016)

IV. NEED FOR INTERNET VOTING

Recent elections have underscored the failure of the current system to protect critical elements of an electoral process. The current system has proven ineffective at preventing or detecting forged, modified, or deleted votes, and loses, misplaces or otherwise leaves millions of votes uncounted in every election. Moreover, millions more are prevented from voting for any number of reasons, including faulty records or improper election cards. These problems signal a major systemic failing of our electoral system and have correctly led many to question the reliability and accuracy of the current voting system.

This section introduces and analyses some major faults with the current election system and evaluates the promise of Internet voting as a solution to these faults. The section is divided into four distinct sub-sections, each offering another failing of the current system and argument in favour of Internet voting as a more accurate and reliable method of voting.

A. LOW PARTICIPATION RATE

The declining rate of participation has emerged as the paramount concern among both academics and policymakers and several recent studies have concluded that the problem of falling voter participation may warrant the implementation of Internet voting.

Advocates of Internet voting feel the technology removes the two main obstacles to voting - convenience and mobility¹³ - and will particularly increase participation among the traditionally under-represented groups, such as younger voters, elderly voters, and disabled voters. Remote Internet voting would also particularly suit voters called out of town who instead of being disenfranchised, would be able to exercise their civic duty.

The U.S. is not the only country experimenting with Internet voting as a potential solution to voter apathy, UK is also studying and trialing the technology with a view towards increasing voter participation. Both the U.S. and

¹³ See James G. Gimpel & Jason E. Schuknecht, Political participation and the Accessibility of the Ballot Box, [http:// www.vote.caltech.edu/Links/gimpel1.pdf](http://www.vote.caltech.edu/Links/gimpel1.pdf) (last visited Jan. 22, 2015)

UK have also instituted other reforms to increase participation, such as simpler registration procedures, liberalizing the absentee ballot requirements, and extending voting times, but these reforms have had little or no effect on voter participation. As a result, both nations have indicated a willingness to substantially invest in and trial Internet voting as a possible cure to the modern day lethargy, and leading British parliamentarian Sir Robin Cook believes implementing Internet voting at the next general election is a way to “enfranchise” disillusioned voters back to the democratic process.¹⁴

Internet voting has successfully generated election-time interest and attracted voters to the polls. For example, despite the fact that Vice President Al Gore had already secured his party’s nomination, the 2000 Arizona Democratic primary, which allowed voters to cast their ballots over the Internet, saw voter participation rise 600 percent over the prior election, with forty-one percent of the 86,907 votes cast via the Internet. Internet voting also appears to have assisted the Reform Party in increasing their 2000 Presidential candidate nomination total.¹⁵ In addition, Internet voting is also credited with raising voter participation from fifty percent to sixty-four percent in the recent legally binding referendum in Switzerland.¹⁶

In addition, computerized voting has proved popular with mainstream voters, with statistics showing voters who have used both remote and polling station Internet voting systems in the U.S. and UK overwhelmingly rate the process very highly and they have uniformly praised the ease of use, speed and assistance provided by the system.¹⁷ Computerized voting has also been praised

¹⁴ Jackie Ashley, *Sir Robin Cook, Leader of the House of Commons, Plans to Make UK First to Vote on Internet*, THE GUARDIAN (Jan. 7, 2002)

¹⁵ Farhad Manjoo, *Reform Voting Evokes E-Votes*, WIRED NEWS, www.wired.com/news/politics/0,1283,37964,00.html (last visited Jan. 12, 2016)

¹⁶ *Swiss Village Holds First Internet Vote*, SILICONVALLEY.COM, <http://www.siliconvalley.com/mld/siliconvalley/news/4985064.htm> (last visited Jan. 14, 2016)

¹⁷ See Farhad Manjoo, *The Case for Electronic Voting*, WIRED NEWS, <http://www.wired.com/news/politics/0,1283,40141,00.html>; *Electronic Voting Trial ‘A Success’*, ELECTORAL COMMISSION, <http://www.elections.act.gov.au/adobe/2001ElectionReviewComputerVoting.pdf> (last visited Jan. 12, 2016)

by non-traditional voters, such as non-English speakers and disabled voters.¹⁸ This praise stems from the fact that computerized voting's flexible format can accommodate more voters than traditional voting methods. For example, while traditional voting is limited to the amount of voters it can accommodate (due to issues such as printing costs), computerized voting can accommodate as many different languages as required without adding significant cost to the system. Moreover, computerized voting is also well received by disabled voters worldwide, including blind voters, who are often unable to cast a ballot without assistance from electoral officials under traditional voting method.

B. EQUALITY ISSUES

While critics claim that the implementation of Internet voting may violate equality laws, deny or unfairly disadvantage some groups in the community the right to equality and equal access and further dilute the minority vote and increase the "digital divide," this section will show not only that Internet voting meets the equal rights standards but also that the current system of voting violates the equality requirements and denies some groups in the community the right to vote and that Internet voting will allow more people to vote and grant the equal franchise to many communities that are without equal representation under the current system. The section will further show that leaving the current voting system unchanged will only increase the "voting technology divide" and promote the unfair treatment of disabled and minority voters.¹⁹

1. Minority Voting and the Internet

The "digital divide" has emerged as the primary constitutional issue regarding Internet voting. In electoral terms, the fear is that giving voters another means of voting will increase voter participation among one group (people who have Internet access) while voter participation rate remains static in other voting groups (non-Internet users). While increasing voter participation is one very persuasive reason for adopting Internet voting, the concern is that this "digital

¹⁸ Thad Hall, *LA Story: The 2001 Election*, www.reformelection.org/data/reports/la-hall.pdf (last visited Jan. 12, 2016)

¹⁹ Paul Schwartz, *Voting Technology and Democracy*, 77 N.Y.U. L. REV. 625 (2002).

divide” will result in greater voter participation among educated and wealthier voters at the expense of less educated and poorer voters.

Proponents of this argument claim that the implementation of Internet voting would violate the equality clause under Article 14 of the Indian Constitution. This can be negated by having a two tier system adopting both remote internet voting and internet voting at the polling station.

In the US, this remains as a myth. A study conducted by the National Telecommunications & Information Administration (NTIA) shows that the perceived digital divide between white and minority voters, educated and uneducated voters, and wealthy and poor voters to be largely misstated. The study revealed that Internet access among Caucasians (29.8 percent), black-Americans (25.5 percent), and Asian/Pacific Islanders (36 percent) are relatively equal. The study also found that two groups- Native Americans (19 percent) and Hispanics (12.6 percent) lag behind the other groups.²⁰ It also appears that the so-called digital divide among those highly educated and those without an education is also illusory, as 53.1 percent of those with only high school education regularly use the Internet. Moreover, income level also appears not to be a determining factor, with forty-one percent of adults with an income under \$15,000 and sixty percent of adults with incomes of \$15,000-\$49,000 using the Internet.

Surprisingly, the Arizona Internet election was almost halted before it began due to a lawsuit filed by the Voting Integrity Project (VIP). The VIP argued the election denied equal access and discriminated against certain voters because Internet voting would last four days instead of the usual one day period, but the court questioned the data on digital divide and stated that the availability of county owned computers with Internet access for voters’ use were enough to deny the injunction.²¹

In India too we are not far behind, the government is taking measures to increase the connectivity of people by providing telephone and internet connections in

²⁰ Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1131, 1163 (2000)

²¹ *VIP v. Fleisher*, No. CIV 000109 Phx. Pgr (D. Ariz. Jan. 21, 2000)

the remote parts of the country. Coupled with this we have the DTH network for educational and entertainment purposes that is beginning to foster communication revolution in our country.

The Constitutional issues regarding equality standards do not seem insurmountable. The constitutional arguments are not valid so long as sufficient Internet access is provided to the public. Therefore, as long as polling booths remain open to accept voters, Internet voting should not be viewed as disadvantaging a particular voting group.

2. Disadvantaged Voters and the Internet

Another equality-based argument often used against Internet voting is that some voters will not be able to keep up with or understand the technological advancement. The clear trend in the U.S. indicates that states will have to provide disabled-accessible voting options or else face the cost and more importantly, the embarrassment and electoral backlash of defending the discriminatory voting system in court. States are starting to realize the importance of this issue and as we have seen are beginning to voluntarily mandate the purchase and availability of accessible voting equipment. This trend is only likely to increase. It can be taken care of in India by having alternative mechanisms of conventional polling booths and internet polling booths and remote internet voting booths.

C. RELIABILITY AND INTEGRITY

Critics of Internet voting often belabour the perceived security concerns with Internet voting, such as the potential of ineligible voters casting ballots, voters fraudulently casting more than one vote, or hackers erasing or changing election results. Not only is that tactic unproductive, but the criticism is unsubstantiated and the comparison illusory. The risks of Internet voting cannot be simply stated, but must be compared to the current methods of voting available. When compared it becomes clear that the current system is not a 100 percent reliable, trusted, and accurate electoral system. The current system is depriving millions of people of the right to vote or have their vote count equally under our

democracy. For that reason, we must study other methods of voting in the hope that they can improve upon our decrepit, ill-administered, and failing system.

V. VOTING TECHNOLOGY: CURRENT SYSTEM

It can be said with substantial certainty that the current voting technologies do not produce accurate results. The cause of this problem is debated, but it appears a majority of the problems associated with the traditional election process instead of fraud or corruption are the result of long-term neglect and mismanagement.

Perhaps more troubling is the performance of some of these voting methods. The 2000 US Presidential election revealed the true extent of the damage that flawed ballots and voting methods can do to an election. In Palm Beach County, Florida, faulty ballots appeared to be the reason that over 19,000 votes were deemed invalid. Moreover, faulty ballots have also been blamed for Reform Party candidate Pat Buchanan receiving an inordinately high number of votes in that heavily Democratic county. Statistical analysis estimates that 2,865 of the 3,407 votes cast for Buchanan were actually intended to be cast for Vice President Gore.²² In an election decided by around 1,000 votes, an election which ultimately decided the next president, one can clearly link the faulty ballot to the ultimate outcome of the election.²³

Not even offline e-voting machines have escaped the voting technology criticism. For instance, e-voting machines were initially blamed for leaving uncounted votes in the 2002 Florida congressional elections, but election officials quickly realized that the majority of errors were actually caused by workers either forgetting to plug the storage disk (the disk that records and stores the vote totals) into the computer at the start of voting or forgetting to take the voting cartridge out of the computer after the close of polls (leaving the votes from those machines uncounted). Eventually, untrained workers and

²² *A statistical analysis of the Florida Vote*, ONLINE JOURNALISM REVIEW, <http://www.ojr.org/ojr/ethics/1017962655.php> (last visited Jan. 12, 2016)

²³ *Congressman Says 19,000 Votes Invalidated; 2 Suits Filed Over Irregularities*, CNN NEWS N<http://www.cnn.com/2000/allpolitics/stories/11/09/palm.beach.votes> (last visited Jan. 12, 2016)

election administrators were appropriately blamed for the errors. Despite their performance in recent elections, some information technology experts assert that offline e-voting machines are unsafe and vulnerable to malfunction.²⁴

A. IMPROVE THE ACCURACY OF THE VOTE

Prior to 2000, the accuracy of election results was rarely investigated. But the 2000 presidential election changed the course of American electoral history. It is estimated that faulty voting equipment and the lack of guidance and instruction to non-English speaking voters, resulted in approximately two million lost or uncounted ballots in the last presidential election.²⁵ In total, it is estimated that six million voters who intended to vote in the 2000 election could not vote due to voting machine failure, inaccessibility of polling stations or incorrect registered voting lists.²⁶ Since 2000, people in USA have been bombarded with reports of lost, uncounted or misconfigured votes, of people being disenfranchised or otherwise impeded from voting and of partisan electoral officials deciding the legitimacy of a vote without a strict standard on which to base their decision. There can be no doubt that the current system disenfranchises Americans. The system is no different in India, every year we find that people who have been given voters ID card have not been allowed to vote as a result of absence of their names in the electoral lists. People are also deliberately not allowed to vote by criminalisation and booth capturing. Thus, there is disenfranchising in India.

Internet voting has the ability in correcting some of the injustice currently embedded into the system and substantially improve the electoral process. For instance, Internet voting eliminates the human error or prejudice associated with the current electoral system. The 2000 US Presidential election so vividly reminded us that partisan electoral officers often act in a partisan manner. The inconsistent, unbalanced system of recognizing and discounting invalid votes seen in that election could not be repeated in a computerized system of voting. Moreover, a fully functional Internet voting system is unquestionably accurate,

²⁴ Dan Keating, *New Voting Systems Assailed*, WASH. POST. A12 (Mar. 28, 2003)

²⁵ *A Modern Democracy That Can't Count Voters*, L.A. TIMES A1 (Dec. 11, 2000)

²⁶ *Voting Reform Projects Creep Forward*, www.fairvote.org (last visited Jan. 12, 2016)

thereby reducing the instances of losing candidates questioning the count, requesting a recount or otherwise lengthening the process in close elections.

As well as removing bias and human error from the process of determining voter intent, Internet voting adds recognizable standards to the recording and tabulating process. Both polling station and remote Internet voting can enhance the recording and tabulating stage of an election for a number of reasons. First, computerized voting is easy for the voter to understand, resulting in a substantially lower rate of invalid votes. E-voting's rate of invalid votes is consistently under one percent, compared with the large rate of invalid votes that exist under other forms of voting (consistently around five percent).²⁷ This low rate of invalid votes is due to the design of e-voting systems, which attempts to ensure that the voter properly casts his or her ballot by leading the voter through the process and confirming that the selections the voter made are the ones he or she intended to make. Moreover, e-voting systems allow voters to check their ballot before sending it through (i.e. placing it in the box).²⁸

Internet voting also has the ability to tabulate and report election results immediately following the closing of polls. As the media increasingly uses technology and opinion polls to predict election outcomes before their conclusion, the importance of quick election results have never been so crucial. However, short of a ban on such "speech", the electoral system risks being compromised by overambitious news reporters if it cannot quickly tally and report the voting results. By allowing the media the opportunity to predict election results (regardless of their accuracy), the system risks diminishing the importance of voters in the pacific time zone, who may be discouraged from going to the polls and voting when the Presidential election appears to already have been decided. The electoral system cannot ignore this reality and must actively attempt to eliminate this growing problem.

²⁷ AUSTRALIAN DEPT. OF THE PARLIAMENTARY LIBRARY, *Electronic Voting in the 2001 ACT Election (2001-02)* (Jun. 18, 2002)

²⁸ This mechanism for checking the ballot could simply be done by a pop-up box appearing which states something of the following nature, "You voted for X. Are you sure you want to vote for X? If Yes, click ENTER. If no, click BACK."

Another reason to favour the implementation of Internet voting is the current system's failure to authenticate a substantial portion of the votes due to increased absentee voting and relaxed identification qualifications when registering to vote or casting the ballot. Internet voting has the ability to reverse this trend and properly authenticate votes and guarantee that a voter does not cast multiple ballots.

In absentee voting, election officials send blank ballots by unregistered mail to the known address of registered voters. Not only does this result in a number of votes being sent to outdated or incorrect addresses, but it also provides easy access for thieves to steal votes from letterboxes or for voters to sell or otherwise allow a proxy to vote in their place. Electoral officials can neither guarantee that the blank ballots reach the proper voter nor can they guarantee the authenticity of the returned ballot as being from the proper registered voter.

Opponents of Internet voting cite voter privacy as a reason to oppose the technology, pointing to the fact that outside influences, such as friends, co-workers, family or work superiors have the ability compel or coerce a voter to vote in a certain way. In fact, it is not hard to imagine a situation where a person voting remotely feels compelled to vote a certain way due to influences of other people in the area where the person is voting. It is also not hard to imagine the even more frightening scenario where voters are voting under duress or coercion, such as a supervisor urging the employee to vote in a certain way with threat of sanction.

While such unfortunate situations cannot be prevented in remote Internet voting they should not be reasons to oppose the voting method. Furthermore it should also be noted that the same troubling situation is currently present in every state, where voters using the absentee ballots face the exact same pressure and possible coercion that remote Internet voters would face. Postal voting is accepted by the vast majority of voters and electoral officials, yet it is proven to be victimized by widespread electoral problems, such as lack of verification, undelivered ballots and vote fraud. Not only does absentee voting escape this line of questioning, but due to its convenient nature, it also enjoys widespread electoral use.

While Internet voting at the polling station would not radically depart from traditional polling station voting (it would only provide as much or as little authentication protection as the jurisdiction currently has in operation under its traditional voting methods), remote Internet voting could provide more authentication and protection than traditional polling stations through its various security measures, including encryption technology (the scrambling of information during transmission), electronic signatures (the use of passwords and/or personal identification numbers (“PIN,”) and biometrics (i.e. digital signatures or digital scan technology) to verify a voter’s identity and maintain the integrity of the data during transmission.

B. COST-EFFECTIVENESS

Through a combination of lower administrative and training costs and a willingness of software companies to offer package pricing, Internet voting has the ability to significantly lower the cost of elections. While the author believes polling station voting should always remain a voting option, the number of polling stations needed during an election could be significantly reduced if a substantial proportion of the voting population chose to cast their ballot remotely, thus reducing the number of polling staff and administrative costs for the electoral commission. Therefore, Internet voting could lower government spending on voting infrastructure and personnel-related costs.

Moreover, remote Internet voting would dramatically reduce, if not eventually eliminate, the need for absentee ballots. This change would substantially reduce the burden of organizing, posting, securing and counting absentee ballots, as well as reduce the costs of printing and postage. As absentee voting results in several tons of wasted and unused paper, a conversion to Internet voting would have the ancillary benefit of helping the environment.

Even simply allowing internet voting at the polling station would ease the administrative burden that is currently faced by election officials; officials would no longer have to carefully supervise the safety, security and transport of the ballots and instead could concentrate on other pressing matters that inevitably arise on Election Day. Internet voting would also reduce the threat of lost or uncounted ballots, as well as eliminate much of the paper-voting by-

product. The Election commission is forced to dispose of the unused ballot papers after the election. Not only does this waste have a negative effect on the environment, but the printing of unused ballots is also a substantial monetary waste that costs taxpayers money.

While one would assume that developing an Internet voting system would be a time consuming and expensive venture (with initial outlays of developing or purchasing a reliable remote e-voting system, hiring technical experts, and training staff among the many necessities) but once the infrastructure has been built thereupon the continuous cost will reduce and the tax payers money can be saved.

VI. DISPELLING THE MYTHS

Millions of people use the Internet daily to conduct important personal, business and financial transactions. Several key industries, such as banking, healthcare and government, also communicate private information in a secure Internet environment on a daily basis. Critics, however, often cite potential security concerns as a reason for opposing Internet voting. This section will analyze concerns regarding the credibility and integrity of Internet voting and will not only prove those concerns to be, for the most part, unwarranted, but also that Internet voting is in fact more secure and reliable than numerous forms of voting currently used.

A. ELECTORAL SECURITY

Internet voting systems are designed with numerous security measures so as to protect the integrity of the election. For example, Internet voting at the polling station can provide measures such as swipe bar-coded cards to activate the computer or biometric identification readers to prevent multiple voting. Of course, while security measures can prevent some voter fraud, they cannot prevent all forms of voter destruction. While the risk of voter sabotage is slight, destructive acts, such as a voter smearing gel on the screen/keyboard/mouse in an attempt to disable the machine or alter votes, could burden election officials and volunteers and may even delay voting.

Some commentators have convinced the public that computerized voting is unsuitable for the voting process because destructive voters hell-bent on sabotaging the election could tamper with or otherwise disable voting machines, but further study regarding potential tampering reveals this argument to be a red herring, as no electoral system is safe from the intentional destructive acts of votes. Indeed, a voter could smash or otherwise disable an e-voting machine.

Not only is such behaviour not expected of the average voter, but in the event of tampering on a computerized voting machine, it would be on such a small scale as to not affect the results of the election. Moreover, Internet voting allows voters the opportunity to check which candidates they have voted for before registering the vote and correct any errors without losing or altering a single vote. Therefore, if the system were to incorrectly indicate the chosen candidate, the voter would immediately become aware of the problem and report it so that it may be corrected.

Critics have also called the integrity of remote Internet voting into question, pointing to the fact that remote Internet voting does not allow electoral officials to verify that the remote voter is actually the person supposed to be casting that ballot.²⁹ On closer inspection of this argument, one again sees its flaws when compared to the current system of voting. The postal voting process is highly insecure and often leads to blank ballots not reaching the intended voter for a number of reasons, including theft. Electoral officials cannot guarantee that the blank ballots reach the proper voter nor can they guarantee that the authenticity of the returned ballot as being from the proper registered voter. Not only does this disenfranchise the legitimate voter, but it also threatens the integrity of the entire electoral process. The integrity of the current absentee process is also threatened by politically affiliated “vote-whores,” who as explained earlier, attempt to buy or steal ballots in order to gain a political advantage for their party.³⁰

²⁹ Cynthia H. Craft, *Making Sure that California's Votes Are Actually Counted*, L.A. TIMES, Opinion, Part M, at 1 (Dec. 17, 2000)

³⁰ Incredibly, this service is legal in some states in the USA. See Rick Hansen, *Vote Buying*, 88 CAL. L. REV. 1323 (2000)

Remote Internet voting can drastically reduce, if not eliminate, the occurrence of fraudulent voting practices by requiring identification particulars from voters when they log on to cast their ballot. While no voting system can provide a 100 percent guarantee against all forms of fraud or irregularities, Internet voting attempts to reinstate integrity in the voting process through a number of security measures.

These security measures could be implemented in a number of ways. One such method would require the voter to encrypt the ballot with a secret key before sending it to the election office. The voter would send the ballot, with their blind signature, to a verifier who verifies that the person is a registered voter. If found to be valid, the ballot would be returned to the voter, who would remove his/her identification signature and send the ballot, with the encrypted signature of the validate, electronically to the electoral office. The electoral office would then publish the names of Internet voters for those voters to verify that for all names that are listed, they were the ones who actually voted. The voter then sends the encryption key to the electoral office and the electoral office publishes the encrypted ballot and key for vote verification.

Another possible solution would be to have voters sign up to vote remotely before the election. The electoral office could send those voters a disk containing a cryptographic key and an affidavit, which the voter would sign and return.³¹ The encrypted key would only be activated after the affidavit is checked against the voters name on the roll. The actual vote would also be encrypted with a different key to generate an anonymous e-mail.

Yet another alternative to authenticating votes may be to introduce a voter's smart card, which carries the holder's particulars on a microchip in the plastic card and can be used to verify a voter's identity both at the polling station as well as remotely. Such a system has worked successfully in Finland; however, in the short-term, it is impractical to expect that voters have card scanners

³¹ The disk would be secure so that it could not be numbered to track the voter and how the voter cast their ballot.

connected to their computers.³² Other possible identification techniques, such as biometric authentication devices and cryptographic devices, also suffer the same deficiency.

Unlike the current system in place in many jurisdictions, the above examples would also prevent voters from voting twice and reduce the instances of fraud, as the security system would not allow the voter's identification information to be opened and accessed more than once. The above examples also prove that it is feasible to provide voters the chance to cast their ballot from anywhere in the world while also surpassing the level of authentication and uniqueness currently available in many current voting technologies.

Due to the problems with postal voting and people voting at the polls without providing identification, one can feasibly argue that Internet voting is actually safer and more secure than postal voting and polling station voting. This assertion is backed by the California Internet Voting Task Force, which reached the conclusion that "it is technologically possible to utilize the Internet to develop an additional method of voting that would be at least as secure from vote-tampering as the current absentee ballot process in California".³³

B. AUDITABILITY

While it is true that Internet voting trusts computers and voting software to properly record and tabulate the votes, software companies insist that e-voting system may prevent against vote loss. Further, an audit trail is created, by sending and burning every transaction on the server to a CD, which would serve as a back-up in the event of a hardware problem or total malfunction.³⁴ The companies also assert that their voting systems utilize an algorithm that mixes up the order in which ballots are stored on the server, thus ensuring that the vote

³² Symposium, Technology and Administration in Election Procedure, SOU 2000:125, 5.2 (2000) (Swedish Ministry of Justice) (*hereinafter* Swedish Report)

³³ California Secretary of State, *California Task Force on Internet Voting 36*, <http://www.ss.ca.gov/executive/ivote/> (last visited Jan. 12, 2016)

³⁴ COLIN BARRY, ET AL, ELECTRONIC VOTING AND ELECTRONIC COUNTING OF VOTES: A STATUS PORT 12, 14, *available at* http://www.eca.gov.au/reports/electronic_voting.pdf (last visited Jan. 12, 2016)

of each voter cannot be traced back to that person and preserving the secrecy of the ballot.

Even those voters who view the software companies' claim of creating an audit trail with suspicion cannot doubt the ability of Internet voting at the polling station to resolve the problem with a print-out of the paper ballot. The ballot could be internally stored or printed out for the voter to place into a special voting box. In the event of electoral doubt, election officials could check the accuracy of the system by manually counting the paper ballots. This satisfies the need for some to have a paper trail and also allows election officials to closely scrutinize the voting system.

Such a system is in operation in Brazil, where the entire election is now conducted using offline ATM-style e-voting technology. In Brazil, after a voter completes the voting process, the machine prints a receipt located behind a Plexiglas covering which the voter can view. The receipt indicates which candidates the machine has registered the votes for and allows the voter to cancel out the votes and vote again if necessary.³⁵

On the other hand, having the voting machine print "receipts" could potentially create more problems than it solves for a number of reasons. First, printing a receipt adds further administrative and monetary burdens to the voting process. Moreover, the addition of printers is likely to create a plethora of Election Day problems. Procedures would have to be in place in the event of printer failure or malfunction and administrators would have to guard against the possibility of printers running out of ink or paper. Procedures would also have to be put in place in the event of a voter claiming the printer did not accurately reflect how the voter wished to vote, yet the vote was cast regardless. For these reasons, the printer-related precaution, if adopted, should only be used in trials and phased out as voters grow confident in the technology.

³⁵ Holli Riebeck, *Electronic Voting in the Amazon*, <http://www.spectrum.ieee.org/WEBONLY/wonews/oct02/brazil2.html> (last visited Jan. 12, 2016)

C. SECURITY CONCERNS

People now rely on the Internet for both work and pleasure, and a large number of people transact through the internet: e-commerce and web purchases, money transfers, bank transactions and stock purchases have become byword of today's society. So why do some Internet users frown upon using the technology to assist the fledgling electoral process when existing security measures adequately protect people who transact over the Internet?

The answer apparently lies in the need for the electoral process to get the entire election correct the first time, every time. While e-commerce has a good track record for security, we realize and accept that some level of fraud exists in Internet transactions.³⁶ Electoral systems do not have that luxury of even a small hiccup in a voting system, it could cause irreparable harm to the electoral system and the democratic process.

Security breaches have the potential to irreparably damage an election and can occur in two ways: (1) by an attack that targets the client or server directly, commonly called a penetration attack; or (2) by an attack that targets and interrupts communication between the client and the server, commonly called a denial of service.³⁷

Penetration attacks occur when a hacker transports a virus to its target by one of a variety of mediums, including floppy disk, CD-ROM, downloads, e-mail or by exploitation of an existing bug or security flaw in the targets computer or browser. Penetration attacks are a common occurrence and difficult to defend against. Once the virus is transported and in place, the hacker can do as he or she pleases and could easily spy on users casting their ballots, prevent users from casting their ballots or even modify a voter's ballot. Even worse, the hacker can accomplish all of the aforementioned activities without the voter's knowledge or

³⁶ Craig Bickenell, *Credit Card Fraud Bedevils Web*, <http://www.wired.com/news/business/0,1367,18904,00.html> (last visited Jan. 12, 2016)

³⁷ Avi Rubin, *Security Considerations for Remote Electronic Voting Over the Internet*, <http://www.avirubin.com/e-voting.security.html> (last visited Jan. 12, 2016)

detection from security measures such as encryption devices or anti-virus software.³⁸

A successful remote Internet voting system must also protect against a plethora of other hacker activities, including “man in the middle”,³⁹ “page jacking”⁴⁰ or similar disruptive and highly damaging attacks that could be aimed at voters on Election Day. These types of attacks pose the same risks as other infiltration attack methods, yet are much easier to carry out. Further, most encryption technologies cannot guarantee success against a potential breach.

Voting experts feel that hacker-related security risks can be neutralized and that Internet voting could be at least as safe as the current system of absentee voting. Some experts even conclude that, if administered appropriately, “Internet elections could pose less risk than traditional elections”.⁴¹ This conclusion is based on the fact that current security measures, such as Secure Sockets Layer (“SSL”) technology, have proven themselves to be safe means of transporting information over the Internet. SSL technology is the most widely used method by e-commerce sites for submitting credit card information to process sales and by banks to process account numbers, balance inquiries and money transfers. SSL creates a confidential communications line between two computers and encrypts the data as it is sent through the line, thereby protecting it from outside interference. Security breaches with transmissions protected by SSL have been deemed a “pretty marginal problem,” that tends to arise more with public terminals than home systems.⁴² However, software companies can provide even more security measures to prevent fraudulent votes or hacker attacks by installing such measures as public key infrastructure (“PKI”), smart-card readers, biometric authentication devices and cryptographic devices.

³⁸ IPI Report, *supra* note 4, at 13-14

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Andre M. Chernay, *Analysis of Internet Voting Proposals*,

http://www.mcgeorge.edu/government_law_and_policy/california_initiative_review/reports/ccglp_cir_reports_internet_voting.htm (last visited Jan. 22, 2016)

⁴² *Id.*

In contrast, Internet voting at the polling station is inherently less susceptible to outside hacker attacks and considerably safer than remote Internet voting because election officials control the server and voting software at the polling station. With reliable technology and support to administer the voting system, it can easily be configured to prevent Internet communication with any outside server as well as prevent disgruntled workers from installing any additional software onto the machines.

Both polling station and remote Internet voting have endured several trials and have not suffered from any electoral failure. The success of the security systems protecting the trials is encouraging, but software designers must constantly upgrade the system to prevent any possible element of intrusion.

