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ABOUT NATIONAL LAW INSTITUTE UNIVERSITY, BHOPAL

The National Law Institute University, Bhopal (NLIU), was established by the Rashtriya Vidhi Sansthan Vishwavidyalaya Adhiniyam, by an Act No. 41 of 1997 enacted by the Madhya Pradesh State Legislature. NLIU is celebrating its 25th year or silver jubilee of its establishment. NLIU is recognized by the University Grants Commission and the Bar Council of India. The university was established to fill the gap and provide the most modern legal education through multidisciplinary teaching and training of newer skills needed for the profession. The University launched its first academic programme in 1998 and teaching for the five year B.A. LL.B. (Hons.) course commenced from September 1 of that year.

NLIU has been successful in instilling a sense of broad perspective along with scholastic and reflexive capabilities bearing in mind larger national and humanitarian goals in its students. Over the years, NLIU has been designing and delivering courses with a view to enhance the ability and capacity of the students, members of the faculty and other participants in avoiding and resolving problems under the framework of law.

THE PATRON

Professor (Dr.) V. Vijayakumar is the present Vice Chancellor of the National Law Institute University, Bhopal. A former professor at NLSIU Bangalore. He specializes in Constitutional Law, Administrative Law, Human Rights Law, and Refugee and Humanitarian Law. Professor (Dr.) V. Vijayakumar obtained B.A. (Political Science, 1972), M.A. (Political Science, 1975), B.L. (1978),

MPhil. (Political Science, 1984), M.L. (International Law and Constitutional Law, 1986) and Ph.D. (International Law and Constitutional Law, 1996) all from the University of Madras and M.A. (Public Administration, 1984) from Sri Venkateshwara University, Tirupati. He holds the UNHCR Chair on Refugee Law since 1997.

Among his various accolades, the most prominent is the Ryoichi Sasakawa Young Leaders Fellowship award received at the Salzburg Seminar in 1993. He has also published more than 35 articles in national and international journals and has contributed to a couple of books.

We wish that he continuously blesses us with his constant guidance, support and encouragement in all our upcoming endeavours.

FOUNDER PRESIDENT, IALH

Prof. (Dr.) V.S. Elizabeth is the fourth Vice-Chancellor of TNNLU. She worked as Professor, teaching history and feminist legal theory, at the National Law School of India University, Bangalore before this. She began her career humbly as a part time lecturer in history in a pre-university college in Bangalore soon after completing M.A. in History, securing the second rank, from the Bangalore University in 1984. Till 1987 she taught in the Indiranagar Junior College, NMKRV College for Women and lastly as a full-time lecturer in History at the Maharani Lakshmi Ammani College for Women 1986-87. In 1986 she passed the University Grants Commission's Junior Research Fellowship exam which took her to the Department of History, Mangalore University to pursue the Ph.D. programme there. She joined the National Law School of India University as a Research Associate on 9th September 1991. She was the Coordinator of the Centre for Women and Law, NLSIU and the International Centre for Research on Women, USA. The curriculum she developed has been drawn upon by the Bar Council of India in designing the prescribed syllabus for teaching History in the five year B.A., LL.B. programme, and by faculty who teach history to law students in the various law colleges and law universities. She also taught women and law related courses as an optional course for students at NLSIU. In 2005 she was invited to join a group of law teachers to found the International Association of Law Schools. She was one of the founding members of the governing board of the IALS (2005-09 & 2010-2013). In 2012-13 she was appointed as a member of the High Level Committee on Status of Women by the Government of India and also serves as the Founder President of *Indian Association for Legal History* (IALH).

CONFERENCE CONVENER

Prof. (Dr.) Uday Pratap Singh has been part of the "NLIU Family" since its establishment, where he teaches as a part of the active teaching faculty, among his various achievements he holds the title of "Dean Student Welfare, Chairperson- Anti-Ragging Committee" to name a few. Enamored with the will to always learn and being an active scholar, he has completed his B. A. and M. A. in history from "St. Johns, Agra" this wasn't enough for his young bright mind he pursued further education, having completed his M.Phil. from "Jawaharlal Nehru University, Delhi" in international relations this wouldn't be the end of the educational endeavors, having completed his LL.B. from "Barkatullah University, Bhopal", having always had a tryst with history or as he often says in his classes "one must remember and revisit the past for a better future", having lived a life of devotion towards his discipline, he has had his fair share of achievements. He has played an active part as a Ph.D research scholar for the "University Grants Commission" in 1997 on a scholarship to collect data regarding U.S-China relations and Human Rights, his love for history is not limited to being educated in the country but also outside, he shares insights of his time in "Boston University" as a full bright scholar where he attended a course on "American History in Law". Due to his expertise in the research field, he has been called upon the time of need by the "National Human Rights Commission" to investigate the allegations of Mayonaisse poisoning in the Balaghat district. He has played a crucial role and been an active member of the world bank project on "conflict between tribals and forest department" in Bangla Tehsil, Dewas. Apart from all the academic endeavors, he's been a respected member of DSNLU, Vishakhapatnam and NLU Aurangabad's General Council.

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ABSTRACT

Since the 'Age of Discovery', the Portuguese visioned controlling passage to India and hegemonizing orient and Indian Ocean trade. Albuquerque's stratagem was a string of fortresses to laid from Hormuz to Melaka, guarding the main trade routes from the Red Sea, to the Persian Gulf and the Strait of Malacca. Later, the British imperial expansion programme in Asia sought to gain control of all the main maritime trade routes of the Indian Ocean through its Royal Blue Water Navy. Leading intellectual geopolitician of the World War era, Karl Haushofer, foresaw the power potential of the Indian Ocean. He referred to the "Asiatic Monsoon countries" and urged German maritime policymakers to promote a geopolitical unity of this region to offset British and American sea power. Very recently, Robert Kaplan has also identified the Indian Ocean and its surrounding region as the new geopolitical pivot of world politics in the 21st century. India has maritime, economic and strategic interests in the Indian Ocean. K. M. Panikkar, was a visionary when he analysed the influence of sea power in Indian history and articulated India's stake in the Indian Ocean.

The seaborne piracy infests the waters of the Indian Ocean astride a very different façade of historical geopolitics, international relations, and maritime legal regime of India, disturbing the commercial route and the energy lifelines of the Indian Ocean. Being the littoral state of the Indian Ocean, India is the immediate stakeholder. India has a primary role to play in addressing the challenges arising out of this seaborne menace in the Indian Ocean. The present study specifically addresses the post-independent evolution of the Indian maritime regime, against the backdrop of the decolonisation and development of the UNCLOS regime. The present work also explores the diverse trade and security imperatives of India, in the Indian Ocean. Is the prevailing Indian maritime legal regime adequate to maintain the maritime stake holds in the Indian Ocean? It is important to explore how India addresses regional and national actors functioning differently within the scope of a discourse of international law and agencies like the UN, SAARC, ASEAN, EU, etc. Anti-Maritime Piracy Bill, 2019 is the Indian national instrument to address the issue of seaborne piracy in the Indian Ocean. It approaches a multi-

layered response of India as a South Asian maritime player and regional stakeholder. It contours, shapes and defines politico-legal discussion of international relations and the contemporary history of the Indian Ocean.

Keynotes: *Indian Ocean, Indian Ocean Trade, Maritime Piracy, Colonialism, Anti-Maritime Piracy Bill, 2019, UNCLOS, Geopolitics.*

INTRODUCTION

Oceans cover seventy-one per cent of the surface of the earth, and maritime culture has long been integral in telling the story of humanity around the world. Indian history is interwoven with the Indian Ocean. The Indian Ocean remains central to the stories and narratives of mobility and exchange in South Asia since time antiquity. In its wake came the traders, merchants, sailors, scholars, theologians, pilgrims, clerks, legal pundits and Sufi divines – they have contributed to a shared political, economic, social, cultural, spiritual, intellectual, aesthetic and legal endeavour of India. The maritime pirates are also an important strand in the Indian Ocean history, as is the centrifugal power of the illegitimate trade, illegal traffic and power play in maritime South Asia, specifically India. Since the seventeenth century, the struggle for economic dominance between the Portuguese and Ottoman Empire outlines the rise of European trading companies. The rise of British industrialization in the late eighteenth century throughout the nineteenth century shifted the economic focus of the Indian Ocean toward colonial domination and cash crop economies. By the nineteenth century, European empires started dominating. The military, transport and communication infrastructure of the British, the Dutch, the French and the Japanese, intensified the movement of people across the Indian Ocean. Sometimes, this mobility was forced and conscripted, involving the pirates, slaves, indentured labourers, coolies, political exiles and prisoners who were transported between plantation and penal colonies. Therefore, the Indian Ocean provides a new way of looking at Indian maritime history – its trends and trajectories, specifically, the unsettling idea of maritime piracy and counter maritime piracy imperatives, and its colonial and post-colonial relationship.

GEOPOLITICAL SETTING OF THE INDIAN OCEAN

It is Alfred Thayar Mahan (1890) who for the first time pinpointed the geostrategic importance of the Indian Ocean. In terms of the balance of power and international relations whoever controls the Indian Ocean dominates Asia, he opined. He considered this ocean as the key to the seven seas in the twenty-first century and prophesied that the destiny of the world would be decided in its waters. The Indian Ocean was thus considered a major sphere of influence to dominate the world, throughout the colonial era. Leading intellectual geopolitician of the World War era, Karl Haushofer (1938), also foresaw the power potential of the Indian Ocean. He referred to the "Asiatic Monsoon countries" and urged German maritime policymakers to promote geopolitical unity in this region, especially aligning with India, China and Japan, to offset British and American sea power. Finally, by the second half of the twentieth century with the decolonisation process, the euphoria of independence overshadowed the turbulence of internecine conflicts and inter-state wars in maritime South Asia. K. M. Panikkar (1951), was a visionary when he analysed the influence of sea power in Indian history and articulated India's stake in the Indian Ocean. Henceforth, since independence, India maintains maritime, economic and strategic interests in the Indian Ocean. It is worthwhile to note that very recently, Robert Kaplan (2010) has also identified the Indian Ocean and its surrounding region as the new geopolitical pivot of world politics in the twenty-first century.

JUXTAPOSING MARITIME PIRACY AND MARITIME SOUTH ASIA IN THE INDIAN OCEAN

But where did the counter maritime piracy imperatives figure in the story of India's Indian Ocean narratives? – Maritime Piracy is as old as maritime trade. We have the first definition of maritime piracy from Plutarch in 100 AD. He described pirates as those who attack without legal authority not only on ships but also in maritime cities. It is punishable wherever encountered. However, tracing historical maritime piracy in the Indian Ocean is complicated and distinctly different from the history of piracy elsewhere. First of all, the Indian Ocean was a *mare librum* i.e., 'free sea'. Here trade and navigation were continuing without any formal permission. Secondly, the long coast-line and non-existence of a singular centralised maritime authority contributed to the development of local and regional tribute-taking, allegiance-based

coastal and maritime stakeholders. Finally, war-time action on the sea was rare and was limited to coastal networks and maritime assistance.

Therefore, finding a legal definition of maritime 'piracy' and 'pirate' is incongruent in the Mughal state. Rather the indigenous words or phrases used for the crime of maritime piracy, for example, समुद्री डकैती (*samudree dakaitee*), समुद्रीयचौद्र (*samudrIyacaudra*) etc. do not confer the same legal seriousness and political implications, like the ones coming from the European admiralty law. In fact, the pirates, as referred as समुद्री डाकू (*Samundiri Daku*), समुद्रदस्युः (*samudradasyu*), जलदस्यु (*jaladasyu*) or *Samundiri Looterein* were often connected to a political entity. For example, the maritime plunder of the pirates active in the Arabian Sea, during the Mughal period, known as the *Malabari*s, were outside Mughal Empire. Yet, they attained socio-political legitimacy through association with the local political leadership. Their operations were considered a defence against the Portuguese maritime intrusions and were thus sanctioned by the Zamorins of Calicut. The Mughal State never disturbed this regional balance of power (Polo 1993, 389). Furthermore, these local maritime chieftains were considered useful maritime allies, for trade and security. – Hitherto, there was no clear distinction between a maritime merchant and a maritime pirate, due to the absence of a comprehensive maritime law and institution to enforce it. A seventeenth-century traveller Pyrard de Laval observed that the *Malabari*s were maritime traders who also indulged in sea-robbery, if the opportunity arrived, and thus played a 'double role' (Prange, 2011, 1270)! "*When in the winter they (pirates) return from the sea they become good merchants, going hither and thither to sell their goods, both by land and by sea, using then merchant ships that also belong to them. They often go to Goa and Cochin to sell their merchandise, and trade with the Portuguese, obtaining Portuguese passports, though in the previous summer they may have been at war*." (1279)

Since the sixteenth and seventeenth centuries, maritime piracy in the Indian Ocean an altogether new dimension to ideas about sovereignty and transgression against it., first the Portuguese, then the Dutch and French and finally the British brought their grandiose claim to maritime supremacy over the Indian Ocean, and therefore also took the responsibility for maritime peace safe-keeping. The Portuguese brought the *cartaz* licensing system. Starting from Albuquerque and Cabral tried to control and enforce the Portuguese trade monopoly in the Indian Ocean, and *cartaz* was used both for granting protection to the allies and committing piracy to the rivals (Maloni 1991, 411). Meanwhile, the Portuguese, in their pursuit of building a "pepper empire", simultaneously maintained peaceful trade links, indulged in the slave trade

and hence exploited the leeway of maritime piracy. 1600 AD onwards the Dutch and British East India Companies were formed and they were given Charters to navigate in the Indian Ocean and involve in the Spice trade. Portuguese profits were reduced (Subrahmanyam 1993, 75–76). In the face of tough competition French, Dutch and British companies resorted to a form of institutionalised racketeering, black market, plunder and piracy, in the garb of Charters and 'Private Trade'. The British East India Company had support for the 'privateers' who even attacked Indian ships in the Indian Ocean. This use of force and violence to control the sea routes and flow of goods had subtle unofficial support from the British government (Rathore 2016, 251). – Hence, we find numerous references to the *harmed* (derived from the Portuguese *armada*), *bombete* (derived from 'bombardiers', who are a varied littoral crowd of sea-raiders) and *firangi* (colourless/white people, referring to the Europeans) pirates in the Mughal documents and regional literary narratives of the time. No wonder Aurangzeb banned the British East India Company in 1695 when the British pirates sunk the imperial ship *Ganj-i-Sawai en route* to Mecca for Hajj.

THE COLONIAL STATE AND THE MARITIME REGIME

However, it was the Europeans, who introduced admiralty law where piracy is regarded *as hostic humani generis*, i.e., 'an act of crime against the human race'. After a tough competition, the British proved their naval supremacy in the Indian Ocean. The conflict of interest between the Mughal state ad the European powers was not only limited to territorial colonisation but also involved maritime imperialism. Battle of Plassey (1757), Battle of Buxar (1764) and finally the Grant of Diwani in 1764 were instrumental to turn the Indian Ocean into a 'British Lake'. With the change of the strategic outlook, the British Government understood that piracy is negatively impacting their trade in the Indian Ocean. Hence, the efforts to suppress maritime piracy in the Indian Ocean, especially in the Persian Gulf, Arabian Sea and Bay of Bengal, surfaced. British policymakers began to view those water bodies as a buffer zone, protecting the British Indian Empire's western, and eastern flanks. British merchants now condemned any maritime or coastal transgressions and pressed both the British Government and East India Company to take action. Therefore, the first Admiralty Jurisdiction came to be invested in the Recorder's Court at Bombay which was established by the Charter of 1798. Soon it was substituted by the Supreme Court of Judicature at Bombay, established by Letters Patent issued under the Charter of 1823. The Bombay Supreme Court was invested with the standard of

admiralty jurisdiction at par with the High Court of Admiralty, England. – The maritime piracy in the Indian Ocean was thus, finally successfully suppressed by the British (Wilson, 2021). By the nineteenth century, maybe due to the imperialism-induced drastic politico-economic changes in the international socio-political situation, it seemed as though maritime pirates have finally retired to the history books, annals and fantasy narratives

However, looking through the lens of colonial maritime politics, the fissures of the colonial projection of maritime law, control of maritime routes and resources and anti-piracy regulations become visible. The existing legal pluralism in the Indian Ocean gave way to the British maritime legal regime, at the cost of the littoral societies and law of the land. Lakshmi Subramanian (2016) has observed that this contest between sovereignty and piracy did not remain confined to the level of ideas. The entry of European colonialism into the Indian Ocean destabilised the littoral stakeholders and snatched their livelihood opportunities. When few of these communities resorted to resistance or new strategies of survival, they were tagged as outlaws who were finally contained, disciplined, and subjugated by European navies (Subramanian, 2016).

INDIAN OCEAN AS INDIA'S OCEAN

Since its independence in 1947, India accepted K.M. Panikkar's (1965) elaborated geostrategic vision of the Indian Ocean. It sees the strategic aspects and questions Indian national security keeping the Mahanian tenets of "sea-power," in particular naval projection, control of sea routes and access to bases in mind. Panikkar observed that control of the Indian waters was in Indian hands formerly to the Cholas, later on to the Arabs. Until the fourteenth century, there was no power strong enough to challenge Indian control over the Indian Ocean. But since the sixteenth century, it altered and first the Portuguese, then the other Europeans appeared in the Indian Ocean. And ultimately, the oceanic problems intruded on the history of mainland India and left a deep footprint of two hundred years long colonization. Therefore, Panikkar repeatedly opined that India must consider the Indian Ocean as its very most important geo-strategic boundary. Though there was a contrast between the earlier maritime visions and the continental mindset evident under Nehru and his successors, which saw the neglect of India's maritime power, there remained a steady following of K.M. Panikkar's deliberations. David

Alan Scott (2006) has thus observed that since decolonisation, various comparisons and links are made in particular to the Indian drive to make the Indian Ocean, 'India's Ocean'.

During the Cold War, the Indian Ocean acquired ever-greater importance for its waters. A. Chernyshov (1976) observed the international relations in the Indian Ocean during the Cold War period and noticed that political activities and intrigues in the littorals of the Indian Ocean have seriously aggravated in the second half of the twentieth century. Hence, at the request of Sri Lanka, and Tanzania, General Assembly adopted the resolution 2832 (XXVI), by which the Indian Ocean, within limits to be determined, together with the airspace above and the ocean floor subjacent thereto, was designated for all time as a 'Zone of Peace (UNODA 1983). Throughout this period, be it under the aegis of the Non-Aligned Movement (NAM) or the South Asian Association for Regional Cooperation (SAARC), India has buttressed its political, economic, and military interests in the Indian Ocean (Misra 1986, 24-27).

It is important to note that the world's maritime commons have been a safe space for maritime trade since the end of World War II (Palmer, 2010). Vijay Sakujha (2000) observes that till the 1980s, piracy was considered 'history' and was "restricted to the silver screen". What can be the political, economic and military reasons responsible for the kowtowing of this maritime menace for so long? First and foremost is the robust presence of the British Blue Water Navy throughout the nineteenth and twentieth century for imperial purposes and the adoption of the British 'navicert system', since World War I. The belligerent's representative in a neutral country was tantamount to a ship's passport, possession of which ensured, in the absence of suspicious circumstances, that the vessel would be allowed to proceed on its way. Modelled after the Portuguese *cartaz* of the sixteenth-seventeenth century, the navicerts were started to be issued in 1916. Anita Bhatt (1992) identified the strategic case of Diego Garcia in British Indian Ocean Territory and considerable US expansion in the Indian Ocean, accompanied by the British, French and Republic of South Africa military presence, during the early nineteen-seventies. Therefore, decolonisation and the unstable nation-building *vis-à-vis* the 'gunboat diplomacy' as means of display of military muscle by the Cold War players kept the Indian Ocean free from petty maritime crimes and piracy. – However, the end of the Cold War saw the resurfacing of maritime piracy in the Indian Ocean.

PIRATES OF THE INDIAN OCEAN: THE CHALLENGE AND ITS REDRESSAL

What is the politico, economic and military reasons for the escalation of piracy on the high seas since the nineteen nineties? The reasons are manifold which may have contributed to encouraging maritime piracy in the Indian Ocean. Primarily, the Cold War cease-fire resulted in a shrinking Soviet navy resulted in the limited naval presence of the US and its allies, in the Indian Ocean. Secondly, piracy surfaced in conditions of political unrest, following the U.S. withdrawal from Vietnam. Thai piracy was aimed at the many Vietnamese who took to boats to escape. Thirdly, the handover of Hong Kong in 1997 to the People's Republic of China led to the exit of the British Royal Navy from important choke points of the Indian Ocean. Fourthly, established in 1977, the Marine Conservation Activism Organisation, Sea Shepard hit and threw butyric acid on the decks of ships engaged in commercial fishing, shark poaching and finning, seal hunting, and whaling. While non-lethal weapons are used by the Sea Shepherd action groups, their tactics and methods are considered acts of piracy. Sixthly, The Asian Financial Crisis of 1997 depressed defence budgets and thereby scaled down naval activity in the Indian Ocean, especially patrolling by regional navies. Finally, globalization has increased traffic shipping. The end of the sponsorship of the client states has weakened the hegemony of the states in the Global South, due to the proliferation of small arms and the lapses in surveillance and control of the oceans. – Henceforth, it seems quite clear that the end of the Cold War is accountable for the appearance of many causative factors for contemporary maritime piracy in the Indian Ocean. All these political, economic, geographical, social, and cultural factors which are sometimes connected or not directly connected to the changing post-Cold War environment, might have contributed to the recent maritime piracy maldevelopment in the Indian Ocean and require ground operations to restore law and order at sea.

India being the immediate stakeholder of the Indian Ocean has diverse trade and security imperatives in the Indian Ocean. Since the nineties, India has poised to a relatively high-average annual growth rate in the industrial sectors *vis-à-vis* the agricultural sectors of their respective economies. As categorised by the International Bank for Reconstruction and Development (World Bank), India belongs to the middle-income developing economies and has maritime, economic and strategic interests in the Indian Ocean. India considers it a primary role to play in addressing the challenges arising out of piracy in the Indian Ocean. The instruments adopted by India, are thus two-fold. First, to come up with a counter maritime piracy national legal regime, ratifying the United Nations Law of the Sea (UNCLOS) and

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), within the par fora of the International Maritime Bureau (IMB) and International Maritime Organisation (IMO). Second, approach to a multi-layered response of the regional players and stakeholders from the global communities involved in the politico-legal discussion of international relations of the littorals of the Indian Ocean, addressing the issue of this seaborne menace (Ghosh, 2004). – This strategic vision is more evident since 1998. This has underpinned India's Naval Chief of Staff Arun Prakash's eloquence on the possibilities opening up for India in and around the Indian Ocean. Questions of intent strategic doctrine and the application of "state power" inclusive of spending, bases, ships and equipment, geographical reach etc. are woven together (Sakhuja, 2010).

Indian Navy, being one of the largest maritime forces in South Asia, has played a crucial role in increasing maritime bonding by initiating numerous Confidence Building Measures (CBMs). It conducts regular naval exercises with Indian Ocean Rim (IOR) and in 2004 held its second joint exercise with China's People's Liberation Army Navy (PLAN) (Ghosh, 2003). Naval training establishments in India under the Southern Naval Command at Kochi regularly accept naval personnel from South East Asian and IOR countries for training, a feature that must continue if Indians are to build stronger and more influential relationships with friendly navies in the Indian Ocean (Ghosh, 2004). In addition to the surveillance of its vast maritime zones, the Indian Navy, in association with its Coast Guard, is specifically involved in surveillance of the Palk Straits, the Gulf of Munnar, the Coast of Maharashtra, and Gujarat, and other island territories, to curb the influx of illegal immigrants, terrorists and to prevent poaching and gun running etc.

On a more international level, since 1995, India has been directing a multilateral naval exercise, designated as MILAN. It includes participation from the Bay of Bengal rim states and conducts every year off the Andaman and Nicobar Islands. Vijay Sakhuja (2003) observes that the MILAN series is institutionalized to achieve interoperability with Association of the South East Asian Nation (ASEAN) navies, projecting the Indian Navy's growing influence in the Indian Ocean, and promoting goodwill between India and ASEAN countries. This exercise includes navies from Myanmar, Singapore, Indonesia, Vietnam, Thailand, Malaysia, and Australia and has now a strategic commitment from the US Navy as well. Furthermore, the Indian Ocean Naval Symposium (IONS) in 2008 started a consultative and cooperative effort to find commonality regarding the growing asymmetric threat. The Indian Navy acted as a facilitator

and invited naval chiefs or the heads of maritime agencies from IOR countries. Twenty-seven naval chiefs or their representatives attended the event and the majority endorsed the charter in principle. As predicted by Smith and Berlin (2007), the objectives of the IONS are to expand it to the next level of cooperation, create allied maritime agencies, establish a high degree of interoperability, and share information to overcome common trans-national maritime threats and natural disasters and maintain good order at sea.

At the sub-regional level, the most effective organisations are probably ASEAN, SAARC, Southern African Development Community (SADC), the Gulf Cooperation Council (GCC) and the Commission de l'Océan Indien (COI). Since regional organisations such as the African Union (AU), the Asia-Pacific Economic Cooperation (APEC) and ASEAN Regional Forum (ARF) partly overlap the region, they are also linked to the Indian Ocean Region (Rajasimman, 2016).

Nevertheless, a clear and coherent geopolitical system from India, addressing maritime piracy in the Indian Ocean, is yet to reach maturity. India is a state party to the UNCLOS and reiterated its support repeatedly on issues like freedom of navigation and overflight, unimpeded commerce etc (Misra 1986, 97). India ratified UNCLOS in 1995. Its position concerning UNCLOS is generally governed by Article 297 of the Indian constitution and laws on waters, continental shelf, EEZ and other maritime zones. However, India is yet to adopt specific legislation on maritime piracy. In absence of the law, the authorities deal with the crime of maritime piracy with the existing provision of other laws like the Indian Penal Code, Arms Act etc. With the initiative of the Ministry of External Affairs, the Government of India, the Piracy Bill came to light in 2012 but is yet to be passed by the parliament.

Meanwhile, along with the Indian Navy, national navies of Sri Lanka, Thailand, Mauritius, Madagascar, Seychelles, Indonesia, Malaysia, Singapore, etc. and non-littoral navies from Turkey, Russia, China, Japan, Australia, the US, and international communities like European Union (EU), North Atlantic Treaty Organisation (NATO) have deployed their warships off the coasts the Indian Ocean to protect trade routes, important pelagic waterways and the global supply chain by preventing attacks on ships by pirates. Domestic stakeholders and international players place their hope on the IOR-ARC concerning economic cooperation, and the UN ad hoc Committee on the Indian Ocean on peace and security matters (Ghose, 2000). The IONS initiative could develop to the next level of cooperation and expand its membership where parallel working groups can address wider maritime security matters and bring together a range

of regional and extra-regional countries to assist with capacity building and policy development (Rajasimman, 2016). A robust anti-piracy law and piracy apprehension mechanism might suffice the limited national resource and domestic capacity of the individual states. Only through a coherent inclusive common anti-piracy programme, India can kindle maritime threat perceptions and eradicate the sense of vulnerability as the Indian Ocean littoral.

CONCLUSION: ADDRESSING MARITIME PIRACY IN THE MULTI-LATERAL PLANE

Unquestionably, the maritime piracy issue in the Indian Ocean consequently attracts global attention. There have been ongoing international responses to address piracy in the Gulf of Aden, Bay of Bengal, Nanyang Sea and Straits of Malacca, ranging from actions by international organizations including the United Nations Security Council (UNSC) and General Assembly, the IMO, regional organizations such as the South Asian Association for Regional Cooperation (SAARC), Association of South East Asian Nations (ASEAN), North Atlantic Treaty Organisation (NATO), the European Union (EU) and the African Union (AU). Furthermore, the African Maritime Law Enforcement Partnership (AMLEP) offers an operational platform, to combat illegal fishing and counter illegal trafficking on the coasts of East Africa (Treves, 2009). Regional cooperation between ASEAN states of Indo-Pacific and AU littorals flanking the Indian Ocean may be strengthened by using SAARC states as the fulcrum. Mutually beneficial Deep-Sea Mining (DSM) and Marine Scientific Research (MSR) projects may be undertaken through a gesture of mutual accommodation by the SAARC countries. Looking at the intensity of maritime crimes in the Indian Ocean, it seems essential that littorals should revise the long-existing Cold War military mindset of *'preparing for war to ensure peace*' with that of *'if you want peace, prepare to cooperate*' as a regional guideline for both military and non-military maritime interaction (Ghosh, 2004).

Not only unilateral and bilateral, but through regional cooperation and multilateral plane, India can address the existing maritime law and order challenges in the Indian Ocean. India's complementary interests in undertaking counter-piracy measures within the UNCLOS regime, SUA Protocol and SOLAS Convention have created a favourable environment for cooperation through the establishment of behavioural coastal and EEZ norms, identifying criteria for legitimate state action at the high sea and creating channels for facilitating linkage among sea-

borne issues in the Indian Ocean, without violating the existing ocean regime. A probable NATO-SAARC-ASEAN-EU cooperation may generate long-term comprehensive state-to-regional and state-to-international channels which would systematically address maritime piracy, other maritime crimes and chances of sea-borne terrorism and other criminal activity, in the Indian Ocean. Indeed, to quote the old saying: *"the sea unites while the land divides"*.

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CROSS BORDER JUDICIAL DIALOGUE - A LOOK AT HOW THE SUPREME COURT OF PAKISTAN ENGAGED WITH INDIAN JURISPRUDENCE IN MST. SAFIA BANO V. HOME DEPARTMENT, GOVT. OF PUNJAB THROUGH ITS SECRETARY & ORS.