VII. CONCLUSION

Before fully implementing Internet voting, further studies need to take place across a wide range of disciplines. Specifically, technical experts need to improve the Internet voting systems overall, particularly security and encryption technology, so that election officials can safely implement the system for use by the widespread voting public. In addition, political scientists must study the effect of Internet voting on public confidence in the electoral process, the effect on participation and the effect on the character of elections. Finally, lawyers need to analyze the existing electoral laws and develop new laws that ensure that electoral failures do not result from a legal breakdown.

Public trials of Internet voting also must be expanded. Only with experience can election officials gauge how a system works and only with experience can technical experts, social scientists and lawyers assess the strengths and weaknesses of a system and make it a viable option for future elections.

Internet voting trials have thus far been successful and encouraging in countries outside India, yet many remain sceptical of the technology. For this reason a slow, evolutionary change is needed to introduce Internet voting into our electoral culture. Such change can be accomplished through a gradual introduction of Internet voting accomplished by a two-phase introduction

approach. Phase I would utilize Internet voting technology in the existing polling stations by allowing voters the choice of voting at the polling station via the Internet or by traditional methods. Phase II would eventually introduce remote Internet voting to the electorate when the technology is ready and when the voters have sufficient confidence in e-voting systems. This slow, gradual approach would allow for constant monitoring, security, testing and improvements and avoid introducing a radical change that could weaken voter confidence in the electoral process.

Unlike many other nations studying Internet voting, the U.S. has sufficiently laid the initial groundwork for the transition to Internet voting through the public and private trials. Therefore, the next step for Internet voting is its gradual introduction in binding public elections. The evolutionary approach to introducing Internet voting is not without its challenges or risks, but those potential pitfalls can be minimized through careful planning and implementation.

The first step towards an Internet voting option could be the introduction of polling stations for a limited number of voters. This limited trial could take place at select polling stations to test the security, accuracy and ability of Internet voting while providing the voter with more convenience and voting options.

The trial would also introduce the concept of Internet voting to the electorate in a comfortable atmosphere without radically changing the familiar voting surroundings. Over time and with successive successful elections via Internet voting, voters will likely get acclimated to the system and acquire the same level of confidence in Internet voting that they have in traditional voting methods.

In addition to introducing Internet voting to the electorate, a limited-scale trial such as this would also attract significant media attention, which if successfully operated, would generate even more attention and excitement.

Internet voting has been championed by some as a miracle cure for the current ills of our electoral system. But one must remember that like any other voting system, it too has its potential drawbacks and flaws. After the initial euphoria surrounding the prospects of Internet voting swept the electoral world, the issue

was studied in further detail and the promise of Internet voting convenience was replaced by overarching issues of security and reliability. But some in the electoral community have come to realize that, when compared to the current voting technologies Internet voting is a reasonable voting alternative.

There is no perfect system of voting and there will never be such a system. Unless the trend of continual electoral failings is reversed, democracy will continue to suffer. Internet voting may be the only solution to curb dwindling participation rates and add more convenience and stability to the electoral system.

The long-term question then becomes to what level of risk should Internet voting be judged? Should Internet voting be held to the same standard of traditional voting or to a higher standard? Most problems associated with Internet voting are not foreign to the electoral process, just problems cast in a different form. Security and other weaknesses are inherent in the traditional voting methods. So to hold e-voting to a 100 percent secure record would be unfair and create a different playing field.

Further study into the area is needed to assess the viability and risks of Internet voting. It is imperative that election officials have the foresight and initiative to actively research into this important area of our democracy. Further, and maybe of equal importance, Internet voting can only be implemented when the level of risk associated with its implementation is acceptable to election officials, politicians and voters. While it appears that currently Internet voting at the polling station is a reasonable level of risk, the level of risk presently associated with remote Internet voting may simply be too great. Maybe in time, the information garnered from further trials and evolutionary introduction of Internet voting will cause election officials and the voting public to accept remote Internet voting as a safe, effective, and efficient way to vote.

But it should be remembered that allowing remote Internet voting to supplement the current system will only add convenience and encourage greater participation in the voting process in the same way that absentee voting has been doing for years. This would supplement the electoral system and lead to better governance through increased involvement of the people.

GLOBALIZATION, MASCULINITY AND THE LAW: THE CASE OF HONOR KILLINGS IN NORTH INDIA

*Preeti Pratishruti Dash**

ABSTRACT

Today's hi-tech era of globalization has enabled India to experience modernity as never before. However, Indians have not accepted modernity as a complete package and have shied away from accepting its values in their personal lives by clinging on to the orthodox past. Ironic though this may seem, it is pretty evident from the violence against people who deviate from the so-called traditional way of living. Couples who choose to marry within their "gotra" and those who opt for inter-caste marriages, are punished by the so-called guardians of Indian tradition, who do not hesitate to even kill these people, for contravening the norm of caste-endogamy. Such practices are common in not only in backward villages of Rajasthan, but also in places that are considered to advanced, i.e., Haryana, northern Uttar Pradesh and Delhi. This paper discusses as to how the khap or caste panchayats naturalize their crimes in the name of preserving the honor of their community. The perception of such crimes by the state authorities which consist of people who are also part of the caste structure and the dilemma of the state in a condition where tradition co-exists with modernity has also been looked into. It is unfortunate to witness that the functionaries of the state have failed to do much even though the Supreme Court, as well as High Courts of the country have denounced the actions of the khap-panchayats. The Law Commission's efforts too, have not yielded much positive results. This paper attempts to analyze the peculiar socio-cultural context within which these crimes occur and suggests a framework to tackle the same.

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I. INTRODUCTION: GENESIS OF KHAP-PANCHAYATS IN HARYANA

In this era of globalization, there is a visible tension between the traditional value system and modern values reflected through increasing urbanization, claims of individual rights and the presence of Constitutional authorities. The modern values and institutions are not easily accepted by the so-called guardians of our tradition, who, by invoking claims of culture and honor, exercise power- whether that of caste, class, gender or age, that is expressed through violence.¹ In this paper, an attempt has been made to understand the tension that exists between traditional authorities such as the khap-panchayats and the modern authorities of the state, including the legal system.

The khap-panchayats usually target the couples who contravene the traditional norms of marriage, by daring to marry outside the caste (inter-caste marriage, especially the marriages of hypogamous kind), or within the same gotra (gotra endogamy). They also do not tolerate other forms of marriage, such as village endogamy, because in Haryana the common practice is to marry outside one's village even if the partner is not of the same gotra.² The khap-panchayats seem to deal with violations of cultural norms very strictly. They have inflicted death upon 'errant females' and/or their parents, have attempted to change conjugal relationships by turning legally wedded couples into brother and sister, compelled couples to divorce and humiliated them by various means.³

Such exercise of power, as claimed by Chowdhry, is intricately linked with the growing process of urbanization that is experienced in today's context. In the state of Haryana, where the khap-panchayats are most active, the process of urbanization has been steady, with the number of cities increasing from 61 to 81 between 1961 and 1981.⁴ However, the urbanization has not been able to create a water-tight distinction between the rural and the urban; and has also resulted in a

¹Prem Chowdhry, *Enforcing Cultural Codes* in A QUESTION OF SILENCE? THE SEXUAL ECONOMIES OF MODERN INDIA (MARY E. JOHN and J. NAIR eds.) 333, 332-367 (1998)

²Ravinder Kaur, *Khap-panchayats, Sex Ratio and Female Agency*, 45(23) ECO. & POL. WEEKLY 14, 14-16, (2010).

³Prem Chowdhry, *Crisis of Masculinity in Haryana- The Unmarried, the Unemployed and the Aged*, 40(49) ECO. & POL. WEEKLY 5193, 5189-5198 (2005)

⁴Chowdhry, *supra* note 1, at 353.

spillover of the urban consumerist culture into rural areas. For instance, the idea of a martial race combined with a macho culture gives rise to the ideology of masculinity that is symbolized through the ownership of “a jeep, a gun and a bottle of rum”.⁵ Moreover, this urban consumerist culture is limited for men only, and women are significantly marginalized in the entire process of urbanization and modernization. It is accepted that modernity corrupts women who are the custodians of tradition. Thus, while the reigning ideology of masculinity actually desires urbanization on one hand, it denounces the city for eroding the traditional cultural norms on the other. Such a conflict often manifests itself as violence at the family or community level.

Bourdieu rightly points out that “*male reputation is dependent on female honor*”.⁶ Thus, once female honor is lost through the process of contravention of traditional marriage norms, the only way in which the honor of her family and her community can be restored is through violence, coercion or killing. The ideology of ‘honor’ is one which directly results from patriarchal gender roles, wherein conformity to these roles is demanded as a source of status and acceptance within the society. For males, ‘honor’ is gained through exerting dominance and control over females and younger males, and lost through weakness and failure to control; it can be restored through violent and coercive acts. For females, ‘honor’ is preserved through subordination, obedience, chastity, endurance and virginity, and it may be lost through any autonomous act, particularly those relating to sexuality, and cannot be restored.⁷

Hence, the role of the khap-panchayats, whose members constitute self-proclaimed guardians of tradition, becomes crucial. In Haryana, where the problem of unemployment looms large, those men who are unemployed or unmarried are not considered to be masculine enough. Therefore, for these men, the need to assert their masculinity acquires an even greater significance than that of the employed or the married, since they may even be publicly ridiculed for their

⁵ Chowdhry, *supra* note 1, at 352

⁶ LAW REPORT INDIA, Ravi Kant, *Honor Killings and the Need for New Legislation*, available at <http://indialawyers.wordpress.com/2010/07/03/honor-killings-and-the-need-for-new-legislation/> (last visited Jan. 3 2016)

⁷ *Id.*

inferior position. The aged also face a crisis with regard to their masculinity. In the wake of increasing level of agricultural technology, the elderly are losing control of the situation as most of them are illiterate. In such circumstances, their affiliation to the traditional khap-panchayats gives them legitimate recognition within their community and enables them to continue assuming their position of power, which would not have been possible otherwise. Thus, both these young unemployed and unmarried men and the aged males- seek to gain status and power by asserting their power and masculinity by controlling the errant others, thus enforcing public masculinity.⁸ Whether it is caste revenge on a dalit, or a khap-panchayat asserting itself in the matter of marriage, Haryanvi society points to tensions arising from an anomic state of society, in which other north Indian states are not far behind.⁹ Thus, not only the breach of caste or class norms, but the construction of gendered identities in a patriarchal society also contributes to such kinds of violence.

II. CONFLICT BETWEEN KHAP-PANCHAYATS AND THE MODERN STATE

The fact that tension between khap-panchayats and the modern legal system comprising of state-enacted laws is bound to rise is obvious. One of the first instances wherein this tension became visible was when an amendment to Hindu-Succession Act of 1956 made it possible for a daughter, sister, widow or mother to inherit land with full legal recognition.¹⁰ This Act was met with stiff opposition mainly because it enabled a complete outsider, i.e., the son-in-law, to inherit family land, traditionally a symbol of power for patriarchal authority, through his wife. In response to this state enacted provision, which was perceived by patriarchs as a disruption of the existing patrilineal mode of inheriting land, the codes of marriage were made even stricter and women's sexuality and their right to choose was sought to be guarded in a more vigorous way.¹¹

⁸ Chowdhry, *supra* note 3, at 5194

⁹ Kaur, *supra* note 2, at 16.

¹⁰ Hindu Succession (Amendment) Act, 2005.

¹¹ Chowdhry, *supra* note 1, at 335

The demand of the khap-panchayats is that state should recognize them as a legitimate authority to adjudicate on private affairs, such as marriage, property rights etc., of members of the community at an individual level, and to uphold the honor of their people at a community level. The grievance of the khap-panchayats is that, manifestations of the modern legal system explicitly brand the decisions of khap-panchayats as illegal and unconstitutional, without taking into consideration the social structure in which they operate. The khap-panchayat members are further aggrieved by the fact that the state gives legitimate recognition to personal laws of various communities such as the Muslim Personal Law, Hindu Personal Law, etc. but doesn't understand the need for existence of the khap-panchayats to upkeep the "honor" of their caste.¹²

While the khap-panchayats' opinion about the modern state is unanimous, the response of the state has been varied. For instance, Brinda Karat, who raised the issue of honor killings by khap-panchayats in the Rajya Sabha in July 2009, is of the opinion that khap-panchayats should be made illegal. During the discussions in the Rajya Sabha on this issue, Union Minister for Home Affairs admitted that violence used by khaps is a "national shame".¹³ However, other stakeholders in the modern state have covertly supported the existence of the khap-panchayats while being careful enough not to encourage their activities openly. For instance, the Haryana state leadership, the youth brigade in particular, has maintained an uneasy silence over the spate of violent incidents, including the murder of young couples and their families by the khap-panchayats. Especially at the time of elections, the silence is deafening.¹⁴ Moreover, the state officers such as the Inspector-General of Police, Rohtak, Haryana emphasized that the 'caste played an important role in village life'. He did not think that the state had any responsibility

¹² *Id.*

¹³ T.A.Rajlakshmi, *In the name of Honor*, FRONTLINE, 2009, available at <http://www.flonnet.com/fl2617/stories/20090828261700400.htm> (last visited Jan. 15, 2016)

¹⁴ *Id.*

in intervening in their (caste-panchayats) activities as he believed that democracy "*essentially means minimal state intervention*".¹⁵

III. JUDICIAL PRONOUNCEMENTS AND LEGISLATIVE CONCERNS

It is under circumstances wherein the status of khap-panchayats is unclear, that it becomes interesting to understand the outcome of the interaction between the modern legal system and the traditional khap-panchayats. There is no specific law to address the violence perpetrated by the khap-panchayats on young couples who exercise their choice in marriage, thus, breaking social norms. Yet, such violence is on the rise by the day and the only recourse available to tackle the same is the criminal law of the country. Therefore, it becomes necessary to understand whether the existing law is capacitated to deliver justice in the context of honor killings.

The issue of honor killings attracted the attention of the Supreme Court in the case of *Lata Singh v. State of Uttar Pradesh*¹⁶. In this case, a young couple, who had married against the wishes of their families, was harassed by the woman's brothers who had initiated criminal proceedings against the man and his family. While quashing the criminal proceedings, the Court lamented at the fact that instead of taking action against the woman's brothers for their unlawful and high-handed acts, the police proceeded against her husband and his relatives. The Court opined that since such instances of harassment, threats and violence against young men and women who marry outside their caste were on the rise, it was necessary for institutions such as the Apex Court to break silence on the issue which is of great public concern. The Court ruled that there was nothing honorable in such killings and that they were nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserved harsh punishment. It also directed the administration/police authorities throughout the country to ensure that couples, who are majors and undergo inter-caste marriages are not harassed or subjected to threats or acts of violence, and to institute criminal proceedings

¹⁵ UpendraBaxi, et. al., *Legacies of Common Law: Crimes of Honor in India and Pakistan*, 27(7) THIRD WORLD QUARTERLY 1244, 1239-1253 (2006).

¹⁶ *Lata Singh v. State of Uttar Pradesh*, AIR 2006 SC 2522.

against anyone who gives such threats or harasses or commits or instigates acts of violence. In the case of *Bhagwan Das v. State of NCT Delhi*,¹⁷ the Supreme Court opined that honor killings, which have become extremely commonplace in several parts of the country, such as Haryana, Punjab and Uttar Pradesh, come within the category of ‘rarest of rare cases’ thus attracting death penalty as a ‘necessary deterrent’ for ‘uncivilised and barbaric behaviour’. High Courts in the northern states of the country too, have dealt with cases of violence against couples choosing marry outside their caste. In the case of *Sanjay v. State of Haryana*¹⁸, the Punjab and Haryana High Court said that Haryana is one of the worst hit states as far as honor killing is concerned, and that although the usual remedy to such murders is to suggest that society must be prevailed upon to be more gender-sensitive and shed prejudices of caste and class, at the same time, it is necessary to ensure that there is no escape for those who take justice into their own hands. Stating thus, the Court awarded life sentences to the accused persons who were held to be guilty of murder. In the case of *Manmeet v. State of Haryana*,¹⁹ again, it was the Punjab and Haryana High Court which acknowledged the ominous presence of khap-panchayats who punish erring couples who choose to marry outside their caste or within their gotra by inflicting violence. In this case, the court pointed out that apathy of the institutions of the state towards inter-caste couples, such as the marriage registrars who refuse to register marriages of young couples without the presence of their parents, and courts condemning the acts of ‘rebellious children’, harms the social fabric of the country which is anyway cut as under by boundaries of caste and communities.

Taking into consideration the aforementioned judgments, it can be inferred that the courts of this country have been considerably sensitive towards rights of young couples who choose to break rigid barriers of caste and gotra in marriage. As a result of widespread concerns regarding such violence, the matter was referred to the Law Commission. The Law Commission, in its 242nd Report proposed a draft legislation titled *Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honor and Tradition) Bill* intended to curb

¹⁷ *Bhagwan Das v. State of NCT Delhi*, (2011) 6 SCC 396.

¹⁸ *Sanjay v. State of Haryana*, CrI. App. 578-DB of 2005.

¹⁹ *Manmeet v. State of Haryana*, 2015 SCC OnLine P&H 222.

the harmful interference of khap-panchayats in the life and liberty of young persons choosing to marry outside their caste or within their gotra.²⁰ The Bill, *inter alia*, proposes a threshold bar against the congregation or assembly for the purpose of disapproving an intended marriage or the conduct of the young couple.²¹ It seeks to criminalize acts by these unlawful assemblies which endanger life and liberty of individuals. The Bill also proposes to make criminal intimidation by the members of unlawful assembly or others, to secure compliance with the illegal decision of the assembly a criminal offence, having higher punishment than criminal intimidation under the Indian Penal Code.²² These provisions of the Bill are without prejudice to the provisions of the Indian Penal Code. Further, a specific section has been proposed to empower the District Magistrate or the Sub-Divisional Magistrate to take preventive measures, and a further obligation is cast on them to take note of the information laid before them by the marrying couple or their family members and to extend necessary protection to them.²³

IV. CONCLUSION AND SUGGESTIONS

The proposition of the Law Commission, however, is yet to materialize into law and the only medium to deal with honor crimes remains the Indian Penal Code, read with the provisions of the Code of Criminal Procedure.

In such a situation, the obvious question which arises is whether the existing law is sufficient to deliver justice in the context of honor killings. The answer is most definitely, no. The need for a special law to tackle honor killings and related crimes is urgent and pressing. This is because these crimes occur in a particular

²⁰ LAW COMMISSION OF INDIA, *Two Hundred and Forty Second Report on Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honor and Tradition): A Suggested Legal Framework* (2012), available at <http://lawcommissionofindia.nic.in/REPORTS/REPORT242.PDF> (last visited Jan. 15, 2016)

²¹The Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honor and Tradition) Bill, 2012, sec. 2

²² *Id.*, sec. 3.

²³ *Id.*, sec. 4.

socio-cultural context and thus, form a class of their own which definitely cannot be equated with other cases of murder or culpable homicide. However, lack of responsiveness on part of the state to deal with the menace, is most troubling.

The need of the present hour is to enforce a legislation criminalizing activities of the khap panchayats, which affect the freedom of young couples to marry within their caste or outside their gotra. The Bill²⁴ proposed by the Law Commission is a plausible option available to the legislature for this purpose.

However, if adopted in its present form, it is bound to leave several concerns unaddressed. For instance, relationships not in the nature of the marriage, such as live-in relationships have not been taken into consideration by the Commission. When the suggestion was put forth by eminent scholars and law universities, the Commission did not accept it stating that including live-in relationships within the realm of this law would dilute the efficacy of the same.²⁵ However, keeping in mind the fact that the Apex Court has recently recognized live-in relationships as having the nature of marriage, they should be ideally included within the law relating to honor crimes.²⁶ Further, it was also suggested that the Law Commission, while drafting the Bill, should include provisions addressing the prohibition of honor crimes and should not aim solely at criminalizing the acts of the khap panchayats. This suggestion too, was not accepted by the Law Commission on the grounds that criminalizing the abhorrent acts of the khaps was of greater priority.²⁷ However, focusing on the prevention and prohibition of honor crimes is equally important so as to bring down the rate of the crimes.

It can be therefore inferred that, the peculiar nature of honor crimes combined with the unique socio-cultural setting in which they occur call for special attention. Thus, it is necessary to bring into force a comprehensive law to deal with the issue of honor killings in India, one that rightly addresses the issues of prevention and prohibition along with penalizing those who commit these heinous crimes.

²⁴The Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honor and Tradition) Bill, 2012

²⁵ LAW COMMISSION OF INDIA *supra* note 20, at 20.

²⁶ *Dhannulal and Ors. V. Ganesram and ors.*, Civ. App. 3411 of 2007.

²⁷ LAW COMMISSION OF INDIA *supra* note 20, at 21.

At the same time, however, it is equally necessary to strengthen state machineries so as to enable them to tackle honor crimes. This is because the police, marriage registrars and other functionaries of the state also operate in and belong to the same society in which these deplorable crimes occur. It is for these reasons that marriage registrars refuse to register marriages without the presence of parents and police refuse to interfere in 'personal matters'. Without strengthening and sensitizing these functionaries, merely enacting legislation would be a shallow attempt to address the deplorable crime, much like cutting the branches of a tree without hitting at its roots.

FEMINIST PERSPECTIVE TOWARDS INSTITUTIONAL CHILD SEXUAL ABUSE

*Dr. Sapna S.**

ABSTRACT

There are many problems which rise at a faster rate than the development of the law that deals with it. One such problem is child sexual abuse. The consequential impacts on the victims of this issue extend far beyond their childhood. It robs children of their childhood and creates a loss of trust, feelings of guilt and self-abusive behavior. However, the complex of the conundrum in this issue lies in the fact that when sexual abuse occurs the child victim may be the only witness and the child's statements may be the only evidence. The vulnerability and the gullibility that is naturally attributed to the age of such victims makes it difficult to extract evidence out of them and reliance on such evidence. Child sexual abuse cases can be very difficult to prove largely because cases where definitive, objective evidence exists are the exception rather than the rule. Thus, viewing the problem through a prism of feminist perspective would bring the problem a step closer to its resolution.

I. INTRODUCTION: ENORMITY OF THE PROBLEM

There is a large gap between what we know about violence against children and what we know should be done. We know that violence against children often causes lifelong physical and mental harm. We also know that violence erodes the potential of children to contribute to the society by affecting their ability to learn and their social and emotional development. Given the importance of children to our future, the current complacency cannot continue. We must place “preventing” violence against children among our highest priorities.¹ Child

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¹ United Nations Secretary-General's *Study on Violence against Children* (2005). *Regional Desk Review: South Asia*, at 23, available at <http://www.violencestudy.org/r27> (last visited on Jan 11, 2016).

sexual abuse² is an obstinate and a persistent problem worldwide, it is a global reality. The shocking surge in the frequency and the scale of this degrading and debilitating sexual assault on children particularly in institutional settings bears testimony of a systematic character making it a phenomenon of social injustice rather than an individual moral wrong.³ Child sexual abuse as a social problem is a reflection of a '*culture of violence*' involving egregious violations of trust by the people whom children trust, or, are often responsible for their care replicating a model of female sexuality that is often commoditized, exploited and reviled.⁴ The visible trend of abuse and cover-up, the taboo being placed on the voice of the child rather than the actions of the perpetrator is as much the case of systematic perpetration of violence against adult women in the male dominated social institutions.⁵ According to a report to the U.N. Special Rapporteur on Violence Against Women, Madhya Pradesh recorded the highest number of child rape cases at 9,465 from 2001 to 2011, followed by Maharashtra with 6,868 cases, Uttar Pradesh 5,949, Andhra Pradesh 3,977 and Chhattisgarh 3,688, Delhi reported 2,909 cases, Rajasthan had 2,776, Kerala 2,101, Tamil Nadu 1,486, Haryana 1,081, Punjab 1,068, Gujarat 999, West Bengal 744 and Odisha 736. Similarly, 719 cases of child rapes were reported

² The term 'Pedophile' is used to refer to individuals with a preferred sexual interest in children and they are the primary distributors, producers of child pornography and child abuse imagery. When the pedophile seduces a child, the child's psychosexual development is fractured. The on-going damage to the child's psyche typically results in emotional, mental, and spiritual devastation of one kind or another. CHILDLINE SERVICE 1098, available at, <http://www.childlineindia.org.in/1098/advocacy.htm>, (last visited on Jan 11, 2016).

³ According to the National Crime Records Bureau statistics, the report on child sexual assaults in India says 48,338 rape cases were reported during the decade. It was reported that, there was a 336 per cent increase in child rape cases in the country between 2001 and 2011. Aarti Dhar, *Child Sexual Assault-Juvenile homes are hellholes*, THE HINDU Apr 21, 2013), available at <http://www.thehindu.com/news/national/juvenile-homes-are-hellholes-says-report-on-child-rape/article4637540.ece> (last visited on Jan 13, 2016).

⁴ Social and cultural patterns of behaviour, socio-economic factors including inequality and unemployment, and stereotyped gender-roles also play an important role.

⁵ Surveys report that well over 90 per cent of perpetrators in child sex offences are males. Some suggest that there is serious under-reporting of female child-sex activity. Some suggest that female pedophiles (ie. preferential offenders) do not exist. When women are involved at all in such activity, their roles seem invariably to be subordinate ones, typically assisting their male partner. Dhar, *supra* note 3.

from Karnataka, 571 from Himachal Pradesh, 519 from Bihar, 457 from Tripura, 452 from Meghalaya, 316 from Assam and 218 from Jharkhand.⁶ And these statistics again, form only the tip of the iceberg as the large majority of child rape cases are shrouded in secrecy regarding the commission of the offence and, are not reported to the police.

Therefore, despite the extent of this abuse, little has been known about the nature of the issue, or indeed ‘what works’ in preventing and responding to it. Several factors could be contemplated to be connected to the current failures to detect and manage such cases. These include lack of community awareness of the dynamics of child sexual abuse, the skill of offenders in both concealing their actions and in intimidating their young victims to keep silent, misconceptions about the reliability of children’s reports of abuse, and mishandling of evidence needed to ensure a conviction.

The repeated media reports about child sexual abuse reveal a conspectus of circumstances where the child victimization leads to a pattern of ‘vulnerability’, ‘powerlessness’, ‘dependency’ and ‘silent concealment’ creating the necessity to contextualize this issue from a sociological and feminist perspective with legal system as its starting point. Therefore, the study will construe how the law understands the issue of child sexual abuse in the arena of the courts, the question of institutional accountability with specific focus on mandatory reporting and justice for the victims from a critical perspective drawn from feminist studies.

Further, the way in which the justice system tackles child sexual abuse cases results in more unnecessary trauma during the whole process and this, more often than not, is either due to ignorance or indifference on the part of the legal personnel with whom the child must interact. Therefore, the study also investigates the ongoing problems which need to be addressed in order that children are not further traumatized through their interaction with the criminal justice system.

⁶ *Id*

Going still further, in cases of institutional child sexual abuse cases, apart from the prosecutorial, investigative and criminal justice perspective, the issue is also about the barriers to civil litigation which allows to further examine justice for victims through redress and compensation schemes. The issue is about the difficulty a plaintiff faces when he/she wants to hold an institution vicariously liable for sexual abuse perpetrated by an employee, agent, or representative of that institution and trying to prove that such intentional torts or crime could fall within the scope of employment.

II. INSTITUTIONAL⁷ CHILD SEXUAL ABUSE AND THE ISSUE OF MANDATORY REPORTING

Child sexual abuse can occur in a variety of settings, including home, school, or work, more so, where child labour is common. Further it is indicated that, child sexual abuse occurs potentially where adults have access to and control over children. By this way, these institutions have become potential venues for child sexual abuse by individuals or groups of abusers. It is crucial therefore to fix our focus on the environment in which such crimes occur. Grasping from reported cases of institutional sexual abuse, the implication is whether there is something about institutions, as environments for child sexual abuse, which turns up to aggravate the vulnerability of potential victims and increases the power over them that abusers can exercise? This means that institutions are high risk environments for children and young people. The concern therefore is that, institutions have failed to protect children entrusted to their care or have not adequately responded to child sexual abuse in their institutions. Such a high risk, combined with the vulnerability of potential victims, requires a greater investment in mitigation.

⁷ The term “institution” is widely defined to include all organizations where parents or guardians entrust other adults to provide activities, care or instruction for children in formal or informal settings. National Crime agency, *CEOP Thematic Assessment- The Foundations of Abuse: A thematic assessment of the risk of child sexual abuse by adults in institutions*, (2013) , available at http://s3.amazonaws.com/rcpp/assets/attachments/1690_CEOP_institutions_thematic_assessment_original.pdf (last visited Jan 13, 2016).

Within the institutional settings there are certain peculiarities which demonstrably increase the risk to children from sexual abuse. Four such key areas have been identified; institutional structure; institutional culture; offenders and opportunities; and victims and vulnerabilities.

- a) Institutional Structure: The rigidity and inflexibility in organizational hierarchy many a times act to stifle effective reporting.
- b) Institutional Culture: The notion of ‘closed institutions’ where the organizational culture is to handle problems internally without allowing room for wider scrutiny, aggravates the secrecy and low disclosures that surrounds these cases.
- c) Offenders and Opportunities: This could relate to the role that offenders have in the institutions either in the form of tutoring the child, grooming etc. as in case of educational institutions where only the offender and victim are present diminishing the likelihood of disclosure, thus making it a witness-free activity.
- d) Victims and Vulnerabilities: There have been a number of factors to be sought out by the offenders like, lack of parental access as in case of residential schools, children from broken homes or marital difficulties, children considered relatively less resilient to abuse within the institution. In addition to the fact that the transparency levels in many institutions are low, the institutions’ aversion to litigation is high and their management culture to maintain the ‘clean image’ is considered imperative. This worsens the problem leading to abysmally low disclosures in institutional settings.⁸

Therefore, only a small proportion of acts of violence against children is reported and investigated, and few perpetrators held to account. The official statistics based on reports of violence in the institutional settings, drastically underestimate the true magnitude of the problem making its prevention or response to it exceedingly difficult.

⁸ *Id.*

III. CHILD SEXUAL ABUSE FROM A FEMINIST PERSPECTIVE

The feminist perspective has always been interested in seeking out the gaps and absence in women's talk and in considering meanings that might lie beyond explicit talking or abnormal silence. In cases of child sexual abuse, it is found that victim's silence is a more effective and likely method of resistance than physical force, particularly because a child is physically and/or emotionally vulnerable in the relationship. Therefore, a critical perspective drawn from feminist studies provides the tools which allow exploring and explaining the legal appropriation of the issue of child sexual abuse and the status of the voice of the victim within the legal system. The importance of a feminist perspective, therefore, lies in the approach that it adapts to include the voice of the subjugated.

Feminist perspective challenges the definitions, assumptions, ideals and epistemological notions of a universal, objective rationality that underlie our legal system which reflects the dominant patriarchal social order, encapsulating the maleness of law and this can be potentially transformative. The contention in this research is that, a feminist perspective will provide a deeper and more comprehensive insight. Analyzing the law through the prism of systems and structures is one way of understanding the judicial texts under review and it seems specifically useful when employing a discursive standpoint.⁹

Most importantly, the critical approach makes out a case to question the factor of power in legal adjudication by an investigation of the contexts of interpretation and by examining the judicial interpreters' authority to speak. The construction of the truth about child sexual abuse is held exclusively by those in the legal domain, and victims' voices become mere matters of formality without actually understanding their depth. This restricts the conceptual freedom of legal knowledge and therefore the powerlessness of the victims is conveniently maintained.

⁹ The interest in discourse as a means of understanding social reality is based on the notion of the subjective orientation of social action. Ruiz J.R, *Sociological Discourse Analysis: Methods and Logic*, 10 (2), FORUM: QUALITATIVE SOCIAL RESEARCH (May 2009), available at <http://www.qualitative-research.net/index.php/fqs/article/view/1298/2882> (last visited on Jan 18, 2016).

Further, a critical perspective is an investigation into what is deficient about the current legal construction of child sexual abuse by challenging assumptions about the status quo. It seeks answers for the questions like why so few prosecutions and convictions are processed through the courts and, crucially, the role played by the legal system. Central to the critical enquiry, therefore, is to point towards the prospect of transformation where it offers a pathway for overcoming the voicelessness of the victims of child sexual abuse by acknowledging the importance of communication.

While much has been written about the child sexual abuse issues from sociological and legal perspective, there is not much literature on the feminist perspective as a transformative approach relating to issue of child sexual abuse particularly in institutional settings. This thesis aims to address, to a considerable extent the gap in understanding the issue of institutional child sexual abuse with a gender component and therefore, it is within this complex tapestry that the feminist inquiry lies in this thesis.

IV. THE LAW RELATING TO CHILD SEXUAL ABUSE IN INDIA- AN OVERVIEW

The Protection of Children from Sexual Offences Act (POCSO), 2012 has been drafted, as a special law to address the issue of sexual offences against children. This Act defines a child as any person below the age of 18 years¹⁰ and provides protection to all children under the age of 18 years from the offences of sexual assault, sexual harassment and pornography¹¹. It also provides for punishment for abetment of the offence, which is the same as for the commission of the offence. This would cover trafficking of children for sexual purposes. For the more heinous offences such as penetrative sexual assault¹², aggravated penetrative sexual assault¹³, sexual assault¹⁴ and aggravated sexual assault¹⁵, the

¹⁰ POCSO Act, No.34 of 2012, sec. 2(1)(d)

¹¹ POCSO Act, sec. 13

¹² POCSO Act, sec. 2(1)(f)

¹³ POCSO Act, sec. 2(1)(a)

¹⁴ POCSO Act, sec. 2(1)(i)

¹⁵ POCSO Act, sec. 2(1)(b)

burden of proof is shifted on the accused¹⁶ keeping in view the greater vulnerability and innocence of children.

This Act envisages punishing even abetment or an attempt to commit the offences defined in the Act¹⁷. It recognizes that the intent to commit an offence, even when unsuccessful needs to be penalized. The punishment for the attempt to commit is up to half the punishment prescribed for the commission of the offence. This Act suggests that any person, who has an apprehension that an offence is likely to be committed or has knowledge that an offence has been committed, has a mandatory obligation to report the matter i.e. media personnel, staff of hotel/ lodges, hospitals, clubs, studios, or photographic facilities¹⁸. Failure to report attracts punishment with imprisonment of up to six months or fine or both¹⁹. It is now mandatory for police to register an FIR in all cases of child abuse. A child's statement can be recorded even at the child's residence or a place of his choice and should be preferably done by a female police officer not below the rank of sub-inspector²⁰. At the same time, punishment has been provided for making false complaint or proving false information with malicious intent. Such punishment has been kept relatively light, i.e. six months, to encourage reporting. If false complaint is made against a child, punishment is higher, i.e. one year²¹.

Despite the changes brought in by POCSO Act, 2012, challenge remains in implementing the Act given the fact that there has been disturbing rise of such cases particularly in institutional settings. Unfortunately, the lack of information and sensitivity amongst service providers is among the principle reasons for the failure of the system. There is a need for greater awareness of POCSO on the part of adults, parents, caregivers, teachers and people in positions of authority. Further, the provisions of this Act show a lack of understanding to the gender component necessary for a complete understanding of this problem given the

¹⁶ POCSO Act, sec. 29

¹⁷ POCSO Act, Ch. IV

¹⁸ POCSO Act, sec. 20

¹⁹ POCSO Act, sec. 21

²⁰ POCSO Act, sec. 24

²¹ POCSO Act, sec. 22

fact that, this issue stems majorly from the patriarchal system that exist in our society where power dynamics dominate all relationships.

V. CONCLUSION

Violence against children has incalculable costs to present and future generations and it undermines human development. We recognize that virtually all forms of violence are linked to entrenched gender roles and inequalities, and that the violation of the rights of children is linked to the status of women.²² To ensure that all sexual violence against children is prohibited and also effectively eliminated, awareness rising and public education is the most effective tool. And to maximize effectiveness, prevention strategies should be based on the best available scientific evidence, aimed to reduce factors contributing to risk and strengthen protective factors, include mechanisms for evaluating the impact of the strategy, and be carried out within a broader framework for addressing violence against children.

There is a pressing demand for the legal system to incorporate the fact of vulnerability of victims and their incapability to be resilient in cases of child sexual abuses. This could be done by viewing the legal processes through the prism of the feminist perspective. This approach leads to a more equitable and practical system of placing the burden of proof. Despite the fact of a relatively comprehensive legislation in place, offences and crimes seem to continue consistently. This is mainly because of the implementation of the Act taking a hit. This can be efficiently overcome by creating awareness about the provisions of this Act amongst the relevant parties.

²² The African Child Policy Forum, United Nations Conference Center, Addis Ababa, *The Second International Policy Conference on the African Child: Violence Against Girls in Africa*, at 1, (May 11-12, 2006), available at <https://test-za.savethechildren.net/sites/savethechildren.org.za/files/African%20Declaration%20on%20Violence%20Against%20Girls.pdf> (last visited on Jan 18 , 2016).

CORPORATE GOVERNANCE & FRAUD UNDER THE COMPANIES ACT 2013: AN ANALYSIS

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ABSTRACT

Corporate Governance in India has gained more focus in the last decade after several scams and frauds came into limelight, especially after the corporate fraud by Satyam by the failure in detecting the same. However, in International level, around 2002 particularly after the accounting fraud by Enron and WorldCom, corporate governance became a buzzword for every nation. The possible causes of corporate governance failure are weak corporate laws & policies, and lack of strong internal & external mechanism to control risk or fraud factors. The Companies Act (CA), 2013 in India, has reframed several weak corporate governance norms and inserts many new provisions and responsibility on corporates to comply with these norms. In addition to that CA 2013 has also provided number of stringent provisions to persons representing corporates such as IDs, KMP & others for better governance and control risks. Therefore, it would be interesting to watch, to what extent these new norms and provisions help corporate world grow. This article is mainly divided into three parts: first part discusses few recent developments in corporate governance norms under the CA 2013; second part elaborates the fraud analysis with stringent fraud provisions in the CA 2013 and the third part discusses the quasi-judicial and regulatory bodies framed for better governance and control risk of fraud.

I. INTRODUCTION

Governance is a word, which was rarely used by corporations a few decades back. Now, almost all the organizations starting from companies to universities, local authority and charity follow governance to run their organizations with

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particular emphasis on its accountability, integrity and risk management. Broadly speaking, corporate governance is not about enhancing shareholder or stakeholder value. It is about enhancing economic growth, entrepreneurship, innovation and value creation. Corporate governance basically involves a set of relationships between a company's management, its board, its shareholders and its stakeholders. Two reasons are responsible for highlighting the importance of corporate governance. First, the wave of financial crisis in 1998 in Russia, Asia, and Brazil, seriously affected the economies and destabilized the global financial system. Secondly, the growing corporate scandals in United States and European countries due to bad corporate governance adopted by corporates.¹ Corporate governance has gained a lot of focus in India after the Satyam corporate fraud. Further, rapid pace of globalization and liberalization have forced companies in having effective corporate governance strategy and adopt improved standards of corporate governance to run their business. To cut down the cases of fraud, malpractice in companies and financial instability, both policy makers and business managers emphasized the importance of improved standards of corporate governance. At international level, OECD and World Bank continuously worked upon better corporate governance and adopted a set of principles to strengthen corporations². Similarly, in India several reforms have been initiated to improve the corporate governance standard by the Securities and Exchange Board of India (SEBI) and the Ministry of Corporate Affairs, Government of India (MCA). The introduction of Companies Act 2013 has brought out a new phase to the corporate sector. To make corporate law more effective much reliance is placed on the disclosure.

¹ Organization for Economic Co-operation and Development (OECD), *Corporate Governance, Value Creation and Growth - The Bridge between Finance and Enterprise* (2012) available at

<http://www.oecd.org/corporate/ca/corporategovernanceprinciples/50242938.pdf> (last visited Jan. 12, 2016)

² E.g. in 1998 OECD included: Fairness-protecting shareholder rights and ensuring contracts with resource providers are enforceable, Transparency-requiring timely disclosure of adequate information on corporate financial performance, Accountability-ensuring that management and shareholder interests are kept in alignment, Responsibility-ensuring corporate compliance with laws and regulations and society norms.

II. IMPORTANCE OF CORPORATE GOVERNANCE

Good corporate governance is crucial for emerging countries to achieve economic goals. To cut down the financial crisis and market vulnerability and to limit the costs towards the transaction for a good financial growth, the importance of good corporate governance is essential.³ A good corporate governance image enhances the reputation of the organization and makes it more attractive to customers, investors and suppliers. Through good corporate governance the company can produce benefits to the organization, by increased access to external financing. This in turn can lead to larger investment, higher growth, and greater employment creation. In addition to that, lowering of the cost of capital and associated higher firm valuation makes investments attractive to investors. Further, better operational performance through better allocation of resources and better management leads company to generate more wealth more. Lastly, good corporate governance can generally mean better relationships with all stakeholders⁴. In addition to this, corporate governance helps in creating long-term trust between enterprises and external providers of capital and has long term reputational effects among key stakeholders, both internal (employees) and external (clients, communities, political/regulatory agents).⁵

III. CORPORATE GOVERNANCE: NEW PROVISIONS UNDER THE COMPANIES ACT, 2013

The introduction of Companies Act 2013 has resulted in new provisions and regulations and has made it mandatory for corporations to comply with the Act. .

³ See Yahya Ali Al-Matari, Dr. Abdullah Kaid Al-Swidi & Dr. Faudziah Hanim BtFadzil, *Corporate Governance and Performance of Saudi Arabia Listed Companies*, 9(1) BRITISH J. OF ARTS AND SOC'L SCI. (2012), available at http://www.bjournal.co.uk/paper/BJASS_9_1/BJASS_09_01_01.pdf (last visited Jan. 12, 2016)

⁴ *Corporate Governance and Development Bank of Turkey*, ADFIAP.ORG available at <http://www.adfiap.org/ceoforumviii/wp-content/uploads/2011/09/Good-Governance-word-version-Devt-Bank-of-Turkey.docx> (last visited Jan. 12, 2016)

⁵ CA Rajkumar & S Adukia, *New Act May Usher in a New Era of Corporate Governance*, 48(11) THE MANAGEMENT ACCOUNTANT, (2013) available at http://icmai.in/upload/Institute/Journal/Nov_2013.pdf (last visited Jan. 12, 2016)

The 2013 Act introduced many novel concepts, such as protecting the interest of shareholders and limits the administrative burden. In addition to this, the Act attempts to align with international requirements. The basic objective of the Act is to encourage transparency, accountability and high standards of corporate governance in the corporate sector; to promote and encourage entrepreneurship and enterprise; it introduces novel concepts for ease of doing business; stricter action and penalty provisions for risk and fraud activities; to cater to the need for more effective and time bound approvals and compliance requirements relevant in the present context.⁶

The Companies Act 1956 contains 13 parts having 658 sections and 15 schedules, was replaced by Companies Act 2013 contains 29 chapters having 470 sections and 7 Schedules. The Companies Act 1956 deals with very limited definition on corporate governance whereas, the Companies Act 2013 has introduced new definitions and also has broadened existing definitions of accounting standards, auditing standards, financial statement, independent director, interested director, key managerial personnel, voting right, etc.⁷

A. ONE PERSON COMPANY (OPC)

In the Companies Act 1956, there was no provision on OPC and only deals with private companies and public companies. Whereas Companies Act 2013, introduced a new class of companies called ‘One Person Company’ (OPC), through which individuals can carry business with limited liability.⁸ This will be private limited company and only one person is required to incorporate such a company, who can be a shareholder as well as director. Further this provision states that only a natural person who is a resident of India and also a citizen of India can form a one person company. This clears that no other legal entities such as companies or societies or any other corporate entities cannot form a one person company.

⁶ Sangeet Kedia, *Highlights of Companies Act 2013*, available at <http://www.classifiedsonweb.com/backend/uploads/NEW%20COMPANIES%20ACT-2013.pdf> (last visited Jan. 12, 2016)

⁷ See Companies Act, 2013, sec. 2(60)

⁸ See Companies Act, 2013, sec. 2(62)

A One Person Company can be converted into a Private Limited Company, both voluntarily before meeting any of the above criteria or mandatorily after meeting the above mentioned criteria. Here there is no approval required for conversion of private company to One Person Company or vice-versa. In certain situation, OPC is mandatorily required to be converted itself into private or public company within 6 months⁹ such as (a) date of increase of its paid up capital as mentioned in rule 6(1) i.e. exceeding 50 lacs; or (b) last day of the relevant period during which its average annual turnover exceed 2 crores (c) application for conversion has to be made in form INC 6. Further this conversion of OPC should ensure that conversion shall happen in accordance with the provision of Section 18 of the Companies Act 2013. The OPC concept is very new in Indian entrepreneurship and set to organize the unorganized sector of proprietorship firms and other entities thus making them convenient to regulate and manage. There are many advantages of incorporation of OPC in terms of less paper work, one person can form a company without any additional shareholder and if the member is willing to add shareholders, all he needs to do is to modify the Memorandum of Association and file it before Registrar of Companies. It can be expected that this provision of OPC will have a bright future and it will be embraced as a very successful business concept.

B. ASSOCIATE COMPANY

The Companies Act 2013 defines an ‘associate’ as a company in which that other company has a ‘significant influence’, but which is not a subsidiary company of the company having such influence and includes a joint venture company. ‘Significant influence’ means control of at least twenty percent of total share capital, or of business decisions under an agreement.¹⁰

C. SMALL COMPANY

Section 2 (85) of the CA 2013 introduced the concept of ‘Small companies’ in India. It is not a public company, holding company or a subsidiary company -

- (i) paid-up share capital of which does not exceed fifty lakh rupees or such

⁹ Companies (Incorporation) Rules, 2014, Rule 6 (2)

¹⁰ See Companies Act, 2013, sec. 2 (6)

higher amount as may be prescribed which shall not be more than five crore rupees; or

- (ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees: Provided that nothing in this Section shall apply to-
- a holding company or a subsidiary company;
 - a company registered under Section 8; or
 - a company or body corporate governed by any special Act.¹¹

D. RELATED PARTY

The definition on Related Party is introduced for the first-time under *Section 2 (76)* of the CA 2013. The following parties are the related party according to CA 2013; a director, a manager, Key managerial personnel (KMP), KMP of the holding company, Directors (other than independent directors) of the holding company, Holding company, Subsidiary, Associate, Fellow subsidiary i.e. subsidiaries of the holding company. The scope of related party transaction widens with the transaction of immovable properties and leasing of property under related party transaction, along with purchase or sale of goods or supply of services and subscription of any shares or debentures of the company.

This provision in Companies Act 2013 has shown a shift from a ‘control-based regime’ to ‘disclosure-based regime’. This provision gives the board of directors, shareholders and investors a clear idea on all related party transactions inside the company. Under this clause, no company shall enter into any contract or agreement with related party without the consent of the board of directors. In addition to that, all transaction which exceeds a certain prescribed threshold limit requires prior approval of the company in a general meeting by a special resolution.

E. KEY MANAGERIAL PERSONNEL

Section 2 (51) of the Companies Act 2013 deals with “Key managerial

¹¹ See Companies Act 2013, sec. 2 (85)

personnel”, which includes (i) the Chief Executive Officer¹² or the managing director¹³ or the manager;¹⁴(ii) the company secretary;¹⁵(iii) the whole-time director;¹⁶(iv) the Chief Financial Officer;¹⁷ and (v) such other officer as may be prescribed¹⁸. Further the *Section 203*¹⁹ states about the Appointment of Whole-time Key Managerial Personnel (KMP), in respect of certain class of companies to be prescribed by Central Government to ensure good corporate governance and regulation. In addition to this as per the *section 2 (51)* of the Companies Act 2013, Company Secretary is also counted as key managerial personnel.

¹² Companies Act 2013, sec. 2 (18): “*Chief Executive Officer means an officer of a company, who has been designated as such by it.*”

¹³ Companies Act 2013, sec. 2 (54): “*managing director means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called.*”

¹⁴ Companies Act 2013, sec. 2 (53) “*manager means an individual who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, whether under a contract of service or not;*”

¹⁵ Companies Act 2013, sec. 2 (24) “*company secretary or “secretary means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 who is appointed by a company to perform the functions of a company secretary under this Act”*

¹⁶ Companies Act 2013, sec. 2 (94) “*whole-time director includes a director in the whole-time employment of the company”*

¹⁷ Companies Act 2013, sec. 2 (19) “*Chief Financial Officer means a person appointed as the Chief Financial Officer of a company”*

¹⁸ This gives the power to the legislature to include some other personnel also within the definition of Key Managerial Personnel as may be deemed fit by them from time to time. As of now, no further prescription has been made pursuant to point number (v) and therefore, as on date, the definition is confined to the six personnel mentioned above.

See generally S. Dhanpal, *Key Managerial Personnel under Companies Act, 2013*, TAXGURU,

available at <http://taxguru.in/company-law/key-managerial-personnel-companies-act-2013.html#sthash.DugH9EWq.dpuf> (last visited Feb. 02, 2016)

¹⁹ As per Companies Act, 2013, sec. 203 read with the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014; the following class of Companies, namely Every listed company, and Every other public company having paid up share capital of Rs. 10 Crores or more shall have the following whole-time key managerial personnel,- (i) Managing Director, or Chief Executive Officer or manager and in their absence, a whole-time director; (ii) Company secretary; and(iii) Chief Financial Officer.

The CA 2013 states that an individual shall not be appointed or reappointed as the chairperson/MD/CEO of the company at the same time, unless the articles of such a company provide otherwise. Furthermore,

- (iii) the appointment of whole-time key managerial personnel should be done in the Board meeting and by way of passing a Board resolution which should contain the terms and conditions of the appointment including the remuneration of such personnel.
- (iv) by the whole-time KMP post vacancy, the vacancy shall be filled-up by the Board of directors at a Board meeting within six months from the date of such vacancy.
- (v) Whole-time KMP can't hold office in more than one company except in its subsidiary company. However, the approval of the Board of Directors is required for KMP to hold positions in other company.

No doubt the Companies Act 2013 has taken very strict provisions by imposing certain rules, such as every listed company has to maintain disclosure report relating to KMP and the appointment or any changes of key managerial personnel. This provision helps the government to get proper information and records about the respective company's internal management and control.

F. CORPORATE SOCIAL RESPONSIBILITY (CSR)

There was no provision of CSR under Companies Act 1956, where as in the 2013 Act, deals with CSR under *Section 135*. As per this provision, a company making profits above a specified amount has to spend on CSR related activities. Companies with net worth of Rs. 500 crore or more, turnover of 1000 crore or net profit of Rs. 5 crore, shall spend at least 2 percentage of the average net profits during every financial year on CSR.²⁰

G. DIRECTORSHIP

Woman Director: According to Companies Act 1956, the maximum number of directorship is 15. Whereas, as per Companies Act 2013, maximum number of directorship is 15, out of which 10 can be in public companies but with the

²⁰ See Companies Act, 2013, sec. 135

special resolution more directors can be appointed. Similarly, in the old Act there was no mandatory provision for woman director, whereas, according to the Companies Act 2013 now at least one woman director is compulsory in every board.

Independent Director (IDs): The 2013 Act, under *Section 149*, introduced the concept of Independent Directors (IDs). It states that all listed companies must have at least one-third of the board as ID and the term of the IDs as five consecutive years. The Act also prescribes detailed qualifications for the appointment of an ID, such as independent director to be a person of integrity, relevant expertise and experience. About the duties of the IDs, the Act includes professional conduct for IDs by prescribing facilitative roles, such as offering independent judgment on issues of strategy, performance and key appointments, and taking an objective view on performance evaluation of the board. This Act empowers the independence directors because of greater accountability and transparency in the company.²¹

H. OTHER CHANGES

Prohibition on issue of shares at discount: The Companies Act 1956 dealt with powers to issue shares at a discount, whereas the 2013 Act provides that companies cannot issue shares at discount except sweat equity shares subject to fulfillment of certain conditions.²²

Prohibition on acceptance of deposits from public: The Companies Act 1956 stated that without issuing advertisement deposits cannot be invite,²³ whereas Companies Act 2013 totally prohibits the acceptance of deposits from public.²⁴

Financial Year: According to the Companies Act 1956 companies were allowed to choose freely its financial year, however it cannot exceed 15 months, whereas the new Act said that the financial year shall be from April 1st to March 31st for all companies.

²¹ See Companies Act, 2013, sec. 149

²² See Companies Act, 2013, sec. 53

²³ See Companies Act, 1956, sec. 58A

²⁴ See Companies Act, 2013, sec. 73.

Special Courts: In the Companies Act 1956, there was no provision on establishment of special courts, whereas the 2013 Act deals with speedy results for offences the concept of special courts has been introduced in new Act.²⁵

Class Action Suits: Companies Act 2013 has also introduced the concept of class action suits under *Section 245*, especially after the occurrence of Satyam fraud. A class action suit can be filed against the company, any of its directors, auditor, including audit firm and expert or advisor or consultant or any other person. Section 245(1) thus gives the right to the members/depositors to file an application to the Tribunal “if they are of the opinion that the management or conducts of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors...”

III. STRINGENT FRAUD PROVISIONS: AN ANALYSIS

After liberalization, there has been a rapid growth in trade and business transactions among the nations. At the same time, the scope of business transactions has improved due to digital technology. With these developments, risk factors like security threats, data theft and the failure of internal management & financial loss has also increased, thereby making many corporates revisit their corporate governance standards and anti-fraud measures. Now, corporates have started focusing on the discipline of governance, risk control and compliance mechanism to monitor their activities. Simultaneously, the CA 2013 imposes certain responsibility under certain provisions for better governance and to control fraud.

A. TYPES OF FRAUD

There are several types of corporate fraud that have been seen in current corporate culture. This is not only limited to theft of assets and an attempt to conceal it. Recently, the scope of fraud is vast and its root has spread to each branch of the corporate system. Following are the types of fraud which seen in

²⁵ See Companies Act, 2013, sec. 435

corporations- corruption and bribery, investment fraud, misappropriation of assets, money laundering, payroll fraud - ghost employees advance fee frauds, bogus invoices, contract procurement, computer hacking of information or property, conflict of interest, counterfeiting, forgery, credit card fraud, false accounting-manipulation of accounts, shares, accounting records, fraudulent bankruptcy-exploitation of cross-border corporate structures, financial statement fraud, fraud risk analysis, Internet online scams-auctions, credit card purchases and misuse of accounts etc.

On the basis of some recent reports and studies²⁶, the ‘corporate frauds, corruption and bribery’, stand on the top place while ‘cyber insecurity and information’ on the second place and others like ‘crime’, ‘Intellectual Property’, ‘terrorism and Insurgency’ also come one after others. In addition to this ‘Strikes and Closures’, ‘Money Laundering’, ‘Internal Reporting’, ‘Workplace Violence and Sexual Harassment’ are other major issues and risks for corporates to maintain their standards in front of stakeholders and international spheres. However, recent studies and experts view that the growing corporate frauds may hamper the economy and the growth cycle of the country, and focus should be on proper precautions. For instance, in a recent World Bank report on ‘ease of doing business’,²⁷ India stands at the 142 among the group of 189 countries.

B. FRAUD BY WHOM

In most of the fraud cases, it is observed and proved that the inside staff and senior management are the main persons who are responsible for fraud. As these persons are directly involved in the diverting of money by opening bank accounts, often in cooperative banks, or by raising false invoices etc. For

²⁶ See generally, PINKERTON AND FEDERATION OF INDIAN CHAMBERS OF COMMERCE AND INDUSTRY, Ravinder Paliwal, Sumeet Gupta, et al, *India Risk Survey 2015*, available at <http://www.ficci.com/SEDocument/20328/India-Risk-Survey-2015.pdf>. (last visited Jan. 31, 2016); KPMG, Rohit Mahajan & Dinesh Anand, *India Fraud Survey 2012*, , available at <https://www.kpmg.com/FR/fr/IssuesAndInsights/ArticlesPublications/Documents/India-Fraud-Survey-2012.pdf> (last visited Jan. 31, 2016)

²⁷ WORLD BANK GROUP, *Doing Business 2015-Going Beyond Efficiency*, 2015 , available at <http://www.doingbusiness.org/reports/global-reports/doing-business-2015> (last visited Jan. 31, 2016)

instance, in the internal fraud case of Wipro 2009²⁸, an employee had been transferring money ranging from one lakh to one crore from Wipro's bank accounts to his personal account during several transactions over a period of three years. According to Deloitte, long serving employees who are familiar with the weakness in the process and others senior persons like CEO and CFO, top-level, mid-level and lower level management, auditor, board of directors, IT department, and operational management are persons who involved in frauds, as they monitored different disciplines inside the company.

C. PENAL PROVISIONS

The Companies Act 2013 focused on personal liability than professional liability, if a company contravenes fraud provisions. Section 447 of Companies Act 2013 states:

Any person who is found guilty of fraud shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud but which may extend to three times the amount involved in the fraud.

In addition to this if the fraud involves public interest; the term of imprisonment shall not be less than three years.²⁹

Furthermore the 2013 Act also provides punishment for fraud for directors, key managerial personnel, auditors and other officers & management of the company in different sections of the Act such as; u/s 7(5), 7(6), 8(11), 34, 36, 38(1), 46(5), 56(7), 66(10), 75, 140(5), 206(4), 213, 229, 251(1), 266(1), 339(3), 448 etc.³⁰ and these are cognizable offences and a person accused of any such

²⁸ Tina Edwin, *Corporate fraud: Most common threats and how it's done*, THE ECONOMICS TIMES, May 27, 2012, available at http://articles.economictimes.indiatimes.com/2012-05-27/news/31878003_1_corporate-fraud-dispute-services-neeta-potnis. (last visited Jan. 31, 2016)

²⁹ See Companies Act, 2013, sec. 447.

³⁰ See *Companies Act, 2013: Fraud and Fraud Reporting*, available at <http://taxguru.in/company-law/companies-act-2013-fraud-fraud-reporting.html> (last visited Jan. 31, 2016)

offence under these sections shall not be released on bail or bond, unless subject to the exceptions provided u/s 212(6) of the Act. The relevant provisions are as follows:

Section 7 (5): A person who furnishing false information or suppressing material fact in documents or declaration filed for incorporation of a company.

Section 8: Affairs of the company conducted fraudulently by any officers.

Section 34: Every person who authorizes the issue of prospectus.

Section 36 (1): Any person who fraudulently induces persons to invest, making false promises, forecasts or statements.

Section 38: Any person who indulged in personation for acquisition of securities, or making multiple applications for acquiring securities.

Section 46 (5) & 56 (7): Every officer who tries to issue duplicate certificate of shares and transfer shares with intend to defraud.

Section 75 (1): Every officer of the company who fails to repay deposits/ interest.

Section 140 (5): Auditor acting in fraudulent manner or in fraud by or in relation to a company.

Section 206 (4): Business being carried out for fraudulent or unlawful purpose or not in compliance with the provisions of the Act or if the grievances of investors are not being addressed by every officer in the company.

Section 213: Business of the company being carried on with intent to defraud creditors, members or any other person or fraudulent or unlawful person or any person concerned in the formation of the company or management of its affairs have in connection with been guilty of fraud.

Section 229: Any person who furnishing false statement, mutilation, destruction of documents, falsification of documents during the course of inspection/inquiry/investigation.

Section 251: Application is made for removal of name from register with the object of evading liabilities or deceiving or defrauding the creditors.

Section 226: Any person who found guilty during its employment for any misfeasance, malfeasance or non-feasance in relation to the sick company.

Section 448: A person who makes a false statement or omits a material fact in any return, report, certificate, financial statement, prospectus of any provisions of the Act.