ABSTRACT

There is a lot of discourse on the (ill)legitimacy of executing a mentally ill convict. A five-judge bench of the Supreme Court of Pakistan recently had an opportunity, in *Mst. Safia Bano v. Home Department, Govt. of Punjab through its Secretary & Ors.* [hereinafter *Safia Bano*], to adjudicate upon the question of whether a convict diagnosed with mental illness could be executed. Answering the question in negative, and reversing its own judgment by a the three judge bench in *Mst. Safia Bano, W/O Imdad Ali v. Home Department, Government of Punjab & Ors.* [hereinafter *Imdad Ali*], which had ruled otherwise, the court observed that "*if a condemned prisoner, due to mental illness, is found to be unable to comprehend the rationale and reason behind his/her punishment, then carrying out the death sentence will not meet the ends of justice*." The decision in *Safia Bano* saw the Supreme Court of Pakistan engaging with Indian Mental Healthcare Act, 2017 and with the decision of the Indian Supreme Court in *Shatrughan Chauhan and another v. Union of India and others* [(2014) 3 SCC 1], *'X' v. State of Maharashtra* [(2019) 7 SCC 1], *Amrit Bhushan Gupta v. Union of Indian and others* [AIR 1977 SC 608], *Ram Narain Gupta v. Smt. Rameshwari Gupta* [AIR 1988 SC 2260] and *Navneet Kaur v. State (NCT of Delhi) and another* [(2014) 7 SCC 264]. This article is an attempt to understand the extend and manner in which the Supreme Court of Pakistan engaged with jurisprudence from India. It argues that the paradigm shift which *Safia Bano* brought about in Pakistan's criminal law related to trial of mentally ill persons was comprehensively informed by jurisprudence from India.

Keywords: *Mental Health, Cross Border Judicial Dialogue, Pakistan Supreme Court, Execution of Mentally Ill.*

INTRODUCTION

The Supreme Court of Pakistan recently had an opportunity, in *Mst. Safia Bano v. Home Department, Govt. of Punjab through its Secretary & Ors.*[1] [hereinafter *Safia Bano 2021*], to adjudicate upon the issue of whether a convict diagnosed with mental illness could be executed. Answering the question in negative, and reversing its own judgment by a the three judge bench in *Mst. Safia Bano, W/O Imdad Ali v. Home Department, Government of Punjab & Ors.*[2] [hereinafter *Safia Bano 2016*], which ruled otherwise, the court observed that "*if a condemned prisoner, due to mental illness, is found to be unable to comprehend the rationale and reason behind his/her punishment, then carrying out the death sentence will not meet the ends of justice*."[3] This article is an attempt to scrutinise the judgment in *Safia Bano 2021* with the object to show: **I)** that the judgment brings about a paradigm shift as far as the criminal law related to the execution of mentally ill persons in Pakistan is concerned; and **II)** that while bringing about such shift, the Supreme Court's *ratio* was comprehensively informed by foreign law, particularly decisions of Indian Supreme Court, on the same subject matter. To achieve these objectives, this article is divided into three parts: **Part A** of the article provides an overview of the facts of the case; **Part B** discusses how execution of mentally ill persons is violative of international human rights law and how various countries have factored the same to update their domestic jurisprudence, particularly US and India; **Part C** discusses how the Pakistan Supreme Court engaged with judgments from United States and India, with international human rights law and the with the latest edition of the WHO's International Classification of Disease to address the above issue. It also briefly discussed how *Safia Bano 2021* brought about a paradigm shift in Pakistan's criminal law jurisprudence on execution of mentally ill.

PART A: OVERVIEW OF THE CASE

A.1. Overview of *Safia Bano.*

The case originated in 2002 when a local trial court indicted Imdad Ali for the murder of Hafiz Muhammad Abdullah. Imdad Ali's lawyer, appointed by the court on State expense, believing that Imdad Ali was incompetent, due to unsoundness of mind, to stand trial filed an application under section 465 of Pakistan Code of Criminal Procedure, 1898 requesting the trial court to hold an inquiry to determine the same.[4] The judge on his own, without taking any expert help and on the basis of a

[1] Civil Review Petition No. 420 of 2016 - Judgment dated 10th February, 2021 - Supreme Court of Pakistan (Five Judge Bench).
[2] Civil Petition No. 2990 pf 2016 - Judgement dated 27th September, 2016 - Supreme Court of Pakistan.
[3] *Safia Bano 2021* (n 1) (para 66).
[4] "**465.** Procedure in case of person sent for trial before Court of Session or High Court being lunatic.
(1) If any person before a Court of Session or High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Court is satisfied of the fact, it shall record a finding to that effect and shall postpone further proceedings in the case.

brief interaction with Imdad Ali, dismissed the application and came to the conclusion that Ali was competent to stand trial. On 29th July, 2002 Imdad Ali was convicted under section 302 of Pakistan Penal Code, 1860 and sentenced to death. He unsuccessfully challenged the same. And his mercy petition was rejected by the President of Pakistan on 17th November, 2015. After a black warrant, fixing the date and time of his execution, was issued on 26th July, 2016, his wife, Safia Bano, approached the local Sessions Judge with an application and prayed that a Medical Board be constituted to examine the mental health condition of Imdad Ali and his execution be stayed. The said application was dismissed. Her writ petition in the High Court of Lahore (Multan Bench), challenging this dismissal order, was also dismissed on 23rd August, 2016. Ms. Safia Bai filed an appeal against the same and a three-judge bench of the Supreme Court of Pakistan heard this matter in *Safia Bano 2016.* Her argument was that since at the time of issuance of black warrants her husband was a patient of 'paranoid schizophrenia' therefore, before his execution, he needs medical treatment is that he would be able to make a will, which is permissible under the Prison Rules, 1978. Relying on the judgement of the Indian Supreme Court in *Ram Narian Gupta v. Smt. Rameshwari Gupta*[5] the three judge bench concluded that schizophrenia, not being a permanent mental disorder and being a recoverable disease, does not fall within the definition of 'mental disorder' as defined in the [Pakistan] Mental Health Ordinance, 2001.[6] Moreover, the court also, while dismissing the appeal, relied on the Indian Supreme Court judgment in *Amrit Bhushan Gupta v. Union of India*[7] *'*to finally conclude that 'rules relating to mental sickness are not subjugate to delay the execution of death sentence.'[8] *Safia Bano* 2021, heard by a five judge bench of the Supreme Court of Pakistan, was a review against this three judge bench judgement.

A.2. Overview of Kaneezan Bibi Case [hereinafter *Kaneezan*].

Ms. Kanzeen Bibi, along with a co-accused, was prosecuted and convicted for murdering six people. On 7th January, 1991 she was sentenced to death under section 302(b) read with section 34 of Pakistan Penal Code, 1860 on six counts. On 1st March, 1994 the High Court of Lahore dismissed her appeal and confirmed her death sentence on all six counts. Khazeen Bibi did not take the plea of insanity either at her trial or during her appeal. Her appeal against the decision of the High Court of Lahore was dismissed by the Supreme Court of Pakistan on 2nd March, 1999. And the President of Pakistan dismissed her mercy petition on 19th January, 2000. In 2009/2010 she filed a writ petition before the High Court of Lahore with a prayer to convert her death sentence to life imprisonment on the ground of mental ailment. The High Court dismissed the same on 22nd July, 2010 and an appeal against the

(2) The trial of the fact of unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court."

[5] AIR 1988 SC 2260.

[6] *Safia Bano 2016* (n 2) (para 10).

[7] AIR 1977 SC 608.

[8] *Safia Bano 2016* (n 2) (para 13).

same was dismissed by the Supreme Court on 2nd December, 2010. Thereafter, the President of Pakistan stayed her execution for three weeks as she was referred to Punjab Institute of Mental Health [PIMH] where she was found to be suffering from schizophrenia. On 17th April, 2018 the then Chief Justice of Pakistan, after perusal of a report submitted by the Superintendent Central Jail, Lahore took *Suo Moto* notice and ordered that her matter be clubbed with Imdad Ali's case.

A.3. Overview of Ghulam Abbas Case [hereinafter *Abbas*].

Ghulam Abbas was convicted under 302(b) of Pakistan Penal Code, 1860 and was sentenced to death by the trial court on 31st May, 2006. His appeal against the same was dismissed by the High Court of Lahore (Rawalpindi Bench) which also confirmed his murder reference. His appeal in the Supreme Court and his subsequent review petition also failed. And on 22nd April, 2019 his mercy petition was rejected by the President of Pakistan. Consequently, black warrants were issued, and his execution was set for 18th June, 2019. His mother, Mst. Noor Jahan, filed the constitution petition before the Supreme Court and the then Chief Justice of Pakistan, while staying the execution, directed clubbing the same with Imdad Ali's case.

A.4. Arguments before the Supreme Court and the Decision.

It is important to note here that as argued by the counsel for all the above-mentioned convicts and as determined by the Medical Board constituted by the Supreme Court, all of them, at the time of hearing this case, were on death row for a considerably long period of time and were suffering from acute mental illnesses. One of the important issues raised in this case, therefore, was 'whether a mentally ill condemned prisoner should be executed?'[9] The counsel for the above mentioned convicts argued that mentally ill prisoners cannot be executed because: a) it would be inhumane; and b) a wholistic reading of exiting prison rules suggested that the prisoners, because of their mental illness, were not be able to understand and follow the mandatory procedures required to be followed before execution.[10] The counsel asked the court to consider these factors as mitigating circumstances for converting their death sentences to imprisonment for life.[11] This claim was further substantiated by Brigadier (Retd.) Mowadat Hussain Rana and Barrister Haider Rasul Mirza who were appearing in this case as *amicus curiae.* Apprising the court about the various myths and misconceptions regarding mental health issues, Brigadier Rana informed the court that 'a mentally ill individual with disturbed higher mental functions of consciousness, thinking, mood, cognition and with impairment of judgment and insight cannot be treated at par with a normal criminal.'[12] Particular to the above mentioned issue, he argued that where a 'condemned prisoner is suffering from a mental illness making him/her incapable of understanding the retributive rationale behind his/her execution, the

[9] *Safia Bano 2021* (n 1) (para 12).
[10] *Safia Bano 2021* (n 1) (para 15).
[11] *ibid.*
[12] *Safia Bano 2021* (n 1) (para 19).

execution will serve no purpose either to him/her or to the society.'[13] Moreover, Barister Mirza argued that the 'death sentence cannot be executed in case of a condemned prisoner who is unable to take rational decisions and whose ability to understand the rationale behind his/her punishment is substantially impaired due to a medically recognized mental illness.'[14] He also argued that in circumstances where a condemned prisoner develops a post-conviction mental illness and because of that mental illness, his/her mental faculties are not appreciative of the reason behind the punishment imposed by the court, the execution of sentence would serve no purpose.[15] However, he stated that 'the prohibition on executing mentally ill prisoners may only be applied to those who are medically found to be suffering from mental illness, the severity of which permanently impairs their ability to appreciate the rationale behind the punishment which they are sentenced to undergo.'[16]

PART B: CROSS BORDER JUDICIAL DIALOGUE

Safia Bano 2021 is a great example of how constitutional courts, at least in South Asia, can constructively engage with foreign jurisprudence for interpretative purposes. The act of engaging with jurisprudence from foreign courts, referred elsewhere as jurocomparatology[17], has become an integral part of interpretative methodologies that the courts across the globe use to interpret statutory and constitutional texts. Constitutional courts, particularly from South Asia, have not shied away from constitutional borrowing.[18] Despite the volatile foreign relations between some of these countries, there has been a healthy transplantation of constitutional norms, doctrines, principles, and practices.[19] Constitutional courts in India, for example, have extensively relied on foreign law, both statutory and judge-made, to interpret provisions of Indian Constitution.[20] In fact, judicial opinions

[13] *ibid* (para 21).
[14] *ibid* (para 22).
[15] *ibid* (para 23).
[16] *ibid*.
[17] Hakim Yasir Abbas, 'The Muddled Science of Comparative Law: Mending Terminology and Mapping its Benefits within Indian Constitutional Discourse' (2018) 2(1) Catolica L. Rev. 39.
[18] Aratrika Choudhuri & Shivani Kabra, 'Determining the Constitutionality of Constitutional Amendments in India, Pakistan and Bangladesh: A Comparative Analysis' (2017) 10 NUJS Law Review 3.
[19] Sunil Khilnani, et. al. (eds.), *Comparative Constitutionalism in South Asia* (OUP 2013) 12; Mark Tushnet and Madhav Khosla, *Unstable Constitutionalism: Law and Politics in South Asia* (CUP 2015); Kevin YL Tan and Ridwanul Hoque (eds.), *Constitutional Foundings in South Asian* ((Hart Publishing 2021).
[20] Adam M. Smith, 'Making Itself at Home – Understanding Foreign Law in Domestic Jurisprudence: The Indian Case' (2006) 24 Berkeley J Int'l L 218 ('*Smith*') [Refers to the initial reliance of the Supreme Court of India on international law and the subsequent intensification of the same since 1990s because of the fact that "the Indian Court (…) amassed more power and the country [underwent] significant changes through its immersion in globalization." Ibid (259)]; Jean-Louis Halpérin, 'Western Legal Transplants and India' (2010) 2 Jindal Global L Rev 14 ('*Halprin*'); Madhav Khosla, 'Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision' (2011) 59 Am J Comp L 909 ('*Khosla*'); Sam F. Halabi, 'Constitutional Borrowing as Jurisprudential and Political Doctrine in Shri D.K. Basu v. State of West Bengal' (2013) 3 Notre Dame J Int'l & Comp 73 ('*Halabi*'); *Vishaka v. State of Rajasthan* (1997) 6 SCC 241 ('*Vishaka*') [Accepting "gender equality' to be a universally recognised basic human right, the court constructively relied on international law to frame guidelines for protection of women against sexual harassment at workplace]; Oliver Meldensohn, 'The Indian Legal Profession, the Courts and Globalisation' (2005) Comp J South Asian Stud 301; Mihaela Papa & David B. Wilkins, 'Globalization, Lawyers, and India: Toward a Theoretical Synthesis of Globalization Studies and the Sociology of the Legal Profession' (2011) 18 Int'l J Legal Prof 175-209; Surya Deva, 'Human Rights Realization

of foreign courts have constantly influenced constitutional interpretation in India[21]. The major issues wherein such engagement has happened comprehensively include right to privacy[22], freedom of press[23], restraints on foreign travel[24], custodial torture[25], constitutionality of death penalty[26], protection of women against sexual harassment at work place[27], prior restraints on publication[28], recognising third gender rights[29], de-criminalising homosexuality[30], and the criminalisation of certain forms of speech and expression on the internet[31]. Unlike some countries, where engagement with foreign law is looked upon with some scepticism[32], the constitutional courts in India have generally accepted/adopted this practice with a lot of enthusiasm.[33]

While this much is known that foreign courts have engaged with judgments of Indian Supreme Court, the true extent and the manner of such engagement is not clear. A recent study, which involved studying the judgments of 43 countries and identifying the frequency and pattern of citations of the

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in an Era of Globalization: The Indian Experience' (2006) 12 Buff Hum Rts L Rev 93; K.G. Balakrishnan, '*The Role of Foreign Precedents in a Country's Legal System*' (Keynote Address Northwestern University Illinois 2008) <http://docs.manupatra.in/newsline/articles/upload/dd0d1fd1-b18c-4240-9b41-15c5923fe819.pdf> last accessed on 27/08/2022; K.G. Balakrishnan, '*Justice in the 21st century: The challenge of Globalisation*' (Introductory Note Qatar Law Forum 2009) <http://www.delhihighcourt.nic.in/library/articles/Justice%20in%20the%2021st%20century%20-%20The%20challenge%20of%20globalisation.pdf> last seen 27/08/ 2022; Valentina Rita Scotti, 'India: A Critical Use of Foreign Precedents in Constitutional Adjudication' in Tania Groppi and Marie Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013) 69

[21] P.K. Tripathi, 'Foreign Precedents and Constitutional Law' (1957) 57 Columbia L Rev 319; *See Smith* (n 20); Shylashri Shankar, 'The Substance of the Constitution: Engaging with Foreign Judgments in India, Sri Lanka and South Africa' (2010) 2 Drexel L Rev 373; *Halprin* (n 20); *Khosla* (n 20); Hakim Yasir Abbas, 'Critical Analysis of the Role of Non-Indian Persuasive Authorities in Constitutional Interpretation' (2013) 1(2) Comp. Const. & Admin. L. Q. 46 ('*Abbas 2013'*).

[22] *Kharak Singh v State of Uttar Pradesh & Ors.* AIR 1963 SC 1295 [Unauthorised police surveillance as considered as violative of right to privacy]; *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1.

[23] *Romesh Thapper v. State of Madras* AIR 1950 SC 124*; Brij Bhushan and Anr. v. The State* [1950] S.C.R. 605*; Bennett Coleman v. Union of India* AIR 1973 SC 106 [Challenge against governmental limits on import of newsprint].

[24] *Maneka Gandhi v Union of India* AIR 1978 SC 597 [Hereinafter *Maneka*] [Challenge against government 's refusal to issue passport to petitioner].

[25] *D.K. Basu v State of West Bengal* AIR 1997 SC 610; See also *Halabi* (n 20).

[26] *Bachan Singh v Union of India* AIR 1980 SC 898 [Majority opinion approving of death penalty in rarest of rare cases].

[27] *Vishaka* (n 20).

[28] *R. Rajagopal v State of Tamil Nadu* AIR 1995 SC 264.

[29] *National Legal Services Authority v. Union of India* AIR 2014 SC 1863.

[30] *Naz Foundation v. State (NCT of Delhi)* 2009 SCC OnLine Del 1762; *Navtej Singh Johar v. Union of India* AIR 2018 SC 4321.

[31] *Shreya Singhal v. Union of India* AIR 2015 SC 1523.

[32] Carlos F. Rosenkrantz, 'Against Borrowings and Other Non-authoritative Uses of Foreign Law' (2003) 1(2) Int'l J Cons L 269; David S. Law & Wen-Chen Chang, 'The Limits of Global Judicial Dialogue' (2011) 86 Washington L Rev 523; Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13 Ind. J. Global Legal Stud 37, 39; Ran Hirschl, 'Comparative Law: The Continued Renaissance of Comparative Constitutional Law' (2010) 45 Tul L Rev 771 ('*Hirschl*').

[33] The evolution of Indian environmental jurisprudence by the constitutional courts is the perfect reflection of this enthusiasm. Virtually all of the Indian legal jurisprudence in relation to environmental law has been developed by the Supreme Court through the interpretation of Constitution and a major portion of this jurisprudence has relied on foreign law. The Supreme Court has developed a reputation of being an activist Court that has, since mid-1980s, transformed itself into a guardian of India's natural environment; See Upendra Baxi, 'The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice' in S.K. Verma and Kusum (eds), *Fifty Years of the Indian Supreme Court - Its Grasp and Reach* (OUP India 2003); Saptarishi Bandopadhyay, 'Because the Cart Situates the Horse: Unrecognised Movements Underlying the Indian Supreme Court's Internationalization of International Environmental Law' (2010) 50 Rev Indian J Int'l L 204.

Supreme Court of India's judgments from 2009 to 2020, has shown that there is a steady decline in such engagement.[34] The study has, however, highlighted that most of the engagement with judgments of Indian Supreme Court has happened with South Asian and African countries.[35] The study also shows that during this period Pakistan has cited Indian judgments in 69 different cases.

PART C: PAKISTAN SUPREME COURT'S ENGAGEMENT WITH JUROCOMPARATOLOGY IN *SAFIA BANO*

C.1. - Definition of Mental Illness or Mental Disorder.

The court's opinion began with a short analysis of the definition of 'mental illness'. To this effect the court used the Mental Health Act, 1983 of United Kingdom and the Mental Healthcare Act, 2017 of India for assistance. The Supreme Court of Pakistan opined that due to the developing nature of the medical science, as reflected in section 3(1) of the Indian Mental Healthcare Act - 2017, and the domestication of internationally accepted medical standards, including the latest edition of the International Classification of Disease (ICD) of the World Health Organisation (WHO), for determination of mental illness, a limited definition of 'mental illness' for legal purposes should be avoided.[36] The court, thereafter, asked the competent legislatures to consider amending the relevant provisions of the mental health laws to cater for medically recognised mental and behavioural disorders as noticed by WHO through its latest edition of ICD.[37]

C.2. - Whether a Mentally Ill Condemned Prisoner Should be Executed?

The court began by acknowledging that there was no express provision in laws of Pakistan that prohibited execution of a convict who was on a death row and suffering from mental illness.[38] However, the court did refer to some provisions of Prison Rules which the court believed to be 'implied safeguards against execution of mentally ill condemned prisoners.'[39] The court then referee to judicial opinions from USA and India which the court believes are 'relevant' for the determination of this issue.[40] The court begins with the decision of the US Supreme Court in *Ford v. Wainwright*[41] to point out the reasons as to why the US Supreme Court in this case declared that the Eight Amendment[42] of the US Constitution prohibited carrying out sentence of death upon a prisoner who

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[34] Mitali Gupta, Is The Global Reputation Of India's Supreme Court In Decline?, 30th Nov. 2020 [Available at: https://article-14.com/post/is-the-global-reputation-of-india-s-supreme-court-in-decline. Last accessed on 29.07.2022] ('*Mitali*').
[35] *Mitali* (n 34).
[36] *Safia Bano 2021* (n 1) (para 37).
[37] ibid.
[38] *Safia Bano 2021* (n 1) (para 58).
[39] *Safia Bano 2021* (n 1) (para 58 and 59).
[40] *Safia Bano 2021* (n 1) (para 60).
[41] 477 U.S. 399 (1986).
[42] The Eight Amendment of the US Constitution provides as follows:
"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

is insane.[43] It then relied on the cases of *Pannetti v. Quarterman*[44] and *Madison v. Alabama*[45] [hereinafter *Madison*] to highlight the principle which govern the question of execution of insane persons i.e. a condemned prisoner who, because of his mental illness, does not understand the reason for his execution cannot be executed.[46]

The Supreme Court of Pakistan then referred to two important judgments of the Indian Supreme Court which specifically addressed the issue that was under consideration. These judgments are considered in detail as follows:

C.2.1. - *Shatrughan Chauhan & Anr. v. Union of India & Ors.*[47] [hereinafter *Chauhan*].

The court seems to have engaged with *Chauhan* for two reasons. The first was to use *Chauhan* to explain why executing an insane convict is wrong. To this effect the court reproduced two paragraphs from *Chauhan* and it is clear from these two paragraphs that the court is using the same to justify why it also believes that mental illness should be a supervening circumstance warranting commutation of death sentence to life imprisonment. This recognition reflects upon the fact that the court, while taking a wholistic understanding of mental illness, changes the jurisprudence governing such cases. The second reason for which the Pakistan SC referred to *Chahaun* was to point out how the three judge bench wrongly applied the Indian Indian Supreme Court judgment in *Amrit Bhushan Gupta v. Union of India*[48] [hereinafter *Bhushan*] to the facts of the Imdad Ali case. Overruling the decision of the court in the three judge bench, the Supreme Court of Pakistan opined that the three judge bench failed to take note of the fact that *Bhushan* was already overruled by *Chauhan* and that *Chauhan* was law in India that governed the question under consideration. The SC also pointed out how *Chauhan* itself was used by the Indian Supreme Court in *Navneet Kaur v. State (NCT of Delhi) & Anr.*[49]

C.2.2. - *X. v. Maharashtra*[50] [hereinafter *X*].

It seems that the case of *X* helped the Supreme Court of Pakistan with two things. The court used it, firstly, to showcase how the Indian Supreme Court talked about the international consensus against the execution of individuals with mental illness.[51] Secondly, the court referred to the case of *X* to address the question as to which mental illnesses would exempt a mentally ill convict from execution.[52] The Court seems to be influenced by what the judge in *X. v. Maharashtra* refers to as the 'test of severity'. This test, as explained in *X. v. Maharashtra,* predicates 'that the offender needs to

[43] *Safia Bano 2021* (n 1) (para 61).
[44] 551 U.S. 930 (2007).
[45] 586 U.S. _____ (2019).
[46] *Safia Bano 2021* (n 1) (para 62).
[47] (2014) 3 SCC 1.
[48] AIR 1977 SC 608.
[49] (2014) 7 SCC 264.
[50] (2019) 7 SCC 1.
[51] Para 63, 5 judge.
[52] Para 63 and 76, 5 judge.

have a severe mental illness or disability, which simply means that a medical professional would objectively consider the illness to be most serious so that he cannot understand or comprehend the nature and purpose behind the imposition of such punishment.'

CONCLUSION

It is clear that the use of these judgements, both from US and India, that the Pakistan Supreme Court agreed with the *ratio* therein as far as the question of execution of mentally ill is concerned. This primarily includes the reason that since a mentally ill convict cannot understand the rationale of his/her punishment, therefore, insanity should be considered as a supervening circumstance warranting commutation of death sentence to life imprisonment. This in itself was an important moment as far as substantive criminal law governing this issue is concerned. The Pakistan Supreme Court finally settled the law on this issue and asked the competent legislatures to bring the mental health law in Pakistan at par with international standards.

AN INCLUSIVE SOCIETY: THE JOURNEY FROM RECOGNITION TO RIGHTS

ABSTRACT

India has been a land of diversity for ages. From breeding the most ancient civilizations to welcoming the greatest intermingling in terms of dynasties, cultures, traditions, religions and beliefs, this landmass has witnessed it all. The queer community has always played a vital role in shaping the culture of our country but unfortunately, they have been subjected to a lot of oppression and prejudices by the Indian society, which is judgmental towards the people who do not fall in line with the majority. The belief that the concept of homosexuality and LGBTQ is a 'western import' seems to be flawed because there are numerous pieces of evidence in mythology, epics, folklore and religious literature that portray the deep-rooted existence of this community in our country. The acceptance of the queer community was lost during the colonial period when despotic and draconian laws were introduced by the British government to suppress the community which further made Indian society LGBTQ intolerant. From recognition to rights, the journey for the Indian Pride Community has been long but, largely glorious and successful. The paper deals with multifaceted aspects of how the LGBTQ community reached inclusivity from initially being considered as incomprehensive.

The paper portrays a clear picture of how the pride community in India has reached social recognition followed by legal recognition which further led them to retrieve undeniable and multipronged rights. The paper elaborates on the trajectory of basic constitutional and fundamental rights of the tribe such as Property Rights, Medical Rights, Marriage Rights, Reproductive Rights and Professional Rights. Accessing basic rights that have been assured to the majority of heterosexual people proves to be a challenge for them. Inheriting property is difficult for them due to the loopholes present in property laws. So is the process of having kids either naturally or through adoption. Fighting the battle against odds like societal pressure and conversion therapies has also been a hurdle. The institution of marriage and cohabitation in their scenario is still facing the issue of recognition due to the lack of legislation on this subject. On the professional front, they have been facing discrimination for ages which further demotivates them and leads to

their low self-esteem. Luckily, the pride community has won several of these rights after a tiresome battle but still, grey areas continue to exist.

In order to bring clarity over the subject the paper also explores and ponders upon judicial verdicts and legislations from the pre-colonial period till the present time and talks about several laws which indirectly exclude the LGBTQ Community, while they make an attempt to benefit the majority.

The history of a battle becomes beautiful and glorious once the end results are met. The paper encapsulates and fabricates all these aspects and portrays the past, present and future reforms needed in terms of rights and recognition for the LGBTQ Community.

Key Words: *Gender Inclusivity, LGBTQ, Rights, Homophobia, Discrimination.*

INTRODUCTION

"What is in a name? That which we call a rose by any other name would smell as sweet." These words were penned down by the Bard of Avon, William Shakespeare and were quoted by Justice Mishra in the Navtej Singh Johar Case[1]. The jurist further goes on to explain how in its most basic meaning, this phrase means that what counts is the person's intrinsic properties and the underlying traits of an individual, not the moniker by which the person is recognized.

The Indian Apex Court legalized homosexuality in September 2018 with this judgment. Following the decision, there was a clamour with claims that India was absorbing liberal ideas from the West. Scholars and researchers in literature and history, however, concur. They contend that this ruling returned the nation back to its origins, where affection was honoured and welcomed in all of its manifestations. By adding Section 377 to the Indian Penal Code in 1861, the colonial rulers outlawed consented "homosexual activity." The criminalization of homosexual behaviour, however, was more of a reflection of Western morality grounded on Christian convictions than Indian impulses. The existence of different sexuality, orientations and the individuality of Trans genders were supported in ancient India. Historical and religious literary works suggest that prior

[1] Navtej Singh Johar v Union of India (2018) 10 SCC 1.

to colonization India was far more accommodating of various sexual identities and inclinations. In ancient times, the idea of gendered diversity was accepted for both humans and demons. From historical classics, mythology and scriptures through literature and history, prose, artwork, and sculpture, queerness can be seen throughout Indian historiography.

ART, CULTURE, LITERATURE AND HOMOSEXUALITY

There are nods to what can be categorized as the "unnatural sins" stated in Section 377 in the Narada Purana, a Hindu text. Although Hindu mythology forbids "unnatural offences," the citations show that they were actually practiced. The political book Arthashastra by Kautilya makes reference to homosexual behaviour. However, the text demands that the sovereign battles against the "social menace" and punish individuals who practice homosexuality. The Manusmriti or Man's law also mentions homosexual behaviour by both men and women[2]. Even if they were rendered illegal for both sexes, the idea that these actions are included in such literary works is sufficient evidence that homosexual acts have been common since antiquity. According to the Ramayana epic written by Valmiki[3], Lord Hanuman witnessed demon ladies caressing and cuddling women as he travelled back from Lanka after meeting Goddess Sita. The Skanda Purana goes on to say that the people who indulge in homosexual acts would acquire impotency.