D. ACTIONS AGAINST FRAUD

Fraud Reporting: The Companies Act 2013, under *section 139, 148 and 204* conferred certain responsibility on auditor, cost auditor and secretarial auditor to report to the board of directors and Central Government about the fraud in addition to their existing responsibilities. *Section 143(12) to 143(15)* of the Act contains provisions relating to reporting of fraud. *Section 143(12)* of the Act provides that if an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he/she shall immediately report the matter to the Central Government within such time and in such manner as may be prescribed.³¹

Anti-Fraud Mechanism Steps: Every organization needs to establish an anti-fraud mechanism to monitor all kinds of activities which may lead to fraud. A study suggested that the following are main strategy that a corporate should adopt to stop fraud; these are prevention, detection deterrence and response.³²

³¹ Company (Incorporation) Rules, 2014, Rule 13(1): *For the purpose of sub-section 12 of Section 143, in case the auditor has sufficient reason to believe that an offence involving fraud, is being or has been committed against the company by officers or employees of the company, he shall report the matter to the Central Government immediately but not later than 60 days of his knowledge and after following the procedure indicated herein below: (a) First Fraud Report to Board/Audit Committee; (b) Final Fraud Report to Central Government on receipt of First Fraud Report; (c) Final Fraud Report to Central Government on failure of receipt of First Fraud Report; (d) Authority and Mode/Format of dispatching Final Fraud Report to Central Government. See also Rule 13 (2), (3), (4), (5).*

³² CHARTERED INSTITUTE OF MANAGEMENT AND ACCOUNTANTS, UK, *Corporate Fraud*, Topic Gateway Series No 57, (May, 2009) available at http://www.cimaglobal.com/documents/importedddocuments/cid_tg_corporate_fraud_may_09.pdf (last visited Jan. 31, 2016)

Fraud Prevention: Many studies have stated that a strong internal control system and ethical culture are the most appropriate strategy for corporate to prevent corporate frauds. By making clear policy statements on business, providing fraud risk training and creating awareness among employees & senior managements, periodic assessment, aggressive role of auditor and a strong internal control system on all approvals, transactions control and division of responsibilities are the important remedies to stop fraud.

Fraud Detection: Corporate should adopt this important strategy to restrict fraud, as it's difficult for corporates to eliminate all kinds of fraud completely. However, by establishment of fraud alert mechanism and fraud warning system, corporates can manage to detect the fraud at early stage. For instance, by implementing a fraud alert mechanism, corporate will be able to detect inappropriate or unusual journal entries, missing approvals or authorization of signature, misplaced original documents and other internal mismanagement activities. Likewise, a fraud warning system also warns corporates about the risks relating to IT and data, risks to financial and business, wherever it find irregularities.

Good Governance: Good governance structure and practice is an essential part of corporate establishment and growth. It deals with internal control system to outside business plan. The following are the essential steps for better governance inside the company such as, Robust integrity and compliance risk management, Organization and culture, Risk assessment policies, Standard setting, Education and awareness, Management and control processes, Third-party due diligence, Monitoring, Auditing, Whistle-blowing and Speaking-up process, Reporting, Communication and improvement actions, Investigation, Remediation etc.

IV. QUASI-JUDICIAL AND REGULATORY MECHANISM

The Companies Act 2013 has changed several old provisions and introduced many new concepts for better governance. The basic idea behind these new concepts and provisions not only seeks to established better corporate governance but also to watch like an eagle to protect against corporate frauds.

The Act has given more power to old institutions and established few new institutions for better result.

A. NATIONAL COMPANY LAW TRIBUNAL (NCLT) & NATIONAL COMPANY LAW APPELLATE TRIBUNAL (NCLAT)

One of the major changes adopted by the Companies Act 2013, is the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT), in place of Company Law Board (CLB). This new tribunal consists of both judicial members and technical members. However, the President will be the head of the Tribunal, while the Chairman will be the head of the Appellate Tribunal. According to Companies Act 2013, to become a judicial member at NCLT, an individual is or should have been a High Court Judge or District Judge for at least five years or with a minimum of ten years of experience as an advocate of a court. Similarly, to become a technical member, an individual is or should have at least 15 years of experience in chartered accountants or cost accounts or company secretary. However, the process of formation of the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) has only been initiated after the recent green signal given by the Supreme Court of India.

Possible Impact of NCLT & NCLAT: A sound mechanism is important to regulate any organization. It can be said that with the establishment of NCLT & NCLTA the government has taken a welcome step for a positive impact on corporate restructuring such as mergers and acquisitions, capital restructuring, revival of sick companies and dispute related matters. In addition to that looking at the tremendous growth and development in corporate sectors mechanisms like NCLT and NCLAT are essential. The objectives of this mechanism is to handle the disputes that arise and to help to reduce the pendency of winding-up cases, shortening the winding-up process and avoiding multiplicity and several levels of litigation before high courts, the Company Law Board and the Board for Industrial and Financial Reconstruction. This Tribunal will also cover merger and acquisition disputes and the dispute arising while converting public company to private company. There is a plan to set up 12 to 13 NCLT benches all over India to speed up corporate dispute redressal. However, the final

decision is yet to be taken. So it will not be wrong if we say that it's a right decision taken by the government and policy makers to smoothen the governance system. However, we have to wait and watch for further developments to set up the tribunal.

B. NATIONAL FINANCIAL REPORTING AUTHORITY (NFRA)

The Companies Act 2013, under section 132, introduced a new regulatory authority known as National Financial Reporting Authority (NFRA) in place of National Advisory Committee on Accounting Standards (NACAS). Its basic objective is to advice, enforce and monitor the compliance of accounting and auditing standards as well as to act as a regulatory body for accountancy profession. The NFRA is a quasi-judicial body, which consists of a Chairman and such other prescribed members not exceeding 15.³³ The head office of the NFRA shall be at New Delhi and it may meet at such places in India as it deems fit. The NFRA consist of three committees- Accounting Standards Committee, Auditing Standards Committee and Enforcement Committee.

Possible impact on Corporate Governance: This set up has to regulate standards of all types of reporting; financial as well as non-financial matters. This authority has the power to recommend to the Central Government on the formulation and lying down of accounting and auditing policies and standards

³³ 1) A Chairperson who is an eminent person and has expertise in accounting, auditing, finance or law.

2) A maximum of 15 members comprising of

- a) Member- Accounting,
- b) Member- Auditing and
- c) Member- Enforcement.

3) A representative of the Ministry of Corporate Affairs who is not below the rank of Joint Secretary or equivalent.

4) A representative of RBI, nominated by it and who is a member of RBI Board.

5) A representative of SEBI who is its Chairman or whole-time member and is nominated by SEBI.

6) A retired Chief Justice of a High Court or a person who had been a High Court Judge for not less than 5 years to be nominated by the central government.

7) President of the Institute of Chartered Accountants of India (ICAI).

The Chairperson and other members who are in full time employment of NFRA cannot be associated with any audit firm including related consultancy firms during the course of their employment and two years after the expiry of such appointment.

for adoption by companies and their auditors, monitor and enforce the compliance with accounting standards etc. Further, the Authority has also been given the power to investigate *suo moto* or a reference made to it by the Central Government by bodies corporate or persons, in matters of professional or other misconduct committed Corporate Accountant and Corporate Secretary firms. By doing this, it will create fear among the firms and corporates to be honest and transparent in financial and non-financial matters, which will lead to a good governance atmosphere inside the company.

C. INVESTOR AND EDUCATION PROTECTION FUND

Under *Section 125 (5)* of the Companies Act 2013, the Investor Education and Protection Fund (IEPF) Authority was established. An Investor Education and Protection Fund³⁴ to educate and protect interest of investors, constituted and notified under *section 125(5)* of the Companies Act 2013 and managed by the Authority was also established³⁵. The head office of the IEPF Authority shall be at New Delhi and offices may be established at other places in India with the prior approval of Central Government. Corporate Affairs Ministry Secretary would be the ex-officio Chairman of the IEPF Authority. Besides, there would be nominees from SEBI and Reserve Bank of India (RBI), an eminent legal expert and three members having at least 15 years of experience in investor education and protection related activities. The CEO would be on the level of Senior Administrative Grade (SAG) in Indian Company Law Services or similar central government Service and shall be responsible for day-to-day operations and management of the authority.

Possible impact on Corporate Governance: Under Investor Education and Protection Fund, the unclaimed dividend, refund of application money, matured company deposits and debentures, and interest on them automatically moved to it, if not claimed within seven years, the new company has given a right to investors to claim the amount after the expiry of seven years also by establishing

³⁴ Companies Act, 2013, sec. 125(1)

³⁵ See *Draft Rules Under The Companies Act 2013, Investor Education and Protection Fund Authority Rules, 2013*, chap. I and chap. II, available at http://www.onepersoncompany.in/uploads/6/9/1/2/6912590/final_iepf_authority_establishment_rules_24_10_2013-1.pdf (last visited Jan. 31, 2016)

their claim. As a result, there would be clarity and transparency within the company to maintain account matters.

D. SERIOUS FRAUD INVESTIGATION OFFICE

The Ministry of Corporate Affairs under resolution dated 2003, established the Serious Fraud Investigation Office (SFIO). Under Section 211 of the CA 2013, deals with SFIO, the Government has also granted statutory status to SFIO to investigate frauds relating to companies. The Government has also empowered the SFIO to initiate investigation with additional powers from other regulatory authorities such as income tax authorities, the state government, etc. Additionally, the Director of the SFIO also has the power to arrest people if he has reason to believe that such persons are guilty of certain offences, including fraud. Another important feature is that no other investigation agency is allowed to initiate investigation if the Central Government handed over the case to SFIO.

Possible impact on Corporate Governance: According to Ministry of Corporate Affairs, in the last three years, 64 cases were referred to SFIO, out of which the SFIO completed 55 cases. Now, Ministry of Corporate Affairs has developed a “Fraud Prediction Model” in SFIO for generating early warning signals for prediction of fraud and malfeasance in the corporate sector. The Ministry also set up a High-powered Steering Committee with technical experts in various fields to design a comprehensive framework for a fraud prediction model. The Director of the SFIO, has got the power to arrest persons if he has reason to believe that such persons are guilty of certain offences, including fraud. The investigator of the SFIO, now has certain powers vested in a civil court under the Code of Civil Procedure with respect to discovery and production of books of accounts and other documents, the inspection of books, registers and other documents and the summoning of and enforcing of attendance of persons. Some of the major scandals investigated by SFIO are Satyam Scandal, Reebok and now Saradha Group scam, where SFIO proved its efficiency. The recent fraud in Saradha group is also an example that shows the

need and importance for effective investigation and prosecution of corporate fraud.³⁶

V. CONCLUSION

All the companies are subject to fraud risks, where they may face the downfall of entire companies, significant legal costs, massive investment losses, incarceration of key individuals, and erosion of confidence in capital markets. Reacting to the recent corporate frauds, CA 2013 took all possible steps to prevent such frauds; these steps can be explained as “no fraud tolerance” attitude. The government with the introduction of the CA 2013, reforms many corporate governance norms by introducing new provisions to maintain transparency and accountability inside the company.

Present investment plans in India and the demands of greater transparency by foreign investors, creates a need for corporate’s to adopt and follow good governance norms internally as well as to comply with Companies Act 2013. The government has taken initiatives by amending different provisions to provide good corporate laws to regulate corporate activities. The Companies Act 2013 introduced many significant changes in the provisions related to governance, e-management, compliance and enforcement, disclosure norms, auditors and mergers and acquisitions. Also, new concepts such as one-person company, small companies, dormant company, class action suits, and corporate social responsibility have been included. In addition to that major initiatives have been taken to set up SEBI courts, making SFIO more powerful, and establishing other regulatory bodies to monitor governance and stop corporate frauds. In the coming few years, one would expect to see more active participation from board of directors. It is only when the entire board functions effectively there would be good corporate governance. This would benefit minority as well as majority shareholders in its long term. This would enable companies to maintain a good corporate image in the market.

³⁶ Bhargavi T.M, *Giving teeth to Serious Fraud Office*, THE HINDU, Jun. 13, 2013, available at <http://www.thehindu.com/opinion/op-ed/giving-teeth-to-the-serious-fraud-office/article4807786.ece> (last visited Jan. 10, 2016)

THE PROBLEM OF SEXUAL HARASSMENT OF WOMEN AT WORKPLACE: AN IMPEDIMENT TO WOMEN'S SELF REALIZATION

*Samia Khan**

ABSTRACT

This paper focuses on the problem of sexual harassment of women at workplace. It describes the concept of sexual harassment and its possible causes. Chief amongst them is the patriarchal setup that refuses to view women as an equal entity. The debilitating effects on the victim's psyche are also highlighted. Possible solutions, short-term and long-term, are also explored. The chief tools to combat the problem are education and sensitization of men as well as women. It is also argued that sexual harassment, if not checked, has the ability to undermine years of success achieved in struggle for women's rights besides decreasing workforce productivity.

I. INTRODUCTION

Women constitute about half of our nation's invaluable human resource. Therefore, their participation in nation building is of vital importance. For this, it has to be recognized that they are equal to men in capabilities and aspirations and that they have as much claim to a dignified life, within the home and outside, as their male counterparts. At the global level, the Universal Declaration of Human Rights and a host of other international instruments affirm that all human beings are equal in dignity and rights without distinction of any kind, including distinction based on sex. Yet, world over, recognition of women as equal human beings and their amelioration has been a continuing struggle requiring considerable time and effort. Within India, Constitutional guarantees

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and endless legislative interventions have not yet ensured total equality. Substantial discriminations exist against women in all spheres including in matters of access to health care, education, training and employment opportunities.¹

A troubling aspect in this struggle for equality is that violence against women has not abated in spite of several efforts. This violence can assume several forms and can vary in magnitude. It is representative of the fact that men, who directly or indirectly perpetuate this violence, have not been able to accept women in the myriad of roles that females have adopted in the modern world. This violence against women, whether it is mental or physical, constitutes a gross violation of their fundamental rights, as guaranteed in the Constitution of India, and is a major impediment in achieving gender equality. Examples of violence against women are rape, sexual assault, domestic violence, sexual harassment at workplace and indecent representation of women. More subtle ways of assaulting the dignity and status of women are their depressingly sick depiction in porn and their objectification in the world of mass media and advertising. A common thread which runs through all these is that women are subjugated because men feel that they can be and women often fail to raise their voice against such blatant discrimination.

Among these forms of violent and diabolic conduct against women, sexual harassment at workplace is the focus of this paper. Since the time women joined the workforce, generations of women have suffered due to unwanted sexual attention and offensive “gender-directed” behaviour at work. They are targeted because of their “gender” and this emanates in part from women’s subordinate status in society.² Interestingly, the ugly and widespread phenomenon of rape and sexual assault are the more commonly recognized forms of violence against

¹ Bharat Bhushan and Sunanda Padhy, *Sexual Harassment of Women at the Workplace: A Socio-Legal Study* 64 THE INDIAN J. OF SOCIAL WORK 506 (2003).

² NATIONAL COMMISSION FOR WOMEN (NCW), *Do Not Fear-Do Not Bear-Do Not Admit-Oppose Sexual Harassment at Workplace* 1 (2012).

women based on gender, while the more subtle but less recognized issue of Sexual Harassment can prove to be more repressive and intimidating.³

Today sexual harassment at workplace is a serious problem which is assuming gigantic proportions with increasing participation of women in the workforce. Sexual harassment not only hurts the physical body but also rips off the soul of women.⁴ The experience of sexual harassment has significant direct and indirect effects on the lives of women⁵ and affects their dignity and self-respect.⁶ Every woman irrespective of status or stage of her life is vulnerable to this phenomenon.⁷ The issue has become ubiquitous across the world, transgressing all limits and borders.

In view of the aforesaid, this article attempts to explain the concept of sexual harassment at workplace and highlights the causes and effects of the problem. It also highlights the various judicial pronouncements on the subject, both Indian and foreign. Certain possible solutions to combat the problem are also provided.

II. SEXUAL HARASSMENT AT WORKPLACE: WHAT IS IT & WHY IT MATTERS?

Sexual harassment at workplace is a very real and dangerous problem that will spiral out of control if women, who suffer the most because of it, are not made aware of the same and remain in the dark about their rights. Before dealing with the origin, definition and other aspects of the concept, we must look at the magnitude of the problem.

Sexual Harassment is a universal phenomenon. For example, as per an ILO study on violence in workplaces, it was reported that in Netherlands, 58% of the women who were questioned had faced sexual harassment, 41% in Norway,

³ RITU GUPTA, *SEXUAL HARASSMENT AT WORKPLACE* 1 (2014).

⁴ Shashi Bala, *Protection of Women from Sexual Harassment at Workplace* 38(4) INDIAN BAR REV. 161 (2011).

⁵ STACY L. MALLICOAT, *WOMEN AND CRIME A TEXT/READER* 199 (2012).

⁶ NCW, *supra* note 2.

⁷ Especially when according to the 2001 Census data the work participation rate of women is 25.6 per cent.

73% in UK and 48% in Spain. The study also suggested that sexual harassment as part of work place violence is no more an extraordinary phenomenon but a matter of daily incidence and occurrences.⁸

In a survey conducted in 23 countries, it was revealed that 15-30 percent of working women had been subjected to Sexual Harassment which varied from explicit demands for sexual intercourse to offensive remarks.⁹ Moreover, it is also reported that in India, a woman is sexually harassed every 12 minutes.¹⁰

Recently, in a written reply in Lok Sabha, Women and Child Development Minister Maneka Gandhi said that 57 cases were reported at office premises and 469 cases were registered at other places related to work in 2014.¹¹

It was also reported that the number of Sexual Harassment complaints in the National Commission for Women had doubled in two years, from 167 in 2012 to 336 in 2014.¹²

More than a hundred cases of sexual harassment have been reported to internal complaints committee of universities and educational institutes in the national capital in the last two years. Out of the total 101 complaints received from 23 educational institutes and universities since 2013, only six remain unresolved, said a report released by the Delhi Commission for Women (DCW).¹³ Police data

⁸ Hunny Matiyani, *Sexual Harassment at Workplaces: A Menace in the Society* 27 THE INDIAN J. OF CRIMINOLOGY & CRIMINALISTICS 42 (2006).

⁹ MINISTRY OF LABOUR-INVALIDS AND SOCIAL AFFAIRS, ILO, *Sexual Harassment at the Workplace in Vietnam: An Overview of the Legal Framework* (2013).

¹⁰ D.K. Srivastava, *Progress of Sexual Harassment Law in India, China and Hong Kong: Prognosis for further reform* 51 HAR'D INTL. L. J. 172 (2010).

¹¹ 526 cases of sexual harassment at workplace in 2014: Maneka Gandhi, THE INDIAN EXPRESS, Aug 8, 2015, available at <http://indianexpress.com/article/india/india-others/526-cases-of-sexual-harassment-at-workplace-in-2014-maneka-gandhi/> (last visited Jan. 31, 2016)

¹² Himanshi Dhawan, *Sexual harassment complaints with NCW double in 2 yrs*, THE TIMES OF INDIA, Dec 20, 2014, available at <http://timesofindia.indiatimes.com/india/Sexual-harassment-complaints-with-NCW-double-in-2-yrs/articleshow/45579951.cms> (last visited Jan. 31, 2016)

¹³ Heena Kausar, *Delhi varsities record 101 cases of harassment*, HINDUSTAN TIMES, Nov 26, 2015, available at <http://www.hindustantimes.com/education/delhi-varsities-record-101-cases-of-harassment/story-FtyWnsS4uPNfBWx50BWQEP.html> (last visited Jan. 30, 2016)

revealed that crimes against women in the capital have gone up by 20 per cent this year as compared to 2014. With respect to cases of harassment there were 1,282 cases in 2014 against 879 in the previous year.¹⁴

Apart from these official statistics various disturbing news regarding the rising incidence as well as reportage of sexual harassment cases are on the rise. Times of India reported that there were about sixty cases of sexual harassment against Delhi Police itself-a force that is supposed to work for, *inter-alia*, safety and security of women in the city.¹⁵

A female research analyst, who had accused former TERI Director General RK Pachauri of sexual harassment, had resigned from the institute. In her resignation letter, the complainant said that despite the inquiry committee finding Pachauri guilty of misconduct, the organisation had “failed” to do the “bare minimum” to ensure that she was not impacted.¹⁶

Three faculty members at the Satyajit Rai Film & Television Institute in Kolkata have been put under suspension following complaints of sexual harassment against them. Some girls alleged that these faculty members also passed comments of sexual nature.¹⁷

A young female lawyer on her blog recently accused a retired Supreme Court Judge (Justice A.K. Ganguly) of sexually harassing her while she was interning with him in Delhi in 2012. The Chief Justice of India took immediate action and

¹⁴ Somreet Bhattacharya, *20% more crimes against women in 2015*, THE TIMES OF INDIA, Dec 15, 2015, available at <http://timesofindia.indiatimes.com/city/delhi/20-more-crimes-against-women-in-2015/articleshow/50179565.cms> (last visited Jan. 30, 2016)

¹⁵ *Over 60 Sexual harassment cases against Delhi Police*, THE TIMES OF INDIA, Apr 23, 2014, available at <http://timesofindia.indiatimes.com/city/delhi/Over-60-sexual-harassment-cases-against-Delhi-Police-personnel/articleshow/34116610.cms> (last visited Jan. 29, 2016)

¹⁶ TNN, *Sexual Harassment case: Complainant against RK Pachauri quits TERI*, THE TIMES OF INDIA, Nov 4, 2015, available at <http://timesofindia.indiatimes.com/india/Sexual-harassment-case-Complainant-against-RK-Pachauri-quits-Teri/articleshow/49654240.cms> (last visited Jan. 31, 2016)

¹⁷ Priyanka Dasgupta, *3 Satyajit film institute teachers suspended for sexual harassment*, THE TIMES OF INDIA, Dec 13, 2015, available at <http://timesofindia.indiatimes.com/city/kolkata/3-SRFTI-teachers-suspended-for-sexually-harassing-girls/articleshow/50156658.cms> (last visited Jan. 30, 2016)

constituted a three- member Supreme Court panel to probe the charges. The panel submitted its report in which it indicted that in order to restore justice for “unwelcome behaviour” and “conduct of sexual nature” towards the woman intern, action under criminal law should be initiated against him.¹⁸

From the above instances it is made amply clear that the problem is widespread and of an urgent nature. It has to be addressed otherwise it will end up reversing years of hard work because of which women have dared to come out and work. We do not want half the human race to stop venturing out or working because we cannot provide a safe atmosphere to them. But before remedial action can be taken it is required to know what exactly is meant by sexual harassment? How did the term originate? What it implies and how does the law look at it?

III. ORIGIN OF THE CONCEPT AND IT'S MEANING

Although the concept of sexual harassment at the workplace may appear to be new, the origins of the phenomenon itself can be traced back to the Industrial Revolution, when women started joining the workforce. Writers have identified incidents of sexual harassment back in the 1830's when increasing number of women began working in the textile mills in New England.¹⁹

It has been suggested that the term “sexual harassment” was coined in 1974 at Cornell University. However, it was the controversy of the nomination of Clarence Thomas as Judge, Supreme Court of the United States that created national awareness about sexual harassment at the workplace. Anita Hill, a law professor at the University of Oklahoma, came forward with accusations that Thomas had sexually harassed her with inappropriate discussion of sexual acts and pornographic films after she rebuffed his invitations to date him.²⁰

The term sexual harassment ‘in a legal sense’ seems to have been first coined in the United States of America and subsequently ‘exported’ from there to other

¹⁸ GUPTA, *supra* note 3, at 67.

¹⁹ NCW, *supra* note 2, at 2.

²⁰ *Id.*

industrialised countries including Australia, Canada, New Zealand, Japan and a number of countries in Western Europe.²¹

We have already seen the phenomenon's rampant prevalence in society. Let us now understand what the term means.

The legal definition of the term varies from country to country. Broadly, it may be defined as "unwelcome sexual advances or verbal or physical conduct of a sexual nature, which has the purpose or effect of unreasonably interfering with the individual's work performance, or creating an intimidating, hostile, abusive or offensive working environment".²² The *UN Committee on the Elimination of Discrimination Against Women (CEDAW)*, 1992 in its Article 11(18) defines sexual harassment as:

"Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment."²³

In India, in the absence of any statutory definition of the term sexual harassment, it was left to the Supreme Court to do the needful. Relying on the International Conventions and norms, the Supreme Court defined the term

²¹ ILO, *Combating Sexual Harassment at Work*, 11 CONDITIONS OF WORK DIGEST 3 (1992) as cited in ALOK BHASIN, *LAW RELATING TO SEXUAL HARASSMENT AT WORK* 3 (2007).

²² SURINDER MEDIRATTA, *CRIMES AGAINST WOMEN AND THE LAW* 63 (2010).

²³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38)*, 1992, A/47/38, available at <http://www.refworld.org/docid/453882a422.html> (last visited on Jan 24, 2016).

sexual harassment for the first time in the year 1997 in *Vishaka v. State of Rajasthan*²⁴. The definition, similar to the one proposed by CEDAW, reads:

“Sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

- a) Physical contact or advances;
- b) A demand or request for sexual favours;
- c) Sexually coloured remarks;
- d) Showing pornography;
- e) Any other unwelcome physical, verbal or non-verbal conduct of sexual nature

Where any of these acts are committed in circumstances where-under the victim of such conduct has a reasonable apprehension that in relation to the victim’s employment or work, whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory, for instance, when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work-environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto”

The Indian Sexual Harassment Act²⁵ has also adopted this definition. The definition of sexual harassment in the 2013 Act can be fully understood by reading Section 2(n)²⁶ and Section 3(2)²⁷ together.

²⁴ (1997) 6 SCC 241.

²⁵ The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. The Act came into force on 9th December 2013, vide notification issued by the Central Government [S.O. 3606(e)]. On the same date, the Sexual

While the words “unwelcome sexually determined behaviour” are not explained in the definition of sexual harassment at workplace as defined in the 2013 Act, they are qualified by the phrase “directly or by implication” in clause 2 of the *Vishaka* guidelines as well as in Section 2(n) of the 2013 Act. It means ‘that conduct may constitute sexual harassment even if it comprises acts or words that, though innocent by themselves, have sexual overtones’. Experiences that a woman working in India may encounter are: comments about her fairness or other physical features, questions about whether she drinks or smokes, questions about whether she dates, men sitting or standing so close to her that there is or might be physical contact, men brushing aside her breasts while ostensibly reaching out for a pen or glass of water, or men unnecessarily touching her while emphasizing a point in conversation.²⁸

According to clause 2 of the *Vishaka* guidelines as well as the 2013 Act, attempted physical contact constitutes sexual harassment; it is not necessary to have actual physical contact. This is evinced by the phrase “physical contact and advances” in the guidelines and Section 2(n)(i). Furthermore, this position was taken by the Supreme Court in its reversal of the High Court’s ruling in *Apparel Export Promotion Council v. A.K. Chopra*. The High Court had found that there was no sexual harassment as the perpetrator had not managed to make any

Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 have also been notified.

²⁶ “sexual harassment includes any one or more of the following acts of behaviour (whether directly or by implication) namely:

physical contact and advances; or

a demand or request for sexual favours; or

making sexually coloured remarks; or

showing pornography; or

any other unwelcome physical, verbal or non-verbal conduct of sexual nature.”

²⁷ “The following circumstances, among other circumstances, if it occurs or is present in relation to or connected with any act or behaviour of sexual harassment may amount to sexual harassment:-

implied or explicit promise of preferential treatment in her employment; or

implied or explicit threat of detrimental treatment in her employment; or

implied or explicit threat about her present or future employment status; or

interferes with her work or creating an intimidating or offensive or hostile work environment for her; or

humiliating treatment likely to affect her health or safety.”

²⁸ INDIRA JAISING, *SEXUAL HARASSMENT AT WORKPLACE* 23 (2014).

physical contact with the complainant, he had merely “tried to molest her” by sitting too close and making suggestive comments. However, the Supreme Court held that even assuming that there had not been any physical contact, simply by making objectionable moves or overtures having sexual overtones, the accused person’s conduct had been rendered unlawful.²⁹

Additionally, clause 2 of the *Vishaka* guidelines prohibits “requests” for sexual favours, and is echoed in Section 3(2) of the 2013 Act. Thus, even if sexual favours are requested and not demanded aggressively or in a threatening manner, they may still constitute unlawful sexual harassment. Examples of this type of conduct include invitations to a hotel room when on a business trip, requests to meet outside the office, to get together to talk, or to be alone together, or repeated requests for a date.³⁰

Since the definition of Sexual Harassment in the *Vishaka* guidelines draws considerably from other jurisdictions and international instruments related to the subject, it will be worthwhile to turn once again to those sources so as to understand better the concept and constitutive elements as well as to grasp what instances can come within the ambit of sexual harassment at workplace and what cannot. For example, the Supreme Court of Canada defined Sexual Harassment at the workplace in the case of *Janzen v. Platy Enterprise, Ltd.*³¹ as follows:

“...sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.”³²

The Court further held that, conduct that constitutes Sexual Harassment varies from “overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender based insults and taunting, which may reasonably be perceived to create a

²⁹ *Id.*

³⁰ *Id.*

³¹ (1989) 1 SCR 1252.

³² *Id.* at 1284.

negative psychological and emotional work environment.”³³ The Court also quoted with approval from a book entitled *Sexual Harassment in the Workplace* by Arjun P. Aggarwal, the statement that:

“Sexual harassment is any sexually-oriented practice that endangers an individual’s continued employment, negatively affects his or her work performance, or undermines his or her sense of personal dignity.”³⁴

The Court also quoted with approval from a book entitled *The Secret Oppression: Sexual Harassment of Working Women* by Constance Backhouse and Leah Cohen, the following definition of Sexual Harassment:

“Sexual Harassment can manifest itself both physically and psychologically. In its milder forms it can involve verbal innuendo and inappropriate affectionate gestures. It can, however, escalate to extreme behaviour amounting to attempted rape and rape. Physically the recipient may be the victim of pinching, grabbing, hugging, patting, leering, brushing against, and touching. Psychological harassment can involve a relentless proposal of physical intimacy, beginning with subtle hints which may lead to overt requests for dates and sexual favours.”³⁵

Thus, sexual harassment is behaviour with a sexual connotation that is abusive, injurious and unwelcome. It places the victim in an atmosphere of intimidation, humiliation or hostility. It may be constituted by many as continuous or a single isolated act and the intention of the harasser has no relevance. Following illustrations have been given in existing literature as constituting sexual harassment,³⁶

- a) A sexual comment or sexually determined behavior such as.
- b) Leering at another’s body and/or sexually suggestive gesturing.

³³ *Id.* at 1277.

³⁴ ARJUN P. AGGARWAL, *SEXUAL HARASSMENT IN THE WORKPLACE* 1 (1987).

³⁵ CONSTANCE BACKHOUSE AND LEAH COHEN, *THE SECRET OPPRESSION: SEXUAL HARASSMENT OF WORKING WOMEN* 38 (1978).

³⁶ GUPTA, *supra* note 3, at 3.

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- c) Displaying sexually visual material such as pin ups, cartoons, graffiti, computer programmes, and catalogues of a sexual nature.
 - d) Repeatedly calling her up late at night with a request to have dinner with her with which she is not comfortable.
 - e) Making sweeping statements while delivering lecture on advertising, for example, women are the best models to sell a product; that body of the car should be sleek and sexy like a woman; soap has to be soft to touch and so on.
 - f) Any other verbal or non-verbal conduct sexual in nature.

Physical sexual contact is not a must as has been amply explained above. Harassment can be extremely subtle without proof or it may not even be visible to others. It depends on the context and circumstances of the conduct, the perception of the parties involved and the manner in which the words or gestures have been spoken or made. Verbal innuendos can be there and conduct seemingly affectionate can in fact be extremely unwelcome.

IV. SEXUALLY DETERMINED BEHAVIOUR: A CRUCIAL TEST OF HARASSMENT

The *Vishaka* guidelines define sexual harassment as including various types of unwelcome “sexually determined behaviour” while the 2013 Act refers to “conduct of sexual nature”. In some jurisdictions, the law has evolved from viewing sexual harassment at the workplace as a civil sexual offence to viewing it as a gender-based wrong.³⁷ This development extends the definition of sexual harassment law to include conduct that disadvantages a person at the workplace by being derogatory or offensive to their gender, even if the conduct does not have sexual overtones. For instance in *Harris v. Forklift Systems*,³⁸ the perpetrator made comments such as: “You’re a woman, what do you know”, “we need a man as the rental manager”, and “dumb ass woman.” In *Faragher v. Boca*

³⁷ JAISING, *supra* note 28, at 31.

³⁸ 510 US 17 (1993).

Raton,³⁹ supervisors stated that they would “never promote a woman to the rank of lieutenant.” In *Onacle v. Sunflower*,⁴⁰ the U.S. Supreme Court held that harassing conduct need not have sexual content or connotation or be motivated by sexual desire to constitute sexual harassment. Correspondingly, in *Rupan Deol Bajaj v. K.P.S. Gill*,⁴¹ the Supreme Court of India ruled that the alleged acts of the accused outraged the modesty of the female complainant because, “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.” The italicised words indicate that conduct need not have sexual content to be prohibited as offensive to women. The phrase “sexually determined behaviour” in the *Vishaka* guidelines as well as the phrase “conduct of sexual nature” in the 2013 Act must be interpreted to include not just behaviour that has sexual overtones or content, but also behaviour that is offensive or humiliating in a gender-based manner.

V. SEXUAL HARASSMENT: TYPES, POSSIBLE CAUSES AND EFFECTS

A. TYPES OF SEXUAL HARASSMENT

Sexual harassment has traditionally been divided into two well-known forms *Quid Pro Quo Harassment* which consists of sexual demands accompanied by the threat of adverse job consequences if the demands are refused and *Hostile Work Environment Harassment* which consists of conduct that renders the environment at the workplace offensive or derogatory to the victim because of her gender. Both types of Sexual Harassment at the workplace are incorporated in the definitions in Indian Law.⁴²

1. Quid Pro Quo

It refers to those situations where an employer or superior at work makes tangible job-related promises of promotion, higher pay, academic advancement

³⁹ 524 US 775 (1998).

⁴⁰ 523 US 75 (1998).

⁴¹ (1995) 6 SCC 194.

⁴² Under clause 2 of the *Vishaka* guidelines as well as under the 2013 Act.

etc. conditional upon obtaining sexual favours from employee or sub-ordinate.⁴³ The notion of Quid Pro Quo harassment has been accepted as part of the law in India since *Vishaka's* case, and today, it finds reflection in Section 3(2) of the 2013 Act. The key elements of quid pro quo sexual harassment are:

- i. a demand for a sexual favour; and
- ii. the threat of adverse job consequences if the demand is refused.

It is implicit in the second element that the perpetrator must be in a position to create adverse job consequences for the woman. Typically, such a person is in a position of authority over the victim. However, a *quid pro quo* sexual harassment situation may also exist with a colleague of the same rank, for example, when one has to do a team-task which requires co-operation which is promised in lieu of sexual favours or when the colleague is closer to the superiors and threatens to malign one's professional reputation. This kind of harassment can result in tangible or economic losses which can damage one's career. The U.S. Supreme Court provided examples of tangible consequences in *Burlington v. Ellerth*⁴⁴. It stated that hiring, firing, failing to promote, reassignment with significantly different responsibilities, a decision causing a significant change in benefits, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits or significantly diminished material responsibilities are all tangible consequences of rejecting sexual demands or resisting sexual harassment. It has been stated that in quid pro quo harassment cases, it is not necessary for the threat of adverse employment action to actually have been carried out. It is sufficient for the complainant to simply prove that such a threat was made.⁴⁵

⁴³ Intl. Women's Rights Action Watch Asia Pacific (IWRAW), *Sexual Harassment in the Workplace: Opportunities and Challenges for Legal Redress in Asia and the Pacific*, Occasional Papers Series No. 7 at 8.

⁴⁴ 524 US 742 (1998). In this case the complainant's supervisor was found to have made "repeated boorish and offensive remarks", some of which were accompanied by threats. This case also established that when a supervisor places obstacles in the way of the performance of an employee's duties, or denies or delays reasonable requests made by the employee in the course of carrying out her duties, in addition to making sexual comments, it amounts to sexual harassment.

⁴⁵ JAISING, *supra* note 28, at 17.

2. Hostile Work Environment

Sexual harassment also occurs when an individual experiences unwelcome sexual advances, requests for sexual favours or other verbal or physical conduct of a sexual nature where such conduct has the purpose or effect of unreasonably interfering with that individual's work performance or creating an intimidating, hostile or offensive working environment. This type of sexual harassment does not include a demand for an exchange of sex for a job benefit. It is the creation of an uncomfortable environment.⁴⁶

Though the phrase "hostile work environment" has not been defined by the Supreme Court in *Vishaka's* case, it now finds statutory reflection under Section 2(n) read with Section 3(2) of the 2013 Act. It is useful to examine hostile work environment cases in other common law countries. In *Meritor Savings Bank v. Vinson*⁴⁷, the U.S. Supreme Court undertook a detailed analysis of what constitutes hostile work environment. The Court quoted with approval the Federal Equal Employment Opportunity Guidelines ("EEO guidelines")⁴⁸, which state that sexual harassment is made out irrespective of "whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'" The Court declared that employees have "the right to work in an environment free from discriminatory intimidation, ridicule and insult" and that "one can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers..."⁴⁹

The Court of Appeal at Ontario, Canada in *Bannister v. General Motors of Canada Limited*⁵⁰, held that work environments where abuse and sexual innuendo flow freely are prohibited, as "no female should be called upon to

⁴⁶Gousia Latif, *Note on Nature, Meaning and Consequences of Sexual Harassment*, 16 KASHMIR UNIVERSITY L. REV. 283 (2009).

⁴⁷ 477 US 57 (1986).

⁴⁸ EEOC Guidelines on discrimination Because of Sex, 29 C.F.R. Section 1604.11(a)(3).

⁴⁹ 477 US 57 (1986). At 66.

⁵⁰ 40 O.R. (3d) 577 (1998).

defend her dignity or to resist or turn away from unwanted approaches or comments which are gender or sexually oriented.”

The U.S Supreme Court has identified specific examples of hostile environment behaviour in numerous cases, like in *Harris v. Forklit Systems*,⁵¹ the objectionable behaviour consisted of: insults based on gender, sexual innuendos regarding women’s clothing, throwing objects on the ground and asking female employees to pick them up, and asking female employees to get coins out of the male supervisor’s front pants pockets. The Court, in *Faragher v. Boca Raton*,⁵² found uninvited and offensive touching, lewd remarks and speaking of women in offensive terms to be unlawful. One of the supervisors in *Faragher* had stated that he would never promote a woman to the rank of lieutenant, and another had threatened the complainant, “date me or clean the toilets for a year”.

These two kinds of harassment are not isolated and may occur together. One may even lead to the other. The ingredients of all the types overlap and there is no straitjacketed distinction possible.⁵³

B. POSSIBLE CAUSES OF SEXUAL HARASSMENT

Although women are now entering domains traditionally reserved for men and are breaking more and more glass ceilings everyday but men have sadly not been able to accept them as their equal counterparts. This is easily attributable to existing patriarchy in the society. The male dominance is so ingrained in the psyche of men and women that they are not able to completely break out of their traditional roles. Discomfort with new changes brought about by education, economic factors and urbanization can lead to dangerous situations. Sexual Harassment is nothing more than a response of some men who have not been able to come to terms with women liberalization. This may even undermine

⁵¹ 510 US 17 (1993). In *Harris*, the U.S. Supreme Court declared that the existence of a hostile or abusive environment must be determined by looking at all the circumstances. There cannot be a mathematically precise test as to whether an environment is ‘hostile’ or ‘abusive’, but rather this is determined in the totality of circumstances. The relevant circumstances may include the frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating, and whether it unreasonably interfered with an employee’s work performance.

⁵² 524 US 775 (1998).

⁵³ GUPTA, *supra* note 3, at 25.

professional worth of women and implant in them seeds of self-disgust and self-doubt.⁵⁴

The seeds of such phenomenon are sown right from the childhood, when parents differentiate between the male and the female child and bring them up in an atmosphere where the sociologically created distinctions between male and female genders are deeply ingrained into young and impressionable minds. Male ego is seldom able to recognize or view women as an equal human being. The reason for sexual harassment also contains indications for its cure- to change mind sets so as to enable men to accept and respect women as equal human beings.

VI. THE EFFECTS: LOSS OF PRODUCTIVITY AND IMPAIRMENT OF RIGHTS

Sexual Harassment at workplace takes its toll not only on the individuals involved, but on the organizations as well. Sexual harassment leads to some negative and adverse effects on women workers. Apart from the violation of physical privacy, women often find that their careers are interrupted or damaged. They are forced to resign or are fired by the company just because the “man” who harassed her happens to be a higher official with lots of influence and value. They may also experience lower productivity, less job satisfaction, reduced self-confidence and a loss of motivation and commitment to their work and their employer. Harassment also limits the potential for forming friendships or work alliances with male workers.⁵⁵ The emotional effects can vary from anxiety, low self-esteem, confusion and embarrassment to fear, depression, humiliation, shame, etc. and may also lead to suicide. The problem is further aggravated due to indifferent attitude of the society towards them where women are accused of having invited the attention through their dresses and behaviour.

⁵⁴ Shrinivas Gupta, *Sexual Harassment of Women at Workplace: India & Abroad*, 24 THE ACADEMY L. REV. 243 (2000).

⁵⁵ Matiyani, *supra* note 8, at 44

This creates mental disturbances, which manifest as psychosomatic disorders. Women develop blood pressure, headache, backache, insomnia etc.⁵⁶

As a whole, sexual harassment at workplace serves as a hidden occupational hazard and it also affects women's personal lives in the form of physical and emotional illness and disruption of marriage or other relationships with men. All this operates as a gross violation of human rights of women. It deprives them of their dignity and denies to them the right to be human.

VII. UNDER-REPORTAGE: PART OF PROBLEM OF SEXUAL HARASSMENT

Women have, hitherto, suffered their predicament silently. They have endured this cruel treatment and it is not difficult to see why. Patriarchy and deeply ingrained social roles have seldom allowed women to express themselves even when they are subjected to less than human treatment. This leads to under reporting of cases of sexual harassment. One can enumerate the following reasons for non-reporting or under reporting- "no faith in the justice system, concern about the retaliation, absence of complaint mechanism, the fact that no action would be taken by the employer, fear of losing job, lack of knowledge about where to complain, concerned about not being believed, cumbersome police/court proceedings, poor monitoring, embarrassment after reporting the incident, lack of support from family, social stigma etc".⁵⁷

All in all, the consequences of reporting can be as severe as the problem itself. However, slowly this attitude is changing and women are coming out. This can be explained by rising education, role of mass media and NGOs and the existence of a law in place. Judicial pronouncements have also played an important role. This trend should continue until this problem is weeded out. In the penultimate part, we shall look at some of the judicial pronouncements on the matter.

⁵⁶ *Id* at 42.

⁵⁷ MEDIRATTA, *supra* note 22, at 66.

VIII. JUDICIAL APPROACH

*Vishaka*⁵⁸ has emerged as a milestone in the struggle of Indian women against the curse of sexual harassment at workplace. A number of other decisions have come from the judiciary to reinforce the dignity of women. Majority of the cases discussed here came prior to the legislative enactment on the matter.

Every woman has a constitutional right to participate in public employment and this right is denied in the process of sexual harassment, which exposes her to a big risk and hazard and places her at an inequitable position vis-à-vis other employees and this adversely affects her ability to realize her constitutionally guaranteed right under Article 19(1)(g). Following this line of argument, the Courts in India have time and again come to the rescue of women who have suffered from sexual harassment at workplace. For example, in *Apparel Export Promotion Council v. A.K. Chopra*⁵⁹, the Supreme Court observed that,

“There is no gain saying that each incident of sexual harassment at the place of work, results in violation of the Fundamental Rights to Gender Equality and the Right to Life and Liberty- the two most precious Fundamental Rights guaranteed by the Constitution of India”.

For the meaningful enjoyment of the right to life under Article 21 of the Constitution, every woman is entitled to the elimination of obstacles and of discrimination based on gender.⁶⁰ Since the ‘Right to Work’ depends on the availability of a safe working environment, the hazards posed by sexual harassment need to be removed for this right to have any meaning.

In *N. Radhabai v. D. Ramachandran*⁶¹, when Radhabai, Secretary to D. Ramachandran, the then social minister for state protested against

⁵⁸ *Vishaka v. State of Rajasthan*.

⁵⁹ AIR 1999 SC 625. See also, *Bodhisatwa Gautam v. Subhra Chakraborty* (1996) 1 SCC 490, the Supreme Court declared that the women have ‘right to life and liberty’ under Article 21 of the Constitution.

⁶⁰ *C.Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil* (1996) 8 SCC 525. See also *Madhu Kishwar v. State of Bihar* (1996) 5 SCC 125.

⁶¹ (1995) SC 238.

Ramachandran's abuse of girls in the welfare institutions, he attempted to molest her and later dismissed her from the job. The Supreme Court laid down its decision in favour of Radhabai with the back pay and perks from the date of dismissal. A plethora of other decisions have also reinforced the right of women to be free from sexual harassment at workplace.⁶²

The Courts have also continuously tried to make the process of reporting and dealing with the problem smoother and less tedious for the woman. In *Samridhi Devi v. UOI & Ors.*⁶³, the Delhi High Court held that in the case of sexual harassment complaints, by their very nature, and the public interest element involved, the employer is under a duty to ensure that the workplace is kept safe, and free from sexual harassment. The Court observed that if action is not taken, or taken belatedly, or taken in a casual or inappropriate manner, the confidence and morale of female employees as a class is undermined.

In *Rinchu v. Govt. of NCT of Delhi & Ors.*⁶⁴, the Court held that in the present times, where women are increasingly being deployed in carrying out diverse assignments, the employer is under an obligation to provide safe working environment and directed the grant of Rs 7.5 lakhs as compensation to the victimized nurse.

In *U.S. Verma, Principal and Delhi Public School Society v. National Commission for Women & Ors.*⁶⁵, ordered the Delhi Public School (DPS) Society to compensate two of its teachers- Jayashree Kannan and Shayista Raza, and a former receptionist Shirni Kaul, who had alleged sexual harassment by the Principal U.S. Verma DPS, Faridabad branch with Rs 2.5 lakhs. In another case, *Rupan Deol Bajaj v. K.P.S. Gill*⁶⁶, Supreme Court observed that the sequence of events culminating in slapping on the posterior of a woman in a public function

⁶² See generally *Apparel Export Promotion Council v. A.K. Chopra*, AIR 1999 SC 625; *Medha Kotwal Lele & Others v. UOI*, 2004(5) SCALE 573 and (2013) 1 SCC 297; *Saudi Arabian Airlines, Mumbai v. Shehnaz Mudbhakal*, (1999) 2 LLJ 109 (Bom).

⁶³ 125 (2005) DLT 284.

⁶⁴ MANU/DE/3718/2006.

⁶⁵ 163 (2009) DLT 557.

⁶⁶ *Deol Bajaj v. K.P.S. Gill*

disclosed in the FIR amounted to prima facie offence under Section 354 of the Indian Penal Code, 1860.

It is amply clear that the Indian Courts have tried to make the law and procedure relating to sexual harassment more responsive and sympathetic to the plight of women. This vindication of the special rights of women by the judiciary has helped women articulate their suffering and seek redressal from the administration.

IX. OTHER RELEVANT LAWS ON THE MATTER: A BRIEF OVERVIEW

It is clear that the Constitutional mandate of Article 14, 19 and 21 was always there to ensure to women a workplace free from sexual harassment. Apart from that, we have 'The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013' which received the President's assent on 22nd April, 2013.⁶⁷ The manner in which the problem of sexual harassment at workplace is defined and dealt with in the Act is already mentioned in great detail above. The Act not only symbolizes India's commitments under CEDAW but also reflects culmination of the Apex Court's initiative for a safer workplace for women and the constant toil, and relentless efforts by various organizations and public spirited individuals.⁶⁸

The Act defines sexual harassment at workplace⁶⁹ in the same terms as the Vishaka judgment. Other terms such as *aggrieved woman*⁷⁰, *employee*⁷¹, *employer*⁷², and *workplace*⁷³ are also widely defined in order to ensure the 2013 Act has the widest possible reach.

An important feature of the 2013 Act is that it sets up two categories of mechanisms. Every employer is required to constitute an Internal Complaints

⁶⁷ Came into force on Dec. 9, 2013.

⁶⁸ GUPTA, *supra* note 3, at 124.

⁶⁹ Section 2(n) read with Section 3(2), The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Act 14 of 2013).

⁷⁰ *Id.*, Sec. 2(a).

⁷¹ *Id.*, Sec. 2(f).

⁷² *Id.*, Sec. 2(g).

⁷³ *Id.*, Sec. 2(o).

Committee (ICC) at each office or branch with ten or more employees.⁷⁴ The District officer is required to constitute a Local Complaints Committee (LCC) at each district, and if required at the block level where the ICC has not been constituted on account of the establishment having less than ten employees or if the complaint is against the employer.⁷⁵ The Complaints Committees are required to provide for conciliation before initiating an inquiry, if requested by the complainant provided that no monetary settlement shall be made as a basis of conciliation.⁷⁶

The inquiry shall be as per the service rules of the employee or prescribed rules if no service rules are available. In case of a complaint by a domestic worker, the Committee will forward the complaint to the police within seven days.⁷⁷ The Committee is required to complete the inquiry within a time period of ninety days.⁷⁸ The Complaints Committees have the powers of civil courts for gathering evidence.⁷⁹

In the event that the Committee (whether the ICC/LCC) arrives at a finding that sexual harassment at the workplace has taken place, it will recommend to the employer/District officer that, in addition to disciplinary action, a sum of money be paid as compensation to the aggrieved woman (or her heirs).⁸⁰ This is in the nature of a monetary compensation. The Act also provides certain basic guidelines for the purpose of calculating the sum of money to be awarded to the complainant as compensation.⁸¹

The Act also provides for punishment of the complainant or any other person concerned in the event of false or malicious complaints, or the production of false or misleading document or evidence.⁸² Penalties have also been prescribed

⁷⁴ *Id.*, Sec. 4.

⁷⁵ *Id.*, Sec. 6.

⁷⁶ *Id.*, Sec. 10.

⁷⁷ *Id.*, Sec. 11(1).

⁷⁸ *Id.*, Sec. 11(4).

⁷⁹ *Id.*, Sec. 11(3).

⁸⁰ *Id.*, Sec. 13(3).

⁸¹ *Id.*, Sec. 15.

⁸² *Id.*, Sec.14.

for employers. Non-compliance with the provisions of the Act shall be punishable with a fine which may extend to fifty thousand rupees.⁸³

It is worth mentioning that there have been other laws and regulations in India which indirectly deal with the problem like; Indian Penal Code, 1860 which contains laws for punishment of offences committed within India. However, there are certain sections in the Code such as Section 294 which deals with obscene acts and songs, Section 354 deals with assault or criminal force to woman with intent to outrage her modesty, rape under Section 375, gesture or act intended to insult the modesty of a woman under Section 509 etc.

Likewise there are certain provisions in other Acts like: Factories Act, 1948; the Maternity Benefit Act, 1961; the Employees' State Insurance Act, 1948; Equal Remuneration Act, 1976; Indecent Representation of Women (Prohibition) Act, 1987 etc., but there does not exist any specific complaint mechanism system to deal with cases of sexual harassment of women at the workplace.

Interestingly, the recently made amendments to the criminal laws⁸⁴ relating to sexual offences against women have broadened the definition of rape, also increased the quantum of punishment for several sex related offences, and created new offences such as the offence of 'sexual harassment' under section 354A⁸⁵ of Indian Penal Code. Important amendments have also been made

⁸³ *Id.*, Sec. 26(1)(c).

⁸⁴ Criminal Law (Amendment) Act, 2013 was passed by the Lok Sabha on Mar. 19, 2013, and by the Rajya Sabha on Mar. 21, 2013, which provides for amendment of the Indian Penal Code, 1860; the Indian Evidence Act, 1872; the Criminal Procedure Code, 1973 and the Protection of Children from Sexual Offences Act, 2012. The Bill received Presidential assent on Apr. 2, 2013 and deemed to come into force from Feb. 3, 2013.

⁸⁵ (1) A man committing any of the following acts-

(i) physical contact and advances involving unwelcome and explicit sexual overtures;
or

(ii) a demand or request for sexual favours; or

(iii) showing pornography against the will of a woman; or

(iv) making sexually coloured remarks,

shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

which streamline the criminal procedures⁸⁶ as well as strengthen the laws of evidence.⁸⁷

X. CONCLUSION

In the beginning we had mentioned about the magnitude of the problem of sexual harassment by highlighting several cases and data. It was mentioned that curing the problem is of utmost importance since whatever little has been achieved by women rights activists has been through ages of struggles and if the problem of sexual harassment is not urgently addressed then there is a risk that women may withdraw into their shell or suffer gross violation of their economic rights. It was not long ago when women had to fight for their right to work. Their very presence in the workplace was both disliked and discouraged. Today, a lot has changed. Women openly come out to work, voice their opinions and are at par with men in matters of professional capabilities. But the problem of sexual harassment at workplace can undermine all this.

There is a need to change the male attitude towards working women. Law alone is not enough to uproot this menace. Massive awareness and sensitization about this social evil is necessary. Society has to understand that both men and women are equal in all aspects. Social attitudes have to change so that women can come out and participate in public life without feeling threatened and vulnerable. There should be a sense of mutual respect between men and women. For this, educational and sensitization programmes should be encouraged for both men and women. This should happen in Universities and Offices. It should also be done at the secondary or senior secondary level in schools so that concept of equality is imbibed by one and all from a young age. For teachers at School and

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

⁸⁶ Amendments have been made to Sections 26, 54A, 160, 161, 164, 173, 197, 273, 309, 327 of Cr.P.C. Sections 198B, 357B and 357C have also been inserted.

⁸⁷ Amendments have been made to Section 146, insertion of a new Section 53A and substitution of new Section for Sections 114A and 119 have been made in The Indian Evidence Act.

University level, workshops can be organized for two purposes- how they can identify and combat sexual harassment and how they can prepare the young generation to accept each other as equals and not indulge in sexual misconduct.

Regarding the law, we must realise that the Sexual Harassment Act should not become another legislative enactment with tall promises and little to show by way of actual enforcement. The implementation needs to be strengthened to justify the effort. Only strong implementation can ensure women empowerment and their pursuance of economic independence can become safer and smoother. For this all the stakeholders have to work in a dedicated manner.

COMPROMISE IN THE CARDINAL PRINCIPLES OF CRIMINAL LAW UNDER THE GARB OF JUVENILE JUSTICE

*Shubham Srivastava**

ABSTRACT

*Crime against children is a global issue. In the recent times there has been a sudden upsurge in the number of crimes against children. The government, being the guardian of its citizens under the concept of *Parens Patriae*, is duty bound to protect the rights of its citizens. However, it is unfortunate that while the State derives the power to legislate for the well-being of its citizens from this principle, it has actually violated the fundamental principles of criminal law relating to children. The article deals with the laws relating to crime against children and analyses the provisions from the stand point of individual liberty which is fundamental to every human being.*

I. INTRODUCTION

Children form the vulnerable section of society. There is a need to give special protection to the children as they are the future of the nation. With the advancement in the field of science and technology and developed means of transport and communication system there develops greater risk of crimes against children. To safeguard children from the criminals various legislations have been enacted by the Parliament besides the Constitutional protection under Part III and Part IV of the Indian Constitution.¹ Besides, Crimes against children or any other person may also be committed by children. Thus special legislation has been enacted for the juveniles/children who are below 18 years of age taking note that children are psychologically and mentally immature to understand the consequences of their Act.² Thus, there appears a need to define who is a

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¹ INDIA CONST. art. 21, art. 23, art. 24 and art. 39

² *Salil Bali v. Union of India*, (2013) 7 SCC 705

juvenile? The recent *Nirbhaya* case in which one of the accused was a juvenile raised the eye brows of the women's rights activists. The nationwide protest forced the law makers to amend the Juvenile Justice (Care and Protection of Children) Act 2000 (JJ Act) and the Indian Penal Code, 1860 (IPC), to treat children between 16-18 years age group as adults, who were found guilty of heinous crimes. Consequently, the Juvenile Justice (Care and Protection of Children) Bill 2014 (JJ Bill) treats children between 16-18 years as adults.

The United Nations Convention on the Rights of the Child (CRC) defines child as a "person below eighteen years of age".³ The Convention recognizes the fact that children by reason of their physical and mental immaturity need special care and legal protection. India being a signatory to the International Convention is obliged to act in conformity with the obligation that it has undertaken. Also the Constitution of India in its Directive Principles of State Policy under Part IV specifically obliges the state to act in the interest of children⁴.

With these commitments in mind, the Indian government is becoming more and more conscious of Constitutional and statutory rights of children. The crimes against children viz. child rape, child pornography, child prostitution, drug addiction and psychological abuse are being dealt with by the government by enacting laws.

But it appears that despite of such commitments the Legislature is acting in a manner which is not in the interest of the child. The JJ Bill, as the title suggests, deals with the care and protection of children. But the bill in substance does not take care of children. The bill provides that the children who are in conflict with law and are guilty of heinous offences may be tried as adults. It violates the very foundation of juvenile justice system. Besides, there are various legislations enacted by the Parliament where fundamental principles of criminal law have been compromised.

³ CRC, art. 1

⁴ INDIA CONST. art. 39 and art. 45

II. BURDEN OF PROOF SHIFTED: RIGHTS OF ACCUSED VIOLATED

Burden of proof or *onus probandi* is the necessity or the duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a case.⁵ Burden of proof requires the prosecution to prove that the person accused of the offence has committed the alleged offence. Under Indian law there is no provision which clearly says that the burden is on the prosecution. Considering the provisions contained under Sections 101-102 of the Indian Evidence Act it can be inferred that the burden is on the prosecution to prove the accusations levelled by him. This is because there is a presumption of innocence in favour of the accused.⁶ The accused has not to prove his innocence. "The rule is based on the principle that in the present day the society is much stronger than the individual, and is capable of inflicting much more harm on the individual than the individual can inflict upon society."⁷ However, in recent times, the principle that the prosecution has the burden to prove the charges against the accused beyond reasonable doubt is being diluted by the legislature.⁸

The IPC in its various provision shifts the burden of proof on the accused person. A presumption is cast on the person who takes a minor out of the keeping of lawful guardian without his consent, that such person has kidnapped such minor.⁹ The burden is on the person to prove that consent was taken from the guardian of the minor. Also a presumption is levelled against a person who not being the lawful guardian of a child employs a child for begging that the person kidnapped the minor for the purpose of begging.¹⁰ This section shifts the burden of proof on the accused person to prove that he did not kidnap the child. It is submitted that the section is against the cardinal principles of criminal law which attributes innocence to the accused person.

Also, where a person disposes of a female below 18 years of age a presumption is levelled against such person, that he disposed the female with the intention

⁵Black's Law Dictionary, Henry Campbell Black, 6thEdn.