According to Prof. Mukhia[4], literature and religious texts from the Middle Ages also imply that sexuality was not stigmatized. Although there was considerable opposition, LGBT individuals were not shunned. They were treated with tolerance by community, and no one was persecuted because of their homosexuality. Persian and Sufi traditions, poetries, love songs called Ghazals etc. depicted plethora of instances where love is evident between two persons of same sex. The renowned Sufi poet of 17th century[5], Bulleh Shah, through his various poems blurred the rigid lines

[2] India Today Web Desk, 'Homosexuality in ancient India: 10 instances' (India Today, 10 July 2018) <https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10> accessed 28 July 2018

[3] Hari Prasad Shastri, 'The Ramayana of Valmiki' (The Asiatic Society, Calcutta, 1932)

[4] Vikas Pandey, ' Why legalising gay sex in India is not a Western Idea' (BBC, 31 December 2018) <https://www.bbc.com/news/world-asia-india-46620242> accessed 27 July 2022

[5] Haroon Khalid, 'From Bulleh Shah and Shah Hussain to Amir Khusro, same-sex references abound in Islamic Poetry' (Scroll, 17 June 2006)<https://scroll.in/article/810007/from-bulleh-shah-and-shah-hussain-to-amir-khusro-same-sex-references-abound-in-islamic-sufi-poetry>accessed on 24 July 2022

between religion, genders and sexuality. In one of his poems, he presented himself as a woman, appearing before her lover, thus dissolving gender identities. In a lot of his creations, he described his feelings of love and passion towards his Murshid, Shah Inayat. A large part of those poems included sexual innuendos, hence depicting the fluidity of his sexuality. The Mughal Dynasty's founding father himself did not lack affinity to the same sex. Babur[6] describes his fascination to a boy called Baburi in his biography, Baburnama. In his book 'Voyages to the East Indies', Dutch explorer Johan Stavorinus[7] discussed homosexual relations between Mughal males in Bengal. Prominent Sufi poet of 16th century, Shah Hussain was said to have fallen for a Hindu boy named Madho Lal. He declared his love for him through various poems by addressing his beloved as Madho. The bond between the two was so divine that he put his name after his beloved's, hence Madho Laal Hussain and both of their tombs are located beside each other, marked by single emblem.[8]

In addition to textual documentation, homosexuality in India has left its remnants in the form of artworks, drawings, and sculptures throughout the history. One such record is kept at the Khajuraho temples. The Chandela ruling family constructed the Khajuraho temple around 950 and 1050 AD. The carvings inside depict scenes in which males display their private parts to other men and women engaged in homoeroticism. The lifetime of Gautam Buddha is depicted in images, found in the Buddhist monastery caves of Ajanta[9] and Ellora, an impediment of impressive architecture. Some of the Buddha's illustrations also feature romantic and sensuous subjects. In these artworks, men and women are shown mating with the same sex. In the pillar caves of Karle[10], two naked women are seen embracing each other. This is a depiction from Buddhist artifacts dating between 50 to 70 CE. Similar imagery may be seen in Konark's Sun Temple from the 1300s in eastern Odisha. The facade of the Sun Temple, which honors the Hindu Sun deity, is adorned in

[6] Annette Susannah Beveridge, 'The Baburnama in English' (Luzac & Co., 1922) <https://archive.org/details/baburnamainengli01babuuoft/page/120/mode/2up?view=theater&q=baburi> accessed on 23 July 2022
[7] Johans Stavorinus, 'Voyages to the East Indies' (G.G. and J. Robinson, PaterNoster Row, 1798) <https://play.google.com/books/reader?id=Ci0LAAAAYAAJ&pg=GBS.PP6&hl=en> accessed on 23 July 2022
[8] Sameer Shafi Warraich, ''Love needs no guidance': How Shah Hussain and Madhu Laal defied social norms past and present' (*Dawn*, 24 April 2018) <https://www.dawn.com/news/1403596> accessed on 25 July 2022
[9] Jonathan Glancey, 'The Ajanta Caves: Discovering lost treasure' (BBC, 23 February 2015) <https://www.bbc.com/culture/article/20150223-uncovering-caves-full-of-treasure> accessed 23 July 2022
[10] Gurvinder Kalra, 'Sexual Variation in India: A view from the West' (PMC, January 2010) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3146184/> accessed 30 July 2022

murals showing sensual themes from the Kamasutra. Explicit depictions of gay lovers may also be seen at the sites of Tanjore and Puri. In Bhubaneswar's Rajrani Temple, there is a statue of two ladies having sexual acts.

Strong yakshas and sleek yakshis giving tribute to the resting Tirthankaras are depicted in Jain writings. However, it is stated that Jain monastic delegated the pleasurable act of paintings to non-Jain craftsmen since they regarded yearning as a contaminant. Therefore, it makes sense that Jain liturgical art avoids depicting passion in any form, including sexuality[11]. Islamic art places a greater emphasis on geometrical, script, and the ethereal than it does on humanoids because images of God's creation are forbidden in the religion. Delhi sultanate did not depict the human figure, let alone sexuality, in their palaces, monuments, or buildings.

These symbolic evidences disprove all theories that deviance is not a part of Indian society. This has been regarded[12] by academics and historians as recognition of homosexuals and identical gender relationships in those days. The sexuality and its flexibility for males, women, and the third gender are asserted through these figurines.

MARRIAGE RIGHTS

Recently on 3rd July 2022, a gay couple from Kolkata, Abhishek Ray and Chaitanya Sharma got united in the auspicious bond of marriage in a private ceremony.[13] Last year in December, the first ever gay marriage of Telangana was solemnized.[14] Even after the Navtej Singh Johar Judgment homosexual couples are looked down upon with a lot of disdain. In the said judgement, Supreme Court decriminalized the consensual sexual activities between homosexuals and gave them the

[11] Devdutt Pattanaik, 'How to spot a lesbian in sacred Indian art' (Scroll, 22 January 2017) <https://scroll.in/article/827274/how-to-spot-a-lesbian-in-sacred-indian-art> accessed 23 July 2022

[12] 'Homosexuality in India: 10 instances' (India Today, 10 July 2018) <https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10> accessed 23 July 2022

[13]' Gay couple gets married in Kolkata; pictures take internet by storm' (The Economic Times, 5 July 2022) <https://economictimes.indiatimes.com/news/new-updates/gay-couple-gets-married-in-kolkata-pictures-take-internet-by-storm/articleshow/92683666.cms> accessed 24 July 2022

[14] 'In a first, gay couple says 'I Do' in Telangana'(The Indian Express, 22 December 2021) <https://indianexpress.com/article/trending/trending-in-india/in-a-first-gay-couple-says-i-do-in-telangana-7681891/> accessed 23 July 2022

legal right to cohabit without any fear of persecution but still, same sex marriages are not recognized in India.

A private member bill has been introduced by NCP's Supriya Sule, that seeks to insert a clause in Section 4 of the SMA[15] stating that a marriage can be solemnized for any two persons, provided that the males are 20 years old and females are 18 years old. The bill also seeks to replace all the exclusive references like "husband and wife" with more generic ones like spouse.[16] This is not the first time that such a step was initiated for the legitimization of same sex marriages. Multiple petitions are pending in Delhi High Court, demanding amendment in personal laws and Special Marriage Act, 1954 in order to provide recognition to same sex marriages. In reply to these petitions, Solicitor General of India had remarked that Indian courts should refrain themselves from legitimizing such marriages to preserve "social morality" and "cultural values of our country".[17] However historians and mythologists believe that court's decision took India back to its roots. References drawn from various historical texts, sculptures and carvings on the walls of ancient temples are a testimony to the existing practice of marriage and cohabitation among the homosexuals in the pre-colonial India.

Most of the ancient Hindu texts like Manusmriti and Dharamshastra talks about eight types of marriages. One amongst them is Gandharva Vivah or marriage by mutual consent. Historians say that Gandharva Vivah acknowledges both gay and lesbian marriages prevalent in historical India.[18] An important commentary on Kamasutra written in twelfth century, "Jayamangala" also states that citizens with homosexual inclination can marry each other if they love each other."[19]

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[15]Special Marriage Act 1954, s 4.

[16]'NCP's Supriya Sule brings Bill to legalise same-sex marriage' (The Indian Express, 2 April 2022) <https://indianexpress.com/article/india/ncps-supriya-sule-brings-bill-to-legalise-same-sex-marriage-7848768/> accessed 23 July 2022

[17] Kanav N. Sahgal, 'Same Sex Marriage in India: Why are Indian Courts taking so long?' (The Leaflet, 30 March 2022) <https://theleaflet.in/same-sex-marriage-in-india-why-are-indian-courts-taking-so-long/> accessed 24 July 2022

[18] Deepanshi Mehrotra, 'The Pre-Colonial History of Homosexuality in India: Why Love Is Not Western (Part I/III)' (Academike, 29 June 2021) <https://www.lawctopus.com/academike/history-of-homosexuality-in-india/> accessed 24 July 2022

[19] Nityanand Tiwari, 'Homosexuality in India: Review of Literatures'(2010) <https://www.researchgate.net/publication/228127620_Homosexuality_in_India_Review_of_Literatures> accessed 25 July 2022

Agni-The God of Fire in Hindu Religion was married to both Svaha, a female goddess and male moon God Soma. It has been mentioned in Kathasaritsagara, Hindu texts of 11th Century that Agni had many sexual encounters with Gods of same sex, which included him accepting semen from them. Some mythologists even commented that when semen of God Shiva caused a burning sensation in his throat and fell down in the river Ganges, Kartikeya, the son of Shiva was born.[20] The story of Shikhandini, the first intersex warrior in Mahabharata, who courageously killed Bhishma is classic evidence of presence of non-normative gender in the mythological India and their marriage.[21]

Another chronicle illustrates the story of an Armenian Jewish merchant who came to India in 1630s and was mesmerized by a Hindu boy named Abhay Chand. His lifestyle influenced him in a way that he turned into a renunciant, putting aside all his social conventions to become a saint, imparting his teachings along with his cherished lover.[22]

In the late 18th century, many poets conveyed their feelings of affection towards the same sex through Rekhti poetry, where male poets used to adopt a female voice to stress the female persona in the poem. They even took feminine pen names, one of them being *Dogana*, which is used as a reference to homo-erotically inclined women. An eminent author of the 18th century, Bankim Chandra Chatterjee, showed a glimpse of homoeroticism in his story "Indira", where intense love was shown to exist between the female lead and her friend Shubhashini.[23]

Around this time, when various Indian authors and poets were accepting different forms of love and sexuality, Lord Macaulay came up with section 377 of IPC[24] which considered homosexual intercourse as an unnatural offence.[25] One of the earliest incidents of homosexual marriage in India

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[20] Saradha Natarajan, 'Agni-Homosexual and Bisexual'(Qplus, 22 January 2020) <https://www.qplus.me/agni-homosexual-and-bisexual/> accessed 24 July 2022

[21] 'LGBT Representation in Hindu Mythology' (Just Cling, 6 November 2018) <https://blog.justcling.com/2018/11/06/lgbt-representation-in-hindu-mythology/> accessed 26 July 2022

[22] Sasha Prevost, 'Sarmad Kashani: The incredible story of the Persian Sufi Jewish saint'(Stroum Center for Jewish Studies, 1 March 2016) <https://jewishstudies.washington.edu/global-judaism/sarmad-kashani-sufi-jewish/> accessed 25 July 2022

[23]Gaganjot Kaur, 'Attitude towards the lgbtq community through the ages indian society and literature' (2021) PARIPEX-INDIAN JOURNAL OF RESEARCH <https://www.academia.edu/58119615/Attitude_towards_the_lgbtq_community_through_the_ages_indian_society_and_literature > accessed 26 July 2022

[24] Indian Penal Code s 377.

[25] Tessa Wong, 'The British Colonial law that left an anti-LGBTQ legacy in Asia' (BBC News, 29 June 2021) <https://www.bbc.com/news/world-asia-57606847> accessed 25 July 2022

was the marriage ceremony that took place between two policewomen Leela Namdeo and Urmila Srivastava in Central India in 1988.[26] In the year 1983, a case reached Supreme Court where a man had sexual intercourse with a boy but with his consent. Supreme court, considering the fact that the act was consensual, held that the man would be punished with Rigorous imprisonment for 6 months rather than 3 years.[27]

The cultural residues of non-normative relationships can be seen even today in the small village of Angaar in Gujarat, where a ritualistic transgender marriage is performed among the men of the Kutchi community around Holi and this practice is prevalent for the last 150 years. Now, different states in India have been witnessing many transgender marriages, where a trans-man marries a trans-woman, after going through sex reassignment surgeries although the tragic part is that their marriage is not legally recognized in India due to the lack of any legislation.[28]

Supreme Court made it clear in the Navtej Singh Johar's case that consensual and private same sex activities between adults constitute an essential part of one's privacy but did not make any explicit and lucid difference between private and public sphere. Now, it has been left to one's own imagination whether marriage is a public affair or it too lies in private sphere as sexuality. Some people believe that marriage is an entirely public affair which is celebrated as a union of two families. Hence, recognition for same sex marriages cannot be inferred from the judgement in this case. The second and more complex issue with legitimization of same sex marriages is the governance of institution of marriage by different personal laws. In order to legalize same sex marriages, an amendment needs to be done in the personal laws by widening the ambit of the term's 'bride' and 'groom'. In 2019, Madras High Court gave a groundbreaking judgement in Arun Kumar case[29], where it was held that the term "bride" used in HMA is of a wider ambit than the mere literal translation and includes trans women and intersex women as well. This judgement has set the ground to redefine the marriage rights for LGBTQIA+ community.[30] The ambit of the

[26]Ruth Vanita, '"Wedding of Two Souls": Same-Sex Marriage and Hindu Traditions' (2004) 20 Journal of Feminist Studies in Religion <https://www.jstor.org/stable/25002506> accessed 26 July 2022
[27] *Fazal Rab v. State of Bihar,* AIR 1983 (SC) 323.
[28] 'Meet the first transgender couple from West Bengal' (Times of India, 23 August 2019) <https://timesofindia.indiatimes.com/life-style/spotlight/meet-the-first-transgender-married-couple-from-west-bengal/articleshow/70802609.cms> accessed 24 July 2022
[29] *Arun Kumar v. The Inspector General of India*, WP(MD) No. 4125 of 2019.
[30] Kanav N. Sahgal, 'Same Sex Marriage in India: Why are Indian Courts taking so long?' (The Leaflet, 30 March 2022) <https://theleaflet.in/same-sex-marriage-in-india-why-are-indian-courts-taking-so-long/> accessed 24 July 2022

personal laws can also be widened by recognizing the self-respect marriages where presence of saptapadi, priests and holy fire is not necessary. Tamil Nadu is the only state where such self-respect marriage ceremony has been held valid. [31]On a constitutional front as well, denying a person the right to choose a partner of their choice is a direct violation of fundamental rights enshrined in the Constitution of India.[32] The data analysis done in various cities show that amongst metro and non-metro city dwellers, the majority i.e., 74% thought that same-sex relationships are entirely the choice of an individual.[33]

REPRODUCTIVE RIGHTS

Indians are inclined to respond with "my family" on being asked what is most pivotal for them. But it really is bizarre that not all Indians get to have one in a country where the families are regarded as the foundation of the cosmos. Decriminalizing S.377 was only the beginning of the war; it is now partially won. And what initially included lifting a restriction should now also include the stark awareness of basic human rights. Consequently, the descent of rights for the pride community is a constant threat.

King Bhagiratha's story is told in the Krittivasa Ramayana. He was the progeny of two women. According to the narrative, King Dilip had two spouses and departed without a descendant. After this, Lord Shiva showed up in the queens' dreams and predicted that they would conceive a baby if they made love to one another[34]. When the bereaved queens followed the instructions, one of them became impregnated and ultimately gave life to Bhagiratha, a well-known ruler credited with bringing the Ganges from paradise to our planet.

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[31] 'Madras HC refuses to declare self-respect marriages illegal' (The News Minute, 10 November 2015) <https://www.thenewsminute.com/article/madras-hc-refuses-declare-self-respect-marriages-illegal-35852> accessed 25 July 2022

[32] Anant Prakash Mishra, 'Why Same Sex Marriages must be judged at the Constitutional Altar' (The Leaflet, 12 March 2021) <https://theleaflet.in/why-same-sex-marriages-must-be-judged-at-the-constitutional-altar/> accessed 24 July 2022

[33] Sanyukta Kanwal, 'Opinion on same sex love among young Indians 2019 by city type' (Statista, 16 October 2020) <https://www.statista.com/statistics/1051734/india-opinion-on-same-sex-love-among-youth-by-city-type/> accessed 25 July 2022

[34] Jacob Ogles, '19 LGBT Hindu Gods' (Advocate, 06 September 2016) <https://www.advocate.com/religion/2016/9/06/19-lgbt-hindu-gods?pg=17#:~:text=Historians%20Ruth%20Vanita%20and%20Saleem,offspring%2C%20and%20Bhagiratha%20was%20conceived> accessed 22 July 2022

The Matsya Purana contains a fascinating tale of God Vishnu changing into the charming woman "Mohini." He plotted to deceive the demonic race to get the gods to consume all of the amrit (holy immortality water). Shiva was also infatuated with Mohini after watching her, and as a result of their union, Lord Ayyappa[35] was born.

Raga Olga D'Silva is a writer, publisher, and businesswoman who has twins aged 23. D'Silva, who was born in Mumbai and now resides in London raised them together with Nicola Fenton. For more than 13 years, D'Silva and Fenton were in a homosexual relationship. According to D'Silva, the fact that the kids have three doting parents—two moms and a father—has been like hitting the jackpot. However, when the group moved to India, situations were not simple for them. Nicola was not acknowledged as the children's legal parent. D'Silva said, "It was difficult when we applied for school admissions since we could only include Nicola as a friend or emergency contact." The same held true for choices involving the children's well-being. Lawfully, she was unable to decide on their account. As a mom, she wasn't ever recognized[36].

For homosexual couples, the only practical options left are surrogacy or adoption. The historical and age-old personal laws in India, most prominently the Hindu Law and the Muslim law have little to no reproductive rights for the pride community. Jews, Christians, Parsis, and Muslims do not recognize full adoption under their personal laws. Hindu law does give an option to married couples, single males and single females to adopt under the HAMA,1956[37], but here also the legal right is vested in one of the parents only. People who want to adopt a kid must bring the child into "guardianship" under the terms of The Guardian and Wards Act, 1890, as non-Hindus don't even have an empowering statute to do so. Sadly, even this law makes no mention of the LGBTQ community's right to parenting.

As per the Juvenile Justice Act of 2000, single adults were prohibited from adopting under Indian legislation. However, as adoption legislation must be based on upholding the child's highest benefits, it would be wrong to let factors connected to relationship status take precedence over the

[35] Jacob Ogles, '19 LGBT Hindu Gods' (Advocate, 06 September 2016) <https://www.advocate.com/religion/2016/9/06/19-lgbt-hindu-gods?pg=1#article-content> accessed 22 July 2022.
[36] Tarini Mehta, 'Where are India's Queer Parents? Having a family is not even an option for many Indians' (The Print, 21 February 2021) <https://theprint.in/opinion/where-are-indias-queer-parents/608267/> accessed 24 July 2022
[37] Hindu Adoption and Maintenance Act 1956, ss 7 and 8.

child's greatest interests. Bearing the very same justification in consideration, the 2015 Juvenile Justice Act exclusively permits males to adopt male kids, while allowing females to adopt children of any gender. Adoption protocols, which are not controlled by personal statute, have been fully outlined under JJ Act 2015. Only married couples are qualified to adopt in accordance with the original legislation and the Regulation promulgated statutorily. As a result, homosexual couples are ineligible to embrace parenthood via adoption as a wedded couple. The Highest Court's decision[38] to uphold live-in relationships and the State's decision to let live-in partners adopt, however, force us to consider whether homosexual partners who are in a live-in relation may be qualified to adopt. The Central Adoption Regulatory Authority forbade live-in partners from adopting in 2018 by a directive[39]. The aforementioned Memorandum was retracted[40], though. The proceedings of the 16th conference of CARA's Steering Committee[41], which took place on 30th August, 2018, contain the debate on the reappraisal. It was determined that one of the live-in companions may become a lone parent through adoption. The prior directive was rescinded in this instance since only one person would be granted lawful parental custody of the kid. According to the ruling mentioned above, a homosexual partnership now has the option of having one amongst the partner to adopt a child. They are left with no choice except to adopt underneath anyone of the partners' name. The same may complicate custody and maintenance-related issues even further. There is no proof that same-sex couples make worse parents than heterosexual couples in any manner. Contrarily, latest researches have shown that kids brought up by homosexual couples are more likely to be successful in school than kids raised by heterosexual partners. The goal of adoption is to provide kids with a comfortable habitat and family that will support their cognitive and social development. No matter what sexuality the parents are, having doting and caring parents is what is needed.

[38] Indra Sarma v VKV Sarma (2013)15 SCC 755
[39] Dr. DD Pandey, 'Circular' (Central Adoption Resource Authority, 31 May 2018) <http://cara.nic.in/PDF/Circular/singlepap.pdf> accessed 24 July 2022
[40] Dr. DD Pandey, 'Circular' (Central Adoption Resource Authority, 11 October 2018) <http://cara.nic.in/PDF/Circular/reconsideration.pdf> accessed 24 July 2022
[41] Deepak Kumar, 'Minutes of 16th Meeting of the Steering Committee of Central Adoption Resource Authority, 30 August 2018) <http://cara.nic.in/PDF/Minutes%20of%20SC%20Meetings%20of%20CARA/16th%20SC%20Meeting%20(30-08-2018).pdf> accessed 24 July 2022

Despite the fact that this is undoubtedly not the idealized and best depiction of a family, it does allow homosexuals to exercise their legal rights to some extents. But all doors have been shut for transgender community. All the legal methods currently have no discourse and path for transgenders by which they can adopt a child.

PROFESSIONAL RIGHTS

In the past decade, Indian courts have tried to extend recognition along with protection for LGBTQ community through leading judgments, but due to lack of stringent legislation, it is evident that people of this community are still prone to workplace harassment at both public and private levels. In a survey conducted in 2013 on over 455 LGBT professionals from 17 top companies, concluded that one third of them alluded to workplace harassment and 80% of them had heard homophobic comments directed towards them at workplace.[42] Another study conducted in 2018 by Times Jobs showed that about 57% of working population accepted the fact that their company doesn't openly recruit people from LGBTQ+ community and almost 56% of them said that they still experience bias at workplace over gender and sexual orientation.[43] A research done by World Bank shows that the most prominent reasons responsible for the increase in poverty among the LGBTQ community includes lack of access to jobs, education, housing barriers, and rejection by families.[44] The transgender community is the most ostracized and stigmatized in modern India. Due to lack of adequate education, employment opportunities and family support, they are forced to resort to dancing, begging or prostitution.[45] This is the condition of the transgender community in post-colonial India but historians argue that they stood at a much better and reputed position in historic times.

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[42] Sanjay Joshi, 'LGBT Awareness in the Indian Workplace'(SHRM, 9 May 2013) <https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/lgbt-indian-workplace.aspx> accessed 26 July 2022

[43] 'India Inc is not creating inclusive workplace for LGBT employees' (The Economic Times, 24 November 2018) <https://economictimes.indiatimes.com/news/politics-and-nation/india-inc-is-not-creating-inclusive-workplace-for-lgbt-employees-people-with-disabilities/articleshow/66778071.cms> accessed 26 July 2022

[44] M.V. Lee Badgett, 'The Economic cost and Exclusion of LGBT People: A case study of India' (World Bank, 3 October 2014) <http://hdl.handle.net/10986/21515> accessed 26 July 2022

[45] Sibsankar Mal, 'The Hijras of ancient to modern India' (Brewminate, 14 September 2018) <https://brewminate.com/the-hijras-of-ancient-to-modern-india/> accessed 26 July 2022

Ramayana depicts an instance where Lord Rama was leaving for his exile and he ordered the people coming behind him to return by addressing them as 'men and women'. Some people still followed him and on reaching the forest told Rama that they neither fall in the category of men nor women. The tale further escalates depicting how Lord Rama became happy by their devotion towards him and bestowed them with a boon that the blessings of this community shall be considered as pious. Even Jainism texts mention the 'Psychological Sex' which is different from the male and female sex and is construed as a reference towards the transgender community.[46] This community held prestigious and noble positions in the royal courts of the Mughal Emperors in medieval India. The Dutch merchant Fransisco Pelsaert was surprised during his visit to India by looking at the prestige and power that the transgender held in the imperial household. He noted that they could get whatever they desire, from riches to servants. Such accounts describing their power can easily be traced down from the travelogues and documentaries of various travellers.[47] The condition of the transgender community deteriorated with the imposition of draconian laws in the colonial era, such as S.377, IPC and the Criminal Tribes Act.[48] The western concepts of treating everyone who is not straight in terms of gender and sexual identity, as marginalized, started prevailing in colonial India. The transgender community was forced from a well-respected pillar of governmental and religious society to a social outcast. It's due to this stigmatization that the transgender community became more susceptible to economic exclusion as they don't have equal access to educational and employment opportunities. Recently, India's first Transgender Pilot Adam Harry was denied the right to fly even after obtaining the required license and training because the regulatory bodies opined that flying duties cannot be assigned to those who are undergoing hormonal therapy.[49]

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[46] 'Transgender Rights: Historical, Constitutional, Legal Perspective and Critique' (B&B Associates, 6 August 2020) <https://bnblegal.com/article/transgender-rights-historical-constitutional-legal-perspective-and-critique/> accessed 27 July 2022

[47] Adrija Rowchoudhary, 'When Eununchs were the mid-rung of power in the Mughal Empire' (The Indian Express, 19 July 2018)<https://indianexpress.com/article/research/eunuch-security-guards-bihar-mughal-empire-history-5266102/> accessed 27 July 2022

[48] Sophie Hunter, 'Hijras and the legacy of British colonial rule in India' (The London School of Economics and Political Science, 17 June 2019) <https://blogs.lse.ac.uk/gender/2019/06/17/hijras-and-the-legacy-of-british-colonial-rule-in-india/> accessed 27 July 2022

[49] Idrees Bukhtiyar, 'How India's First Transgender Pilot is struggling to fly' (India Times, 17 July 2022) <https://www.indiatimes.com/news/india/how-indias-first-transgender-pilot-is-struggling-to-fly-574969.html> accessed 27 July 2022

Supreme Court in the NALSA[50] case, emphasized on the fact that constitutional protection against discrimination on the grounds of sex includes discrimination based on sexual orientation and gender identity. Further judgements by Supreme Court also provided for protection of the public employees from discrimination at workplace but constitutional rights do not extend to private employees. Neither existing laws on workplace harassment account for LGBTQ community nor Transgender Persons (Protection of Rights) Act, 2019 is strong enough to take within its sweep the right of equal access to employment opportunities as it uses gendered language and requires certification of transgender status. This issue has another aspect to it. Not providing equal employment opportunities to LGBTQ community has perilous consequences. According to a 2014 report of World Bank, Homophobia existing in India has an enormous impact on economy of India in the form of lower labor force participation, lower income output, and higher health and social costs concerning LGBT people.[51] There are certain organizations such as Accenture, Capgemini etc. which are adopting policies for making their working environment more LGBTQ tolerant and gender inclusive.[52] An edutech Startup, Scaler in January has announced that it will provide 12 days period leave for women and transgender employees.[53] There is a stringent need of a regulatory framework to prevent discrimination and harassment at the workplace on the grounds of gender, sexual identity and other factors.

MEDICAL RIGHTS

In 2013, a 22-year-old transgender was gang-raped by three men in West Bengal but instead of getting any treatment as first aid or HIV protection at the nearest hospital, she received taunts and judgmental views of the hospital authorities. Another instance exists where a transgender victim of a train accident died unattended.[54] A 2016 Lancet paper on Transgender health in India shows

[50] *NALSA v Union of India and Ors.*, (2014) SCC 438.
[51] Harini Ashar, 'How Homophobia is costing India 1.7% of its GDP' (Homegrown, 24 June 2019) <https://homegrown.co.in/article/803715/how-homophobia-is-costing-india-1-7-of-its-gdp > accessed 27 July 2022
[52] Pride Circle, 'India Workplace Equality Index' <https://workplaceequalityindex.in/> accessed 23 July 2022
[53] 'Scaler announces 12 days of period leave for women, transgender employees' (Times of India, 13 January 2022) <https://timesofindia.indiatimes.com/scaler-announces-12-days-of-period-leave-for-women-transgender-employees/articleshow/88877108.cms> accessed 27 July 2022
[54] Ashwaq Masoodi, 'Accessing healthcare still an ordeal for LGBTQ in India' (Mint, 16 July 2018) <https://www.livemint.com/Politics/w6C5ws5POJ7d1O590mP6mJ/Accessing-healthcare-still-an-ordeal-for-LGBTQ-in-India.html > accessed 27 July 2018

that even after getting legal recognition, the basic right to access healthcare is denied to the transgender community. [55]

Even though homosexuality is no longer considered a mental issue, the practice of conversion therapy has sustained itself in religious, moral and farce medical practices. Conversion therapy is based on an assumption that same-sex attraction is abnormal and requires treatment. Indian Journal of Psychiatry published a paper in 1983[56] stating that aversion techniques are used to treat homosexuality whereby patients were tended with electric shocks on watching same sex pornographic and stopped those shocks when they switched to heterosexual pornography. This was done in order to associate pain with homoeroticism and pleasure with heterosexuality. In the year 2014, Indian Psychiatry accepted the fact that homosexuality is not a medical condition and does not need to be treated through any technique. These practices are unethical and were discredited by many medical practitioners but it still prevailed in many parts of our country.[57] A report was published by UNHRC in which it was stated that 98% of the people interviewed have faced psychological and physical damage after undergoing Conversion therapy. Finally, in the Laxman Balkrishna Joshi's case[58], Supreme Court held that doctors taking up cases for conversion therapy can be held liable under medical negligence.

It has been shown in many studies that prevalence of mental health issues is higher in individuals belonging to sexual and gendered minorities as compared to heterosexual population and that substance abuse, anxiety and suicidal thoughts is common in their experiences.[59] During the COVID Pandemic, their difficulties grew as they faced additional barriers due to the complex process of registration to access COVID vaccines. In addition to that, very little research has been done to learn about the side effects that vaccines can cause in people who are undergoing Hormone

[55] Long C Ming, Muhammad A Hadi and Tahir M Khan, 'Transgender Health in India and Pakistan' (2016) 388 The Lancet <https://doi.org/10.1016/S0140-6736(16)32222-X> accessed 26 July 2022
[56] Manju Mehta and Smita Deshpande, 'Homosexuality- A study of Treatment and Outcome' (1983) 25 Indian Journal of Psychiatry <https://www.researchgate.net/publication/51576721_Homesexuality_-_a_study_of_treatment_and_outcome> accessed 27 July 2022
[57] Sangeet Sebastian Kumar Vikram, 'Mail Today Exclusive: Delhi doctors use electric shock to treat homosexuality' (India Today, 27 May 2015) <https://www.indiatoday.in/mail-today/story/homosexuality-cure-delhi-doctors-exposed-conversion-therapy-254849-2015-05-27> accessed 27 July 2022
[58] *Laxman Balkrishna Joshi v. Trimbal Bapu Godbole and Anr*, 1969 AIR 128.
[59] Jagruti R Wandrekar and Advaita S Nigudkar, What Do We Know About LGBTQIA+ Mental Health in India? A Review of Research From 2009 to 2019' (2020) 2 Journal of Psychosexual Health <https://doi.org/10.1177/2631831820918129> accessed 27 July 2022

Replacement Therapy.[60] The biggest threat to people of the LGBTQ community in the medical field is Sexually Transmitted Diseases. A study shows that almost two third of the transgender community has no access to treatment for STDs.[61] Hence, the need of the hour is to have a regulatory framework for ensuring proper access to healthcare for the LGBTQ community.

PROPERTY RIGHTS

Supreme Court while decriminalizing homosexuality stated that rights regarding inheritance and adoption cannot be done away by them, and can only be created through legislation. Unfortunately, even after four years, no legislation has been framed to ensure the property rights of the LGBTQ community. Homosexual couples cannot acquire or inherit their partner's property without a will and even if a will is made, there are chances of will getting challenged by their legal heirs. Similarly homosexual couples cannot file for a joint loan for buying a home together and can't even claim insurance policy for their partners.[62] Section 8 of HSA, 1956 regards widow being heir of the deceased man's property and section 15 of same act states the husband to be heir of deceased woman. Due to the mention of specific terms such as husband and widow, this section will not apply on homosexual couples.[63] This stands as a huge obstacle in the inheritance rights of homosexual couples. It becomes equally difficult for a homosexual couple to rent a house in order to cohabit, due to the prejudices prevalent in the society.

For transgender community, even though Transgender Persons Act 2019 provides for the right to purchase or rent any property, it is not very helpful as the act remains silent on whether it impacts other inheritance laws. Transfer of property is a concurrent subject but, till now no legislation has been made for inheritance rights of transgender community by state or centre. The main issue with

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[60] Saumya Rastogi, 'Complex Registration, Limited Research: Why India's LGBTQ Feel Left Out from Vaccination Drive' (News 18, 15 June 2021) <https://www.news18.com/news/buzz/complex-registration-limited-research-why-indias-lgbtq-feel-left-out-from-vaccination-drive-3847049.html> accessed 27 July 2022

[61] 'Towards more inclusive Health Programs: A Learning Brief' (Learning 4 Impact) <https://www.learning4impact.org/content/Learning%20brief.pdf> accessed 26 July 2022

[62] Neil Borate, 'Same Sex couples in India lack basic financial rights' (Mint, 25 June 2019) <https://www.livemint.com/money/personal-finance/same-sex-couples-in-india-lack-basic-financial-rights-1561396839301.html> accessed 27 July 2022

[63] Markandey Katju, 'Section 377 Verdict: Gay marriage, inheritance, adoption laws unlikely; 'majoritarian' view will keep State, SC away' (Firstpost, 7 September 2018) <https://www.firstpost.com/india/section-377-verdict-gay-marriage-inheritance-adoption-legislation-unlikely-majoritarian-view-will-keep-state-sc-away-5134701.html> accessed 27 July 2022

the personal laws such as Hindu Succession Act dealing with inheritance is that the laws are gender oriented and use specific terms and provisions for man and woman. There is no provision that envisages the rights for transgenders and the act remains silent on whether a trans-man will fall within the ambit of rights given for man or woman. The issue with Muslim law is that the laws relating to inheritance under Muslim Law is largely uncodified and is governed by customary laws that don't mention transgender rights. Lastly, even though Indian Succession Act is largely gender-neutral and provides for same inheritance laws for both male and female, it is not suited for the transgender community as it doesn't take into account the guru chela relationship prevalent in Hijra community.[64]

EXPRESSION CRISIS

Based on prior narratives, legislation can both aid and hinder. The statute that declared the LGBTQ population to be unprosecuted felons, which dates back over 150 years, was a roadblock for them. They were not allowed to act on their feelings and emotions for someone who was of the own gender because of Section 377 of IPC. The Apex Court's groundbreaking ruling in the 2018 judgment has finally eliminated the offensive part. Despite it, because of the continued lack of authority, the group is now appealing to the laws to effectively concede to prejudice against it.

Homosexual or Trans marriage is not a spurious joke whose main use is to allow opulent people to have ostentatious weddings. A sacred covenant, matrimony has significant ramifications attached to it. A wedded pair receives incentives since they are assessed as a single entity. On the demise of a partner, the surviving spouse frequently obtains social security payments. Legally recognized couples have recourse to healthcare along with medical coverage. Benefits given to heterosexual couples as a norm generate complexities for homosexual partners.

LGBT persons and couples require different types of assisted reproductive technologies (ART) to help them start a family. To create an embryo, gay men would need donor eggs, and to deliver those babies, they will also need surrogate hosts. In order to become pregnant lesbian couples and single lesbians too may need donated sperm. They may also think about using donor eggs or to

[64] Karan Gulati and Tushar Anand, 'Inheritance Rights of transgender Persons in India' (2021) NIPFP Working Paper Series <https://www.nipfp.org.in/media/medialibrary/2021/08/WP_350_2021.pdf> accessed 27 July 2022

retort to IVF treatment to produce their own embryos. When trans individuals wish to have offspring, they may regulate their hormone medication or extract and store eggs or sperms until they decide whether or not to become parents. Sadly, we have no such regulatory legislation in India. Also, the new Surrogacy Bill[65] makes parenthood a distant dream for the pride community as only impotent heterosexual couples are allowed to avail this method. Legislation concerning reproductive choice should not adopt a socially constructed heterosexist stance because sexuality is a continuum and neither fixed nor constant. The crux is that the situation is complicated and calls for pluralism, but still the policies are inherently discriminatory.

Numerous penal statutes, such as IPC's Section 375 (rape), do not take LGBTQ+ partnerships into consideration at all. At the moment, rules against rape, physical assault and harassment[66] only take a 'male-female' dichotomy into account. Only men can commit the crime, and only women can be the victims. In addition to these Section 354A, 354B, 354C and 354D all act in a male-female setting completely excluding the LGBTQ community. The laws had been made in a historical context when males and females were the only recognized sexualities. In light of the new concepts and settings, the discriminating tint of such laws needs to be set aside.

The POSH Legislation, which prohibits, punishes, and prevents sexual assault of women at work, solely acknowledges women as sufferers of this crime. This inherently prevents the prospect of LGBTQ+ individuals from being sexually harassed at their job. Considering a minor improvement, the majority of corporations in India are still unwilling to adopt Queer and trans-inclusive standards, despite the fact that several proactive organizations have gender-neutralized their workplace policies. The introduction of Period leaves policy also proves to be detrimental to the trans men. All in all Female rights usually overpower and clash with LGBTQ rights for bad.

[65] Bhavdeep Kang, 'Here's why new ART and Surrogacy regulation bills are out of step with contemporary societal and judicial trends, explains Bhavdeep Kang' (The Free Press Journal, 10 December 2021) <https://www.freepressjournal.in/analysis/heres-why-new-art-and-surrogacy-regulation-bill-are-out-of-step-with-contemporary-societal-and-judicial-trends-explains-bhavdeep-kang> accessed 28 July 2022

[66] Apurva Vishwanath, 'Child porn weighed on my mind, says Supreme Court judge who upheld Section 377 in 2013' (The Print, 18 September 2018) <https://theprint.in/india/governance/child-porn-weighed-on-my-mind-says-supreme-court-judge-who-upheld-section-377-in-2013/119898/> accessed 28 July 2022

WAY FORWARD

We live in a sanctimonious world where no one really understands our ancient sexual lineage, erotic metaphysical understanding, or mythical customs. Our once-liberal and all-inclusive view of sexuality and relationship behaviors was obscured by incorrect and misunderstood religious standards and constant foreign intervention. We lost sight of the highly developed latitudinarian attitudes and behaviors we had at the era. This awful irony is indeed tragic. Nevertheless, it is really wonderful that Section 377 has been repealed by the Honorable Supreme Court to safeguard the confidentiality, choices, and predispositions of its residents behind closed doors.

The International Commission filed about 60 RTI's[67] in order to get comprehensive picture of the actual state of LGBTQ community in the light of several schemes promised by the government. The findings of the report were startling. According to the NALSA judgment transgenders were conferred with the identity of being the third gender. States haven't been able to keep pace with the decision. Facilities which involve an identity card and benefits are still out of the frame. Supreme Courts' reformist discourse has elevated India to the rank of regional leaders in the advocacy of LGBTQ equality and rights. Grass root execution is now our biggest roadblock. Simply endeavoring to decriminalize LGBTQ relationships will not put a stop to the rampant prejudice against them. Changing laws and policies, coupled along with increased and targeted public awareness is the two-pronged strategy that is necessary for long-term fixes.

[67] International Commission of Jurists, 'Living with Dignity Sexual Orientation and Gender Identity Based Human Rights Violations in Housing, Work, and Public Spaces in India' (June 2019) <https://www.icj.org/wp-content/uploads/2019/06/India-Living-with-dignity-Publications-Reports-thematic-report-2019-ENG.pdf> accessed 28 July 2022

THE METAMORPHOSIS OF THE SUBALTERN TRANS QUEER COMMUNITY IN THE INDIAN SUBCONTINENT

ABSTRACT

History is a continuous, systematic narrative of past events relating to a particular people, country, period, and person. It is constantly evolving and changing with time. The civil and criminal administrations across these different periods immensely shape the lives and livelihoods of individuals living in that particular time frame. One of the sects of individuals who have gone through tremendous change over time is the subaltern trans queer community, also referred to as Hijras, eunuchs, and transgender. These sects of individuals are a group of highly stigmatized minority groups distinctly known for their sexual identities. The terms transgender, Hijra, and eunuchs are used interchangeably for their identification, whereas all these terms have developed across different contexts and socio-political settings in the Indian Subcontinent. The sect of individuals has existed in the Indian Subcontinent since immemorial, and there are various textual references to indicate the existence of the same. They have undergone a significant transformation, ranging from carrying out diplomatic and administrative functions in the medieval period to facing the threat of cultural elimination in the colonial era. There was a paradigm shift in the societal view and their role during the pre-and post-colonial period concerning their organization and functions. It was only in the year 2014, in the case of National Legal Services Authority v. Union of India, that the third gender community attained legal recognition in the country. Prior to this, they had been expressly barred from acquiring even the most basic amenities, such as housing, healthcare, and education. In this paper, the author aims to examine the metamorphosis of this trans queer community across different frames of time in the Indian Subcontinent. It seeks to examine the transformations in this community's role in the Indian Subcontinent and its underlying factors. In addition, it aims to point out the significant impact the state plays through civil and criminal administration in shaping the lives of these people.

Keywords: *Subaltern trans queer community – a paradigm shift - Cultural elimination – Civil and Criminal Administration - Legal Recognition*

INTRODUCTION

An individual's gender identity refers to a personal conception of one's own gender and is not always in line with one's birth sex. Gender expression refers to the way one chooses to publicly express themselves in terms of their gender. It is important to acknowledge that these two terms don't have to necessarily into the conventional gender types. There is a wide range of individual who does not fall under the purview of heterosexuals or cisgender. These sects of individuals fall identify themselves under the LGBTQ community. Transgender and Queer are terms encompassed under this umbrella term. Lesbian, gay, and bisexual communities are "contemporary" communities that have emerged to defy the heteronormative paradigm. Transgender refers to those people who are categorized as neither male nor female. Although there are naturally two sexes, hermaphrodites occasionally replace one or both of them. This is because the development of sexual characteristics in living beings is significantly regulated by both genetic and environmental factors. Queer, on the other hand, refers to a sect of people who question and break heterosexual norms. This is an orientation and a community of people who fall under the LGBTQ spectrum. So, it stands for any orientation that is not straight. This paper examines the metamorphosis of this very gender type also referred to as the transgender community across various time frames in the Indian Subcontinent. The term transgender was coined in the year 1965[1]. The term transgender is an umbrella term whose gender identity is not in conformity with their birth assigned sex. Gender identity and sexuality are two entirely different terms. Hence a transgender can be of any sexuality[2]. Some transgender identifies themselves as male, female, gender queer, non- binary or anything outside the conventional gender spectrum[3].

[1] Oliven, J., 1965. *Sexual hygiene and pathology;* Philadelphia: Lippincott.
[2] Nanda, S., 1999. *Neither man nor woman*. Belmont, Calif.: Wadsworth Pub. Co.
[3] N. Dave, N., n.d. *Queer Activism in India: A Story in the Anthropology of Ethics*. Scholars Portal.

ETYMOLOGICAL AND HISTORICAL PERSPECTIVE OF THE TERMS ASSOCIATED WITH THE TRANSQUEER COMMUNITY

The concept of Transgenders, i.e., Hijras or others have been known since ancient India and is not a new concept. They have been known in Indian history with various names like hijras, kinnar, Shakthis, kothis, Jogappas, etc. Before we look into their legal position it is important for us to understand their historical presences and position through the society. At the beginning of the creation, when the Vedas were issued forth by Brahma, civic virtues and ethics were set aside by Manu, compiling the Dharmashastra, while Brhaspati did similar verses related to politics, economics and prosperity, compiling Arthashastra. On the other hand, Nandi, the companion of Lord Shiva, did the same with verses concerning a sense of pleasure and sexuality, hence compiling Kama Shastra, which was later put into writing by Vyasadeva. It was further divided into parts which were almost lost until it was recompiled by Vatsyayana, during the Gupta period[4]. The later Vedic texts divide the gender/sex of the human being into 3 categories based on their prakriti (nature), i.e., pums prakriti (male), stir-prakriti (female) and Tritiya prakriti (third sex)[5]. Manusmriti states that in case both male and female seeds are equal then a hermaphrodite who is typically an individual born with both female and male sex organs.

Throughout Indian history, there are several texts that make reference to the transqueer community. Both the Epics- Ramayana and Mahabharata also make references to them. We find a reference to Shikandini (female born) changing her sex and is then called Shikhandi and is a eunuch[6]. Similarly, Krishna transformed himself into a woman named Mohini to marry Arana and fulfilled his wish that a widow would weep on his death[7]. Across South, Asia Aravan is known as the patron god for the transgender communities called Thirunangai, Aravani and Hijras. On the other hand, Ramayana, which has no less than 300 versions, one of its versions refers to an episode related to the origin of Badhai, a practice that is even now followed in some parts of the country,

[4] Vātsyāyana. and Daniélou, A., 1994. *The complete Kama Sutra*. Rochester, Vt.: Park Street Press.
[5] Wilhelm, A., 2010. *Tritiya-Prakriti: People of the Third Sex*. Xlibris Corporation.

[6] Sorabji Cornelia, *Shikandi: The Maiden-Knight and Other Stories* (Blackie and Son 1916).
[7] Somasundaram O, 'Transgenderism: Facts and Fictions' (2009) 51 Indian Journal of Psychiatry.

of hijras, singing and dancing and giving blessings[8]. Fourteen types of men who are impotent with women have also been mentioned in Naradasmriti, which include transgender (Sandha), Nisarga (intersex), mukhebhaga, Kumbhika and asekya (homosexual men).

Charaka Samhita and Sushruta Samhita, two important works on Indian medicine and surgery, refer to various types of men who are important to women. Charaka Samhita refers to 8 types of napumsa like Dviretas (has both male and female seed), Samskaravahi (aroused according to previous life impressions), etc. The third gender, according to Sushruta Samhita, encompasses those who are conventionally called as homosexuals, bisexuals, transgender, etc. Sushruta refers to two types of homosexuals -

a. Asekya - one who has scanty paternal sperm and they lack sexual desire without drinking the semen of another man.
b. Kumbhika - one who initially was a passive member of sodomy and then commits the same with a woman. Also called as Guda-yoni and are included with Kliva.

Kamasutra divides tritiya Prakriti (Third Sex) into two kinds based on their appearance (masculine or feminine). Also refers to third sex as napunsaka. Further remarks that tritiya prakriti with feminine appearance have breasts, while those with masculine have mustaches, body hair, etc., and refers to prostitutes of the tritiya prakriti as catamites (Hijras)[9].

Apart from Aravana, we also find reference to Bahuchara Mata, a Hindu goddess, believed to be an avatara of Goddess Shakti and is considered as a patroness of the Hijra community. Her temple is located in Beharji town in Mehsana district of Gujarat. The Hindu Goddess Worshipped By India's Transgender Community - Homegrown. And let us not forget the Lord Shiva, being represented as Ardhanarishvara, dual male and female nature[10]. This has been depicted at the Elephanta Caves near Mumbai. At Rajghat, an early period kushan head of Ardhanarishvara was discovered, which now is in the Mathura Museum.

Similar mention of the Eunuch and transgender community have been made during the medieval period. Ferishta in his work entitled “History of the Rise of Mohammedan Power in India”, while

[8] Narain S, 'In A Twilight World' (2022) 20 Frontline.
[9] *ibid.*
[10] Al Pande A, *Ardhanarishvara, The Androgyne* (Rupa & Co 2004)

describing the history of the kings of Bengal and Behar (commonly called Poorby), refers to eunuch Shahzada, who having gained control over the guards of the palace, murdered Futeh Poorby in 886. After having put the sovereign to death, the eunuch assumed the title of Shahzada, but was put to death of the widow of Futeh Poorby, after two months of reigning[11].

We find references to eunuchs even during the reign of Babur, Humayun and Akbar. One such Eunuch who was a part of all three of the above-mentioned rulers was I'tibar khan. He was one of the eunuch's during Babur's reign and was later during Humayun's reign attached to Prince Akbar's suite. And later during Akbar's reign, he was appointed as the governor of Delhi. Another Eunuch who had been appointed in the administration of Akbar was Ikhlas, who held the rank of a commander of one thousand[12]. During Jahangir's reign, in the province of Sylhet, a dependency of Bengal, people put into practice a custom wherein they made their sons eunuchs and gave them to the governor in return of revenue (mal-wajibi). Ultimately Jahangir who put an end to this practice and the practice of eunuch trafficking[13]. Mir-a't-i'A'lam, a work which has been attributed to Bakhtawar Khan, was a nobleman in Aurangzeb's court and was appointed as the superintendent of the eunuchs and remained the favorite eunuch of the emperor[14]. It is undisputed that these communities have existed in India and have been a part of the mainstream society until the arrival of the British. It was the civil and criminal administration of the British Empire that led to its downfall. These sects of Individuals went from holding an imperative role in the royal courtyard and kingdom to suffering to suffice for their basic necessities in less than an era.

[11] Mabbett I, 'History of The Rise Of The Mohamedan Power In India. By John Briggs. Editions Indian, Calcutta1966. Pp. Xviii, 328. Timelines, Genealogical Chart.' (1968) 9 Journal of Southeast Asian History.
[12] Blochmann, *The Ain I Akbari Of Abul Fazl 'Allami* (1st edn, The Asiatic Society, Calcutta 1993).
[13] Jahangir, Rogers A, and Beveridge H, *The Tūzuk-I-Jahāngīrī, Or, Memoirs of Jahāngīr.*
[14] Elliot H, and Dowson J, *The History Of India, As Told By Its Own Historians* (Institute for the History of Arabic-Islamic Science at the Johann Wolfgang Goethe University 1997).

JUDICIAL PRECEDENTS WITH REFERNECE TO THE TRANSQUEER COMMUNITY

In the case of ***Government v. Ali Buksh***[15], the courts in the North West Province in 1852, the colonial courts criminalized Hijras, an entire community, on the grounds that they are cross-dressers, 'beggars' and 'unnatural prostitutes[16], it further contended that they were 'habitual sodomites', beggars, an obscene presence in public space and the kidnappers and castrators of children[17]. In addition, they launched numerous campaigns[18] that led to the gradual reduction of this sect of individuals pushing them to the edge of the society. Therefore, the colonial governments condemned any other form of gender expression and identity that was not in line with the main stream society. However, during the British period their position deteriorated post the enactment of the Criminal Act of 1871.

The above-mentioned act defines the term eunuch would include all those men who admit themselves or on medical inspection, appear to be impotent. And this act directed the local government to maintain registers that included their names and addresses and their property, especially of those who are suspected of kidnapping or castrating children under Section 377 of IPC. This act also prescribes penalties on the registered eunuch if they appear in female clothes, penalties if any of the registered eunuchs kept boys under 16, etc. Section 29 of the Act clearly remarks that the registered eunuch was not capable of being or acting as a guardian to a minor, nor were they capable of making a gift or a will or of adopting a son[19]. By the early 1870's the provincial government demanded the removal of the entire families from the Hijra families including separating the offspring from the widows[20]. As a result of these actions, the Hijra community were nearing the face of extinction. This act was however repealed in August 1949 and was denotified in 1952. Post its denotification the provincial government mandated that men who dressed as women and were considered virile should be regulated under the law of public nuisance instead of the Criminal Tribes Act[21]. This Criminal Tribes Act, 1872 had a lingering

[15] *Government v Ali Buksh* [1852] NWP, 1314.
[16] *Id* notes 7.
[17] *Id* notes 8.
[18] Hinchy JB, *Power, Perversion and Panic: Eunuchs, Colonialism and Modernity in North India* (2013)
[19] Criminal Tribes Act [Repealed] 1871.
[20] Hinchy J, *Governing Gender and Sexuality in Colonial India* (Cambridge University Press 2019)
[21] Indian Office of Records, 'Part B Proceedings'.

effect on the Indian Subcontinent despite being notified in 1952. It was due to such administration during the British era that the Hijra community had to resort to numerous means to sustain in society. Some of the eunuchs resorted to agriculture as a means of survival as it was considered as a respectable occupation[22]. The aftermath of this act persisted in Indian law for the longest time, for instance the amendment to the Karnataka Police Act which mandated the registration in order to curb the undesirable activities of eunuchs[23].

THE WATERSHED MOMENT IN THE JUDICIARY WITH RESPECT TO THE RIGHTS OF THE TRANSQUEER COMMUNITY

It was only in the year 2014, in the matter of **National Legal Services Authority v. Union of India**, did the supreme court rule that transgender individuals are eligible for the protections provided by the Indian Constitution. The court distinguished between psychological sex and biological sex, rejecting gender identity based on biological sex and placing the most value on psychological sex-based identification. Furthermore, it took 162 years after the Ali Buksh ruling for these communities of people to even receive legal recognition. It was held that "Gender identification becomes an integral part of enjoying civil rights by this community. Only then would this community have more substantial access to numerous rights associated with being recognized as a 'third gender', such as the right to vote, the right to own property, and the right to marry[24]." Though this judgement was a watershed judgement in the history of transgender rights it has its fair share of ambiguity and vagueness. The ruling passes the responsibility for recognition to governments and leaves room for arbitrary and capricious actions. It also provides inconsistent and vague instructions that cannot be fulfilled. In the case of ***Navtej Singh Johar and Ors. v. Union of India (UOI)***[25] "Sexual orientation is integral to the identity of the members of the LGBT communities. It is intrinsic to their dignity, inseparable from their autonomy and at the heart of their privacy". This case decriminalized Section 377 of IPC as this provision has lent the authority to the state for suppression of one's identity. It further contended that a person's sexual orientation

[22] *Supra* note 20.
[23] Karnataka Police Act 1963.
[24] *National Legal Services Authority v Union of India* [2014] SC, 5 SCC (SC).
[25] *Navtej Singh Johar and Ors vs Union of India (UOI)* [2018] SC, MANU (SC)

is a crucial component of their privacy. Fundamental Rights protected by Articles 14, 15, and 21 are centered on its protection. These two judgements changed the face of Transgender community in the Indian Subcontinent.

EXISTING SCENENARIO WITH RESPECT TO THE RIGHTS OF THE TRANSQUEER COMMUNITY

Subsequent to this the Transgender Persons (Protection of Rights) Bill[26] was introduced in Parliament in 2016 in response to the NALSA ruling. However, it lapsed with the dissolution of the previous Parliament before being reintroduced and enacted in 2019[27]. Due to its close approach to the Supreme Court's ruling, Section 2 now includes terminology incorporating transwomen and transman irrespective of whether they have undergone a Sex Reassignment Surgery or hormone therapy or laser therapy, in addition it also includes person with intersex variations, genderqueer[28]. The Act outlaw's discrimination against transgender people, including unfair treatment or service denial in the following areas: (a) education; (b) employment; and (g) the right to live in, buy, rent, or otherwise occupy any property. There are no anti-discrimination provisions in the Act pertaining to other aspects of property rights, and it is unclear how the defining clause affects other areas of law (including inheritance)[29]. Having said that it is pertinent to state that this act comes with its fair share of criticism. For instance, in order to be eligible for protection under the Act, an individual must submit an application for a transgender certificate[30]. The act lays down a procedure to procure the same. It requires a person to provide proof of surgery, issued by a hospital official, to the District Magistrate in order to change their legal gender. This provision runs in contravention to the Nalsa judgement where the courts opined that any insistence for sex reassignment surgery for declaring one's gender is immoral and illegal[31]. This requirement runs in contravention to numerous international commissions for instance a report in WHO stated that take all necessary

[26] Transgender Persons (Protection of Rights) Bill, 2016
[27] Transgender Persons (Protection of Rights) Bill, 169 of 2019.
[28] Transgender Persons (Protection of Rights) Act 2019.
[29] *ibid.*
[30] Transgender Persons (Protection of Rights) Act 2019.
[31] *Supra* note 23.

legislative, administrative, and other measures to fully recognize each person's self-defined gender identity, with no medical requirements or discrimination on any grounds[32].

The transgender community has long suffered in silence in the face of widespread prejudice and societal injustice received a new glimmer of hope from this ruling. But there is a lot of grey area with respect to the actual implementation of these rights guaranteed to them. The right to marry, inherit property, adopt, succession and inherit are guaranteed to every citizen of the country. These laws are governed by the respective personal laws of that particular religion. In the paradigm of marriage, in the landmark case of ***Arunkumar v. Inspector General of Registration***[33] the court held that the right to marry a person of one's choice was held to be integral to Article 21 of the Constitution[34]. It was held that the expression 'bride' occurring in Section 5 of the Hindu Marriage Act, 1955 will have to include within its meaning not only a woman but also a transwoman. It would also include an intersex person/transgender person who identifies herself as a woman. The duty consideration is how the person perceives herself." This was a landmark judgement with respect to transgender rights and personal autonomy in the country.

In India, the laws governing inheritance only apply to those who identify as either male or female thereby excluding the transgender community from the purview of inheritance laws. The Hindu Succession Act, 1956 defines a heir as any person, male or female, who is entitled to succeed to the property of an intestate either via testamentary succession or interstate succession[35].The Hindu Succession Act scheme requires two persons to be married to inherit the other's property[36]. Therefore, post the Arun Kumar judgement, which recognized the marriage between transgenders as a legal and valid marriage there will be shift in the succession and inheritance laws with respect to Hindus in the Indian subcontinent. With respect to Muslim Personal Laws, Both Shias and Sunnis share distinctive fundamental principles with respect to inheritance. Only men and women are regarded as having property rights under Sharia Law, and Shia and Sunni inheritance laws reflect this in their lists of sharers and residual beneficiaries[37]. The Indian Succession Act of 1925

[32] United Nations Development Programme, 'Blueprint For The Provision Of Comprehensive Care For Trans People And Trans Communities In Asia And The Pacific' (Asia Pacific Transgender Network 2022) <5 http://www.healthpolicyproject.com/pubs/484_APTBFINAL.pdf> accessed 18 May 2016
[33] *Arunkumar v Inspector General of Registration* [2019] Madras High Court (Madras High Court).
[34] *Shafin Jahan v Asikan KM,* [2018] SC, 16 SCC (SC).
[35] The Hindu Succession Act 1956.
[36] Mulla D, and Desai S, *Mulla Hindu Law* (23rd edn, 2018)
[37] Diwan P, and Diwan P, *Muslim Law in Modern India* (Allahabad Law Agency 2002)

grants Christians wider property rights[38]. Transgender people are included as a subject matter for inheriting the ancestral property under Section 44 of the Act[39]. Although no such amendment has been made to the actual law, it is still India's legislature and society's lone progressive action with respect to succession in the country. This runs in contrast to the inheritance laws during the colonial era.