⁶ V. S. Achuthanandan v. R. Balakrishna Pillai, AIR 2011 SC 1037

⁷J.F. STEPHEN, 1 A HISTORY OF CRIMINAL LAW OF ENGLAND (1983)

⁸ GLANVILLE WILLIAMS, THE PROOF OF GUILT (1963)

⁹ IPC , sec. 361

¹⁰ IPC, sec. 363A (3)

that such female would be used for prostitution.¹¹ Where a female is let on hire to a brothel keeper a presumption is put on the person that the female was intended to be used for prostitution.¹² Thus, where a female is let on hire for cleaning or even household purposes, the section is sufficient enough to implicate the person. Further, until contrary is proved, it shall be presumed that the intention of the person was to use the girl for prostitution purposes. Where a prostitute or a brothel keeper obtains a minor girl, it shall be presumed that such person has obtained her for prostitution¹³.

Besides, the Protection of Children from Sexual Offences Act, 2012 (POSCO) which was enacted to protect children from assaults of sexual character and from the evils of pornography has been found to be in violation of the fundamental principles of criminal law.

The Special Courts which are constituted under the Act can presume the commission or attempt or abetting of certain offences unless contrary is proved,¹⁴ and the existence of culpable mental state on the part of the accused person.¹⁵ By this provision the burden of proof has been shifted on the accused person.

Various International Conventions¹⁶ specifically recognise that an accused in a criminal case has the presumption of innocence unless proven guilty. India being a signatory to the declaration, it is mandatory for the nation to make laws in conformity with the International Commitments. Thus, the Act should be amended and the provision be brought in accordance with the cardinal principles of criminal law.

With the objective to improve the health of women and children the Prohibition of Child Marriage Act, 2006 was passed by the Parliament. The Act prohibits the solemnization of Child Marriages in India. The Act declares the child marriage as voidable at the option of the contracting parties, who was a child at

¹¹ IPC, sec. 372

¹² IPC, sec. 372 Explanation I,

¹³ IPC, sec. 373

¹⁴ POSCO, sec. 29

¹⁵ POSCO, sec. 30,

¹⁶ UDHR, art. 11(1); ICCPR art. 14(2); ECHR art. 6(2)

the time of marriage.¹⁷ The Act puts the burden on the person who is accused of the performance or conduct of Child Marriage, to prove that such person had reasons to believe that the marriage was not a child marriage.¹⁸

The above discussed three Acts in their various provisions violate the principle of presumption of innocence by shifting the burden of proof on the accused person. It is pertinent to mention that “many Constitutions around the world are in the process to recognize the general principles of criminal law, especially the presumption of innocence.”¹⁹ Canadian Charter of Rights and Freedom specifically provides that a person charged with an offence shall be presumed innocent unless proved guilty.²⁰

Also, it is appropriate to mention a Canadian Supreme Court case *R v. Oakes*,²¹ wherein the court held that:

“Presumption of innocence protects the fundamental liberty and human dignity of every person and if burden is put on an accused to discharge the presumption on a balance of probability there would be possibility of conviction despite the existence of reasonable doubt.”

The Constitution of India protects the accused from self-incrimination.²² Thus, an accused person has a right to silence. The Law Commission of India in its report observed that “The provision has various facets. Firstly, the burden is on the State or rather the prosecution to prove that the accused is guilty. Secondly, an accused is presumed to be innocent till he is proved to be guilty and the protection against self-incrimination”.²³

¹⁷ ANJANI KANT, LAW RELATING TO WOMEN AND CHILDREN (2012)

¹⁸ Prohibition of Child Marriage Act, 2006 sec. 10

¹⁹ Bruce P. Archibald, *The Constitutionalisation of the General Part of Criminal Law* 67 CAN. BAR REV. 403 (1988).

²⁰ Canadian Charter of Rights and Freedom art. 11(d)

²¹ [1986] 1 S.C.R. 103

²² INDIA CONST. art. 20(3)

²³ LAW COMMISSION OF INDIA, *One Hundred and Eightieth Report on Article 20(3) of The Constitution of India and The Right to Silence* (2002), available at <http://lawcommissionofindia.nic.in/reports/180rpt.pdf> (last visited Jan. 10, 2016).

It is submitted that it is repugnant to public policy to allow conviction even when there exist a doubt as to the culpability of the accused. Also, there appears no help to the court in presuming the guilt on the part of the accused person. Rather, such presumption thrusts the accused into the undue procedural hardship to prove his innocence, besides the social sanctions which accompany with the accusation of commission of offence.

Mere accusation is considered as sufficient to implicate a person even though found innocent after inquiry. The State being the father of its citizens under the doctrine of *Parens Patriae* is under an obligation to protect the rights of its citizens. A balance is to be drawn between the rights of the accused and the victim. Thus, the Indian position should also be brought in conformity with the international standards and the statutes, which shift the burden of proof on the accused, should be amended accordingly.

It appears proper to compare the Indian position with the Republic of Singapore. The Constitution of Singapore says that “life and personal liberty of an individual can be taken in accordance with law.”²⁴ Here, the law enacted, must be just and reasonable. On similar lines, the Indian Constitution provides protection of the life and liberty of an individual.²⁵ The Indian Courts by judicial interpretations have expanded the term ‘law’ to mean only just and reasonable piece of legislations. Thus, any law which arbitrarily invades the individual liberty of any person shall be *ultra vires* the Constitution. It is submitted that the shift of burden of proof and the presumption of guilt on the accused is in violation of the Constitution of India. It violates the fundamental right to reputation and the right to be presumed innocent, as presumption of guilt of the accused directly infringes upon the personal liberty of an individual. The presumption of innocence is a fundamental right to which every person accused of a crime is entitled. Thus, the laws as discussed above which shifts the burden of proof on the accused and raises a presumption of guilt against the accused, should be amended accordingly.

²⁴Michael Hor, *The Presumption Of Innocence- A Constitutional Discourse For Singapore*, 1995 SING. J. LEGAL STUD. 365 (1995)

²⁵ INDIA CONST. art. 21

III. THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) BILL 2014 AND THE CURRENT DISPUTE RELATING TO LOWERING OF AGE

Criminal Justice System across the globe fixes a certain age below which a person is exempted from the criminal liability. This exemption is granted because it is presumed that a child is not mature enough to understand the nature and consequences of his act or that what he is doing is either wrong or contrary to law. Under the Indian Criminal Justice System the age of criminal responsibility is fixed at 7 years by Indian Penal Code, 1860. The children between 7 to 12 years are subject to criminal liability where the child has developed sufficient maturity to understand the consequences of his act. Besides, the age for sexual consent has been increased to 18 years by the Criminal Law (Amendment) Act, 2013, on the premise that a person below 18 years is immature to think for his best interest.

Recently, in the wake of the gruesome rape of a young woman on 16 December 2012 in Delhi, a heated debate has started nationwide with respect to lowering the age of juveniles to 16 years. The aim of which is to try the persons above 16 years as adults, who are found to indulge in heinous crimes. However, it is pertinent to mention that the Criminal Law (Amendment) Act, 2013 made the age of sexual consent to 18 years.²⁶

The JJ Act defines ‘Juvenile’ to be a person below 18 years of age.²⁷ The age of juvenility is determined as on the date of commission of offence. The Apex Court in *Gurpreet Singh v. State of Punjab*,²⁸ held that if the accused was a juvenile on the date of occurrence and continues to be so, then in that event he would have to be sentenced to a juvenile home. However, if on the date of sentence, in a case before the Supreme Court, the accused is no longer a juvenile, the sentence imposed on him would be liable to be set aside,²⁹ or it may

²⁶ IPC, sec. 375(6) (as amended by Criminal Law (Amendment) Act 2013)

²⁷ JJ Act, sec. 2(k)

²⁸ (2005) 12 SCC 615

²⁹ In *Vijay Singh v. State of Delhi*, (2012) 8 SCC 763; the court upheld the conviction but quashed the sentence because the appellant was about 30 years old at the time of conviction.

be reduced to the period of detention,³⁰ or remit the case to Juvenile Justice Board for disposal,³¹ or convict the accused and direct the records to be placed before the Juvenile Justice Board for awarding suitable punishment.³²

Thus, if a juvenile is found guilty of an alleged offence, he simply cannot go unpunished. However, as the law stands, the punishment to be awarded to him or her must be left to the Juvenile Justice Board constituted under the JJ Act.³³

The new JJ Bill provides that when a person above 21 years of age is apprehended of a serious offence committed while he was between 16 to 18 years, he may be treated as an adult. This is a new provision in the Act which treats persons between 16-18 years of age, who are guilty of serious offences as an adult. It is submitted that having such a provision will have various repercussions. This section goes against the basic principle of juvenile law. One cannot be tried in retrospect. Also the provision is against the Juvenile Justice System. A person who could not be caught for no fault of his own, a person who could not be apprehended because of the dullness of the police officials should be tried as an adult. Such a provision is against the individual liberty of the accused person. It deprives the accused of his right to the benefits of juvenile justice system. This provision appears arbitrary as it discriminates between persons for the commission of similar offence during similar mental and psychological state but for the reason such person is apprehended on different dates.

Section 16 of the JJ Bill lays down that

“Where a heinous offence is committed by a child above 16 years of age, the board may after inquiry try the case as summons case under the Code of Criminal Procedure.”

³⁰ *Satish @ Dhanna v. State of Madhya Pradesh*, (2009) 14 SCC 187; *Dharambir v. State (NCT of Delhi)*, (2010) 5 SCC 344

³¹ *Hari Ram v. State of Rajasthan*, (2009) 13 SCC 211; *Daya Nand v. State of Haryana*, (2011) 2 SCC 224

³² *Ashwani Kumar Saxena v. State of Madhya Pradesh*, (2012) 9 SCC 750

³³ *Jitendra Singh v. State of U.P.*, Cri. App. No. 763 of 2003, Jul. 10, 2013.

Also a juvenile may further be tried as an adult, if he has committed any heinous offence.³⁴ The question whether a juvenile should be tried as an adult or not should be decided by the Children's Court³⁵.

The new provision is brought after the emotional outcry which followed the *Nirbhaya* case. It appears that the whole thrust of the society is towards criminalising the juveniles who are in conflict with law, without trying to rehabilitate the child. It is to be noted that, in our country, where a child is most easily placed in crimogenic environment, where the government is not able to assure food, health, education, shelter and employment etc. which are contributing factors that lead a person to commit a crime, but is able to assure the punishment if one happens to commits an offence and is caught by police. It violates the right to equality and the right to life under the Constitution of India.

The Child Rights Convention (CRC) prohibits the imposition of Capital Punishment and Life Imprisonment on a juvenile.³⁶ The Bill has retained similar provision.³⁷ The United Nations Committee recommended that States Parties

“which limit the applicability of their juvenile justice rules to children under the age of 16 (or lower) years, or which allow by way of exception that 16 or 17-year-old children are treated as adult criminals, change their laws with a view to achieving a non-discriminatory full application of their juvenile justice rules to all persons under the age of 18 years.”³⁸

Thus, it is submitted that the bill by lowering the age of persons to be tried as juveniles, is acting in gross violation of International Standards and humanity and such act is nowhere in the interest of child. The very foundation of Juvenile Justice System is to rehabilitate the child who is found to be in conflict with law

³⁴ JJ Bill, sec. 19(3)

³⁵ JJ Bill, sec. 20

³⁶ CRC, art. 37

³⁷ JJ Bill, sec. 22

³⁸ UN Convention on the Rights of the Child: General Comment No. 10 (2007) on Children's Rights In Juvenile Justice *available at* <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf> accessed on 15/01/2015

and not to stigmatize. But the approach of the legislature appears to be against the preamble inscribed in the Juvenile Justice Bill itself.

It is admitted that the recent Delhi gang rape has shaken the beliefs of common man and the legal system that a juvenile is pure, soft and true at heart. But simply because one of the accused in the Delhi gang rape case was a juvenile, it does not give a license to take away the rights of our children. The new bill that allows the ordinary courts to try children aged between 16 to 18 years for heinous crimes as adults is disastrous. Under the existing law, a juvenile cannot be tried as an adult and the maximum punishment that is prescribed is 3 years in a reformatory home. Also the Supreme Court in the recent case of *Dr. Subramanian Swamy and Others v. Raju through Juvenile Justice Board*,³⁹ upheld the constitutionality of the age of juvenility fixed by the JJ Act . Also in a recent case *Salil Bali v. Union of India*,⁴⁰ the Supreme Court recognised the fact that the age of 18 years has been fixed having regard to the understanding of the experts that a child till 18 years can be reformed. The Court recognised the fact that “there are exceptions where it is probably impossible to reform children between 16 to 18 years of age but such proportions are very less so as to warrant any change in the thinking of the people.”⁴¹

It is submitted that justice does not mean merely punishing the convict. This view shows affiliation to the age old notions of retribution and deterrence based penology. The attempt of the legislature seems to shift from reforming the juvenile to punishing the juvenile and awarding a tag of “criminal” to such juvenile. Besides, the Apex Court has also been indifferent to juveniles. In a recent incident, a 16 year old boy kissed a girl of the same age by force, the Supreme Court upheld 6 months imprisonment and refused to take note of the fact that 18 years had passed since the time incident.⁴²

³⁹Cri. App. No. 695 of 2014, Mar. 28, 2014

⁴⁰ *Salil Bali v. Union of India*

⁴¹ *Id.*

⁴² *Ajazar Ali v. State of West Bengal*, Criminal Appeal No.1623 of 2013 decided on Oct. 4, 2013

“The Juvenile Justice Bill 2014 which is pending in Parliament if passed would have various repercussions. It would traverse the attempt to increased protection given to children in last 150 years”.⁴³

The bill, as stands, empowers the Juvenile Justice Board to decide whether a juvenile above 16 years involved in heinous crimes such as murder and rape is to be sent to an observation home or tried in a regular court. It is submitted that all children below 18 must be saved from prison as the juveniles cannot be tried under the regular criminal framework as it would defeat the very purpose of the juvenile justice system. Also the international standards point towards fixing the age limit at 18 years. The reduction of age is the result of public outcry against the rape and murder of *Nirbhaya*. Public sentiment should be respected but it cannot be the yardstick for changing such laws and giving a knee jerk reaction to the incident. It appears that we have been carried away by emotions and the ‘rule of law’ is no more a principle we cherish. We want spontaneous and retributive justice. An eye for an eye and a tooth for a tooth appears to be the guiding principle. Also there is no justification as by introducing persons between 16 to 18 years of age group to the rigours of criminal trial would serve what greater purpose. Also there is no scientific rationale that children between 16 to 18 years of age cannot be reformed. Transferring a child from juvenile court to adult court is arbitrary and would deprive the child of his childhood by taking his right to life and liberty and would thus end all means to reformation. The CRC provides that “children in detention should be separated from adults and they must not be tortured or subjected to degrading treatment”.⁴⁴

As Brent Pollitt puts it that the society has a vested interest in protecting its members from juvenile offenders, it should also possess an undeniable interest in holding juvenile offenders accountable for their actions. He, however, disagrees with the notion of treating juvenile offenders as adults and transferring

⁴³ Faizan Mustafa, *Rough Justice*, THE INDIAN EXPRESS, available at indianexpress.com/article/opinion/columns/rough-justice-3/ (last visited Jan. 11, 2016)

⁴⁴ Age and Criminal Responsibility by Frances Reddington, 1 JIJIS 105 (2002)

them to criminal court as such an approach fails to best serve either of these interests.”⁴⁵

The unfavorable environment of the prison only further corrupts the juvenile, promoting recidivism. Transferring the juveniles to criminal courts without reforming them would only postpone the ailment without any permanent correction, with great chances of more violent behavior, when the non-rehabilitated juvenile returns to society.

A study conducted in Florida showed that the juveniles who were transferred to criminal courts were more likely to reoffend than those sent to juvenile courts.⁴⁶ It is submitted that “the aim of the juvenile court was to help young law violators get back on the right track, not simply to punish their illegal behavior.”⁴⁷

Also, researches show that in many children, brain continue to develop till early 20’s and thus, just because one is physically mature, he may not appreciate the consequences or weigh information the same way as adults do. So we may be mistaken if we think that [although] somebody looks physically mature, his brain may in fact not be mature.⁴⁸

Criminal behavior of other persons fails to attract the people’s rights activists or call for a change in the existing law. It is only when a juvenile happens to fall a prey to criminality, the women’s rights activist or human rights activist raise their eyebrows to the issue. It appears that juvenile justice system acts like a magnet, which attracts the public's frustrations about the crime problem, despite juveniles form only a small portion of the problem.

However, it is submitted that juvenile courts are not as virtuous as appear prima facie.

⁴⁵ Brent Pollitt, *Buying Justice on Credit Instead of Investing in Long-term Solutions: Foreclosing on Trying Juveniles in Criminal Court*, 6 J.L. & FAM. STUD. 281 (2004)

⁴⁶ *Id*

⁴⁷ Jeffrey A. Butts, *Can we do without Juvenile Justice*, 15 CRIM. JUST. 50 (2000-2001)

⁴⁸ Sedra Spano, *Adolescent Brain Development*, 22(1) YOUTH STUDIES AUSTRALIA 36-38 (2003)

“There are 197 districts in India which are affected by internal armed conflicts. Children in these areas are treated as adult, irrespective of their age. They are regularly exposed to arbitrary arrest and detention, torture, extrajudicial executions and sexual assaults as part of the counterinsurgency operations. Juveniles in these districts are denied access to juvenile justice unlike their counterparts in rest of the country.”⁴⁹

The answer to the grave issue of the violation of the right of our accused children lies in simplifying the processes in the juvenile courts and not being flown by the emotional outcry of the public. The rights of our children cannot be sacrificed at the behest of emotional outcry.

Apart from the issue of lowering the age of juveniles there are various other legislative provisions which violate the individual liberty of an accused person. Section 315 of the IPC punishes an act which has the effect of causing the death of a new born child or prevents the live birth of a child. It is submitted that the provision violates the individual liberty. Where it is found that a child in the womb has developed an incurable disease and the statutory limit under the Medical Termination of Pregnancy Act is crossed. The child cannot be aborted and the mother has to bear all the pain of carrying and delivering the child which is diagnosed to die after birth. And if any person does any act which prevents the birth of the child, he shall be held liable. Recently, in a Special Leave Petition⁵⁰ before the Apex Court of India, for amendment of the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994, to raise the time period of 20 weeks to 28 weeks, on the ground that Right to life includes Right to health. Both these rights are violated when a women is forced to carry a child in the womb which is diagnosed to be incurable and has to bear all pain and financial loss to bear the child⁵¹.

⁴⁹Nobody’s children: Juveniles of Conflict Affected Districts of India, 2013

⁵⁰ *Dr. Nikhil D. Datar v. Union of India &Ors.*, S.L.P. (Civ.) No. 40 of 2008,

⁵¹Centre for Reproductive Rights, *Datar v. Union of India*, available at

http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Datar_v_India.pdf
(last visited Jan. 22, 2016)

Besides, POSCO criminalises the act of watching porn even in private where one party is below 18 years of age.⁵² However, the section is silent where the accused and victim both are persons below 18 years of age. The section needs amendment.

IV. DISPROPORTIONATE PUNISHMENT

The punishment should be proportionate to the severity of crime. It should not be gruesome so as to be grossly disproportionate to the severity of crime nor pleasant as to defeat the aims of punishment. Question may arise whether imprisonment is cruel and unusual punishment. It is submitted that imprisonment is not *per se* cruel and unusual and it may be justified on the ground of protecting the society by incapacitating the criminal. But, “imprisonment for unreasonable and disproportionate duration may be treated as cruel and unusual.”⁵³

The IPC prescribes compulsory 10 years rigorous imprisonment for trafficking of a minor and where there is more than one minor, the punishment shall increase to 14 years rigorous imprisonment which may extend to imprisonment for life.⁵⁴

Where injury is caused to the victim at the time of commission of rape which results in death of the victim, compulsory rigorous imprisonment for twenty years shall be imposed, which may extend to imprisonment for life. Here imprisonment for life means imprisonment for the remainder of that person's natural life, or with death. It is submitted that the legislature in a hurry failed to note the cardinal principles of criminal law and refused to be guided by the philosophy of sentencing. Prescribing compulsory imprisonment for 20 years takes away the discretionary power of the courts, which is concomitant to criminal justice system. With this the Courts have been deprived of the power to order punishment considering the facts and circumstances of the case viz. the

⁵² POSCO, sec. 11,

⁵³ 24 Corpus Juris Secundum, Criminal Law, sec. 1593.

⁵⁴ IPC, sec. 370

bread earner, social conditions of the accused, etc. The apex court in *Bachan Singh v. State of Punjab*⁵⁵ considering the *Jagmohan Singh case*⁵⁶ observed:

“General legislative policy that underlines the structure of our criminal law is to define an offence with sufficient clarity and to allow the maximum punishment therefor and to allow a very wide discretion to the judge in the matter of fixing the degree of punishment”.

Extended imprisonment is justified on the ground that the criminal is incapacitated for the duration to commit any offence. But this philosophy does not appear to be justifiable as the purpose of criminal justice system is to reform the offender and to help the offender to re-join the society as a law abiding citizen.

Also, the JJ Bill prescribes harsher punishment for crimes against children.⁵⁷ It appears that the legislature is determined to provide harsher punishments without any proof that stricter punishment results in reduction of crime. The legislation re-evolves the theory of retribution in the criminal justice system. It is to be kept in mind that punishment does not take the form of retribution in the name of administration of justice.

The Bill criminalises the act of corporal punishment even when it is practiced in good faith for disciplining the child.⁵⁸ The section creates absolute liability. There is a great possibility of abuse of provision since even a single pat may be counted as corporal punishment.

Further Section 86 of the act prescribes *twice* the punishment for any offence committed on a disabled person. The term ‘disabled person’ is very wide in nature. In the absence of any definition as to what amount of disability should be considered for the purpose, the section is prone to implicate any person with any kind of disability.

⁵⁵(1980) 2 SCC 684

⁵⁶ *Jagmohan Singh v. State of U.P.*, (1973) 1 SCC 20

⁵⁷ JJ Bill, sec. 79, sec. 80 and sec.83

⁵⁸ JJ Bill, sec. 83

It is submitted that there appears no connection between the punishment and the crime rate. It has not been scientifically proved that heavier punishment deters the criminals from committing crimes. If this were so, the execution of *Nathuram Godse* for assassination of Mahatma Gandhi, would have deterrent against the assassination of former Prime Ministers Indira Gandhi and Rajiv Gandhi, etc. Also, the execution of *Dhananjoy Chatterjee*⁵⁹ has not deterred criminals from committing crime in West Bengal. Contrarily, in 2012, “West Bengal had recorded the highest incidence of crimes against women with 2,046 cases of rape, 4,168 cases of kidnapping, 593 cases of dowry deaths and 19,865 cases of domestic cruelty.”⁶⁰

Also, a criminal will never read the punishment into the Penal laws before committing a crime. Thus, there appears no proper justification as to why emphasis is laid on increasing the punishment. The Eighth Amendment of the US Constitution bars the infliction of excessive fine, cruel and unusual punishment etc. It is submitted that some guidance should be taken from the US Constitution and similar provision be incorporated in the Indian system.

V. DEFINITION BROADENED

In the recent times, the definition of crime has been broadened by the legislature. The offences are defined in such a way that a single positive act may lead to criminality. Also if crimes are defined in a broad manner, there will be greater risk of abuse of law which would to incriminating of innocent people.

The JJ Bill provides that any juvenile who is guilty of heinous offences may be tried as an adult. The bill defines “*Heinous offences*” as the offences for which the minimum punishment prescribed under the Indian Penal Code or any other law is imprisonment for 7 years or more.⁶¹ It is submitted that the definition for heinous crimes is wide enough to include any offence for which prescribed

⁵⁹ *Dhananjoy Chatterjee v. State of West Bengal*, (1994) 2 SCC 220

⁶⁰ NATIONAL CRIME RECORDS BUREAU, *Annual Report 2012* (2013)

⁶¹ JJ Bill, sec. 2,

punishment is 7 years or more. Thus, in broad range of offences a child can be implicated and subjected to the rigours of criminal justice system.

Further, POSCO makes Penetrative Sexual Assault as an offence.⁶² It does not recognize consent as a defence. The Section rules out any possibility of consensual sex. While the present Act, 2012 makes any consensual sexual activity with a woman below 18 years a punishable offence. The *IPC* recognises sexual intercourse with wife above 15 years of age as valid.⁶³

Since the Act has overriding effect⁶⁴, it criminalises marital sexual relations between spouses below 18 years of age.⁶⁵ Thus, by implication Muslim marriages under the divine Muslim Personal Law will be made punishable under the act. The section undermines the acts of consensual sexual activity which is against the individual liberty of a person. The term 'right to life' under Article 21 of the Constitution of India includes the right to pursue life of whatever taste desired by an individual. Thus, where consenting parties are willing to enter into sexual activity, it cannot by any means be declared as an offence.

VI. ABUSE OF LAW INCRIMINATING PEOPLE

In the present time, with bad legislative drafting, there are greater chances of abuse of law. The Protection of Children from Sexual Offences Act, 2012 casts a responsibility on an individual who is having apprehension of the commission of any offence under the act to inform the same to the Special Juvenile Police Unit or the local police.⁶⁶ The failure to report the case attracts punishment⁶⁷. Since the provision makes failure to report punishable, it is submitted this provision can be misused by family members or neighbours against adolescents who are in a relationships to harm their reputation or to take revenge or for any other purpose.

⁶² POSCO, sec. 3,

⁶³ IPC, sec. 375 Exception II

⁶⁴ POSCO, sec. 42A

⁶⁵ POSCO, sec. 7

⁶⁶ POSCO, sec. 19

⁶⁷ POSCO, sec. 21,

Also the Prohibition of Child Marriage Act, 2006 provides that where a child marriage has been declared void by the parties to the marriage, the male contracting party or the guardian may be directed to pay the maintenance to the girl till her remarriage⁶⁸. Thus, the guardians of the girl are exonerated of any responsibility. Further, the act punishes a male above 18 years of age who contracts a child marriage whether knowingly or unknowingly.⁶⁹ Thus, minor girl or her parents may easily implicate the male person by hiding the real age of the child and misrepresenting it to be a major.

VII. CONCLUSION

Thus, the mere fact that one of the accused in the Delhi Gang Rape Case was a Juvenile does not give a license to take the rights of our children. A juvenile cannot be subjected to the rigors of criminal justice system. Juvenile Justice System and Criminal Justice System both are different and have different purposes to serve. Criminal Justice System is adversarial in nature and Juvenile Justice System is reformatory and child friendly in nature. Also, it has not been proved that a person between 18 to 16 years of age cannot be reformed. The attempt to lower the age of juvenile from 18 to 16 years appears to be irrational. Notably on one hand, the Parliament has increased the age of consensual sex from 16 to 18 years through Criminal Law Amendment Act 2013 on the ground that children below 18 years of age are not mature enough to give a valid consent. On the other hand, the Parliament is in a row to lower the age of juveniles guilty of heinous offences from 18 to 16 years to be tried as adults. The change is being brought on the ground that where a juvenile has developed sufficient maturity as to the consequences of his act, such juvenile should be treated as adult. Upon similar lines, where a juvenile has developed sufficient maturity he should be considered as eligible to give valid consent for sexual relations. The contradictory ideology of legislations should be removed.

⁶⁸ Prohibition of Child Marriage Act, 2006, sec. 4, the

⁶⁹ Prohibition of Child Marriage Act, 2006, sec. 9

The fact that a juvenile offender lacks the mental capacity as that of an adult criminal should be recognized. There appears a greater chance of success in reformation of juvenile offenders if all such offenders under the age of 18 years are retained within the juvenile justice system, regardless of heinous crimes. By adopting the reformatory model of sentencing, on one hand a juvenile is made accountable for his criminal act and the fact is recognized that juveniles are different in culpability as opposed to adult counterparts. Thus, both the society and the juvenile will benefit and a harmonious balance will be maintained between the two. Thus the new bill which seeks to lower the age of a juvenile offender should not be passed.

Also, with the rise of legislations which impose a burden on the accused to prove his innocence there has been a sudden rise in the attitude of the people and the media to presume the guilt of the accused person. Whenever a crime against children is committed, a presumption is leveled against the accused that he has committed the alleged offence. Whenever a crime against children is committed, the whole thrust of the State, Criminal Justice System and society is against the person accused of the alleged offence. The person is treated in such a way as he is guilty of the offence despite the case pending before the Court. In this way, innocent people may be condemned, harassed and deprived of their individual liberty for no reason. The accused may not get a fair trial or a convict may get a higher sentence than he deserves.

It is submitted that if media exercises an unrestricted or unregulated freedom in reporting a criminal case, the mind of the public and the judges will be prejudiced. Such publication of information before the trial of the accused in the court can be of serious prejudice to the accused. Where the accused is finally acquitted by the courts, such an acquittal may not help him to rebuild his lost reputation in society.⁷⁰

⁷⁰ See generally LAW COMMISSION OF INDIA, *Two Hundredth Report On Trial By Media, Free Speech And Fair Trial Under Criminal Procedure Code, 1973* (Aug. 2006) available at <http://lawcommissionofindia.nic.in/reports/rep200.pdf>, (last visited Jan. 22, 2016)

Compromise in Cardinal Principles of Criminal Law

Besides the issue of lowering the age of juvenile, other laws which have been analyzed under the four heads should be considered and amended accordingly. It should not be forgotten whatever be the circumstances, the cardinal principles of criminal law should not be traversed and should be respected. Since, that would result in injustice and violation of constitutional protection enshrined under Article 20(3) and 21 of the Constitution of India.