The North West Province administration allowed the chelas to inherit property of their deceased guru in case they were 'eunuchs' and lived 'in common' with their respective gurus[40]. There was a presumption that the very same was followed due to the insignificant value of the property of the deceased. This runs in contrast to the current laws of inheritance in India. In the case of Sweety v General Public[41], the chela had passed away and the guru contested his rights over the deceased's property. The courts opined that there was no reason why the appellant (guru), in accordance with their traditions, shouldn't inherit the property. The court also came to the conclusion that the parties would not be subject to the Hindu Succession Act, which it claimed would restrict their rights because the parties' religion was not recorded.

The courts in the recent times have also addressed disputes with regard to their rights. There is no uniform approach that is followed by the judiciary with respect to the rights of these transqueer community. The Madras high court has held that transwomen can apply for police constable posts reserved for women[42] and in contrast the Calcutta high court has held that that transwomen could not apply for Asha posts specifically reserved for women[43]. The courts have also held that members of the transgender community have the right to food security, right to pension in the recent times. In case of the former the courts opined that A transgender person's access to food is just as important as it is to other societal groups. The transgender community has long been plagued by poverty and discrimination. One aspect of the right of transgender people to live in dignity, with the assurance that they may lead their lives on their own terms in realization of gender identity, is preventing discrimination in all spheres of life. However, the legislation must go beyond nondiscrimination by acknowledging the State's affirmative duty to grant access to social security.

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[38] Akram M, 'Christian Transgenders to Have Equal Right On Ancestral Property' *The Hindu* (2016) <https://www.thehindu.com/news/cities/Delhi/christian-transgenders-to-have-equal-right-on-ancestral-property/article8587686.ece> accessed 12 August 2022

[39] The Indian Succession Act, 1925

[40] *Supra* note 20.

[41] *Sweety v General Public* [2016] HP, 909 SCC OnLine (HP)

[42] *Nangai v Superintendent of Police* [2014] Mad, 988 SCC OnLine (Mad)

[43] *Sumita Kumari v State of West Bengal* [2016] Calcutta High Court, 455 Cal LJ (Calcutta High Court)

The cornerstone of it is food security. Transgender people require both[44]. Therefore, the courts have on occasion granted transgender plaintiffs' relief. By relying on longstanding customs, courts have recognised transgender people's inheritance rights. They have ruled that transgender people will be covered by gender-specific regulations. However, this is merely the beginning and India has a long way to go in incorporating and accepting the transgender community to the mainstream society.

Indian law has a solid foundation when it comes to international commitments. Unless domestic law supersedes them, courts are bound by international law[45]. Therefore, they can be used by domestic courts if Indian law does not contradict with the concepts contained. Applying the UDHR and ICCPR principles is already enforceable in certain instances[46]. The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) recognize that no person shall be arbitrarily denied their legal rights[47]. Principles 3 A and 15 C of the Yogyakarta Principles[48], where it is explicitly stated that every individual every individual should enjoy equal rights with to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property with facing any kind of discrimination based on their sexual orientation and gender identity. Consequently, the aforementioned concepts (such as the Yogyakarta principles governing inheritance) are not in conflict with Indian law. Instead, they seem to reinforce the basic rights protected by the Constitution and the ruling in NALSA v. Union of India by the Supreme Court.

But irrespective of their existence in the Indian Subcontinent since time immemorial, they are viewed as criminals by the police, the government, and the media. They are perceived for their criminality apparently due to the acts they indulge in ranging from begging, extortion, stealing and gender and sexual practices[49]. The notion of persistent criminality is based on a long legacy of upper-class and elite Indian writing about "robber castes" as well as colonial depictions of culturally distinct types of collective crime in India, such as the criminal tribes. There a wide range of laws which facilitate and aids the policing of the Hijra community in the Indian Subcontinent,

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[44] *Ashish Kumar Misra v Bharat Sarkar* [2015] Allahabad, MANU (Allahabad)

[45] HEGDE V, 'Indian Courts And International Law' (2010) 23 Leiden Journal of International Law

[46] *Jolly George Varghese v Bank of Cochin* [1980] SC, 360 SCC (SC)

[47] Universal Declaration of Human Rights 1948 (III); International Covenant on Civil and Political Rights 1966

[48] 'The Yogyakarta Principles – Yogyakartaprinciples.Org' (*Yogyakartaprinciples.org*, 2022) <http://yogyakartaprinciples.org/principles-en/> accessed 12 August 2022

[49] Saria V, *Hijras, Lovers, Brothers* (Forddham University Press 2021)

one among them is section 377[50]. This section was used as a means to police against people who are sexually deviant, for instance, the Hijras. Numerous reports highlight and state that the executive arbitrarily uses this power for personal gains. There have been numerous instances where it has been reported that Hijras have been jailed and frequently endure beatings, physical torture, forceful stripping, and rape in jails and police stations. In addition, they are also subjected to frequent entrapments by the police intended to extort payments from them[51]. Hijras are also subjected to arbitrary arrests under Section 294 and Section 268 under the Indian Penal code which criminalises 'obscene' acts that 'cause annoyance to others[52] and prohibits 'public nuisances' respectively[53]. As a result, a complex web of laws and policing procedures governs Hijras' daily life in India today.

CONCLUSION

The colonial administration in nineteenth-century in India envisioned a colonized population that was highly gendered specific and regulated. The foundation of colonial conceptions of political power and moral ideals of colonial government lay in issues of gender, intimacy, and the body. The Hijras fell outside this paradigm and were considered perverse and a language of dirt and disease[54]. There is a clear-cut dichotomy with respect to the status of the Hijra community prior to and post the advent of the Britishers. We find numerous references in Ancient India as highlighted earlier indicating their existence in society since time immemorial. During the medieval era, the eunuchs held posts like governor, administrator, commander and superintendent and so on. It is only posting the advent of the Britishers that this perception changed drastically. They were subjected to cultural and social elimination due to their non-conformity to the gender stereotypes and they were seen as a threat to the crown. Essentially, from a colonial perspective, the disorderliness of the Hijras had a variety of dimensions. Sexual activities, gender expression, public cultural practices, housing types, and discipleship hierarchies were seen as a threat to the

[50] Supra note at 27.
[51] 'Human Rights Violations Against The Transgender Community' (*Pucl.org*, 2022) <http://pucl.org/sites/default/files/reports/Human_Rights_Violations_against_the_Transgender_Community.pdf> accessed 12 August 2022 'India: Enforce Ruling Protecting Transgender People' (*Human Rights Watch*, 2022) <https://www.hrw.org/news/2015/02/05/india-enforce-ruling-protecting-transgender-people> accessed 12 August 2022
[52] Indian Penal Code 1860.
[53] *ibid.*
[54] Hiltebeitel A, 'Dying Before the Mahābhārata War: Martial and Transsexual Bodybuilding For Aravāṉ' (1995) 54 The Journal of Asian Studies

civil and criminal administration of the British empire. Irrespective of all these hardships, the Hijra community found their ways and means to sustain and survive in society. The number of "eunuchs" on the registers has decreased as a result of Hijras and other "eunuchs" implementing different tactics to become less noticeable to the colonial state. Since these "absent" persons were deleted from the district record after three years, the unrestricted movement of those categorised as "eunuchs" had gradually decreased the registered population. As a result, many registered users were able to "disappear[55]." Therefore, through their tactfulness, the Hijra community survived the atrocities imposed by the Britishers. Therefore, the transgender community went from being socially included and recognized in Ancient and medieval India to being culturally eliminated and socially excluded during the colonial era. It is the lingering effect of colonial governance and civil and criminal administration that India is still at a very nascent stage with respect to transgender rights.

Transgender rights are a broad and intricate topic. Indian laws are based on binary genders. The rights of all individuals, irrespective of their gender, are increasingly emphasized in today's global and domestic world. It is improbable that legislation could enumerate all gender identities. This is certainly salient considering how gender identities are transforming. Therefore, it may be logical to exclude gender from the legislation going ahead. laws that are gender-neutral and provide everyone with the same rights. Having said that it is pertinent to state that, it is not suggested to make all laws gender neutral as certain statutes for instance the Protection of women from Domestic Violence Act, 2005 or the Muslim Personal Law (Shariat) Application Act were enacted to protect the minority and marginalised women. Therefore, it is suggested that the legislation should include definitional provisions for transmen and transwomen, as well as provisions for those transgender people who do not identify as either men or women. There is also a dire need for addressing the civil rights of the transgender community and adapting the legislation accordingly. It is also pertinent to address the issues that Hijras and Transgender people are now struggling with, such as fear, shame, gender dysphoria, societal pressure, despair, suicidal inclinations and so on. It is important to bridge the gap that was broken during the colonial era. Every individual needs to be aware and given a chance to realize the rights that are warranted under the Indian Constitution. The state must increase awareness among society about the

[55] Agrawal A, 'Gendered Bodies: The Case of The `Third Gender' In India' (1997) 31 Contributions to Indian Sociology

existence of the transgender community so as to ensure that the social stigma is eradicated. It is only then India can progress towards a progressive and equitable society.

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36. *Sumita Kumari v State of West Bengal* [2016] Calcutta High Court, 455 Cal LJ (Calcutta High Court)

37. *Sweety v General Public* [2016] HP, 909 SCC OnLine (HP)

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HISTORICAL AND LEGAL PERSPECTIVE OF THE POSITION OF TAWAIF

ABSTRACT

Alia Bhatt starrer and Sanjay Leela Bhansali directorial, Gangubai Kathiawadi, entered the same league as 83 and Sooryavanshi, with record-breaking Box-office collection on Day 1. 'Gangubai Kathiawadi', a non-holiday release movie, is a movie which revolves around a young girl who was sold in a brothel at Kamathipura, Mumbai's oldest red-light areas and her journey for the rights of its sex workers. The term prostitution has been defined by the Immoral Traffic Prevention Act, 1956 as *"prostitution*" *means the sexual exploitation or abuse of persons for commercial purposes, and the expression "prostitute" shall be construed accordingly*; as most of the women working as prostitutes are forced or coerced into it. Having no other means to provide for themselves, they use this to support themselves and their family. This helps us understand that prostitution is one such challenge faced by women over a long time in history.

Women are known to be inferior to men and hence, played little to no role in politics, diplomacy, and wars. They were limited to household chores and subjected to extreme criticism if they tried to break the norm and do something different. However, over the years, the status of women has developed. Unfortunately, there are specific challenges they still face, like being forced into prostitution like the 'tawaifs' of North India.

The tawaifs or courtesans were well-respected women who excelled in music, dance, theatre, and Urdu literary traditions. The courtesans' culture began during the Mughal era and became more prominent under the nawabs. The children of nawabs would go to the tawaifs to learn etiquettes or '*tehzeeb and tameez*'. To work together and strengthen themselves, they established 'kothas', known for their skills. They were termed 'ganeewali' or 'kothewali', and soon these terms were associated with sex workers as the British only visited the kothas to fulfil their sexual needs. These women were called '*nautch*' by the British and were forced into this occupation to support themselves and that is how they became known for prostitution over time and not their talents.

Prostitution has been carried out for a long time in history and has been regulated in certain periods like during the Mauryan empire. Kautilya's Arthashastra mentions the salary of the prostitutes and the fact that they come under the State. Still, since the work done by them is

considered immoral and dirty by mainstream society, they have been outcasted, and continue to be. This paper aims to understand the importance of tawaifs in Indian history, drawing a comparison of prostitution through different ages and their current legal status and medical conditions. The paper will conclude with various suggestions and recommendations in the legal aspect.

Keywords: *Indian History, Women, Prostitution, Courtesans, Sexual Exploitation.*

INTRODUCTION

The word "history" originated from the Greek word 'Historia' which means inquiry or research or knowledge acquired from an inquiry. Various aspects of the past are engulfed within history, like political history, social history, tribal history, military history, etc. One such kind of history which has evolved over time, is women's history. During the Vedic period, as recorded in the *Sarvanukramanika*, we find references to 20 women amongst the seers/authors of Rigveda[1], like *Lopamudram*, *Visvavara*, *Sikata Nivavari* and *Ghosha*. We also find reference to tributes of respect being paid to women who had contributed to the advancement of scholarship, like that of Sulabha Maitreyi, Vadava Prathiteyi and Gargi. The word dampati[2], a vedic word used for the couple, etymologically means joint owners of the house, which gives us a good idea about the position of women in a marriage in the Vedic society. However, in the later Vedic period we find that women, especially the Sudra women, were ineligible for Vedic studies and their position deteriorated in the society. One such group of women whose position could be seen visibly deteriorating were the courtesans and prostitutes. The earliest reference about prostitution can be found in Rig Veda as 'dancing girls' who were also referred to as 'Nrtavah'. It talks about the tradition of offering the slave girls by kings to rishis, which tells us about the existence of prostitution[3]. The Apsaras mentioned in Rig Veda are known to reside in heaven called 'swarga' and entertain the gods by singing and dancing and later came to be known as courtesans[4]. In *Aiterya Brahamana*[5] we find reference to slave girls being gifted to a priest by the king. Further Valmiki's *Ramayana*[6] tells us about 'apsaras' and how they were desired by

[1] HH Wilson, Rig Veda Sanhita Volume I (1st edn, HR Bhawagat Sadashivpet Poona City India 2016) 5
[2] Wilson (n 1)
[3] Bhagwat Saran Upadhya, Women In Rgveda (1st edn, Nand Kishore and Bros 1933) 42
[4] Ibid
[5] PV Kane, History of Dharmasastra Vol 2, Part 1 (Bhandarkar Oriental Research Institute, Poona 1941) 239
[6] Hari Prasad Shastri, The Ramayana of Valmiki, translated by Hari Prasad Shastri (Shanti Sadan Cheap stow villas, London 2011)

many and could choose as many lovers as they wanted. In fact, Indra[7] himself would send these apsaras to many rishis and sages to disturb their penance. When Lord Rama[8] returned from the exile, Vasistha[9] ordered the prostitutes to attend the ceremony along with *gainikas* to honur him. In another incident, when Krishna came to the court of Kauravas he was received by the courtesans. This tells us about the prominent culture of courtesans and how they played a significant role[10]. In Mahabharata the story of the Yadavas' destruction concludes with the kidnapping of tribal women. The Brahmin sages were linked to the sensual teachings in Kuru and Pancala, of which prostitution was one branch. In a particular incident, Arjuna went to heaven to pay a visit to God Indra[11]. To satisfy Arjuna's salacity, Indra requested Urvashi an apsara to entertain Arjuna for the night. They are even described in the Kalidasa's work *Meghadutam* and *Ritusumhara,* where he describes the life of prostitutes and observes the culture which has emerged from nature. The *Matsya Purana* dilates upon the duties of the prostitutes and the special clauses of law applicable to them[12].

THE ROLE OF PROSTITUTION AND COURTESANS IN ANCIENT AND MEDIEVAL INDIA

The term prostitution can be defined as "the practice of engaging in sexual activity for payment". A Sanskrit term '*muhurtika*[13]' means, purely temporary unions with no lasting relationships. The terms sadharani or samanya (common), synonyms for prostitute, distinguish her as a woman not possessed by one man; this is the desideratum[14]. The terms *varangana, varastri* and *varamukhya* signify that since she is not the responsibility of any one man, she looks after herself[15].

Prostitution in Ancient India: Insights from Kautilya's Arthashatra

[7] Wilson (n 1) 9
[8] Kisari Mohan ganguli, The Mahabharata of Krishna-Dwaipayana Vyasa (between 1883 and 1896])
[9] Wilson (n 1)121
[10] Shadab Bano, 'Women performers and prostitutes in Medieval India ' [2009-2010] Vol 70(1) Proceedings of the Indian History Congress, 251-265
[11] Bano, (n10)
[12] Priya Darshini, 'Status of Ganikas in Gupta Period: Change or continuity?' [2003] 64 Indian History Congress 167-172
[13] Sukumari Bhattacharji, 'Prostitution in Ancient India' [1987] 15(2) Social Scientist 32-61
[14] Bano (n 10)
[15] Bano (n 10)

The courtesans were not prostitutes, *kamasutra*[16] explains how the courtesans over a period of time delineated their role, as sexual relations with men not only offered them sexual pleasure, but also protection from powerful men in the society like guards, police, court members *et cetera*. According to *Vatysana,* the courtesan (or *vaishika*) has long been a key element of human society, and particularly Hindu culture. The book addresses the duty of the courtesans and how she is essential in functioning of the society. Kautiliya's *Arthashatra*[17] also gives us information about the existence of prostitution and how, they were classified and regulated. The prostitutes were divided in three categories, (a) Royal Prostitutes (b) City Level and (c) Private, and all these three classes were under the control of the State[18]. They were well taken care of by the State, their needs and safety were looked after, there was well developed legal system in place. For example, if the prostitute died, her daughter or sister would be brought into the place by giving them the same status and pay, and if there was nobody available to fill the place, Kautilya was grave enough to take away the property. Further if the prostitutes were old and could not provide services they were appointed as nurses or *maitrikas* and if they did not fulfil their duties, they were fined for the same[19]. This system was prominent during the Gupta period.

During the ***Gupta Period*** the *gainikas* or public women were given importance and played a significant role in the social and cultural life of people, and since marriages were mostly carried out for political gains, polygamy was a common practice in the period[20]. Vatsayana describes how, courtesans were known to be a part of the royal harem in the Gupta empire and fulfilled the desires of the king. According to Kamasutra they are known to excel in sixty-four kalas, namely nrityam (dance), gitam (singing), lute-playing *et cetera*[21]. A Sanskrit drama named *Charuduttam*[22] describes that since courtesans were trained in theatrical performances, they were exceptionally desirable among the elite class like the kings, acharyas *et cetera*.

One of the main reasons that courtesans gained popularity was that the institution of marriage was considered to be noble and a girl was married very early and after marriage her life was

[16] Alain Danielou, The Complete Kama Sutra the First Unabridged Modern Translation Of The Classic Indian Text (Park Street Press 2020) 9
[17] R Shamshastray, Kautilya'S Arthasastra (4th edn, 1951)
[18] G Kuppuram, 'Chankaya On prostitution (Based on Arthasastra)' [(1979)] 40(2) Proceedings of the Indian History Congress 215-219
[19]Kuppuram (n 18)
[20] Umesh kumar Singh, 'Immoral Trafficking of Girls and Women in Ancient India ' [2007] 68(1) Indian History Congress 162-178
[21] Moti Chandra, The World of Courtesans (Hind Pocket Books 1976)
[22] Monica Saxena, 'Ganikas in Early India, Its Genesis and Dimensions' [2006] 34(11) Social Scientist 2-17.

limited to household chores and husband which gave her little to no time to learn any skills, in comparison to this courtesan were well-educated skilled and renowned in various arts. They were independent and contributed to the society. Although according to *dharmashatras*[23] and *manusmriti*[24] their profession was considered morally wrong and men of honour such as *bhramins* were prohibited from eating food cooked by the *ganikas*[25].

According to various ***Buddhist texts***, ganikas played a very important social role for example, with reference to *Mahavagga*, Ambapali the ganika of Vaishali was so famous and renowned that King Bimbisara was forced into starting his own institution of ganikas in his kingdom as he suffered the loss of respect in the society[26]. These are some references from ancient India, now we can look at certain instances from medieval India. The earliest phase of medieval Indian History has been associated with Delhi Sultanate, music and dance being a major part of the culture developed into well-recognised arts over a period of time.

THE IMPACT OF BRITISH COLONIALISM ON PROSTITUTION IN INDIA

Since, ancient India there has been a link between the women performing arts for entertainment and physical pleasure. So, the entertainers were along the same line of prostitutes although, the label was not fixed and kept changing. The elite class of courtesans was what separated them from regular prostitutes as courtesans were typically associated with culture[27]. Although, the courtesans stood out, the thin line separating them from prostitutes had diminished over time. *Manucci*[28] reports that the women who performed in court were considered to be 'more esteemed'[29]. Bernier a French traveller also highlights their elite status[30]. Several chronicles give reference to turning the women of defeated rajas into singing and dancing girls, to humiliate the conquered enemy. Over a period of time when prostitute as an institution was regulated, prostitute houses with several establishments came up directly under the control of the state. Alauddin Khilji fixed rates for prostitutes in order to make profit out of them, in fact

[23] PV Kane, History Of Dharmasastra Vol 1, Part 1 (Bhandarkar Oriental Research Institute, Poona 1941)
[24] Patrick Olivelle , Manu's Code Of Law A Critical Edition And Translation Of The Manava Dharmasastra (The university of Texas and Oxford Press 2005)
[25] Bano (n 10)
[26] Darshini (n 12)
[27] VeenaTalwar Oldenburg, 'Lifestyle as Resistance: The Case of the Courtesans of Lucknow, India ' [1990] Vol 16(2) Feminist Studies 259-287
[28] Niccolao Manucci, Storia Do Mogor Vol-i (John Murry Albermale Street 1907) 181
[29] Bano (n 10)
[30] Francois Bernier, Travels in the Mogul Empire AD 1656-1668, revised by VA Smith (2nd edn, Oxford University Press no date) 273

the legal position of the prostitute was also specified. A woman had to register herself as a prostitute and the state recognised the prostitute as a legal person[31]. Besides these prostitute houses there were cultural houses that were established under the state, where according to Ibn Battuta, musicians both male and female resided[32]. This separate place was not given to them for carrying out sexual pleasures but to mark their cultural habitat. No religious or ethical objections were raised as the courtesans were considered to be an important aspect of society.

After the end of sultanate, Bengal and Multan broke away and declared independence, after which the Deccan region also rose to power. In the Deccan the ***Vijayanagara Empire*** rose to power. During the 14th century Vijaynagara Empire was a very socially active empire, as many travellers, ambassadors have written about the vibrancy of the period. The women played a significant role in the empire and occupied high positions in the society however, the women of the empire faced certain evil social practices like sati, idolisation et cetera. The culture of prostitution or courtesans was also very prevalent during the time. Although prostitution is regarded as derogatory and uncultured, in the Vijayanagara empire they were regarded as a respectable community and was divided into two kinds (a) courtesans or gainakas who were independent and (b) courtesans who were attached to the temple. Even women of good families were forced into prostitution because of the social evils in society and one major contributing factor was sati. And for a girl to take the title of courtesan 'kannerika ceremony' had to be performed where the courtesan girl is seated next to man like in a wedding and the whole ceremony was to be financed by the man. Unless this ceremony was performed no courtesan was supposed to have sexual intercourse with any man. These women were well educated and enjoyed several privileges according to accounts of many foreign travellers. They lived in beautiful houses on the best streets, were called upon during feasts and were allowed to chew betel leaves in the presence of the emperor[33].

As the Vijayanagara Empire was flourishing in the South the Mughals were establishing their rule in the North. The music, dance, architecture was some of the important aspects of the Mughal era. The courtesans played a significant role in the Mughal era as well, they were also known as *tawaifs* in the North. They enjoyed power, prestige and political access and were authorites on cultures. The children of royal families were sent to them to learn etiquettes or '*tehzeeb and tameez*' The tawaifs reached their peak in Mughal era and were considered to be

[31] Bano (n 10)
[32] Bano (n 10)
[33] SR Deshpande, Bhartiya Ganika (Repro Books 1996)

a symbol of sophistication, although there is no definitive evidence that they offered sex as well. They were at the top in comparison with street dancers and prostitutes[34]. During Akbar's Reign we find a reference to the female prostitute *Aramjan*[35]. *Ain-i-Akbari* tells us that the prostitutes were many in number so, they were allotted a separate part of the town to reside in called *shaitanpura* or *devilsville*[36]. The same has been mentioned in*, the history of India*[37]. Mysore Revenue Regulation states that "*no respect is to be shown to persons who are born of slave-women and of prostitutes, and they are not to be associated with. They are moreover not to be taught to read and write*"[38]. With the arrival of the British then there was a gradual decline in the livelihood of the courtesans and slowly, their institution was completely disintegrated. We find references to prostitution being firmly established in various cities, like Bengal, Banaras et cetera. In Banaras during the late nineteenth century the Chowk and its adjoining mohallas, Dal Mandi, Nariyal Bazaar, Raja Darwaza and Chhatte Tale, were famous as the tawaif quarters in Banaras[39], they quite literally occupied the centre of the city during the time. Although the tawaifs were a symbol of culture once, their status was slowly being reduced to sex workers. According to *Gazeeter of Bombay*[40] courtesans included three classes with a strength of 770 out of which 220 were males and 300 females. They were also known as *Kalavants*, which means professionals in the art of dancing or singing. Although they are dancers or singers their actual calling was prostitution, and so there were women who voluntarily chose prostitution as profession[41].

As mentioned above that courtesans played a significant role in politics, not many are aware about their role in the sepoy mutiny of 1857. A courtesan from Lucknow *Azizun Nisa* also known as *Azeezunbai* moved to Kanpur at an early age and settled there, and slowly made relations with the British Indian Army. She had an affair with Shamsuddin Sawar of the 42nd Cavalry, who was on the frontline of the mutiny in Kanpur. During the revolt of 1857 her house was used as a secret meeting point for the rebel sepoys. She was responsible for the massacre of British women and children that died in the revolt. The courtesan's names were on The British List which further indicates their involvement in the revolt. This shows us how women

[34] Pran Nevile, Nautch Girls of India: Dancers Singers Playmates (Ravi Kumar Publisher 1996)
[35] H Beveridge, The Akbarnama Of Abul Fazl Vol 2 (The Asiatic Society 1907) 128
[36] Abul Fazl Allami transalted by MA Blochmaan, Ain-I- Akbari (Baptist Mission Press 1873) 301
[37] HM Elliot, The History of India, as Told by Its Own Historians the Muhammadan Period (Trubner Company 1867–1877) 535
[38] British India, Provincial and Revenue Establishments of Tippo Sultan And Mahomedan And British Conquerors in Hindostan, Stated And Considered (1793)
[39] Saba Deewan, Tawaifnama (Westland Publications Private Limited 2019) 169
[40] Kanara, Gazetteer of the Bombay Presidency volXV pt1 (Government Central Press 1883) 321
[41] *ibid*.

courtesans played a significant role in history. Before the British began to displace the Kingdoms, Lucknow had emerged as a cultural capital and the courtesans had established themselves there. They resided in the lavish apartments in the Chowk in Kaiser Bagh, they were invited for cultural soirees, and went under rigorous training to keep their skills polished.

As the Britishers started annexing kingdoms they started associating the cultural houses of courtesans to brothels. This gravely affected the identity of courtesans. They were included under the same medical law as prostitutes, The Contagious Diseases Acts of 1864,1866 and 1869 were introduced in England as legislation to control the spread of venereal disease among enlisted men in garrison towns and ports[42], as the British men were being affected. As a part of this Act, it required the registration and periodic medical examination of prostitutes in all cantonment cities of the Indian empire[43] and the courtesans and prostitutes of Lucknow were checked regularly and controlled by the British. After the imposing of these regulations, the Courtesans were stripped of their cultural identity, as the British started going after the property possessed by these elite women and sending them to cantonments for the health of British soldiers and started using them mainly for sex. The Britishers entirely stripped the courtesans of their cultural value and reduced them to sex workers. So, as of the date their 'kothas' mean brothels, where prostitution takes place. As they were forced into prostitution by the Britishers and are still known as prostitutes in the Modern day.

THE MODERN-DAY POSITION OF PROSTITUTION IN INDIA: LEGALIZATION AND PROTECTION NEEDED

Now we shall look into the Modern-day position of prostitutes in India. Prostitution in India is dealt with under *Immoral Traffic (Prevention) Act, (1956)*[44]because according to the Constitution of India prostitution as a whole is not illegal certain activities in relation to prostitution are illegal like trafficking, running brothels *et cetera*. The act does not legalize it but punishes the third person facilitating prostitution. The laws that govern are very indefinite and does not help one interpret a clear position of the prostitutes or prostitution. Since the work done by prostitutes is considered immoral and unethical, they are not welcome in mainstream society and are outcasted and hated upon for their profession. Many women do not enter the

[42] Kokila Dang, 'Prostitutes, Patrons and the State: Nineteenth Century Awadh' [1993] 21(9/11) Social Scientist 173- 196
[43] Lata Singh, 'Visibilising the 'Other'in History' [2007] 42(19) Economic and Political Times Weekly
[44] Immoral Traffic Prevention Act 1956

profession voluntarily but are forced into it. This affects their mental health and their physical health is as it is in danger because of their work. According to statistics, it was found that almost all female sex workers have been struggling with anxiety and depression[45] and are at high risk of HIV/ AIDS. The main reason for most of the people to start working as prostitutes was the need for money. The World Health Organization (2000) has also confirmed that violence against women is one of the leading causes of gender-related depression among women[46]. Studies reveal that FSWs (female sex workers) are under a higher chance of depression because of their vulnerable situation to trauma, lack of rights, no support from family, *et cetera*.

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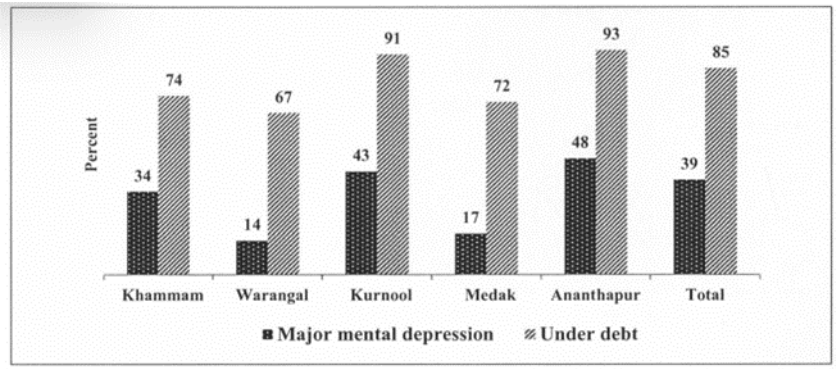

The above figure indicates the mental depression and debt under which the female sex workers, which forces them to keep working despite the unhealthy and unhygienic conditions. They live in very enclosed places; for example, a dozen girls are housed in a 10 x 10 room. Further, they hardly receive any medical care and sometimes have to go through forced abortions.

The current situation in India for prostitutes is not very feasible; although they are allowed to carry out prostitution, they are not provided with any form of legal support or security from the government. Further, the law clearly doesn't state regarding their profession. "*India abides by the "tolerationist" approach. This approach does not criminalize the prostitutes but those who organize the trade of sex i.e. brothel keepers, pimps and so on*"[48] In India, prostitutes face discrimination on a daily basis, the laws are vague and do not provide any kind of protection. In comparison to India there are countries that have laws in place for sex workers for example, Germany they have an extensive set of laws imposing health and safety regulations, which

[45] Marboh Goretti Laisuklang and Arif Ali, 'Psychiatric morbidity among female commercial sex workers' [2017] 59(4) Indian Journal Of Psychiatry

[46] World Health Organization. Mental Health Determinants and Populations Team. (2000). Women's mental health: an evidence-based review. World Health Organization.

[47] Sangram Kishor patel and others, 'Correlates of Mental Depression Among Female Sex Workers in Southern India' [2015] Vol 27(8) Asia Pacific Journal of Public Health 809-819

[48] Mahica vinod, 'An Account of Healthcare Policies for Prostitutes in India' [2019] 10(1) Journal of Economics and Finance 69-74

must be adhered to by the employers, they have their working hours fixed, access to daylight hygiene and health insurance. In the state of Nevada, the sex workers are tested regularly and the brothel owners must put up notices about health care guidelines for sex workers, all clients must use condoms.

India needs to address the legal position of prostitution and make laws, which provide them with legal recognition, basic facilities, *et cetera*. This will help them get the medical facilities they need and protect themselves from further discrimination in society. India can understand and analyse the prostitution laws of various other countries and shape ours according to the need of the hour.

CONCLUSION

In conclusion, there are many different facets to the history of prostitution and courtesans in ancient India. Although the Rigveda contains the earliest allusions to prostitution—dancing girls were provided to rishis—the status of women in society was not fixed. During the Vedic era, women like Sulabha Maitreyi and Gargi were praised for their contributions to knowledge, however, Sudra women's status plummeted in subsequent times. Courtesans played a variety of roles in society; some were sexual companions of powerful men and others were well-respected members of the royal harem. Prostitutes have been treated in a variety of ways throughout history, with the state playing a part in regulating and safeguarding them in ancient India. Prostitutes were divided into three distinct categories by the Arthashatra, which also fined those who neglected their responsibilities. While the Gupta era saw a lot of use of this method, it is of the utmost importance to remember that it was not without its drawbacks.

It is complicated how courtesans are portrayed in works like the Kamasutra, with some academics contending that it attempts to romanticize prostitution. Nevertheless it is apparent that courtesans were quite vital to people's social, cultural, and economic lives at this period. In the end, the history of courtesans and prostitution in ancient India paints a nuanced picture of the place of women in society. Others were consigned to the position of sexual companions to powerful men, while some women were honored for their contributions to academics and the arts. It is crucial to remember that the status of prostitutes and courtesans in society was not set in stone and changed over time and between various geographical areas. With discussions over the legalisation and regulation of the sector, prostitution, and sex work remain a highly divisive issue in contemporary society. Understanding the historical background of courtesans

and prostitution in ancient India can assist to clarify some of the complexity and subtleties of this topic and can serve to foster a more educated and nuanced discussion.

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20. H Beveridge, The Akbarnama of Abul Fazl Vol 2 (The Asiatic Society 1907) 128
21. Abul Fazl Allami transalted by MA Blochmaan, Ain-I- Akbari (Baptist Mission Press 1873)
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27. Lata Singh, 'Visibilising the ‘Other’in History' [2007] 42(19) Economic and Political Times Weekly
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31. Sangram Kishor patel and others, 'Correlates of Mental Depression Among Female Sex Workers in Southern India' [2015] Vol 27(8) Asia Pacific Journal of Public Health 809-819
32. Mahica vinod, 'An Account of Healthcare Policies for Prostitutes in India' [2019] 10(1) Journal of Economics and Finance 69-74

ANCIENT VEDIC JUDICIAL HISTORY OF INDIA AND ITS EVOLUTION

ABSTRACT

Legal history in India has evolved from ancient forms of Vedas to Pre-Independence Colonial Period to the present Modern Indian legal system. India has witnessed legal history even during the Bronze age and Indus Valley Civilisation from Vedas, and Upanishads which was further enriched by Jains and Buddhists. India's secular legal history varies by area and monarch rule, with each Indian Kingdom, established with civil and criminal courts. Under the Mauryas (321-185 BCE) and Mughals (16-19 century). The paper examines the Ancient Hindu Law and traces its evolution throughout British Era to present Modern Indian Law.

"Dharma" was a core principle of Indian culture beginning in the ancient Vedic era. Parts 3 and 4 of the Indian Constitution include these principles, which transcend time and culture. Some are duty in Part 4A. Since the Vedic time, duty-based society has embraced human rights. Mahabharata has also explained the social form of Dharma as: -

धारणाद्धर्ममित्याहुः धर्मो धारयते प्रजाः |
यस्याद्धारणसंयुक्तं स धर्म इति निश्चयः ||

– Mahabharata, 69.58(Karna Parva)

According to the Law Commission's Fourteenth Report, "ancient writers have described a hierarchical system of courts as having existed in the past, but the framework cannot be proven conclusively." However, later people like Narada, Brihaspati, and others seem to show that normal courts must have existed on some level with the hierarchy of courts, with some higher courts having more power than the courts below them.

The rule of law was found to be the foundation of Indian jurisprudence; that the King himself was subject to the law; that arbitrary power was unknown to Indian political theory and jurisprudence and the king's right to govern was subject to the fulfilment of duties, the breach of which resulted in forfeiture of kingship; that the judges were independent and subject only to the law; that ancient India had the highest standard of any antiquity in terms of ability, learning, and integration. In some respects, it is believed and interpreted by famous English writer that the Ancient Laws of India was far more advanced of own eras.

Keywords: *Dharma, Judicial System, Ancient India, Rule of Law.*

INTRODUCTION

The Justice Administration that was followed during Ancient India helped the nation attain the level of "optimum" human civilization. The performance of "Dharma" was the most crucial from the citizen during that stage and formation of "Smritis", which mentioned about Legal Obligation in that era. The history of civilization of India and its evolution can be classified into three stages:

1. Judicial System in the Ancient Era
2. Judicial System in Medieval Period
3. Judicial System in British Rule.[1]

The fundamental basis of Judicial System in Ancient India relied on "Dharma", which was considered as *ideal for each individual*. Being derived from "dhr", which means to uphold, sustain or nourish, therefore meaning to hold the value of "Satya" and to deliver and preforming it.[2] The Justice System if India was found on the basis of *Rule of Law*. The king ruling the kingdom, was himself subject to follow the law and failure to perform the duty as king, lead to setback of right to be king. The King's prime duty was administration of justice to its people of kingdom, he was in charge to enforce rule of law, keeping people safe with justice and punishing wrongdoers. Even Kautilya laid the duty of king as, "In the happiness of his subjects lies the King's happiness; in their welfare his welfare; whatever pleases him he shall not consider as good, but whether pleases his people he shall consider too good." During the Vedic Age, there was also presence of legal literature in form of ***Sutras, Dharam Sutras and Dharam Shastras***. "Sutras", which means thread, meaning binding and connecting many things together like threads.

The legal system of the Ancient Era provided a strong Justice or Legal System to the nation. "Manu Smriti", which is one of the oldest smritis of India, written by Manu, serves as a source of legal literature about the system of law that prevailed in Ancient India. It also emphasises on the hierarchy of Judicial Structure and the delivery of justice with a principle of "natural justice". The "Dharma Shastras" and other ancient legal texts revealed an incredible system of Ancient India that governs the obligation of Kings, Judges and Judicial & Legal Procedures. The greatest virtue is "Dharrna", which emphasis on social order.[3]

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[1] Mr. Justice S. S. Dhavan, 'The Indian Judicial System- A Historical Survey' (*Allahabad High Court*) < https://www.allahabadhighcourt.in/event/TheIndianJudicialSystem_SSDhavan.html> accessed 31 July 2022

[2] 'Dharma' (*Encyclopaedia Britannica*) < https://www.britannica.com/topic/dharma-religious-concept> accessed 31 July 2022

[3] Vansh Tandon, 'Dichotomy of the Ancient Indian Legal History: A S-W-O-T Analysis Approach' (2021) 4(3) *Int'l JL Mgmt. & Human* < https://doij.org/10.10000/IJLMH.11757> accessed 31 July 2022

The message which Dharrna lays is the message of Dharma as the core value to the individual to fulfil their duties. One of the most notable aspects of the Hindu legal system was its commitment to maintaining the independence of the judicial system. The concept of dharma encompasses, in its broad range, the concept of human rights. The person in ancient India functioned in the capacity of a citizen of the state, and it was in this role that he was endowed with both rights and responsibilities. The majority of these rights and responsibilities have been articulated in terms of obligations, also known as dharma.

These responsibilities include duties owed to oneself, one's family, other individuals, society, and the world at large. Dharma served as the foundation for ancient human rights jurisprudence. The objective of ancient Indian legal theory was the construction of a socio-legal system that was devoid of any evidence of conflict, exploitation, or misery. This "Dharma" legislation served as a model for the establishment of a worldwide legal system.

The foundational principles of interpretation have been evolved to an advanced level of perfection. It was necessary of judges to make decisions, both criminal and civil, in accordance with the law.

LITERATURE REVIEW

- ***Mr. Justice S. S. Dhavan***[4] of Allahabad High Court in his article, "The Indian Judicial System-A Historical Survey" talked about the Ancient Judicial System and its evolution to medieval period, with a comparison with present legal system. He emphasis that the present legal system has maintained the ancient tradition with a principle of "Brihaspati", meaning that the judge decision on a case should not be based on any personal motive and should be free from any prejudice, must be on the basis of "*rule of law*". He emphasized on the importance of rule of law which was present during that period.
- ***Patrick Olivelle (2015)***[5]**,** laid an analysis of Ancient Jurisprudence of India and its Four Feet of Legal Procedure present during that era. The four feet that were used in ancient civilization to reach a verdict as: *Dharma, Vyavahara, Charitra and Rajasasana*. It laid that the four feet were established to address the disputes and were developed by the state as open to general public. The author says that there can be two ways of interpreting the

[4] Dhavan (n 1)

[5] Patrick Ollivelle & McClish Mark, 'The four feet of legal procedure and the origins of jurisprudence in ancient India." (*Journal of American Oriental Society)* 2015 135(1) <https://www.jstor.org/stable/pdf/10.7817/jameroriesoci.135.1.33.pdf> accessed 31 July 2022

four feet: as the four feet of animal on which it stands, therefore laying the importance of each foot and other as interpretation by Manu as four pillars of Dharma.

- ***Shivaraj S, Huchhanavar***[6] in the article, "The Legal System in Ancient India", discussed that the British claiming lacked civilization was untrue and India has a "justice" and "rule of law" as its principle. He laid the wrongful selection by people of the nation led to injustice and its discarding of the ancient system which had a rule of law as principle and was of supreme level of accuracy.
- ***Dr. Jagtar Singh (2020),*** in his article about governance in Ancient India the importance if supreme law and its role on establishing organs of state. He laid that during the Vedic age there was an interconnected link between justice, religion and law, where the king was the supreme authority and the legal system worked on his supervision.
- ***Tanish Dogra (2021),*** talked about the ancient India and its legal system evolution throughout Vedic Era. He talked about the development of Jurisprudence and how law has helped the nation to develop. In his article, firstly he explained the components of Hindu Law, the existence of Smritis and relevance of Vedas.
- ***Bar Council of India***[7] in its, "Brief History of India" recorded the legal history of India throughout its Vedic Ages, Medieval Period and British Era. The article also mentions about the rule of law presence after the independence and how the law commission collectively framed the constitution of the nation.
- ***R. K. Gupta (2004)***[8]***,*** in his article emphasised on the presence of law-and-order administration during the Ancient India and talked about the need to re-emphasise the law like Vedic times to bring law in order.
- ***Shailendra Kumar & Sanghamitra Choudhury (2021)***[9]***,*** through an examination of Vedic literature and Dharmasastras, the author of this document intends to present a comprehensive analysis of the concept of rights and obligations that was common in early Vedic culture. In order to achieve this goal, the author of this work goes into the interpretation of the Vedas and the Dharmasastras.

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[6] Shivaraj S. Huchhanavar, 'The Legal System in Ancient India' (Legal Services India) < http://www.legalservicesindia.com/article/1391/The-Legal-system-in-ancient-India.html> accessed 31 July 2022

[7]The Bar Council of India, 'Brief History of law in India' < http://www.barcouncilofindia.org/about/about-the-legal-profession/legal-education-in-the-united-kingdom/> accessed 31 July 2022

[8] R. K. Gupta, 'Law and order administration in ancient India' The Indian Journal of Political Science (2004) < https://journals.scholarsportal.info/details/00195510/v65i0001/111_loaiai.xml > accessed 31 July 2022

[9] Shailendra Kumar & Sanghamitra Choudhury, 'Decoding the elements of human rights from the verses of Ancient Vedic literature and Dharmaśāstras' (2021) Literature < https://doi.org/10.3390/literature1010004> accessed 1 August 2021.

JUDICIAL SYSTEM IN ANCIENT INDIA

The idea of "Dharma", was the core principle which guided Indian civilization throughout the Vedic Era until the Muslim invaded the nation and endowed the king as a servant to itself. Dharma derives from a Sanskrit root, "dhr" which can be translated as "to support, preserve or nurture". It is closely discussed with concepts of "rta" and "satya", which translates as mental awareness and truth. The term Dharma refers to putting satya (truth) into action.[10]

Dharma has difference set of meanings, including "principle of justice", the "principle of holiness". Dharma can change according to its evolution; it has two sides: Sanatana Dharma and Yuga Dharma. Yuga Dharma is correct interpretation and lays that the dharma changes according to change in the Yuga. Sanatana Dharma also allows for the necessary shifts of the perspective on the basis of evolution.

The judiciary in Vedic times consisted of a hierarchy of courts, where the Chief Justice, as that time Praadivivaka, was at the top, and each higher court had an authority to scrutinize and review the judgements by the lower courts to ensure that the "principle of natural justice" is ensured. The doctrine that was followed was "*Res Judicata*[11] *(Prang Nyaya)*", which laid a duty of the court to ensure the justice "without favour or fear".

The King used to choose judges based on specific characteristics such as:

- *Vyavahara* (governing process of law)
- *Dharma*
- *Bahushrutha* (deep researcher)
- *Pramananjana* (knowledge of rule of evidence)
- *Nyayasasthrevilambinah* (responsible citizen)
- Knows *Vedas* and *Tarkas* (logical reasoning)

There was a "Rule of Law" concept in Ancient India, where the king had a duty to protect to rights of each individual. Therefore, the kingship was not above rule of law and king had an obligation towards the kingdom. Dharma is Sanatana, which means it possess timeless value and it is not restricted by time of place in any way.

Since the very beginning, people had the concept of Dharma, it is not same as any religion but the two concept are frequently confused together. In the case of A.S.Narayana Deekshitulu vs. State of Andhra Pradesh & Ors[12], Justice J. Hansaria quoted the book of Swami Rama 'A Call

[10] Britannica (n 2)
[11] Dhavan (n 1)
[12] *A.S.Narayana Deekshitulu vs. State of Andhra Pradesh & Ors* 1996 AIR 1765

of Humanity' saying, "Religion is enriched through use of visionary method and in contrast Dharma blooms within realm of direct experience", therefore laying a distinction between both. There were two institutions present during the Vedic times- called as Sabhas and Samitis. While Sabha was kind of village council, the Samiti was a general deliberation for all the judicial work of the village.

There were various types of cases discussed while the old vedic period:

1. Disputes of lands
2. Debt-recovery
3. Cheating
4. Inheritance laws
5. Abduction
6. Murder
7. Assault, etc.[13]

VEDIC LITERATURE AND PERFORMANCE OF JUSTICE

The Vedic Era saw the development of legal literature in order to regulate the "rule of rule", in much more structural format. The literature was developed in form of free texts, which was used to control the working of the society. There was presence of three types of legal texts during Vedic Period:

1. Sutras
2. Dharamsutras
3. Dharamshastras[14]

"Sutras," which literally translates to "thread," refers to the act of tying and joining a number of different objects together like threads. The objects can be achieved by focusing attention on variety of facets of human existence, including the following: *Srautasutras, Grihasutras* (Domestic Affairs) and *Dharamsutras*. Dharamsutras, are generally recognized as a foundational document for the development of literature on civil and criminal wrongs. Later on, Dharmasutras evolved into Dharmshastras. The works of Dharmashastras are far more elaborated in nature and have been in existence till today as:

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[13] Radha Krishna Choudhary, and Radha Krishna Chowdhary, 'JUDICIAL IMPORTANCE OF THE REPRESENTATIVE INSTITUTIONS IN ANCIENT INDIA.' (1947) Proceedings of the Indian History Congress, *JSTOR*,
< http://www.jstor.org/stable/44137121 >. Accessed 7 Aug. 2022.

[14] Vedansh Tandon, 'Dichotomy of the Ancient Indian Legal History: A S-W-O-T Analysis Approach' (2021) *IJLMH* < https://doij.org/10.10000/IJLMH.11757 > assessed 5 August 2022

- Manu Smriti is the earliest work of Dharmashastras and the textual tradition of the Vedic Period and was composed by Manu around the 2nd-3rd Century.
- The Yajnavalkya Smriti, which was composed during the fourth and fifth century CE, is considered to be the "best written" and "most unified" literature in the Dharma Sastra tradition. The Narada Smriti was written around the 5th-6th century A.D. and has been dubbed as the "juridical text par excellence" because it is the only Dharma sastras text that focuses exclusively on legal issues, ignoring righteous behaviour and penance.
- The Vishnu Smriti was written much later, in the 7th century AD. It doesn't talk about how to understand dhárma directly; instead, it focuses on the bhakti tradition.[15]

The provisions of the texts indicates that the ancient texts were based on "principles of justice" and tried to establish a "rule of law". The interpretation of legal texts had highest level of perfection and Judge had duty to decide cases according to the rule of law in both civil and criminal cases. Even after the presence of conflict of thoughts, ambiguity and complexities, the ancient law has been able to form guiding principles so that the judicial system can be articulated properly and be well developed.

However, in the process of interpreting the written text of the law, the court had to keep in mind that its primary responsibility was to uphold justice rather than to strictly adhere to the legal requirements. Brihaspati gave the following instruction to the court: "The court should not provide its verdict by only following the text of the shastra, for if the conclusion is absolutely devoid of rationale, then the consequence is injustice."

JUDICIARY IN ANCIENT INDIA

According to Brihaspati Smiriti, there existed a system of courts in Ancient India from the family Courts to ending with the King. At the top of the hierarchy was the Supreme Court. The family arbitrator held the lowest position. The court of the Chief Justice, who was named Praadivivaka, or Adhyaksha, was the next higher court; and the court of the King was the highest court. According to the Narada's Versa, the Dharma Sastras and disposal of Justice were based on four major pillars:

1) *Dharma:* It means the truth and performance of Satya as a Supreme rule.
2) *Vyavahara:* It means the evidence, in form of text, document, that is presented before the court

[15] Kumar (n 9)

3) *Charitra:* It means the local customs, legal inference of the texts or the customs recorded in the ancient books
4) *Rajasasana:* It means performance of Justice by the king.[16]

These principles were used for administration of justice in courts. The justice was divided into units where the principles were used called: Sthaniya, Dronamukha, Khrvatika and Sangrahana.

Sangrahana consisted of 800 villages, Dronamukha of 400 villages, Khravatika of 200 villages and Sangrahana consisted of 10 villages.

EVOLUTION OF VEDIC JUDICIAL HISTORY

India had the presence of legal system even in the period of Bronze Age and Indus Valley Civilization. There are many developments that have taken place with the evolution. During Vedic Era, the nation was divided into many parts and was ruled by a king. The laws were formed from Vedas, Upanishads, and other texts. Dharma was the core principle during that period. Dharmashastra talked about the obligation of Judges and the King, as the establishment of *rule of law* was the basis of law. All these were basis of Hindu Law.

The 7th century AD brought in the emergence of Muslim settlers, which led to the induction of Muslim laws, practices and traditions. During the Medieval Period, Sharia law was introduced in the Judicial System. Their system was totally based on their religious texts. As Prophet said in Quran, "Justice is the balance of God upon earth in which things when weighed are not a particle less or more. And he appointed the balance that he should not transgress in respect to the balance; wherefore observe a just weight and diminish not the balance"[17]. Sharia law held "morality" in the highest regard. The Sultans were given the responsibility to maintain rule of law. Chief Justice was called, "*Quzi-Ul-Qazat*".

After the Medieval Period, there was establishment of the British Era when the East India Company was established in 1612, in Surat. As the company developed and spreaded over other kingdoms, there was incorporation of their customs and traditions. After the Charter of 1726, the Indian Courts' power and control was provided to British Rulers. The Regulating Act of 1773 by the King of England led to the establishment of the Supreme Court in Calcutta. The Courts at Madras and Bombay were established by King George III in 1880 and after the act of 1861 various High Courts were established in other towns as well. The English Common

[16] Ollivelle (n 5)
[17] Dhavan (n 1)

Law was used for deciding cases and was incorporated into Judicial System. Later, Privy Council was also established and has presence in India for about 200 years.

In 1935, the nation passed the Government of India Act, 1935, where the government of India adopted a federal structure and there was establishment of "Supreme Court" and after Independence, the nation adopted its own constitution.

RELEVANCE IN PRESENT TIME

The ancient legal texts, concepts and theories lay that ancient India knew the importance of the rights of individuals and there was the presence of a proper "rule of law", for the performance of justice to each citizen. The principle of "*Res Judicata*", which was followed in that Era, should be maintained in the present time. There is an important role that is to be played by the Judiciary to achieve social and economic development.

The principle of "*without favour or fear*", should be upheld. Like the Vedic Era, the present social development should accord with our traditions. The knowledge of the law in Ancient India was more than that of today's jurists. The nation has sustained and maintained peace in its olden days and had a highly-developed framework of law which was based on "*Dharma*". The present legal system should try to maintain the rule of law and the optimum delivery of justice to its citizens.

Even the classic Hindu Law has its root in the Vedic Law, which is based on Dharma. Justice B. N. Srikrishna of the Supreme Court of India, made an observation that the context of rule of law was not a foreign notion that our nation has adopted, and it has been present in the society since the Vedic Period.[18]

The Classic Hindu Law, which has its roots in the Vedic Era is the oldest and still existing law. One of the famous jurists like Mayne has acknowledged the Hindu Law. With the derivation of Hindu Law being from Smritis, Bhagavat Gita, Ramayana, etc., various courts in our country have laid the importance of '*dharma*' again and again and laid it in their various judgements.[19]

In the *Ramcharitamanas*, there have been roots of the criminal laws of India with examples of Sita being abducted, there has been the establishment of rape laws and establishing sexual relationships without consent as *adharma*.

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[18] B. N. Krishna, 'Skinning A Cat' ebc-India.com < https://www.ebc-india.com/lawyer/articles/2005_8_3.htm > assessed 6 August 2022

[19] IJLMH, "Hindu Legal Theory and Its Relevance in Current Times - International Journal of Law Management & Humanities" (International Journal of Law Management & Humanities, December 12, 2020) < http://doi.one/10.1732/IJLMH.25189 > accessed August 10, 2022

The basic term of 'person' was defined by Ram, which falls under S. 11 of IPC, 1860. In the Evidence Act of India, ancient concepts are present such as *Sakshi* (witness), *Lekhya* (Documentary evidence), *Bukhti* (possession), etc. Cases in Courts, where the relevance of Indian Vedic Laws was defined are:

- *Dattatraya Govind Mahjan & Ors. v. State of Maharastra*[20], where the court in its judgement laid importance on the Concept of Dharma and Karma of Adjudication, as it can lead to a society where there is prevalence of justice.
- *The Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal & Anr*[21], the court in its judgement pronouncement held that moral values cannot be sacrificed in the guise of social or cultural changes.

FINDINGS

The paper found that the development of Judicial System in the Vedic Period was high level and there was the presence of an abled governance system. The Indian Legal System was found on the basis of rule of law and has the principle of Dharma as its core value. Even the king in that era was bound by the law.

Ancient India had the highest level of development when compared to the history of other nations in terms of ability, learning, integrity, and independence of Judiciary and the level of standard and development that ancient India had with respect to its Judicial development, has been surpassed till now by the nation. The village justice system that was present in that era has evolved in form of Panchayati Raj and plays a major role to deliver justice in rural areas even now.

The rules and procedures were similar to what we follow today. To advance, civilization needs a peaceful living system, which demands a functioning law and order system and an active judiciary. The ancient judicial system developed by India's great seers satisfied all the requirements for a safe and effective system and was compatible with the current system.

Since the beginning of human history, people have believed in a system of rights and justice for all people. Although the terminologies that were used to denote the same thing changed from time to time and location to place, the values that were represented by those things have stayed the same from the time of the Vedas till today.

[20] *Dattatraya Govind Mahajan & Ors. v. State of Maharashtra*, AIR 1765 SC (1996)
[21] *The Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal & Anr*, AIR 915 SC (1977)

They were a part of the Scriptural obligation, and once they were adopted by the rulers and kings, they became authoritative. The fundamental ideas and readily accessible ideals that underpin them have remained consistent throughout the entirety of humankind's history.

These ideals are brought to light in Parts 3 and 4 of the Indian Constitution, which is important to all people across the board regardless of time or culture. A few of them are designated as duties in accordance with Part 4A[22]. It is important to draw attention to the fact that duty-based societies still exist today.

CONCLUSION

Ancient India not only developed mathematics, astronomy, medicine, grammar, philosophy, and literature but also law. The Indian Constitution aims to build a more fair and just legal system than ancient India's customary powers. The Indian Constitution aims to alleviate the humiliation caused by caste and patriarchy, restoring human dignity. Formal and substantive equality under the rule of law in modern India can allow a more creative blooming of dharma in self and community.

The significance of "dharma" was a vital part of the Judicial System of the Ancient Era. The role of Ancient India in today's times is clearly visible as the Ancient Judicial System was more developed and principled than the Modern Judicial System. The Ancient Judicial System was laid by great jurists of that era and fulfils all the requirements for a stable and workable judiciary. Therefore, the present legal system needs to adopt the principles and rules of the Ancient Legal System, which was formed on the basis of 'dharma' and 'justice'.

This old notion is still applicable in modern concerns. The word dharma is not religious but refers to righteousness, morality, and well-being. It taught us that if we do well, we can build a secure, healthy, and content society. Laws are based on our conscience. Therefore, we should follow dharma and respect others' lives. We also recognised that our courts have interpreted dharma in diverse judgments.

[22] Dhavan (n 1)

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UNDERSTANDING THE INDIAN REGULATIONS GOVERNING THE AQUATIC TOXICOLOGY OF THE INDIAN OCEAN

ABSTRACT

India has a coastline of 8,118 km, with 2.02 million sq. km of exclusive economic zone and 468,000 sq. km of a continental shelf area. This is spread across 10 coastal states and 7 Union Territories, including Andaman and Nicobar and Lakshadweep Islands. With this long coastline, a number of aquatic species are to be found across the coastline like Zooplanktons, sponges, fishes, marine reptiles, phytoplankton, etc. There are many industries located along the coastline like the Oil and Refinery, Shipbuilding, Ship breaking, Chemical and Fertilizer, Cement, Iron and Steel, Pharmaceutical industries, etc., and these industries must be polluting and contaminating the water, which would affect marine life. Forensic toxicology is the study and practice of the application of toxicology, i.e., the scientific study of chemicals such as drugs, toxins, and poisons, for the purpose of law and criminal investigation. Whereas Aquatic toxicology is the study of the effects of anthropogenic chemicals and activities, and natural chemicals, materials, and activities on aquatic organisms, at various levels of biological organization, from sub-cellular through whole organisms, and to populations, communities, and ecosystems. An aquatic body is considered to be toxic when a particular chemical kill 50% or more of the population when in direct contact, in a relatively short period of time from 24-96 hours to a maximum of 14 days. This paper would look at the historical perspective of aquatic culture and toxicology in India and understand the laws related to aquatic toxicology in India concerned with the toxic levels of the Indian Ocean. This paper would further understand the Australasian and Western legislations and regulations apropos to aquatic toxicities to subsequently draw a comparative analysis between the foreign and Indian regulations. Drawing an understanding from the analysis, the paper shall determine if India needs to make more stringent laws to safeguard our aquatic lives from toxicology.