**CITIZENSHIP RIGHTS AND TRANSGENDER COMMUNITY:
EVALUATING THE IMPACT OF SECTION 377 AND NALSA
JUDGEMENT**

Priya Mathur *

ABSTRACT

Being a citizen of a state essentially means having a set of equal rights. Indian constitution even provides for equality before law and equal protection of laws through Article 14 of Indian Constitution. However, in reality, realization of these rights remains flawed as queer persons still face legal inequality through Section 377 of Indian Penal Code while transgender persons face legal and social harassment despite declaration of progressive judgments like National Legal Services Authority v. Union of India and Others (2014) (hereinafter NALSA). The purpose of this paper particularly is to interrogate the status of transgender persons in India to understand impact of discriminatory laws like Section 377 on them and analyse whether, after NALSA judgment, any positive change has come in their lives or not? This is particularly important given that while NALSA granted transgender people equality of opportunity in society by ordering positive institutional steps; it remained non-committal on their harassment in relation to Section 377. After carefully analyzing the primary and secondary research on the subject the author found out that even in the post-NALSA period, transgender persons still face 1) state violence and societal humiliation; 2) institutional difficulties in getting official identity documents and 3) Non- Cooperation from State Governments in getting educational scholarships, medical facilities, housing and financial support. Therefore the paper suggests that from colonial to post-colonial times, through laws like Section 377, a worldview against transgender persons is produced in Indian society which cannot be eliminated even by progressive judgments like NALSA. What is needed is gender sensitisation and gender neutral education along with abolition of discriminatory sexual laws to truly achieve any change.

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I. INTRODUCTION

The concept of citizenship has been a subject of intense debate in political theory. However the core point that is mostly agreed upon is that being a citizen means having a set of rights in the state. Indian constitution provides for fundamental rights like right to freedom of speech and expression,¹ right to life and liberty,² right to equality of opportunity in public employment³. Most important of all, it provides for equal protection of laws and equal access of rights to all its citizens as it lays down a strong anti-discrimination principle which clearly states that ‘state shall not discriminate against any citizen on grounds...of religion, race, caste, sex, place of birth or any of them’.⁴ Thus, being an Indian citizen not just means having rights but rather it means having equal rights.

However the vocabulary, citizenship and subsequent rights that flow from it is suspended when it comes to queer individuals. We can say so because constitutional rights like right to equality, right to non- discrimination and right to life and liberty are constantly denied to them. This is evident from the fact that while on one hand they face legal inequality because of criminalisation of homosexual relations through Section 377 of Indian Penal Code (*hereinafter* Section 377); on the other hand their civil and social rights as Indian citizens are not even recognised in civil laws of matrimony, family and social welfare. This is because Indian state institutionalises these rights in a heterosexual framework and as a consequence denies queer individual’s various civil and social rights like marriage, divorce adoption and inheritance. It must be noted that as a result of this invisibility in civil law and hyper visibility in criminal law queer citizens more often than not face social bias in the form of violence and discriminatory treatment in educational institutions, workplace and public life as well as bear limited representation in political parties and decision making process of the state.

¹ INDIA CONST. art. 19

² INDIA CONST. art. 21

³ INDIA CONST. art. 15

⁴ INDIA CONST. art. 15 and 16

However this is not to say that the situation of queer rights is totally bleak in the Indian state as some progress is now being made at least for transgender⁵ community, if not for the larger queer community, through progressive judgments like NALSA. What is significant in this judgment is that it granted third gender status to transgender citizens and ordered the Central and State governments to bring positive institutional steps to address issues of employment, education and healthcare.

However the judgment remained non-committal to take any stand on harassment of transgender citizens through Section 377 forgetting that their unequal position in society is tied to this archaic law. So while it granted transgender people equality of opportunity in society it failed to articulate how their right of sexual expression continued to be violated by Section 377.

The aim of the current study is to exactly trace that and understand how the existence of Section 377 has pathologized the status of transgender persons in India and whether, after the NALSA judgment, any positive change has come in their status or not? Therefore the paper will be divided into two parts: Pre-NALSA and Post-NALSA period and will comprise of four sections. The first section and second section will discuss the pre NALSA period and will trace the colonial and nationalist discourse around sexuality to understand how it changed the perception of transgender community in the eyes of larger society as well as analyse the systematic harassment that the transgenders faced in the post-independence era. The third and the fourth section will discuss the post NALSA period to analyse the legal guidelines of NALSA and probe whether any changes have come in the lives of transgender persons after NALSA or is the continuation of Section 377, despite the existence of NALSA, still a hindrance in their pursuit of realising equal citizenship and rights in India.

⁵ Even though in this paper the word transgender is used to address the individuals of 'third gender', it must be noted that in India various other terms are also prevalent like hijra, kothi, aravani, shiv-shakti and kinnar.

**II. COLONIALISM, NATIONALISM AND SECTION 377: DISCOURSE
AROUND SEXUALITY**

Any analysis of Section 377 has to be understood within the context of colonial rule in India. This is because the legal tradition that is followed today by the Indian state is a result of the colonial legacy. It was with the advent of colonialism that codified laws and systemized structure of judiciary came into existence in India and it was the British Empire which introduced homophobic and discriminatory laws like Section 377 and Criminal Tribes Act.

Section 377 found its footing when colonial codification of criminal offences began in 1834 under Thomas Babington Macaulay. Before that, in pre-colonial India, there was no monolithic authority overseeing adjudication in criminal and civil matters. Rather much of the 'law' in that period was 'customary' with adjudication taking place within segregated communities.⁶ However when the British came to power they replaced this system of jurisdiction and became the only arbiter of disputes. They achieved this by dividing the legal sphere into criminal and civil adjudication respectively. The civil side saw the 'construction of personal laws on religious lines governing all communities administered by colonial courts',⁷ while the criminal realm of law saw the consolidation and implementation of Indian Penal Code (*hereinafter* IPC) in 1860. When the IPC was applied, it caused dramatic shifts in the Indian criminal legal system because the offences which were previously considered against individuals under the customary law were now considered offences against the state. This took away any opportunity of leniency and pardon as now specific punishments were fixed for specific crimes.

The most dramatic shift that IPC caused is that it started an era of legal homophobia in the Indian state. This is because in this code colonial rulers included the British aversion to non- procreative sexuality through a section called 'unnatural offences' (which later came to be known as Section 377). Here we must note that initially Macaulay applied a broader definition of 'unnatural

⁶ Varsha Chitnis and Danaya C. Wright, *The Legacy of Colonialism: Law and Women's Rights in India*, 64 W. & L. LAW REV. 1316 (2007)

⁷ ARVIND NARRAIN, QUEER: DESPISED SEXUALITY, LAW AND SOCIAL CHANGE 33(2003)

offences' as the Draft Code of 1837 of IPC criminalised even the vague act of touching rather than specifically penalizing 'penile-anal sex'. Further it also incorporated the principle of consent prescribing different terms of imprisonment depending on whether the act was consensual or not.⁸ However this broader interpretation of the unnatural offences did not sit well with the British authorities who considered the draft code as ambiguous. For them it did not specify whether Section 377 even applied to the mere indecent liberties, or applied to only actual commission of non-heterosexual acts. Therefore when the code was applied in 1860 the provision was framed relatively more precisely introducing the term 'carnal intercourse against the order of nature' as well as replacing the vague act of 'touching' with specific requirement of 'penetration'.⁹ Thus the final version when applied as Section 377 of IPC read that:

“Unnatural offences - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment ... for a term which may extend to 10 years, and shall be liable to fine.

Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this Section.”

It must be noted that what includes 'carnal intercourse against the order of nature' was not defined, thus leaving it still ambiguous. This had serious implications as when the law was applied in Indian society, one of the major

⁸ The Draft Code of 1837 of IPC introduced two provisions called Clause 361 and Clause 362 towards this end which read that:

cl. 361 Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.

cl. 362 Whoever, intending to gratify unnatural lust, touché for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine.

⁹ It must be noted that the term 'unnatural offences' was still retained as a caption.

projects of judiciary was to define the scope of penetration and doing so they criminalised broad range of non- heterosexual acts as ‘against the order of nature’. This coupled with doing away of the classification of consent makes any non-heterosexual conduct indistinguishable from ‘rape and paedophilia’ in the eyes of the law, linking the figure of non-heterosexual individual to that of violent sexual criminal.¹⁰

This especially downgraded the status of the transgender community which until now was accorded respect by the Indian society. They enjoyed prominent positions in pre-colonial era often serving as ‘political advisors, administrators, generals’¹¹ and even as messengers and ‘guardians of harems’.¹² Infact they commanded influential positions in Delhi Sultanate ‘especially under Khiljis of Delhi in 13th and 14th century and under Mughals from 16th to 19th century’.¹³

However after the arrival of the British Raj this position of respect and influence was radically altered as colonial rulers were repulsed by the respect given to the transgender persons in the royal courts and the larger society. Therefore to curb this they vigorously tried to criminalise the transgender community by describing them as against ‘public decency’ and categorising them as criminal tribe or caste under Criminal Tribes Act of 1871. Under this act, they declared them as criminals by birth that needed to be kept under constant surveillance by the colonial state. They even incorporated within it Section 377 of IPC by introducing Section 24 which stated that the local government must maintain a register with names and addresses of all eunuchs ‘who are reasonably suspected of kidnapping or castrating children or of committing offences under section three hundred and seventy seven of the Indian Penal Code’.¹⁴ The act went on to even criminalise transgender persons on the basis of their appearance as it stated

¹⁰ Alok Gupta, *This Alien Legacy: The Origins Of ‘Sodomy’ Laws In British Colonialism* in HUMAN RIGHTS, SEXUAL ORIENTATION AND GENDER IDENTITY IN THE COMMONWEALTH, STRUGGLES FOR DECRIMINALISATION AND CHANGE 96 (Corinne Lennox and Matthew Waites eds., 2013)

¹¹ M. Michelraj, *Historical Evolution of Transgender Community in India*, 4(1) ASIAN REV. OF SOC. SCI. 18 (2015)

¹² *Id.*

¹³ GAYATRI REDDY, WITH RESPECT TO SEX: NEGOTIATING HIJRA IDENTITY IN SOUTH INDIA 8 (2005)

¹⁴ Criminal Tribes Act, No. 27 of 1871, sec. 24 A

that any registered eunuch ‘who appears, dressed or ornamented like a women, in public street...or who dances or plays music or takes part in any public exhibition’ either in public or hired ‘in a private house may be arrested without warrant shall be punished with imprisonment of...two years or with fine, or with both’.¹⁵

Even though the criminalisation on the basis of transgender appearance was done under Criminal Tribes Act, it came to be explicitly employed in cases of Section 377 also. This is evident from the colonial case of *Queen Empress v. Khairati (1884)*¹⁶ where the sessions court of Moradabad convicted the accused Khairati on the grounds that 1) he was dressed in women’s clothes while singing among the women of his village community 2) medical examination showed that the orifice of his anus was in the distorted form of trumpet and 3) he had syphilis. What is significant to note here is that the court concluded that even though the above three facts individually did not provide sufficient proof to convict, together they leave no doubt that Khairati must have had ‘unnatural sexual intercourse in last few months’¹⁷ and therefore he must be punished. This was astonishing because in this case there was no record of the sexual act per se or any witness testimony. Yet the accused was convicted on mere suspicion of the appearance of sodomy. What was also astonishing was that colonial court rationalized such decision stating that it was taken in the larger spirit of the law as ‘any misconduct of this sort...cannot be exempted from punishment’ in the moral interest of society.¹⁸ Further when the matter went to Allahabad High Court in appeal, even though the court overturned the sessions court’s decision, it still repeatedly referred to the accused Khairati as ‘habitual sodomite’ or ‘habitual offender’¹⁹ even when he was neither previously charged nor convicted on any offence in relation to this. Yet the judge on the basis of his appearance or

¹⁵ *Id.* at. Sec. 26

¹⁶ Another case was *Queen Empress v. Ghasita (1884)* in which Ghasita was prosecuted on the suspicion of being habitual sodomite on the mere basis that he cross dressed. However since the Section 377 of IPC was not codified until 1860, the judgments of *Queen Empress v. Ghasita (1884)* and *Queen Empress v. Khairati (1884)* is not available. Both cases are only mentioned by researchers in their commentaries.

¹⁷ ANJALI R. ARONDEKAR, FOR THE RECORD: ON SEXUALITY AND THE COLONIAL ARCHIVE IN INDIA 68 (2009)

¹⁸ *Id.* at 68

¹⁹ *Id.* at 69

cross dressing concluded that he was a habitual sodomite or offender who indulged in acts of 'sexual immorality'. Thus this case shows the colonial regime in its quest for sexual compartmentalisation of Indian society pathologized transgender persons.

What is even sadder is that nationalism also contributed in fostering stigma and discrimination against transgender persons in colonial India. We can say this because the narrative against non-heterosexual behaviour which entered the Indian society through law was also propagated by the nationalist forces. This is evident from the fact that nationalists did not vehemently question or protest against the implementation of either Section 377 or Criminal Tribes Act. Infact they rather invested all their energies in building a common national identity around the axis of normative sexuality, stressing on heterosexual institutions like marriage and procreation. Doing so, they also tried to build an image of hyper Indian masculinity by formulating and representing the Indian past and its culture as based on hyper masculine values. This is especially evident if we look at Bankim Chandra's essay on Krishna where he argued 'away all references to Krishna's character traits' which could seem as soft, childlike, sexually playful god who was simultaneously an androgynous. Rather he depicted him as 'a respectable, righteous, didactic, 'hard' god, protecting the glories of Hinduism as a proper religion and preserving it as an internally consistent moral and cultural system'.²⁰ This nationalist narrative completely discarded and abandoned the existence of transgender community as inherent to Indian society, relegating them to the status of 'perverse' sexuality, in order to adhere to the 'new norms of sexuality, politics and social relationships'.²¹

By doing so the colonial and nationalist forces pathologized the transgender identity who until now was accommodated in the pre-colonial India. This led to the obscurity of transgender identity as it created conditions where they were now constantly in fear of legal prosecution. Further it also commenced the starting of an era where Indian sexuality came to be categorised in opposing binaries like 'normality and abnormality'. The colonial state by defining 'legal

²⁰ ASHISH NANDY, THE INTIMATE ENEMY LOSS AND RECOVERY OF SELF UNDER COLONIALISM 23 (1983)

²¹ *Id.* at 23

sex as heterosexual and penetrative' gave heterosexuality the status of being the 'only normal form of sexuality' and everything outside it as illicit. The legal dimension was especially deterring for transgender community and even larger queer sexuality because it provided a set of sexual norms that now the society needed to adhere to.²² By doing this, it organised Indian society exclusively around heterosexuality and heterosexual institutions while relegated non-heterosexual behaviour to the sphere of illegality, something which even continued after the independence from colonial rule.

III. LEGAL AND SOCIAL DISCRIMINATION AGAINST TRANSGENDER PERSONS IN POST INDEPENDENCE ERA

Even though Criminal Tribes Act was abolished by the central government in post independent India, transgender community still faces marginalisation and discrimination in the Indian society. Largely this is a result of the continuation of Section 377 which still stands constitutionally valid in statutes despite the repeated challenges. In 2009, significant progress was made when Delhi High Court decriminalised homosexuality by overturning this archaic colonial law. However soon this change was lost in 2013 as Supreme Court overturned the Delhi High Court judgment. Since then Indian state has not taken much effort to correct the situation and has been non-committal often citing lack of political consensus as a reason for not striking it down through legislature.²³ Recently in December 2015 Shashi Tharoor, an MP from Kerala even introduced a private member bill to amend Section 377 to decriminalise consensual sex between consenting adults. However this bill was defeated in Lok Sabha by the vote of

²²HIMANI BANNERJI, *INVENTING SUBJECTS: STUDIES IN HEGEMONY, PATRIARCHY AND COLONIALISM* 73 (2001)

²³ The UPA government in 2013 did not made many efforts to strike down Section 377 after the Supreme Court verdict on the matter. In fact then Home Minister Sushil Kumar Shinde commenting on the issue of queer rights rejected a legislative solution stating that it is not possible to legislate anything as it needs political consensus. Similarly no legislative progress has also been made after the new government of National Democratic Alliance came in 2014. In fact recently the governments law minister Mr. D.V. Sadanand Gowda in a press statement said that there were not even plans for any government deliberations on the issue.

71-24 which shows lack of real intent on part of legislature to rectify the discrimination against sexual minorities.²⁴

It must be noted that the number of cases booked under Section 377 against transgender individuals cannot be measured as this law is not fully documented. Many cases do not reach the trial courts by being settled at the level of police stations and those who reach are not appealed in High Court or Supreme Court for reasons unknown. However just because number of prosecutions under Section 377 cannot be measured we should not assume that this law does not perpetuate contempt for sexual minorities. Rather we should keep in mind that law is not merely about ‘controlling behaviour directly’ by enforcing punishment but also about ‘making statements’ Indian state by criminalising ‘consensual non procreative sexual behaviour’ expresses contempt for sexual minorities which often transcends into discriminatory attitude in the society.

This is evident if we look at how police officials repeatedly harass transgender persons by threatening them to book under Section 377. According to Narrain, this happens because Section 377 ‘criminalises carnal intercourse against the order of nature...even if it is voluntary’. By doing so, it also:

“...criminalises certain kinds of sexual acts that are perceived to be unnatural. The law, which has its origin in colonial ideas of morality, in effect (then also) presumes that a hijra...is engaging in carnal intercourse against the order of nature, thus making this entire lot of marginalised communities vulnerable to police harassment and arrest.”²⁵

Numerous newspaper reports and NGO studies have documented how transgender individuals are physically tortured, gang raped and even sexually assaulted by police personnel under the intimidation of Section 377 of IPC. In fact, police personnel under the camouflage of arresting them for cruising sex, force them to provide ‘sexual favours’. At times they are even forced by police

²⁴ *Tharoor Says ‘Intolerance’ After His Bill To Amend Section 377 Rejected*, HINDUSTAN TIMES, Dec. 18, 2015, available at <http://www.hindustantimes.com/india/tharoor-cries-intolerance-after-bill-amending-section-377-rejected-in-lok-sabha/story-2qEJgMtB1m3QnOAMpLhWwO.html> (last visited Jan. 20, 2016)

²⁵ Siddharth Narrain, *In a Twilight World*, FRONTLINE, Oct. 24, 2003, available at <http://www.frontline.in/static/html/fl2021/stories/20031024002509800.htm> (last visited Jan. 25, 2016)

to have unsafe sex which makes them vulnerable to HIV and STDs. In case they refuse, they are either physically beaten up and raped in police custody or even booked under false accusations ranging from petty offences like theft and pick pocketing to serious crimes like peddling and possessing drugs.

One such story is of Sachin, a hijra, who was picked up by a policeman, taken to bushes and was asked to strip. He was then beaten up and raped by the policeman.²⁶ In another case a transgender sex worker called Smita along with her husband was detained in the police station and was subsequently asked to strip in front of 15-20 policemen. She was then sexually abused and humiliated as she was forced to spread her thighs for police officers to touch her sexual organs. Violence against her was not limited to this as she was even beaten up with police lathis on the head, hands and shoulders and even had to bear verbal abuse in the form of homophobic slurs.²⁷

Similarly Kokila a Bangalore based Hijra was gang raped by several men on 18 June 2004. When she went to the police station to file a complaint she was arrested, tortured and harassed. Her gender identity was even ridiculed and she was forced to strip naked.²⁸ In another case Aishwarya a 23 year old hijra was harassed for money by police personnel at the bus station. They even threatened her that if she did not pay she would be booked for theft. When she could not pay she was taken to Cubbon Park Police Station and was detained, tortured and sexually abused for 3 days.²⁹

A case of violence and discrimination that reached the courtroom was that of *Jayalakshmi v. The State of Tamil Nadu and Others* in 2007. It was a case of a Chennai based transgender named Pandian who committed suicide after being tortured and harassed by police officials. They inserted lathis inside his anus and

²⁶PUCL-K, *Human Rights Violations Against Transgender Community*, PUCL-K 27 (Sep. 2003) available at <http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.pdf> (last visited Jan. 25, 2016)

²⁷ *Id.* at 30-31

²⁸Sangama, *India: Rape And Police Abuse Of Hijra In Bangalore; Call For Action*, OUTRIGHT ACTION INTERNATIONAL, available at <https://www.outrightinternational.org/content/india-rape-and-police-abuse-hijra-bangalore-call-action-sangama> (last visited Jan. 25, 2016)

²⁹PUCL-K, *supra* note 26

forced him to have oral sex.³⁰ The Madras High Court in the judgment stated that there was sufficient proof to recognise that inhuman sexual violence was committed by police officials on the victim and these circumstances forced him to commit suicide. The court as punishment directed the state to take interdisciplinary action against the accused police officers and pay the compensation of Rs. 5 lakhs to the family of Pandian. Recently a case was reported in Ajmer where a transgender was arrested and forced to engage in sexual acts with the police under the threat of being booked over a narcotics case if she refused.³¹

The discrimination against transgender persons is not restricted to only police personnel but also takes place within the family. Given that in Indian society heterosexuality is represented as sacrosanct, Indian parents often interpret non conformity to gender norms by their children as sexual deviance. They associate it with feelings of shame and as a result transgender individuals are constantly beaten up, pressurised to get married and even socially ostracised by their family. One such case is of a transgender named Kalyani. When she decided to go for sex change operation, she had to face the outrage of her family and as a consequence had to run away from home. In another case, a transgender named Roopa was beaten with a cricket bat by her brothers when they found out that she had joined a hijra community.³²

The intensive effect of Section 377 is not only restricted to the realm of state and family but also extends itself to day to day discrimination in public life. For example transgender persons often face physical harassment at schools which forces them to discontinue their education. Lack of education further results in fewer employment opportunities. In such conditions they are often forced to fend for themselves through sex work and bestowing blessings. They also routinely face discriminatory treatment in renting or buying houses due to their 'different appearance' and social stigma. Further they also face outright rejection when they attempt to access public toilets, restaurants, hotels, libraries,

³⁰ *Jayalakshmi v. The State of Tamil Nadu and Others*, 2007 4 MLJ 849

³¹ Maria Akram, *Transgender Raped By Cops Fights For Justice*, THE TIMES OF INDIA, Sep. 12, 2014 available at <http://timesofindia.indiatimes.com/india/Transgender-raped-by-cops-fights-for-justice/articleshow/42319820.cms>. (last visited Feb. 2, 2016)

³² PUCL-K, *supra* note 26

museums, places of worships, public transport like buses and trains because of their gender identity and sexual orientation.

However despite this homophobic violence and discrimination in society, the Indian state continues to deny that Section 377 is discriminatory on grounds that it is rarely enforced. Not only does it conveniently forget that enforcement of Section 377 cannot be measured simply by the list of cases in the appellate court but it also forgets that the mere existence of this law fosters a negative and discriminatory attitude in society sometimes to an extent that ‘societal acts of homophobic and transphobic violence derive sanction from it’.³³ What this means is that even when law is not used to prosecute transgender persons inside the courtroom, its mere existence sanctions their persecution outside the courtroom.

IV. THE NALSA JUDGMENT

The shift in the narrative of transgender rights in India came up when National Legal Services Authority filed a petition in 2012 arguing that legal recognition of only binary genders and lack of legal measures to serve particular needs of transgender community were in violation of their Constitutional rights. Central and the state governments in their response to the petition argued that they had already constituted an expert committee to look into concerns of transgender community and adequate steps were being taken. In April 2014 the Supreme Court came up with its decision and declared that ‘hijras and eunuchs be treated as third gender’ and transgender people have the ‘right to decide their self-identified gender’³⁴ which the central and state government must legally recognise. It also directed the central and state government to recognise transgender people as ‘socially and educationally backward classes...and (therefore) extend all kinds of reservation in cases of admission in educational

³³ Oishik Sircar, *The Fallacy Of Equality: ‘Anti-Citizens’, Sexual Justice And The Law In India* in JUSTICE AND LAW: THE LIMITS OF THE DELIVERABLES OF LAW 216 (Ashok Agrwaal and Bharat Bhushan eds., 2009)

³⁴ *National Legal Services Authority v. Union of India & Others*, Writ Petition (Civil) No. 400/2012 and Writ Petition (Civil) No 604/2013 ¶ 129

institutions and for public appointments'.³⁵ Other measures that the court directed include the setting up of separate HIV Sero-surveillance centres, separate public toilets, framing of social welfare schemes etc.

It is important to note that NALSA judgment is quite path breaking in terms of its interpretation of fundamental rights. This is evident from the fact that it relied on Article 14, 15, 16, 19(1)(a) and 21 while making a case for rights of transgender. For example it states that Article 14, which gives right to equality and equal protection of law, uses the term 'person' and therefore its application cannot be restricted to just binary genders. Hijras/Transgenders also fall within 'the expression "person" and hence (they are also) entitled to legal protection of laws in all spheres of state activity...as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country'.³⁶ Further it interpreted 'sex' as encompassing of gender identity under Article 15 and 16 of the constitution. The court argued that expression 'sex' cannot be limited to the biological understanding of male and female rather it also includes those who consider themselves neither male or female. On the basis of this interpretation of sex it declared that any gender based discrimination including discrimination against transgender persons is illegal. As for Article 19 the court stated that right to freedom of speech and expression includes 'one's right to expression of his self-identified gender'³⁷ and therefore this expression of one's gender identity through actions, behaviour, words and dress should not be restricted. This is especially progressive as transgender individuals often face discrimination on basis of their defiance of binary forms of dressing and behaviour. The court also took note of Article 21 of the constitution and argued that one's right to choose gender identity is integral to one's fundamental right to live with dignity and therefore falls within the scope of Article 21 of the constitution.

By applying such reasoning the judgment proved to be progressive in a lot of ways. For example by expanding Article 14 to encompass transgender persons in equality before law and equal protection of law, it addressed the invisibility of queer individuals generally and transgender persons specifically in civil laws. It

³⁵ *Id.*

³⁶ *Id.* at ¶ 54

³⁷ *Id.* at ¶ 62

presented the revolutionary possibility that now marriage, adoption, succession, inheritance and welfare laws, which are based on gender binary, can be interpreted to address the invisibility of queer persons. Further the fact that Article 19(1)(a) is extended to include freedom of expression of gender identity gives the possibility that it can also be extended to include freedom of expression of sexual identity. After all the court itself stated that, ‘each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom’.³⁸ By this logic, Section 377 violates article 19(1)(a) as it criminalises the right to express one’s sexual orientation and same-sex intercourse involves expression of sexual orientation. Even if the sexual act and identity distinction as upheld by Koushal is applied, Section 377 would still be unconstitutional as under article 19 freedom of expression of sexual orientation will involve expression through sexual act. Also the NALSA judgment itself tied sexual identity with sexual act stating how Section 377 even if associated with certain acts, highlights certain identities including hijras and therefore used ‘as an instrument of harassment and physical abuse’ against them.

V. DID NALSA DETER THE IMPACT OF SECTION 377 ON TRANSGENDER COMMUNITY?

It must be noted that despite acknowledging that Section 377 fosters prejudice against transgender community, the NALSA judgment did not take a clear stand on this archaic law stating that the matter is already settled by the Koushal judgment and therefore it will not comment on it further.³⁹ By doing so, it still left the door open for prejudice to sustain against transgender persons through Section 377 in Indian society. Therefore it is important to evaluate whether any change has come in the lives of transgender persons after NALSA or is the continuation of Section 377 still a hindrance in their pursuit of realizing equal citizenship and rights in India?

³⁸ *Id.* at ¶ 20

³⁹ *Id.* at ¶ 18

A. ATMOSPHERE OF VIOLENCE AND DISCRIMINATION STILL EXISTS

The atmosphere of violence and discrimination permeated due to the fact that Section 377 still exists even after the NALSA judgment. This is evident from the fact that, from January to November 2014, more than 800 cases of violence against transgender persons, men who have sex with men (MSM) and hijras were recorded in 17 states of India as per the data collected by India HIV/AIDS alliance. Many of these cases are of institutional violence where the victims had to bear torture and sexual abuse by the police personnel. A more immediate example of this institutional violence is a case reported in Ajmer in June 2014, right after the NALSA judgement, wherein one person called Nagma and seven other hijras were detained by the police on grounds of assaulting a policeman. What followed was horrifying as according to the FIR filed by Nagma, all of them were beaten and sexually assaulted by policemen in Dargah Police Station and were even forcefully made to give Rs. 40,000 to the police.⁴⁰ In another case reported in Guntur, Andhra Pradesh, a Hijra named Iliyana was detained by the local police along with a member of Sneha Sri Sadikaraka Welfare Society (SSSWS), a NGO working for MSMs, transgender and hijras. While the member of the NGO was released, Iliyana was not. Rather she was beaten up by the police and booked under a false case of kidnapping. Even after she was released, the police made her to come to the police station again and again after which she committed suicide as she was tired of the police atrocities.⁴¹

It must be noted that despite NALSA guidelines, transgender persons are being subjected to not only physical violence but also mental cruelty and public humiliation. This is evident from the fact that recently in September 2015; a case was reported in Hyderabad where a transgender named Vyjayanthi Vasanta Mogli was stopped by the head of the security from buying a movie ticket in the city's mall and was even asked to leave the premises. When she confronted the mall authorities for the reason to do so, she was not given any straightforward answer and was not even given any apology for the behaviour of the staff. This

⁴⁰Dhamini Ratnam, *Ground Report: Crime And Punishment*, LIVEMINT, Dec. 5, 2015 available at <http://www.livemint.com/Leisure/5XCUSYRBJYDccUROFjs4bM/Ground-Report-Crime-and-punishment.html> (last visited Feb. 5, 2016)

⁴¹*Id.*

shows that despite the court ruling the corporate companies are yet to take any step to sensitise their staff and to comply with the rules laid down by the judgment.⁴² Similarly transgender persons still face discrimination in renting or buying an apartment. Recently a case was reported in June 2015 in which a transgender woman in Mumbai was asked to vacate the house by the landlord as the owner feared that her presence in the building will attract backlash from neighbours.⁴³

Such incidents show that the Section 377 has spread prejudice against sexual minorities and it has not subsided even after the NALSA guidelines. In fact, the 2013 Koushal judgment has only strengthened this prejudice at the societal level as the transgender persons continue to live in an atmosphere of fear of institutional and societal violence. Bhan argued that ‘this has continued because colonial-era law (has) attached a tag of criminality to individuals on the basis of their sexuality, giving them the status of apprehended felons’,⁴⁴ despite the court recognizing the ‘third gender’.