Key Words: *Forensic Toxicology, Aquatic Toxicology, Legislations and Regulations*

INTRODUCTION

As per the National Crimes Record Bureau, total number of cognizable crimes in 2020 were 66,01,285, of which 42,54,356 were under Indian Penal Code (IPC) and 23,46,929 were Special and Local Laws (SLL) crimes. The period between 25th March- 31st May 2020, India was under total lockdown due to pandemic 1st wave (Covid-19). During this period, movement in the public space was restricted which resulted in decline of registered cases under crime against women, children, senior citizens, theft, etc. However, an increase in cases registered under disobedience of order duly promulgated by public servants, under other IPC Crimes and under other State Local Acts were witnessed.[1] With these statistics, we reach certain questions like- what is a crime, who studies them or what is the subject that deals with it.

It is very difficult to define the word crime, because the act defined as criminal varies across time and culture. However, one can understand that these are the conducts of individuals which are prohibited by the society and laws that govern the society and it is a criminologist who studies these crimes. Criminology is the scientific study of crime and criminals and encompasses interdisciplinary or multidisciplinary studies within itself. Another discipline which has a cardinal role in criminal investigation is Forensic science, which literally means the application of science to Law. Within Forensic Science there are multiple branches and sub branches like Forensic Physics, Forensic Chemistry, Forensic Psychology, Forensic toxicology, DNA Forensics, etc. The focus of this research paper remains Forensic toxicology, which is the use of toxicology and other disciplines to aid medical or legal investigation of death, poisoning and drug use. Let us first understand what toxicology is.

UNDERSTANDING THE HISTORIC STUDY OF TOXICOLOGY

Toxicology is the study of the adverse effects of the xenobiotics[2] and hence is a science that has been borrowed and evolved from ancient poisoners. Xenobiotics are the foreign objects such as plant constituents, drugs, pesticides, etc. It must be noted that humans are, as per one estimate, exposed to 1-3 million xenobiotics in their lifetime, which gain access to the body

[1] Government of India NCRB, "Crime in India 2020 - National Crime Records Bureau" (Crime in India 2020September 13, 2021) <https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf> accessed August 28, 2022.

[2] Patterson, A. D. (2010, May 17). *Xenobiotic metabolism: A view through the metabolometer*. Penn State. Retrieved August 29, 2022, from https://pennstate.pure.elsevier.com/en/publications/xenobiotic-metabolism-a-view-through-the-metabolometer.

via food, air, drinking water, lifestyle choices, etc. The knowledge of toxic substances and poison existed for ages and were used by early humans for hunting, warfare and assassination. We find many textual references to poison beginning with Ebers papyrus, Hippocrates, in the book of Job, to Maimonides, to Philippus Aureolus Theophrastus Bombastus von Hohenheim-Paracelsus. It was only during the 1800s that the study of science dealing with such substances began to take shape. A Spanish-born Mathie Orfila, is regarded as the father of modern toxicology, a subject-matter that deals with the study of poisons and their effects, that includes substances like arsenic, drugs and industrial chemicals.[3] In other words, the adverse effects of chemical or physical agents on living organisms is what toxicology deals with. According to Loomis, there are 3 divisions of toxicology based on disciplines involved- Environmental, Economic and Medical.[4] On the other hand Klaasen refers to three categories of toxicology - descriptive, mechanistic and regulatory.[5] However, let us now look at and understand the knowledge of poison that Indians had in history, because the paper is primarily focusing on the Indian ocean.

The author of Rig Veda[6], world's oldest surviving poetry, makes several references to poisonous creatures and objects. In the first mandala, we find references to venomous creatures,

[3] Patterson, A. D. (2010, May 17). *Xenobiotic metabolism: A view through the metabolometer*. Penn State. Retrieved August 29, 2022, from https://pennstate.pure.elsevier.com/en/publications/xenobiotic-metabolism-a-view-through-the-metabolometer.

[4] Ibid, p5. According to Loomis "The multidisciplinary nature of toxicology is one of its greatest strengths, for it brings the capabilities and techniques of experts in those sciences into the field of toxicology. It also allows for the practical and logical division of the subject into sections on the basis of the disciplines involved. Environmental division includes the roles that engineering, environmental and chemical specialists play in the identification and quantification of natural as well as unnatural agents responsible for contamination as well as transfer of chemicals between and within air, soil, and water. The economic division involves the biologists, chemists and basic medical scientists who identify and quantify the chemicals responsible for toxicologic problems in industry, in foods and in drugs. It also includes the basic laboratory research programs that elucidate the chemical- biologic mechanisms responsible for harmful effects of chemicals on biologic tissue. The Medical division utilizes the capabilities of physicians and veterinarians for the diagnosis and therapy of chemical intoxication.

[5] C.D. (2001). Casarett & Doull's Toxicology: The Basic Science of Poisons (6th ed.) [E-book]. McGraw-Hill Professional. Retrieved July 17, 2001, from https://bcms.edu.iq/wp-content/uploads/2021/07/pharm_books/Toxicology/Tox%201/Casarett%20and%20Doull%20-%20Toxicology%20The%20Basic%20Science%20of%20Poisons.pdf
pp11-12. According to Klassen, the professional activities of a toxicologists falls into 3 main categories- descriptive, mechanistic and regulatory. A descriptive toxicologist is concerned directly with toxicity testing, which provides information for safety evaluation and regulatory requirements. On the other hand, a mechanistic toxicologist is concerned with identifying and understanding the cellular, biochemical and molecular mechanism by which chemicals exert toxic effects on living organisms. The results of these studies are very important in many areas of applied toxicology. Whereas, a regulatory toxicologist has the responsibility for deciding on the basis of data provided by the descriptive and mechanistic toxicologists, whether a drug or another chemical poses a sufficiently low risk to be marketed for a stated purpose.

[6] The word Veda comes from the root word vid which means knowledge or to know. There are four vedas- Rig, Sama, Yajur and Atharva. The Rig Veda contains the world's oldest surviving poetry. Each Veda has four parts, the last three of which sometimes blend into each other- the Samhita, Brahmana, Aranyaka and Upanishad. The Rig Veda Samhita is a collection of 1028 hymns (Suktas) arranged in 10 books (Mandalas). Book 2-7, also known

some of which are little venomous, while others are great venomous.[7] We not only find reference to venomous aquatic reptiles but also to substances that are venomous like the poison of the Shalmali tree[8]. Further it also refers to a visha named vandanam in the following lines "Vandanam etat sanjnakam visham".[9] We find references to charms meant to not just keep serpents away from the premises but also to cure poison bites. We find references to Vedic lore in the Brahmanas and Sutras that are designated as Sarpavidya and Visavidya (Science of Serpents and of Poisons).[10] We also find reference to two kinds of poison - Sthavara and Jangam. Snake poison falls in the category of Jangam poison whereas afeem is an example of sthavara poison and it has also been mentioned in Atharvaveda that Jangam poison is destroyed by Sthavara poison.[11] Manusmriti refers to poison vendor called as *rasavikrayin.*[12] Kautilya on the other hand refers to the bark of *meshasringi*[13], as a kind of poison, snake poison.[14] Similar reference is to be found in the other ancient Indian texts like Nyaya Sutra, Kanda Sutra, Ashtadhyayi and Patanjali's Yogasutra.

We also find reference to poisoning episodes in medieval India too like that of the kumarapala being poisoned by Ajayapala, his brother, Mahipala's son, to make sure that the throne is his and not of the preferred one, Kumarapala's daughter's son.[15] Babur in his memoir refers not just to the attempt made to poison him by Ibrahim Lodi's mother[16], but also refers to antidotes

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as the family books, of the Rig Veda samhita are considered to be the oldest, while the later portions of this Samhita, along with all the other Vedic texts, comprise Later Vedic literature. There are several recensions (Shakhas) of the Vedas, associated with different schools (Charanas) of the Vedic study and interpretation. The only surviving recension of the Rig Veda is the Shakala Shakha.

[7] Unknown, *Rig Veda Sanhita, Vol II,* Eng.Tr. by H.H.Wilson, Ashtekar & Co, Poona, 1925, p 117.

[8] Unknown, *Rig Veda Vol IV,* Eng.Tr. By H.H.Wilson, Ashtekar & Co, Poona, 1927, p 187. Also see Rameshwar, *A Pharmacognostic and pharmacological overview on Bombax ceiba*, Scholar Academic Journal of Pharmacy (SAJP), 2014, pp 100-107. Bombax Ceiba is commonly known as silk cotton tree and semal which belongs to the family Bombacaceae. It is one of the important medicinal plants in tropical and subtropical India and also occurs in Sri Lanka, Pakistan, Bangladesh, Myanmar, Malaysia, Java, Sumatra and Northern Australia. It had number of traditional uses and its medicinal usage has been reported in the Indian traditional system of medicine such as Ayurveda, Siddha and Unani. It is known by different names such as Red cotton tree, Indian Kapok tree (English), Shalmali (sanskrit), semal (hindi), Shimul (Bengali).

[9] *ibid*, p 337.

[10] Unknown, *Atharvaveda,* Bloomfield, Verlag Von Karl J.Trubner, STrassburg, 1899, p 61.

[11] Acharya Atridev Vidyalankar, *Ayurveda Ka Brihat Itihas,* Hindi Samiti, Uttar Pradesh Shasan, 1976, p 72.

[12] Manu, Manusmriti, Eng. Tr. by Patrick Olivelle, *Manu's Code of Law,* Oxford University Press, 2005, p 116.

[13] Parijat Kanetkar, Gymnema sylvestre: A Memoir, in *Journal of Clinical Biochemistry and Nutrition, 41 (2)*, Aug 29, 2007, pp 77-81.Gymnema sylvestre is regarded as one of the plants with potent anti diabetic properties. This plant is also used for controlling obesity in the form of gynema tea. The plant is native to central and western India, tropical Africa and Australia. The Sanskrit name for this is meshashringi or madhunashini.

[14] Kautilya, Arthashastra, Eng.Tr. by R.Shamasastry, p171.

[15] James Campbell, *History of Gujarat,* Government Central Press, Bombay, 1896, p195.

[16] Babur, Baburnama, Eng. Tr. in A.S.Beveridge's *The Baburnama in English, Vol II,*1922, p 541.

for poison.[17] However, during Akbar's reign we find reference to diamond powder[18] being used as poison.[19] We also find reference to poison being used during the freedom struggle period, especially potassium cyanide, as in the case of Preeti Waddadar.[20] As we can understand from the historical perspective, the early period witnessed the use of animal poison but during the medieval and modern period we find the use of substance-based poisons.

ANALYSIS OF VARIOUS REGULATIONS GOVERNING OCEANIC POLLUTION LEVELS

It is believed that the oceans originated roughly 4-6 billion years ago. It is a well-known fact that oceans cover 70.8% of the surface of the Earth. It is widely understood that there are five oceans on the surface of the earth, namely the Pacific, the Atlantic, the Indian Ocean, the Arctic Ocean, and the Southern Ocean. Over time the oceans have been used by human beings for various purposes from waging wars to carrying out trading activities among nations. Oceans as fundamentally understood as water bodies but over the years have served a major role in the regional, political, and economic development of nations.

Indian Regulations

Coming to the vastly spread Indian Ocean which is spread across 68 million square kilometres, which stretches to three continents, which is Africa in the west, Asia on the north and North Eastern side and island continent of Australia on the western side. The ocean waters open to the Southern Ocean on its south. It contains numerous islands within its marine area. Some of the popular island nations located in the ocean are Indonesia, Malaysia, Singapore, Japan,

[17] *ibid.* p 511.
[18] 1516252680FSC_P10_M23_e-text.pdf (inflibnet.ac.in). The term diamond originates from the Greek word 'adamas' meaning undefeated or invincible. Remarkably, its Aryan essence 'dam', to tame or pacify, is also the source of the expression 'madam'. The adjective 'adamas' was used to refer to the hardest substance recognized and turned out to be synonymous with the gem. In reference to the toughness of this stone made of carbon, a chemical element essential to all life, in this it's most concentrated form. Diamond dust is possibly the most awful poison in existence. If someone consumes diamond dust, the regular peristaltic motion of the digestive tract causes these minute fragments of the world's hardest substance to imbed themselves along the alimentary canal, the natural motions of the inner body causing them to work deeper and deeper until the internal organs are pierced and shredded.
[19] L.M.Crump, *The Lady of the Lotus: Rup Mati Queen of Mandu,* Oxford University Press, p 59. The very night that Adham Khan celebrated his feast, he caused the royal palace to be garnished for the entry of the new king of love. Rupamati, having finished her bathing, gave order for her body to be adorned with the very bridal dress which Baz Bahadur had given her. After this was done, she took her'bin'in her hand and sand songs to melt the heart- yea, the very same songs which Rai Chand had sung- until she was beside herself. THen retiring to her bedchamber, she took poison of powdered diamond.
[20] Kalpana Dutt, *Chittagong Armoury Raiders Reminiscences,* People's Publishing house, Bombay, 1945, p56.

Philippines and Sri Lanka. Some of the major nations that the ocean covers are India, China, Pakistan, most of the Gulf nations, South Korea, Japan, Vietnam and Taiwan on the far eastern stretch. This makes the Indian ocean the third largest ocean in the world, covering over an area of 70 million sq. km. This enables the ocean to extend to a long range of coastline, providing access to a number of ports and high seas. But a large number of nations that have their coastline running through the ocean are economically developing. Majority of these nations have been freed from the domination, which have been home to the world's one third population which rely substantially on marine resources for their food securities and livelihood. The population of these nations are projected to significantly increase in the coming decades, putting the ocean under further pressure to fulfil the needs of the vast population. A larger issue mulling over the ocean is that its resources are further subjected to multi-dimensional challenges from the concerning elements of climate change like sea level rise, acidification of the ocean, and the extremely volatile weather change.

In order to tackle the ever-changing climate in the region of the Indian Ocean, there have been multiple frameworks mainly focused on securing food availability, sustainable growth, and climate action. To begin with, one may look at the South African constitution provides for an environment that is conducive to the well-being of the human population which would further address sustainable development, thus making environmental conservation the primary focus of the legislative frameworks. Some of the acts and laws that have been enacted regarding the protection of the environment are the National Environment Act of 1998, the Biodiversity Act of 2004, the Environment Conservation Act of 1989, Integral Coastal Management Act of 2008 which are mainly aimed at addressing challenges faced regarding development in a sustainable manner. Moreover, fisheries have a separate dedicated regulation—the Marine Living Resources Act 1998, covering spatial planning, licence permits for commercial fishing, and sustainable use of marine resources. Despite this, there is a dearth of concerted actions that directly respond to ensuring food security or addressing climate change.

Regulations in Mozambique

Meanwhile, the western African nation, Mozambique has rolled out laws of relevance to the conservation of the marine environment, such as Forestry and wildlife Forestry and Wildlife Law, Fisheries Law and Local Organs Law, Environment Law 1997, and the National Adaption

Programme of Action, 2007 that focuses on integrated and sustainable management of 46 the marine environment and actions to mitigate climate change.[21]

The Indian Ocean Rim Association (IORA) was formerly known as the Indian Ocean Rim Association for Regional Cooperation; the current date represents 21 countries whose shores are washed by the Indian Ocean. From 29th to 31st March in the year 1995, was when the Mauritian Government convened a meeting with the Government representatives. Seven countries' business sectors and academia met to examine ways to improve economic cooperation among Indian Ocean Rim states. The IOR-ARC was formally inaugurated on March 6-7, 1997, during the first Ministerial Meeting in Mauritius. This meeting approved the charter and established the administrative and procedural foundation for the organization's development. Bangladesh applied to join the organization during its second Ministerial Meeting in March 1998 in Maputo, Mozambique. Bangladesh's membership application was accepted in September 1999. Bangladesh has played a significant role in the forum since then. Some of its member states have their own laws to protect the Indian Ocean and its seas. The Tanzania Environment Management Act 2004, Kenya National Environment Policy, 2013, India National Environment Policy, 2006, and the Australia Environment Protection Policy of 2014 are some of the laws to protect the maritime environment.

Regulations in the United Republic of Tanzania

Officially known as the United Republic of Tanzania, has its administrative set up in Dar es Salaam and Dodoma is its Legislative Capital. Its population touching to a meagre 55 million, it is the largest nation in eastern Africa, the shores of which are washed by the Indian Ocean on the eastern coast. The National Environment Policy was passed in the month of December 1997. The Policy notable aims to prevent of degradation of land and address poverty through public participation and education. The policy further aims at promoting renewable energy production and efficient energy by controlling emissions from the industries. Environmental impact assessments, environmental law implementation, market-based metrics, standards, and indicators are among the tools used to execute the Policy. The administration intends to take a cautious approach and encourage international collaboration on transboundary challenges. The

[21] Grantham research institute. (1995, April 17). National Environment Policy. LSE. Retrieved August 29, 2022, from https://www.climate-laws.org/geographies/mozambique/policies/national-environmental-policy-077271f0-27ef-43ae-b694-dd0051ae1a7c#:~:text=The%20National%20Environmental%20Policy%20was,conciliating%20development%20with%20environment%20protection.

Ministry of Environment is identified as the primary governmental entity with the authority to act on the subject.

Regulations in Kenya

In the year 2013, the Kenyan legislative passed the National Environment Policy, which mainly aims to provide a framework to introduce an approach that is integrated to manage Kenya's environment in a sustainable manner. It put forth a proposal to make a stronger legal and institutional framework in order to help with good governance and simultaneously introduce an integrated environmental management system with the aim of economic growth, reduction of poverty, and improvement of overall livelihoods. It aims to promote further advancement of environment management tools by collaboration and cooperation with the private sector.

Regulations in Kenya

Australia known to be the smallest continent but covers a large area of landmass, making it one of the largest countries in size. In recent years, Australia has been facing a water crisis at an increasing rate mainly from marine debris and ingestion of plastics by the marine fauna. The issues related to water pollution in Australia are mainly concentrated in the coastal rivers, with the main contaminants being metals, pesticides, and sediments, terrigenous in nature. Though the pressure of pollution in coastal waters are mostly moderate, it greatly varies among the waterways. The greatest threat that Australia faces is that from microplastics, the ecological effects of which are largely unknown yet, though leading to the accumulation of toxins, and eventually resulting in their transfers into the marine food chains and ultimately into the human diets. The Department of Environment and Science under the Queensland Government has taken up the commitment to adopt and promote modern management techniques which shall effectively minimise the current harm caused to the environment. Since the 20th century, the Government of Australia has rolled out a number of acts and frameworks to keep a check on the increasing levels of toxins in the coastal waters of the Australian islands. In the year 1994, the Environmental Protection Act was passed. This mainly adopted and began to promote modern through an "environmental stewardship approach". This approach refers to taking certain responsibilities to look after the environment on an individual level. It puts a duty on each citizen and resident of Queensland to avoid harming the environment, including the coastal waterways. Next was the Environmental Protection (Water and Wetland Biodiversity) Policy 2019, which delves further into the steps to be taken providing how the measures provided in the Act of 1994. In the northern European nation, Ireland under the Dumping at

Sea Act of 1996, the Act forbids the purposeful dumping of any substance or material into Irish marine waters from any vessel or aircraft, as well as the deliberate incineration of any substance or material inside the maritime region. Section 4 of the Act expressly forbids the intentional disposal of an offshore facility in the marine region, as well as any substance or material derived from such an installation.

Constitutional Provisions in India

According to the judiciary, the right to clean water is under the purview of the right to life, and hence the reach of Article 21, Article 48, and Article 51(g) of the Indian Constitution might encompass the right to clean water. The Supreme Court ruled that the right to clean water is a fundamental right under Article 21 of the Indian Constitution. The court stated that the access to clean water is a core need of the human right to life. The state has a responsibility to keep the water clean.

Around the globe, there are several key regulations to protect the environment, as it has been one of the primary functions of the Government. These regulations function by imposing taxes and costs on households and businesses for them to dispose of their wastes in a responsible manner. Indian regulations regarding the environmental protection are majorly centred around the Water Act of 1974, which dealt with the increasing amount of pollution levels.

CONCLUSION

However, public perception of the efficiency of these rules has not always been favourable. There have been several media stories or studies documenting the ineffectiveness of these restrictions, as well as claims of abuse of monies designated for these objectives, ranging from underuse and erroneous reporting to fund diversion.

We conclude that environmental rules in India can be effective in lowering pollution levels, but only if regulators are suitably equipped and motivated. The broader question of the ideal degree of environmental control, on the other hand, remains unanswered. This would necessitate the development of realistic estimates of the costs that restrictions impose on firms and people, which would then be weighed against the societal benefits of pollution reductions in terms of health and other areas. It is also vital to test market-based kinds of regulations that can reduce pollution at reduced costs.

ADVOGADOS OF COLONIAL GOA AND THEIR ADVOCATION OF CIVIL RIGHTS, FREEDOM & NATIONALISM

ABSTRACT

Goa's struggle for freedom was one of the longest drawn in the history of freedom struggles waged during the colonial era. In the course of this liberation movement, thousands of freedom fighters and civilians belonging to the Colonial Goa as well as from India, were subjected to brutalities by the Portuguese Police and Army. Many of them were tried under TMT (Territorial Military Tribunal) established by the Portuguese government. Among those who were arrested for their active participation in the liberation movement, several 'advogados' (advocates in Portuguese) too were there. And there were many advogados who fought the cases on behalf of those jailed freedom fighters. The present paper would like to bring to light the price-less contributions of these valiant advogados of colonial Goa who dared to take on the dictatorial regime without fear or favour. This paper intends to study both, their direct participation in the Goan liberation movement and their challenging the Portuguese colonial legal procedures in their Indian possessions. As both these actions together helped in a major-way for fulfilling the Goans' desire for freedom from colonial rule. The role of these advogados in creating and spreading awareness among the Goan citizens about the ill-effects of the colonial policies and their active advocation of civil rights which were suppressed by the totalitarian regime through their writings, speeches, cases, and movement for freedom are remarkable. They have acted as an active check against the illegalities of colonial administration. But for some unknown reasons they remained lesser- known and deprived of scholarly appreciation in the domains of both Law and History. Precisely for this reason, this paper attempts to understand and bring forth the contribution of the advogados of Goa, starting from exposing the fallacy of the 'Colonial Act', to that of challenging the Portuguese nationalism in their own courts and defending the Indian Nationalism of the Goans.

Keywords: *Advancing Civil Rights, Enabling Freedom, Advocating Nationalism, Legal struggle against Colonialism*

INTRODUCTION

The role of the advocates has been remarkable as the upholders of the law and in preserving justice in any given society around the world. The same is true in the case of India as well as Goa. The advagados of colonial Goa were also active participants of the Goan liberation Movement. Their sense of justice and legal ethics did not allow them to let the colonial government suppress the basic civil liberties. Along with advocating for civil rights they were the harbingers of the ideas of freedom and liberty among the Goans.

There can be thousands of resistances on various issues spanning across different time zones that rise and subdue but behind every persistent and consistent revolution there usually be certain genuine causes affecting the larger population over the generations. A look at the Goan liberation movement gives us a glimpse of the resistance that started initially for achieving civil rights but slowly started absorbing all the just causes into its fold which made it inevitable to demand complete independence from Colonialism.

Right from José Inácio Francisco Candido de Loyola who decried the press restrictions and censorship as a violation of the freedom of expression of thoughts, there have been numerous advogados who relentlessly waged a war against injustice and colonialism. Their degrees are varied from a Sanad to practice Law, Licentiate in Canon Law, to graduation in Law and to that of Doctorate in Law. They have studied from different places, Goa, India, Portugal, etc. Their contribution to the cause of the Goan liberation movement can be studied under two broad headings, their direct participation in the anti-colonial struggle and as the defenders of the Goan freedom fighters and freedom struggle.

DIRECT PARTICIPATION IN THE ANTI-COLONIAL STRUGGLE

The prominent among the advogados that took part in the liberation movement were Telo de Mascarenhas, Antonio Furtado, Tony Fernandes, Laxmikant Venkatesh Prabhu Bhembre, Panduranga Jagannath Sinai Mulgaonkar, Gopala Apa Kamat, Libia Lobo Sardesai, etc. And there were other advocates whose fight was focused only on achieving civil rights and equality at par with the citizens of Metropolis, i.e., Portugal. For example, José Inácio Francisco Candido de Loyola.

Adv. José Inácio Francisco Candido de Loyola (1891 – 1973), popularly known as '*Fanchu*' was a well-known lawyer from the village of Orlim in Salcete. He was famous for being outspoken about the lack of civil liberties for the Goans under colonial rule. He was the nephew

of Dr. José Inácio de Loyola, the founder of '*Partido Indiano*' (The Indian Party).[1] He held the position of the Parliamentary Secretary to the Labour Minister of Portugal.[2] He also worked as the Administrator of the Comunidades of Salcete[3]. Due to his open defiance of Portuguese restrictive rules and for expressing his thoughts, he earned the hatred of the ongoing regime, and the paper that was being edited by him '*Jornal da India*' got suspended by Governor Francisco Manuel Couceiro da Costa.[4] His letter known as '*carta politica*' to the Governor was in retaliation to this suspension in which he minced no words. He had brought out another publication '*Rebate*' to express his thoughts and he already warned the Governor that he will shout out everywhere if the Rebate too wouldn't work out in expressing his thoughts.[5] He had to relocate to Bombay after the colonial government filed a suit against him after his fiery speech against the hostile Portuguese activities. There too he continued his mission in support of civil rights through a journal '*Portugal e Colónias*' and also lent a hand by sponsoring another journal '*A Voz da India*'. He even participated in elections in the year of 1945 but the rigged elections shut all the hopes of representing Goan issues in the Portuguese Parliament.[6] He was among those Goans who did not visualize complete liberation from Portugal. He wished Goa to be a full pledged state within the Estado da India but not as a colony. He wished that Goans should have equal rights just as the citizens of the Metropolis do.[7] His interview with the 'Free Press Journal' based in Bombay landed him in serious trouble as the Portuguese government considered that his words against the policies of the colonial government and in support of the civil disobedience movement launched by Dr. Lohia on 18th June 1946, have made an irreparable loss to the government's image. Consequently, he was arrested and imprisoned at Aguada jail. He was tried by the TMT, accused of '*endangering external security of the State*'.[8] His case is evidence of a Portuguese suppressive regime where a citizen of a colony cannot even ask for basic civil liberties and express his views about the rulers. Those who dared to ask for freedom had to face more cruel actions by the Portuguese in the later days.

Adv. Telo de Mascarenhas was in Portugal before and during the initial years of the dictatorial regime. Salazar was teaching in the Faculty of Law before becoming the Prime Minister of Portugal. He used to teach Political Economy at Coimbra where Telo de Mascarenhas studied and obtained his law degree.[9] He had written an article titled '*Death to the Idols*' which got published by '*O Bharat*' fearlessly.[10] Through this article he questions the falsehood propagated by the Portuguese through their education curriculum. He declares that Portugal is not their Motherland as being taught in Goan schools, neither they are Portuguese and they don't teach the students the fact that their Motherland is India.[11] This article received a criminal

proceeding, both for him and the publisher of *O Bharat*.[12] His was defended by Antonio Furtado at Lisbon Court who was his friend and also a nationalist from Goa. He along with his friends started '*Centro Nacionalista Hindu*' (Hindu Nationalist Centre) which became a platform for incubation and propagation of the nationalist ideas.[13]

Adeato Barreto and Jose Paulo Teles (another Law graduate) were his other Goan friends in Portugal. They were successful in establishing the Indian Institute exclusively for the study of Indian history and philosophy within the Arts faculty of the University at Coimbra.[14] This was done with the help of the liberal-minded faculty there right under the nose of the dictatorial government.

In a letter addressed to Salazar, Telo de Mascarenhas opined that '*to dominate a people against their will is to offend the fundamental principle of human dignity*'[15] and made an appeal for the release of the political prisoners, to pull back the expeditionary forces, to restore the civil rights and to accept the desire of the Goans for the Independence from colonial rule.[16]

He was of the conviction that non-violence can't bring freedom for the Goans. Particularly after the liberation of Dadra and Nagar Haveli by a handful of Goan nationalists with the help of a few Indian supporters, he expressed his views that few more such attempts are enough to make Portugal understand that Goans are willing to die for the cause of their motherland and will not hesitate to tread the path of force.[17] He was an active member of NC(G) in Bombay.

Adv. Laxmikant Venkatesh Prabhu Bhembre, an advocate from Quepem, in a letter addressed to the Governor of Estado da India, said that they had to organize a meeting of Goans under his presidentship at Londa in Karnataka because of the restrictions on civil liberties imposed by the colonial government.[18] He further said that in that meeting it was decided to form the organization 'Nation Congress of Goa' so that they can fight in peaceful means for securing civil rights.[19] He demanded the complete abolition of all those decrees and other such acts that are restricting civic liberties, right from the constitution, colonial act, carta organica, the overseas administrative reforms, the decrees against the freedom of public meetings, against the freedom of the press, and many other fascist decrees.[20]

Venkatesh Vishnu Vaidya, another Goan nationalist while giving the notice to the Governor General of the Estado da India about his decision to offer Satyagraha at the motor stand of Quepem and to break the prohibitive law on addressing the public, mentions Laxmikant Bhembre who had disobeyed this dictatorial law previously. He reiterates Mr. Bhembre's demands for the civic liberties.[21]

Freedom of the press, freedom to organize public meetings, and to create institutions are the basic civil rights of any modern society, that were suppressed in colonial Goa. News related to the burning issues like shortage of rice and its sky-rocketing prices, petroleum, and the news related to Indian leaders and the Indian national movement used to be curbed from getting published in Goa. To thwart these prohibitions, nationalists from Goa started to subvert their writings and also started getting them published in Bombay, Belgaum, Pune, and Dharwar. There was spurge in the writing of novels, plays, and poetic genres so as to communicate the message among the larger audience without being suppressed or penalized.