B. PROBLEM OF DOCUMENTS AND RECORDS

While it cannot be ignored that the guidelines of NALSA is quite progressive, for any real change to come a lot depends on its implementation at the ground level which still remains in doubt. This is evident from the fact that transgender persons still find it difficult to obtain official identity documents like Aadhar, ration cards and passports. In January 2015, E-PAO even reported an incident in Guwahati where a trans-person who identified herself as female, and even had a gender identity change affidavit with herself to support her claim, was put into transgender category by the passport office against her will.⁴⁵ Her assertion of

⁴²Nikhila Henry, *Transgenders Denied Entry Into City Mall*, THE HINDU, Sep. 28, 2015 available at <http://www.thehindu.com/news/cities/Hyderabad/transgenders-denied-entry-into-city-mall/article7696688.ece> (last visited Feb. 5, 2016)

⁴³Anahita Mukherji, *Mumbai Transgender Claims She’s Being Turned Out Of Flat For Her Sexuality*, THE TIMES OF INDIA, June 24, 2015 available at <http://timesofindia.indiatimes.com/city/mumbai/Mumbai-transgender-claims-shes-being-turned-out-of-flat-for-her-sexuality/articleshow/47791162.cms> (last visited Feb. 5, 2016)

⁴⁴Dhamini Ratnam, *Ground Report: Crime And Punishment*, LIVEMINT, Dec. 5, 2015 available at <http://www.livemint.com/Leisure/5XCUSYRBJYDccUROFjs4bM/Ground-Report-Crime-and-punishment.html> (last visited Feb. 7, 2016)

⁴⁵Santa Khurai, *For Too Many Supreme Court NALSA Judgement On Transgenders Rights Is Still A Big Illusion*, E-PAO, Jan. 24, 2015 available at

the NALSA judgment, which clearly states that transgender persons have the rights to decide their self-identified gender and state and central government must grant them legal recognition of their self-identified gender identity, also did not help. This case shows that implementation of dictums of NALSA judgment is yet to happen on the ground fully.

In another case a man from Kolkata named Ajay had to bear with confused court authorities when he legally tried to transition into women. After NALSA ruling, he filed an affidavit in Alipore district court to change his name and gender so that he can subsequently get the details changed in his official identity documents like PAN- Card and passport. However the magistrate refused to grant his plea and rather questioned him for undergoing hormonal treatments without the court's consent even when there is no such requirement given under law to do so. It was only after he approached another judge armed with specific provisions of NALSA judgment that his plea was granted. Even then the judge was not clear on how to go about the case but granted Ajay's plea on repeated insistence.⁴⁶ Similarly in Tamil Nadu a transgender named S. Swapna was refused by the Joint Director of Government Examinations in Chennai to change her name and gender in her Secondary School Leaving Certificate (SSLC) and Higher Secondary Course certificate on grounds that 'prevailing regulations does not permit such course of action'.⁴⁷ It must be noted that S. Swapna was born as a male named S. Nazar and in 2011 she underwent sex reassignment surgery (SRS) after which even her B.A. degree from Madurai Kamaraj University stated her name and gender as S. Swapna taking into account the SRS. However, the Joint Director did not see any reason for effecting the change and it was only after she approached the Madras High Court that she was granted relief. The court directed the authorities stating that:

http://epao.net/epSubPageExtractor.asp?src=news_section.opinions.Opinion_on_Racial_Discrimination.For_too_many_Supreme_Court_NALSA_Judgement_on_Transgenders_Rights_is_still_a_big_illusion_By_AMANA (last visited Feb. 10, 2016)

⁴⁶Mohua Das, *Hurdles, Also At Court, For Man Seeking Sex Change*, THE TIMES OF INDIA, Jul. 24, 2015 available at <http://timesofindia.indiatimes.com/india/Hurdles-also-at-court-for-man-seeking-sex-change/articleshow/48196036.cms> (last visited Feb. 7, 2016)

⁴⁷*S. Swapna (Transgender) v. The State Of Tamil Nadu*, Writ Petition (MD) No.10882/2014 and M.P.(MD)_No.1/2014 ¶ 3

“When a transgender undergoes a sex reassignment surgery and makes an application thereafter for change of name and sex in the relevant records on the basis of various documents including the certificate issued by the Medical Officer, the concerned authorities... (should)...verify the records and make consequential changes in the concerned records. The petitioner cannot be dragged from pillar to post on the ground that there are no rules permitting such changes in educational records... The authorities in a case of this nature must extend their helping hand to a transgender rather than denying the relief on technical reasons.”⁴⁸

There has also been confusion on the issue whether Female to Male transgender persons are covered under ‘third gender’ category of NALSA ruling. For example a case came up in front of Madras High Court where the petitioner, a women police constable, was terminated from her service on grounds that she failed to disclose that she was a transgender. Problem with her termination was that she had always identified herself as a female and was even brought up by her family as female. Infact it was the medical officer who during the routine medical check-up put her up as ‘transgender by birth’ without her consent. It was after she appealed in the court that her right was recognised and the court directed the Superintendent of Police to grant her job back within six weeks.⁴⁹ While giving this direction the court made several important points. For example it stated that there was no particular law given in the country to determine sex and there was no explicit definition of ‘male’ and ‘female’ in Indian law.⁵⁰ It also pointed out that under NALSA ruling:

“transgender persons have right to decide their self-identified gender and the Governments have to grant legal recognition of their gender identity such as male or female or as third gender. The Hon’ble

⁴⁸ *Id.* at ¶ 5. A case with similar facts called *K. Prithika Yashini v. The Controller of Examination (2015)* came up again in Madras High court. In this case also the authorities refused to change the name and sex of the petitioner in educational records and the relief was only granted after the court directed the authorities to make appropriate changes within 8 weeks.

⁴⁹ *Jackuline Mary v. The Superintendent of Police Writ Petition No.587/2014 and M.P.Nos. 1 and 2/2014* ¶ 43

⁵⁰ *Id.* at ¶ 16

Supreme Court has affirmed that this right flows from Article 19(1)(a) of the Constitution of India. In my considered opinion, in the case of Females to Males (FTMs) also, such fundamental right is available to them and therefore, it is for them to choose and express their identity either as females or males or as transsexuals.”⁵¹

The above examples prove that there is lot to be done on the ground level in terms of implementation of NALSA as more often than not transgender persons are denied their rights when they approach administrative authorities. In all of the above cases it was only after the petitioners approached the court that they were granted relief.

C. LACK OF STATE MEASURES

It must be noted that Supreme Court recognised the rights of transgender community in April 2014 and gave central government six months to implement its directions. However in September 2014, central government made an application in Supreme Court for clarifications and modifications of certain points in the NALSA judgment. In the same application, government also requested for 6 months extension to implement the directions of the court. Further it also stated that reservation of transgender community as socially and economically backward classes have to be determined in consultation with National Commission for Backward Classes. Nevertheless, the Centre has sent notices to the state governments to implement: 1) a grant of Rs. 1000 per month to the parents of transgender children, 2) it has directed to set a class seventh to tenth scholarship, 3) a scholarship for promotion of higher studies among transgender children and 4) to implement a monthly pension scheme for transgender persons. In line with the dictums of the central government, Tamil Nadu and Karnataka have set up a monthly pension scheme. States like Maharashtra, West Bengal, Odisha and Tamil Nadu have set up a Transgender

⁵¹ Id. at ¶ 36

Welfare Board while Bihar and West Bengal have made provisions for reservations in government employment.⁵²

However despite the declarations of all of the above measures, any real implementation is yet to be fully taken by the central and state governments. This is evident from the fact that Ministry of External Affairs requires a proof of sex reassignment surgery to allow a gender change in the passport. This is in violation of NALSA guidelines which clearly states that one has the right to identify their own gender and verification of it requires only psychological tests and not any physical assessment. Further if we look at HRLN report⁵³ we will see how getting an SRS is no easy task. In states like Odisha there are no facilities of sex reassignment surgeries in public hospitals. They are only available in private hospitals which cost close to one lakh rupees for the operation. Providing health facilities and medical care is the basic guideline put up by NALSA and SRS is an integral part of this medical care which is yet to be made available by state governments. Similarly no separate wards and toilets have been provided to transgender persons in hospitals or even hostels in Indian states despite the fact that NALSA guidelines clearly require the state to do so.

Also while reservations are being considered and implemented in various universities of the country, the minute details of providing transgender persons with a comfortable and safe environment is yet to be figured out by the state. Further transgender persons still have lack of access to land and are yet to be included in government housing schemes like Rajiv Gandhi Awas Yojana. Similarly transgender community also face problems in availing benefits like those of pension schemes as many of them do not even have bank passbooks. The application procedures for such schemes and benefits require the applicants to submit their identity cards. Often transgender persons even face difficulty in procuring these documents because of the rejection of concerned authorities to

⁵²Vaishana Roy, *The Road Looks Long For Third Gender*, THE HINDU, May 2, 2015 available at <http://www.thehindu.com/opinion/op-ed/the-road-looks-long-for-third-gender/article7162258.ece> (last visited Feb. 15, 2016)

⁵³Human Rights Law Network, *Issues Faced By Transgender Persons In Odisha* (Jul. 2015) available at <http://www.hrln.org/hrln/images/stories/pdf/Transgender-Fact-Finding-Report-HRLN.pdf> (last visited Feb. 15, 2016)

change the name and sex on their certificates. In such situations gathering required documents and producing them to avail such benefits seems like a distant dream to them.

VI. CONCLUSION

During the course of this paper we noted how citizenship and rights in India are only fully available to heterosexual citizens of the state. Gender conformity and adherence to heterosexual norms is expected out of a citizen if he/she has to enjoy the material ingredients of citizenship and rights. If one does not adhere to it then fundamental rights like right to equality, right to non-discrimination and right to life seem to exist only on paper to them. This is because in reality they would be relegated to the sphere of inequality. In such a system, Indian states' promise to provide equal citizenship to all seems farce when one looks at the pathologization of transgender persons. The central player in this pathologization is criminal legal system of India. This is because from colonial to post-colonial times, through laws like Section 377; it explicitly prohibits non procreative sexual practices and punishes those who engage in them. By doing this it marks some forms of sexual orientation and gender identity as 'abnormal', 'bad' and 'illegitimate' while others as 'normal', 'good' and 'legitimate'. By doing so, it produces a worldview against transgender persons as they do not fit in the dominant 'sexual norms' of the society. This even permeates into different social settings and becomes part of the ordinary conversations and social fabric in families, medical establishment, workplaces and even public life. In fact it creates an environment where existence of Section 377 is used to rationalize legal acceptability of violence against transgender individuals. This is precisely the reason as to why even progressive judgments like NALSA has not been able to make much difference to their status at the ground level. Therefore, what is needed now is to generate sensitization in larger society towards the rights of transgender persons. This can be only done when sensitization measures and gender neutral education is provided from the elementary level so that it can be spread to all levels of society.

CASE COMMENT: IRSAD ALAM v. THE STATE OF BIHAR

*Pradyumna Kibe**

I. INTRODUCTION

Confessions have always been a twisting tale for the Courts in the country as the law is still finding its equilibrium position. There have been doubts as to what should be considered as confession; what part of the inculpatory statement can be considered as confession. The Hon'ble Patna High Court deciding upon the same subject-matter provided its view dealing with extensive and exhaustive aspects of the case. The author would try to analyse the judgement through the lens of existing trends derived from the precedents.

Confession is one of the best form of evidence available to prosecution for make its case strong enough. But what is to be considered as confession has not been defined under the Indian Evidence Act of 1872. This case relates to statements made by the accused to the Custom Officer, which have been construed as confession by the Trial Court; in these statements the accused has out rightly denied his own liability but agreed on other facts. The High Court has delivered its judgment taking in its point of view many aspects of the confession, checking what confession is, what its probative value is and when it can be relied upon.

II. FACTS, ISSUES AND JUDGEMENT

The Superintendent of Custom Circle, Bettiah received information that the pick-up van being driven by the accused-appellant was carrying *ganja* from Ramgarwaha, Bihar to Ballia in Uttar Pradesh. After receiving such information, a team from custom office intercepted the van at Bettiah and found a secret chamber in which 113 kg of *ganja* was hidden. The accused-appellant was then brought to Custom Office where his statement was taken and noted in Exhibit 3 and was interrogated by the Officer as presented in Exhibit 4. The accused in

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these statements to the Custom Officer accepted all the facts, but, denied that he was aware of the presence of the false chamber in the van. He also stated that he is an electric mechanic and had never done such an act before and was travelling on insistence of pick-up van's owner. The owner of the van had told the accused to go Ballia and to contact Dr. Hira after which the owner would provide him with further instruction.

The accused was charged under Section 23(1) of the Narcotic Drugs and Psychotropic Substances Act of 1985. Exhibits 3 and 4 were presented as confession by the Prosecution in this case. But the prosecution failed to provide the Trial Court with any evidence regarding the intention of the accused. The Trial Court, relied entirely on these confession statements of the accused and convicted him and sentenced him for a period of 12 years of rigorous imprisonment and fine of Rs. 1,00,000. Appeal was filed by the accused before the Hon'ble High Court of Bihar.¹ The Counsel on behalf of the accused-appellant contended that the alleged confession of the accused, i.e. Exhibit 3 and 4, on which the Hon'ble Court has relied on is not evidence itself. The Counsel also submitted that the prosecution first has to prove that the accused was knowingly and consciously in possession of *ganja* and then only can corroborate the same from alleged confessional statement. The following issues were raised by the accused-appellant and discussed thereafter by the Hon'ble High Court:

- i. Whether confession made to Custom Officer is admissible or not?
- ii. Whether confession of an accused is no 'evidence' unless there is other 'evidence' on record proving the case of prosecution?
- iii. Whether the confession of a co-accused can be used for the purpose of only corroboration or rendering of assurance to the conclusion?

The Court discussed the third issue in light of understanding the perspective taken by the different Courts regarding the admissibility and sole reliance of confessions for conviction of an accused. Discussing various case laws and the

¹ *Irsad Alam v. The State of Bihar*, 2014 Cri.L.J. 2107 (Pat.)

positions previously taken by the Courts, the Hon'ble High Court answered the issues and decided in the acquittal of the accused-appellant. The learned Court overruled the judgement of Trial Court stating that though the confession made to the Custom Officer is not barred for admissibility by Section 25 of the Indian Evidence Act, 1872 but the same confession has to be used as a corroborative piece of evidence and the conviction should not be solely based on the confession itself without any substantive evidence to the same.

III. ANALYSIS

The Hon'ble Supreme Court has settled the law on whether the Custom Officer stands in the same footing as of a Police Officer. This issue is attracted because in Section 25 of the Evidence Act, any confession made to the Police officer becomes out right inadmissible. But, it has been clearly held in series of cases by the Supreme Court that Custom Officer would not come within the ambit of Section 25 and thus, any statement made to such Officer is admissible in court of law.²

There lies a difference between the admissibility of confession made by the accused himself and statement of confession made by the co-accused. It has been kept open to the Courts to base its conviction on accused's confession, even if it is retracted. The Apex Court has stated that for basing conviction on the confession some corroboration is still required.³ The law does not require this corroboration with the confession and there is no bar on conviction solely on the basis of this confession. Whether the conviction should be based on such confession without corroborating it, is a matter of prudence. The Supreme Court in its decision in the case of *Pyare Lal Bhargava v. State of Rajasthan*,⁴ answered this in negative and held that that no matter what, a general corroboration is required to convict an accused. With this the confession is also

² *Badku Jyoti Sawant v. State of Mysore*, AIR 1966 SC 1746; *Ramesh Chandra Mehta v. State of West Bengal*, AIR 1970 SC 940.

³ *Sarwan Singh Rattan Singh v. State of Punjab*, AIR 1957 SC 637.

⁴ AIR 1963 SC 1094.

required to be voluntary and true, and this should be the first priority of the Courts before admitting such statements.⁵ Also, the Court should not disregard the retracted confession if it sees that it was voluntary and true.⁶ In the *Kehar Singh's case*, a twin test on confession was laid down by the Supreme Court in which first test was to check whether the confession was voluntary and true and then, to check whether there is any other reason which stands in between for acting on the statement itself.⁷ Against this trend of admissibility of confession, the Apex Court in *K.I. Parunny v. Asst. Collector (HQ), Central Excise Collectors, Cochin*⁸ said that confession can form the sole basis of conviction, but the Court did not failed to reiterate the fact that the rule of prudence should be applied here and corroboration should be sought from prosecution as against confession.

Section 30 introduces the relevancy of the confession of a co-accused. But there lies a fundamental difference between the evidentiary value of confession by maker himself and confession by a co-accused. A co-accused's confession is seen as some other person's confession and thus carries the least probative value as the maker has not implicated himself in the crime.⁹ So, co-accused has no greater status than an accomplice whose evidence, by law, should be used by way corroboration. The Supreme Court has set the precedent in *Kashmira Singh v. The State of Madhya Pradesh*¹⁰ that the confession of co-accused should not be considered as evidence on the simple rationale that the accused is not given any opportunity to test the veracity of confession. Before relying on the confession of the co-accused, the Court has to first organize evidence against the accused and then only for corroboration should look forward to confession of the co-accused.¹¹ In another Apex Court's decision, it was decided by the Court that each constituent of the confession should be corroborated by individual

⁵ *Kehar Singh v. The State (Delhi Administration)*, AIR 1988 SC 1883.

⁶ *State of Tamil Nadu v. Kutty alias Lakshmi Narashinhan*, 2001 CriLJ 4168.

⁷ *Kehar Singh v. The State*

⁸ (1997) 3 SCC 721.

⁹ *Bhuboni Sahu v. The King*, 76 Ind. App. 147; *Emperor v. Lalit Mohan* 12 CriLJ 2 (Cal.).

¹⁰ AIR 1952 SC 159.

¹¹ *Haricharan Kurmi v. State of Bihar*, 1964 AIR 1184.

evidences, but general corroboration of the confession statements can also relied upon.¹²

At this juncture, it is important to discuss that what confession is; how does it differ from admission and when an admission is turned into a confession. Though the word confession has not been defined in the Indian Evidence Act, 1872 but, there are judicial decisions and authorities available to define the term. Stephen describes confession as “*when the accused makes an admission suggesting that he himself has committed the crime*”.¹³ However, Indian Courts did not accept this definition and narrowed it down to a direct acknowledgement of guilt.¹⁴ Also, mere inculpatory statements which did not directly admit guilt of the accused were not considered as confession.¹⁵ The well accepted judgment of the Privy Council in *Pakala Narayana Swami v. The King Emperor*¹⁶ provided outline to the definition of ‘confession’, that the exculpatory statements of the confession if proved, it would not amount to confession under the Act. So, if such a statement is construed as confession by prosecution, it can nevertheless made admissible under Section 21 of the Act. This proposition was accepted¹⁷ by the Supreme Court where it said that statement which is not a direct acknowledgement of guilt can be made admissible from Section 21’s ambit and can be proved against the accused. In *CBI v. V.C. Shukla*,¹⁸ it was held that a confession which falls short of the actual guilt of accused is not a confession.

Considering the above discussion, now the content of Exhibits should be looked upon. In Exhibit 3, which is a statement made by the accused to the Custom Officer, the accused-appellant did not disputed any fact put forward by the prosecution, but stated that he was unaware that there was a false chamber in the

¹² *Balbir Singh v. State of Punjab*, AIR 1957 SC 216.

¹³ JAMES FITZJAMES STEPHEN, DIGEST ON LAW OF EVIDENCE (1877).

¹⁴ *R. v. Santya Bandhu*, (1902) 4 BomLR 633.

¹⁵ *R. v. Jagrup*, (1885) ILR 7 All 646.

¹⁶ AIR 1939 PC 47.

¹⁷ *Faddi v. State of Madhya Pradesh*, AIR 1964 SC 57.

¹⁸ AIR 1998 SC 1406

pick-up van and it was filled with *ganja* at that point of time,¹⁹ while in the statement made by the accused under Section 313 of the Code of Criminal Procedure, which is Exhibit 4, stated that he is a poor electrician and did this job for money as he unaware that the vehicle contained *ganja*²⁰. These statements as are exculpatory in nature as it takes away the liability of the accused and helps him prove his innocence, thus rendering them not being a confession. Thus, these statements are now admissible under Section 21 of the Indian Evidence Act as they are just admissions.

By the above cited authorities it is well-settled as a rule of prudence that further evidence should be provided to the Court to corroborate the admissions and confession of the accused. As, there are no underlying evidences on record which can help to substantiate the guilt of the accused, the decision of the Trial Court is wrong and the Hon'ble High Court has rightly acquitted the accused.

IV. CONCLUSION

Eventually, the Court rightly acquitted the accused in light of the precedents as there was no such admission of guilt by the accused-appellant in his statements to the Custom Officer. He merely accepted the facts which occurred at the time when he was intercepted by the team from Custom Office. He had no culpable *mens rea* to commit the crime, which is a necessary ingredient in an act committed under the NDPS Act. The statements of accused were incorrectly considered as confession as the accused did not admit his guilt. The learned Judge correctly inferred from various perspective of law on confession considering the fundamental questions relating to confessions including its nature, evidentiary value, and distinction with admission. The law of confession has been such from its beginning and this judgement was in accordance with it covering almost every aspect of confession and the different aspects of probative value. The Court through this judgement solidified the present position of law.

¹⁹ *Irsad Alam v. State of Bihar*, ¶ 58.

²⁰ *Id.* at ¶ 59

CASE COMMENT: RAJESH BOYRA v. STATE OF MP

*Vasundhara Kanoria**

I. INTRODUCTION

When it comes to attracting the charge of Bigamy, it is paramount that the prosecution strictly proves that the essential ceremonies are performed for the second marriage. This reliance of the court to make the Prosecution strictly prove the performance of ceremonies either based on law or custom is problematic because the customary practices are extremely heterogeneous and they are subject to evolution over time. The customs performed during the ceremony are also subject to financial and social constraints. So this leads to the court acquitting many people charged under bigamy. The court also does not take into account the admission statement made by the accused himself. The author would seek to analyze the trend of the courts regarding the same and also endeavor to analyze it jurisprudentially.

II. BACKGROUND

To briefly state the facts of *Rajesh Boyra v State of MP*,¹ the accused was charged under sec.494² of IPC and the trial court convicted him for the same by appreciating the evidence presented by the prosecution witnesses and the

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¹ 2014 Cri.L.J. 4949.

²INDIA PEN. CODE, No. 45 of 1860, sec. 494. Marrying again during lifetime of husband or wife--Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.-This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

documentary evidence adduced by the Trial Court. The accused filed a criminal revision application. The matter before the Hon'ble Chhattisgarh High Court was whether the Trial Court had erred in handing out the conviction. To attract the charge of bigamy it is important that the prosecution proves that the second marriage has been performed by following the essential ceremonies stipulated by either law or custom. This is the trend that has been followed by the Supreme Court right from the codification of Hindu Laws in 1956. The Court believes that in absence of the prosecution strictly proving that the essential ceremonies had in fact taken place, the charge of bigamy cannot be attracted. This proposition has been reiterated in several judgments that have also been relied upon in this particular case. *Bhaurao Shankar Lokhande v. The State of Maharashtra*³ was the first case in which the Hon'ble Supreme Court reinstated the same proposition. In this case the second marriage was performed as per the Gandharva rights. The counsel for the first wife pleaded on the ground that the second marriage ceremony had been performed in public with the attendance of people. Witnesses also testified as to attending the ceremony but the court laid emphasis on proving the fact of the essential ceremony. The prosecution tried to establish the fact of completion of the ceremonies but the court relied on a text on Gandharva marriage ceremonies and ruled that the marriage in question had not been performed accordingly. The accused was acquitted and the charges were dropped. The court also laid down the two essential ceremonies for a valid Hindu marriage as: invocation before the sacred, i.e. 'vivaha' and seven steps around the fire by the groom and the bride, i.e. 'saptapadi'.⁴

This precedent has been reiterated in many judgments that followed. In the famous judgment of *Kanwal Ram and others v. The Himachal Pradesh Administration*,⁵ the Supreme Court held that the prosecution has to strictly prove the fact of essential ceremonies.

³ AIR 1965 SC 1564.

⁴ Flavia Agnes, *Hindu Men, Monogamy and Uniform Civil Code*, 30 (50) ECO. & POL. WEEKLY 3238-3244(Dec. 16, 1995).

⁵ AIR 1966 SC 614.

III. PRESENTATION OF THE COURT'S OPINION

In this case the Hon'ble High Court was faced by the question that whether the sec. 494 of IPC can be attracted. For this, the court pointed out that it was essential that the prosecution proves that the second marriage was solemnized by the performance of the essential ceremony either prescribed by law or customs. This legal position has been reiterated in several judgments of Supreme Court right from 1956. The court while appreciating the evidence noted that the prosecution had failed to adduce any evidence so as to show that the second marriage was solemnized by following the necessary customs. In this case the customs was that of the Churl community. So while the prosecution adduced witness testimonies to show that the marriage was performed it was the burden of the prosecution to strictly prove that essential ceremonies have been completed. The prosecution also took the defense that the accused in his statement made under sec.313 had admitted to solemnizing the second marriage during the subsistence of the first one. The court also pondered on this defense and came to the conclusion that sec. 50 has an express bar on being attracted for offences under sec.494.

“Sec. 50 : Opinion on relationship, when relevant.--
When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, or any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869) or in prosecution under sections 494, 495, '497 or 498 of the Indian Penal Code (45 of 1860).”⁶

⁶ INDIA EVI. ACT, No. 1 of 1872 , sec. 50

So after taking into account the Supreme Court precedents, the Hon'ble High court came to the conclusion that the prosecution had adduced no evidence to prove that the essential ceremonies had been performed and at the same time it reiterated that an admission from the accused is not enough to attract a charge under bigamy. For all the aforementioned reasons the High Court acquitted the accused and reversed the judgment of the Trial Court.

IV. ANALYSIS OF THE CASE

It is important to understand why bigamy laws were introduced. The idea behind criminalizing bigamy was not just to protect the sanctity of marriage as an institution but also to prevent the spouse from a difficult and exploitative situation. Usually in a heavily patriarchal setup as India that vulnerable spouse is the wife. The court believed that it was important to intervene and ensure that no one got married while the first marriage was still subsisting. Considering that this was the idea behind including bigamy laws in IPC it is extremely problematic when the only way to get a conviction for the same is by proving the essential ceremonies being performed. The court also refuses to rely on the admission of the accused himself explicitly stating that he entered into the second marriage willfully. While one can appreciate that it is important that the case is proven beyond reasonable doubt and the burden of proving always lies on the prosecution, it becomes problematic when conviction is highly improbable and there are many loopholes to escape the same. One major problem is that reliance on customary practices is not always possible. Let us consider the same from the perspective of Hindu Laws. Hinduism is not a religion of the book; it did not have any supreme authority. The assumption that there ever existed a homogeneous Hindu community is the very first problem.⁷ Hinduism is primarily a religion based on evolution. That is it did not have rigid rules laid down in one particular book but a variety of rules and customs that developed in a particular society. So when the British tried to make sense of the Hindu laws their reliance on Shastras lead to distortion of the customary

⁷ NIVEDITA MENON, SEEING LIKE A FEMINIST (2012)

practices that existed in India. The English placed reliance on translations of Manusmriti and Dayabhaga and Mithakshara. They also failed to realize that Hinduism did not have uniformity within their practices and that Hinduism was a religion based on the idea of evolution and change based on time, context and interpretations. To codify these customs and to make it static is against the very idea of Hinduism. The same idea is preached by Gandhi when he claims that:

“People can overthrow customs that did not conform to principles of equality and justice or went against “good conscience” because he had inherited a tradition whereby the power to change its own customary law rested with each community.”⁸

This tradition that Gandhi refers to is the fluid nature of Hinduism and how it is subject to change and interpretation over time. Law i.e. the Hindu law must obey the principles of change, in order to be vital, to adapt itself to the alterations of social condition.⁹ In this sense the Hindu law is different from other types of religious laws. That is the Hindu definition is based on exclusion rather than inclusion. This in itself gives an idea of the extent of heterogeneity that existed in the religious group that we call “Hindus”. The legal definition of Hindus includes Jains, Sikhs and Buddhists. One of the reasons why it was extremely difficult to come up with a Hindu definition based on inclusion because of the vast differences that co-exist with the various sects of Hinduism. It is evident in the matriarchal practices of Nair coexisting with the patriarchal set up of North Indian practices. Under the Aliyasantana and Marumakkattayam systems of law, which are matriarchal in conception, women enjoy rights not only equal to but fuller than those accorded to men.¹⁰ Even the schools of Mithakshara and Dayabhaga have so many varied interpretations that it becomes problematic to understand the same. So when it comes to proving an essential practice the court relies on some text, but the text or authority might not be accurate as the

⁸ Madhu Kishwar, *Codified Hindu Law: Myth and Reality*, 29(33) ECO. & POL. WEEKLY 2145-2161 (1994).

⁹ P. K. Menon, *Hindu Jurisprudence*, 9(1) THE INTERNATIONAL LAWYER 209-213 (1975)

¹⁰ Renuka Ray, *The Background of the Hindu Code Bill*, 25(3) PACIFIC AFFAIRS 268-277 (1952).

customs are subject to change over time. And also many a times customs performed are subject to financial constraints and other factors. A discernible pattern emerging is conviction by the lower judiciary and leniency by the apex court, which rescues the errant husbands by prescribing rigid standards for proving bigamy, which renders it impossible even for the high courts to convict the husbands.¹¹

V. CONCLUSION

In this case the court relied upon the legal precedents and the statutory provisions but somewhere the principles of natural justice are getting lost. The strict standard imposed by the court is appreciated considering one of the main canons of Criminal law is ‘innocent until proven guilty.’ But the standard imposed in the case of bigamy provides a free pass to errant husbands hence defeating the purpose of the provision itself. When one understands the cultural and social demographic of India it becomes too difficult to understand all the practices and customs of all sects. This makes it extremely problematic for the prosecution to prove essential ceremonies for attracting the charge of bigamy.

¹¹ Agnes, *supra* note 4



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