The colonial government was delaying in giving approval even for the Kanya Shala, i.e., school for girls. Hindu Sangha, League of State of India were among the many such organizations whose statutes had no hope of getting approved.[22] Since it had become utterly impossible to create and organize political organizations of national character in Goa, they had to organize National Congress of Goa from Bombay in mainland India.

Press censorship had reached a level where news-papers of national character had to deposit amount between eight to fifteen thousand of rupees to the government's treasury depending upon the number of the pages being published.[23] The title of the publication needs prior approval and the content needs to be verified and then it may straightaway end up censored outrightly, legal implications might follow as well.[24] Goan nationalists were left fuming as they were forced to envy the neighbouring British – India. Though the censorship existed there too and that was not liberal either, the extreme curbs that existed in Portuguese Goa compelled them to choose the lesser evil.[25]

Adv. Antonio Furtado: He was from Carmona, Salcete in Goa. He was graduated in Law from Lisbon. He was a friend of Telo de Mascarenhas and when the latter was facing criminal proceedings in Portugal he defended him.[26] Upon returning to Goa, he worked in the best offices as the Administrator of the Comunidades and in the Administrative Tribunal but all the hell let loose when he flatly refused to sign a statement issued by the Government in Goa against the then Indian Prime Minister Nehru's statement about the future of Goa in the year of 1950.[27] Portuguese has put his house under surveillance and his activities were closely being watched. His life partner, Berta Menezes Bragança was the niece of T. B. Cunha who is considered as the 'father of Goan Nationalism'. They had to escape to Belgaum to evade the probability of arrest. He started publishing and editing the magazine which became the mouthpiece of Goan nationalism titled '*Free Goa*'.[28] Through this they have reached out to the

Goans living in Indian cities like Bombay, Pune, Belgaum, Dharwad, etc, along with Goa. Morarji Desai, the then Chief Minister of the Bombay State, in a public letter addressed to Antonio Furtado reveals the '*Indian Government's policy and anxiety to admit as soon as possible the people of Portuguese possessions into the Democratic Republic of India*'.[29] But the Portuguese government has banned *Free Goa* along with several other Indian and Goan newspapers. Thus, making it difficult to frisk through the borders and reach the Goan readers.

Adv. Panduranga Jagannath Sinai Mulgaocar: He was a native of Molcornem of Quepem, living at Mapusa. He had obtained Sanad in Portuguese Law and also a Diploma in Portuguese Law.[30] He was the brother-in-law of Adv. Gopala Apa Kamat who was from Panaji and used live in Bicholim.[31] Both of them were nationalists and were active members of the National Congress of Goa. Any important correspondence of NC(G) used to go via these advocates. They were responsible for organizing the meets of NC(G) in Karwar for the nationalist Goans.[32] They, along with Advocate Teles and Shankara Dessai were planning to offer Satyagraha in violation of the prohibitive orders imposed by the Portuguese.[33] Both of them were accused of organizing the meets, conducting and participating in subversive activities, and also attending the meets in Porvorim and Paitona at Dr. Martin's residence.[34] They were arrested and tried by the TMT for the crime of desiring freedom from colonial rule.

Adv. Libia Lobo Sardessai: She was born in Porvorim, Goa. She had started taking part in the liberation movement in Bombay where she obtained her degree in Law. When every meet was being scrutinized and penalized, every piece of article, booklet, pamphlet, and newspaper was coming under stringent censorship, nationalist Goans started looking for an alternative platform of communication where they can reach a large audience and establish a connection with all the citizens of Goa. At this juncture, Libia Lobo Sardessai along with Vaman Balakrishna Sardessai and Nicolau Menezes found a way out.[35] They started an underground radio station called 'Voz de Liberdade' (Voice of Freedom) in 1955 which they used to run from different localities like Castlerock, and Belgaum in Karnataka to evade any attacks or confiscations by the Portuguese police. Her imposing voice broadcasting nationalist information to the Goans, and her dedication to the cause of Goa's freedom had earned her appreciation from everyone. It was her voice that had given an ultimatum to the Portuguese armed forces stationed in Goa to surrender to the incoming Indian armed forces on 17th of December 1961 and it was her voice that announced the news of liberation to the Goans on 18th of December 1961.[36]

Adv. Tony Fernandes: Sebastião Fernandes was popular as Tony Fernandes. He was from Sanvordem from Sanguem tehcil of Goa. He was qualified advocate from Karnataka University. Having seen the fate of peaceful satyagrahis in the hands of the Portuguese police and army, he took the path of armed rebellion against the colonial regime. He was part of the revolutionary organization Azad Gomantak Dal (AGD) and rose to the position of its General Secretary (1957 – 61).[37] He took part in many armed assaults against the Portuguese police outposts, mines, railway lines, and other places of colonial power. The liberation of Nagar Haveli from the Portuguese is the feather in the cap of the AGD and Tony Fernandes too participated in this action to liberate Nagar Haveli in July - August 1954.[38] The role of Tony Fernandes in awakening the masses in the regions of Quepem, Sanguem and organizing the cadres in support of Goan liberation movement is remarkable. Post-liberation he went on to become the law minister and became a household name in his constituency Sanguem due to his ever-readiness in serving his people.[39]

Adv. João Francisco Caraciolo Cabral: He was from Nagoa, Verna in Goa. He was graduated in Law from Lisbon and had secured B.Sc from London. He was employed with the Anglo-Portuguese bank in London but was shown pink-slip due to his active participation in the organizing support for the cause of Goan freedom there.[40] He was behind the organization '*Goa League*' and the publication of '*The Goa News*' from London. *Goa – Goan Point of View* was a booklet published by him and he contributed numerous articles to the papers of London spreading the news about the conditions of Goans under the Portuguese regime and gathering support against colonialism.[41] He was selected as a member of the Indian delegation to the International Court of Justice regarding the case of Right of Passage to Dadra and Nagar Haveli.[42] According to Judge Chagla, what the Portuguese were calling as their right to passage and the facts they displayed were nothing more than '*some revocable facts of curtesy and accommodation by the British authorities'*.[43] Dadra and Nagar Haveli were liberated in 1954 by the freedom fighters and people. It was administered by the Varishtha Panchayat of the people from August 1954 to 1961. Even while the International Court of Justice and Portugal considered them as part of Portuguese possessions, the people of Dadra and Nagar Haveli maintained their freedom as well as their allegiance to India. He used to think like a global citizen and his mission was to eradicate the evils of colonialism from the face of the earth. As such he worked along with the nationalists from Angola, Mozambique, and other African colonies of Portugal.[44] He also run the bulletin named '*Portuguese and Colonial Bulletin'*. He was instrumental in organizing a Seminar on Portuguese Colonies at Delhi prior to the

liberation of Goa.[45] Thus, consolidating the worldly opinion in support of the liberation of all the Portuguese colonies.

DEFENDERS OF FREEDOM FIGHTERS

The defenders of the freedom fighters inside the Territorial Military Court in Goa were also used to be the sympathizers of the Goan liberation movement. Because of their own conviction about the ideas of freedom and nationalism, they could defend the political prisoners of varied backgrounds. Some of them were in no position to pay their fees or any penalty imposed by the Court. While the TMT proceedings state that actions were taken for the service of the 'nation', i.e., Portugal, the 'nation' in the minds and hearts of the Goan political prisoners and their defenders was 'India', that is 'Bharat'. That is why the off-court actions of these defense counsels were oriented toward spreading 'Indian Nationalism.'

Advocate Sridhar Rama Tamba:

Sridhar Tamba was an advocate from Panaji, North Goa which used to be known as Nova Goa during colonial times. It wasn't easy to be a defense counsel to the freedom fighters of Goa. But he consistently braved to be on their side and defended many of them like Shirubhau Limaye, Prabhakar Vaidya, Mohan Ranade, Ramdas Chafadkar, etc.[46] This naturally brought suspicion upon him among the colonial administrators. He was constantly under the radar of the Portuguese special police. Consequently, in the year of 1957 and was tried by the TMT. A look at the accusations raised against him gives an idea of his intense involvement in the Goan liberation movement.

01. That, in the month of March 1955, he made suggestions to the Indian Consul to take stringent measures while implementing the economic blockade against colonial Goa. He suggested controlling the exporting of Indian products to Goa via Singapore and other countries, for non-cooperation of Indian dock-men at the port of Bombay and any other Indian ports with the ships and boats bound to Mormugao, to boycott Pakistan-based ships carrying coal in Bombay and also to compel the ship-workers of Pakistan to boycott the Portuguese ships at the port of Karachi, to stop the air-control for the Goan air-craft carrier for the route of Goa – Daman, Diu – Karachi to restrict any quick movements of the Portuguese, to impose a prohibition on imports of cashew from Mozambique in order to put the trader-collaborators of the Portuguese in difficulties.[47]
02. That, he provided Nicolaou Menezes with the information and suggestions for his lectures and other broadcasts of propaganda against 'our country' through the 'Voz da

Liberdade' (Voice of Liberty) radio being run from secret locations about the intentions of the Portuguese behind discovering sea-route to India, on their management of the accounts of the Estado da India (State of India), and also about the convictions in the Military Court.[48]

03. That he had provided the information about Portuguese legislations to the Egyptian representative Mr. Khalil, as asked by the former Indian Consul, Mr. Coelho as that information may be brought by the Portuguese in the case at the International Court of Justice in Hague.[49]
04. That he made contacts with a 'terrorist' Apa Karmalkar and along with advocate Gomes Pereira discussed with him matters of political nature and also about his separation from motherland.[50]
05. That he provided him with the copy of the Treaty of Sedation of Nagar Haveli to Portugal to be used by the Government of India against the Portuguese in the Court of Hague.[51]
06. That he had been working as a correspondent and advisor of the political prisoners as can be asserted from his various correspondences.[52]

These accusations show the serious concerns of the colonial government of Goa that time. The economic blockade imposed by the government of India, the problem of passage to the Portuguese-controlled territories of Daman and Diu through Indian territory, and the ongoing case at the International Court of Justice are the key issues that were giving nightmares to the Portuguese then. And Sridhar Tamba was apparently advising the Indian Consul on the ways to effectively implement the economic blockade against colonial Goa. As the sources suggest his advises were actually taken seriously by the Indian side. Mahan Ranade, one of the prominent freedom fighters mentioned in his autobiographical account about the Bombay Dock Workers Union that boycotted any cargo meant for Goa.[53]

About him being the correspondent and advisor of the political prisoners, he worked relentlessly not only for the well-being of the imprisoned Goan freedom fighters but also for their distressed families. Several political prisoners used to write, seeking his help and advisory on various issues and letters expressing their gratitude. For example, a letter by Antony D'Souza to Mr. Tamba reveals that there was an in-arbitrary decision of a sharp decrease in the subsidy for the prisoners. Also mentions that their application regarding this to the Governor General has resulted in nothing. Through this letter, he seeks the help of Mr. Tamba

to enquire about the status of their application by approaching the Procurators and if it is inevitable meet the Governor General himself.[54]

Yet another letter by a freedom fighter written from Reis Magos jail, enquires him about the news that there was a change of strategy by Purushottam Kakodkar, a prominent freedom fighter of Goa, and gives him names of the prisoners whose families need immediate financial relief.[55]

V. H. Coelho, in a letter written from Sachvalaya, Bombay, in 1956, requested Mr. Tamba to furnish with the information related to Acto Colonial, Carta Organica do Imperio Colonial Portugues, and Reforma Administrativa Ultramarina, all as on 15th August 1947 and if any subsequent changes made to the above. He requested Mr. Tamba to send this information through Mr. Khalil, the Egyptian First Secretary.[56] Mr. Khalil also submitted a report to the Government of India pertaining to the miserable conditions of the political prisoners in the jails at Goa.[57] It is no secret to guess that Mr. Tamba was the major source of information about the political prisoners' conditions in Goan jails.

And a letter addressed to Mrs. J. C. Pinto, dated 27th September 1956, by Mr. Tamba is fully subverted so as to even if it falls in the hands of the colonial authorities, they can't ascertain the intentions of the writer. The following extract from his letter shows clearly his opinion as well as a suggestion to the nationalists in Mumbai.

"…*Only in case the Indian army people start guiding the sabotage work, and direct the attacks on our frontier outposts as the Greek army people are doing in Cyprus only then the Indians by sheer guerrilla work and military strength will force us to obey them*…"[58]

He understood by then that without the support of the Indian government and army it is going to last forever to get rid of the Portuguese dictatorial regime. So, he had cleverly hinted at the nationalists to negotiate for support from the Indian army. Ultimately after about five years, in the year of 1961, Indian government finally had to send the army to liberate Goa.

ACTO COLONIAL AS PERCEIVED BY THE ADVOCATES AND FREEDOM FIGHTERS

Salazar even before becoming the Prime Minister of Portugal while being the finance minister drafted the *Acto Colonial* which subsequently became a legislation. Laxmikant Venkatesh Prabhu Bhembre contested the colonizers' claim that 400 years of Portuguese rule was not that

of subjection. He mentioned Dr. Antonio Aguiar's opinion about the *'Acto Colonial*' (Colonial Act) that,

"*…It was the Metropolis which exclusively in its interest dictated their laws, controlled their trade, imposed their taxes, etc. and to the natives, no rights were recognized; only obligations were imposed on them and no guarantees were provided to them against the fiscal and administrative abuses…*".[59]

The above words are just a small part of Dr. Aguiar's complete statement that unmasks the colonial propaganda of civilizing mission and the welfare state in the colonies.

Now let's see for ourselves what is there in *Acto Colonial*;

"*Art. 2º. É de essência orgânica da Nação Portuguesa desempenhar a função histórica de possuir e colonizar domínios ultramarinos e de civilizar as populações indígenas que nêles se compreendam, exercendo também a influencia moral que lhe é adstrita pelo Padroado do Oriente*."[60]

While article no. 2 of the colonial act justifies the colonization of the overseas domains as the organic essence of the Portuguese nation and the civilizing mission of the Portugal as a moral influence supported by the Padroado de Oriente, according to article 7, The State is not going to alienate any part of the colonial territories and rights of Portugal except in case of rectifications approved by the National Assembly.[61]

As such *Acto Colonial* not only justifies the colonization drive of Portugal but also authorizes it to subjugate the colonies forever. T. B. Cunha, the father of Goan Nationalism pointed out this and said that this law denies the Goans' right to self-determination.[62]

But Salazar had to make changes to this atrocious colonial act subsequently and incorporate it into the constitution in order to refute India's claims to Goa, to deny that it is not a question of colonialism, and display that as a matter of Portuguese national integrity as Goa is not a 'colony' but an overseas 'province' of Portugal. So, it cannot be alienated from Portugal and no question of integration with India arises. Though the words changed from colony to province, there was no change in the fate of the Goans.

In a letter published in "*Le Monde*", a French daily, the Director of the Portuguese Information Agency responding to a letter an '*Indian in Goa*', claims that Salazar had abolished the designation of 'colonies' and replaced it with the 'overseas provinces' and also claims that

irrespective of the fact that the citizens of Goa, Daman & Diu are of Indian race or from Europe, they are given equal rights and responsibilities as Portuguese citizens. This letter also claims that the citizens of Goa, Daman, and Diu are eligible for any post.[63] *Le Monde* published the response to this letter of the official of Portuguese propaganda from the '*Indian in Goa*' to the knowledge of its readers. The *Indian in Goa* in his response exposes the racialism being followed by the Salazar government by pointing out that in practice the ranks of officers in the Portuguese Army are out of reach for the persons of Asiatic and African ranks.[64]

Advocate Jose Paulo Santana Desidério Lucas Teles, while defending Tristão Bragança Cunha in Territorial Military Court, mentions article 26 of the colonial act that guarantees the colonies '*administrative decentralization and financial autonomy that are compatible with the constitution, their state of development, and their own resources, without prejudice to Article 47*' which says financial autonomy can be put to some curbs at times of grave situations to the revenue or any dangers posed to the Metropolis.[65] He points out the irony of these guarantees where Goan citizens like T. B. Cunha had to be arrested and imprisoned for expressing their opinions about the lack of very civic privileges that are guaranteed by the colonial act.[66] Thus, the farce and fallacy of the Acto Colonial and many such legislations forced many Goans to raise their voice for civic liberties.

Teles was one of the friends of Telo de Mascarenhas and Antonio Furtado while in Lisbon and also after coming back to the motherland. He was one of the defendants constituted along with Rui Gomes Pereira for Adv. Sridhar Tamba when the latter was facing the trial under TMT.[67] While defending T. B. Cunha, he questioned the very existence of the TMT and opined that it is incompetent to even try the case of T. B. Cunha.[68] Territorial Military Tribunal as a court at Estado da India was formed as a section of the Special Military Court of Lisbon. But according to the art. 41 of the Decree Law Nº 35. 044 dated 20th October 1945, the Special Military Court has lost its power to pass down its competence to the ordinary courts. [69]

Though no appeal can be made against the sentence of the Territorial Military Court which acts as the section or delegation of the Special Military Court to the Supreme Judicature, but, in case of the incompetence of the Territorial Military Court, it is admissible to appeal to the Supreme Court of Judicature in Lisbon.[70] Teles argued and appealed that when the Special Military Court itself was abolished how can a section of it can try the cases and he also questioned its authority to deport Mr. Cunha out of the colony. He argued that it is in violation

of Para 1 of Article 208 of *Carta Organica* (Organic Charter) that prevents sending on exile as a penalty outside the colony.[71]

Defending the political prisoners had its own merits that fetch some adverse gifts like getting black-listed. But that too couldn't deter Teles from participating in nationalist activities.

Adv. Vinayaka Sinai Kaisare: Mentioned as Vinaeca Sinai Coissoro in Portuguese documents and TMT proceedings, he was one of the courageous advocates of Goa who defended many freedom fighters. He had defended Porfirio da Silva Lobo, a student from Assolna. He was arrested and imprisoned at the jail in Aguada fort and was tried by the TMT.[72] Several accusations were levelled against him. One of the charges against him was that he was a member of the United Front of Goans (UFG) and also of the National Congress of Goa (NCG). TMT proceedings termed both the organizations as secret and illegal and had intentions to snatch Goa from Portugal and integrate it with neighbouring India.[73] Adv. Kaisare argued that neither UFG nor NC(G) is a secret organization. Both were registered organizations in India and their activities are public by nature. The administrators of India are aware of the existence of these organizations.[74] And the organization, UFG was already dissolved. Being a member of these organizations can not be construed as committing a crime and the charges of participating in subversive activities are filed under mere suspicion. And that his client was not involved in any anti-national activities neither in Goa nor in India.[75] By doing so, Mr. Kaisare had successfully brought clarity that being a member of any organization doesn't amount to a crime that the Police or system accuse them of. Unless the member carries out any action that is subversive, he cannot be charged for just being a member of any organization. As already told by Adv. Laxmikanth Venkatesh Prabhu Bhembre, since the freedom of forming associations was prohibited, NC(G) had to be organized from other places like Bombay and Belgaum. Their meetings were being held at places near the borders of Goa. The charge here was that Goans cannot think and act for the liberation of Goa from Portuguese rule and should not think about integrating with India. In yet another case, defending Gurunath Kelekar, Mr. Kasare had argued that a person has to be punished for the crimes he did but not for having different ideology or thoughts.[76] While arguing for Mr. Kelekar that his thoughts are for integrating Goa with India, but there was nothing to prove any such actions from him, he actually defended the freedom of thought and to some extent expression too.

Thousands of Goans used to be arrested merely on the grounds of suspicion or because they were acquaintances of the nationalists. A simple chant of Jaihind or a photo of an Indian

freedom fighter at home can land anyone in jail. Kaisare had defended many poor workers in Territorial Military Court. Chandrakant Mesta was one such poor boatman who was accused of carrying out the revolutionary activities just because he helped a few underground nationalists cross the river in his small boat unknowingly.[77]

The increasing number of arrests of unassuming civilians made the situation of civil rights worse. But there were many Goan advocates who willingly started accepting the cases of the civilians as well as the political prisoners for the sake of humanity and freedom. Advocates, Antonio Gomes Xavier Pereira, Rui Gomes Pereira, Octaviano de Silveira de Saldanha, Mário Batista Cardoso, Datta Folu Dessai, António José João Francisco Pinto de Menezes, Sócrates do Costa, Herberto Alberto do Amaral Sampaio Alferes, Mahadev Yeshwant Sinai Coissoro, Mahadev Yeshwant Rao and from Lisbon, Dr. Claudio Jorge and Dr. Antoni Augusto Correia de Aguiar, all of them contributed their lot in protecting the vulnerable and making sure that no innocent is punished.

CONCLUSION

Advogados of Colonial Goa have proven themselves as the upholders of Justice and made remarkable contributions to safeguard their motherland from being a 'forever possession' of alien rulers. Their fight was for civil rights, for the right of self-determination, and also for the right to freedom. By defending the political prisoners, they have defended their own right to practice law, and practice justice without bias. In their varied functions and varied roles in the Goan liberation movement, they have brought about political, constitutional, and legal awareness among the masses of Goa. They were successful in mobilizing international support for the Goan cause before and immediately after the liberation too. They acted as catalysts in organizing the resistance against Portuguese colonialism among its other colonies. By questioning the partisan attitude of the colonial rule they have made foundations for a just society post-liberation.

End Notes:

1. Shirodkar, P. P., ed. *Trial of José Inácio de Loyola*, Source material for the history of the freedom movement of Goa, Vol. IV, Panaji: Goa Gazetteer Department, Government of Goa, March 1994. See *The Biographical Sketch*.
2. *ibid.,*
3. *A Época*, Ano 4º, Nº 189, 13 de junho de 1928, p. 2.
4. Shirodkar, P. P., ed. *Trial of José Inácio de Loyola*, Source material for the history of the freedom movement of Goa, Vol. IV, Panaji: Goa Gazetteer Department, Government of Goa, March 1994. See *The Biographical Sketch*.
5. *ibid.*,
6. *ibid.*,
7. *ibid.*,
8. *ibid.*,
9. Kelekar, Shashikar., *Telo de Mascarenhas*, New Delhi: Publications Division, Ministry of Information and Broadcasting, Government of India, June 1984, p. 13.
10. *ibid.*, p. 17.
11. *ibid.*,
12. *ibid.*, p. 18.
13. *ibid.*, p. 19.
14. *ibid.*, pp. 19, 20.
15. Kelekar, Shashikar., *Telo de Mascarenhas*, New Delhi: Publications Division, Ministry of Information and Broadcasting, Government of India, June 1984, p. 34.
16. *ibid.*, pp. 33 – 35.
17. *ibid.*, p. 46.
18. Shirodkar, P. P., ed. *Trial of Laxmikant Venkatesh Prabhu Bhembre*, Source material for the history of the freedom movement of Goa, Vol. II, Panaji: Goa Gazetteer Department, Government of Goa, 1992, p. 9.
19. *ibid.*,
20. *ibid.*, p. 11.
21. Medeira, B., ed. *Trial of Venkatesh Vishnu Vaidya*, Vol. XII, Panaji: Goa Gazetteer Department, Government of Goa, 2016, p. 5
22. *ibid.*, pp. 5, 6.
23. *ibid.*, p. 6.

24. *ibid.*, p. 6. *A Voz da India* was one such daily that had to pay twelve thousand rupees. Cases used to be filed against authors of the articles and the editors of the newspapers. For example, Bharatkar Hegde Dessai, editor of *O Bharat*.
25. Cunha, T. B., *Goa's Freedom Struggle (Selected Writings of T.B. Cunha)*, Bombay: Dr. T. B.
    Cunha Memorial Committee, 1961, pp. 141, 142.
26. Kelekar, Shashikar., *Telo de Mascarenhas*, New Delhi: Publications Division, Ministry of Information and Broadcasting, Government of India, June 1984, p. 18.
27. Shirodkar, P. P., ed. *Who's Who of Freedom Fighters – Goa, Daman and Diu*. Vol. I, Panaji: Goa Gazetteer Department, Government of Goa, Goa, 1986, p. 102.
28. *ibid.*,
29. *Free Goa*, 25th January, 1954, p. 3.
30. Dicholkar, M. L., ed. *Trial of Peter Alvares and Others*, Vol. XI, Panaji: Goa Gazetteer Department, Government of Goa, 2015, P. 129.
31. *ibid.*, p. 131.
32. *ibid.*, p. 116
33. *ibid.*, p. 63
34. TMT proceedings: Ordem. No: 695, Processo No: 891, Ano de 1954, folio. no. 3 (R), from *HAG*, Panaji.
35. Shirodkar, P. P., ed. *Who's Who of Freedom Fighters – Goa, Daman and Diu*. Vol. I, Panaji: Goa Gazetteer Department, Government of Goa, Goa, 1986, p. 302.
36. *ibid.*, p. 303.
37. *ibid.*, p. 102.
38. *ibid.*, p. 101.
39. *ibid.*, p. 102.
40. *ibid.*, p. 37.
41. *ibid.*,
42. *ibid.*,
43. Shirodkar, P. P., *Goa's Struggle for Freedom*, Delhi: Ajanta Publications, 1988, p. 199.
44. Shirodkar, P. P., ed. *Who's Who of Freedom Fighters – Goa, Daman and Diu*. Vol. I, Panaji: Goa Gazetteer Department, Government of Goa, Goa, 1986, p. 37.
45. *ibid.*,
46. Shirodkar, P. P., ed. *Who's Who of Freedom Fighters – Goa, Daman and Diu*. Vol. I, Panaji: Goa Gazetteer Department, Government of Goa, Goa, 1986, p. 346.

47. TMT Proceedings, Ordem. No: 1621/1526, Processo No: 46/57, Year of 1957, folio.no. 234 from *HAG*, Panaji.
48. *ibid.*,
49. *ibid.*,
50. *ibid.*, folio.no. 235
51. *ibid.*,
52. *ibid.*,
53. Ranade, Mohan., Struggle Unfinished. Goa, Vimal Publications, India, 1990, p. 89.
54. TMT Proceedings, Ordem. No: 1621/1526, Processo No: 46/57, Year of 1957, folio.no. 70 from *HAG*, Panaji.
55. *ibid.*, folio.no. 74.
56. *ibid.*, folio.no. 76
57. Kunte, B. G., ed. *Goa Freedom Struggle Vis-à-vis Maharashtra*, 1946 – 1960, Vol. VIII, Part. II, Mumbai: Gazetteers Department, Government of Maharashtra, 1978, p. 34.
58. TMT Proceedings, Ordem. No: 1621/1526, Processo No: 46/57, Year of 1957, folio.no. 68 from *HAG*, Panaji.
59. Shirodkar, P. P., ed. *Trial of Laxmikant Venkatesh Prabhu Bhembre*, Source material for the history of the freedom movement of Goa, Vol. II, Panaji: Goa Gazetteer Department, Government of Goa, 1992, p. 12. And Dr. Antoni Augusto Correia de Aguiar was the Goan advocate based in Lisbon and used to defend the cases of the Goan and Indian political prisoners there.
60. *Acto Colonial*, Nova Goa: Imprensa Nacional, 1935, p. 1.
61. *ibid.*,
62. Shirodkar, P. P., ed. *Trial of T. B. Cunha*, Source material for the history of the freedom movement of Goa, Vol. I, Panaji: Goa Gazetteer Department, Government of Goa, 1991, p. 155.
63. 'Salazar's Racialism Unmasked', *Free Goa*, 10th December, 1953, p. 3.
64. *ibid.*,
65. Shirodkar, P. P., ed. *Trial of T. B. Cunha*, Source material for the history of the freedom movement of Goa, Vol. I, Panaji: Goa Gazetteer Department, Government of Goa, 1991, p. 71.
66. *ibid.*, p. 71.
67. TMT Proceedings, Ordem. No: 1621/1526, Processo No: 46/57, Year of 1957, folio.no. 356 from *HAG*, Panaji.

68. Shirodkar, P. P., ed. *Trial of T. B. Cunh*a, Source material for the history of the freedom movement of Goa, Vol. I, Panaji: Goa Gazetteer Department, Government of Goa, 1991, p. 107 - 108.
69. *ibid.*, p. 107.
70. *ibid.*,
71. *ibid.*, p. 108.
72. TMT Proceedings, Ordem. No: 642, Processo. No: 933, Ano de 1953, folio. No. 93, from *HAG*, Panaji.
73. *ibid.*,
74. *ibid.*,
75. *ibid.*,
76. Kanekar, Suresh., *Goa's Liberation and Thereafter – Chronicles of a fragmented life*, Goa 1556, December, 2011, Saligao, Goa. Pp. 48, 49.
77. TMT Proceedings: Ordem. No: 455/424, Processo No: 42, Ano de 1957, folio. no. 107, from *HAG*, Panaji.

ASSESSING HOW THE EVOLUTION OF WOMEN IN LAW MAKING REFLECTS THE EMPOWERMENT OF SOCIETY

ABSTRACT

If you want something said, ask a man; if you want anything done ask a woman.

- Margaret Thatcher

In the backdrop of recent judgment of the Supreme Court on the legality of abortion rights which triggers questions on the gender sensitivity. It is essential to deliberate upon the effectiveness of the laws due to the involvement of more women in the process of law making. Women with different perspectives, attitudes and agendas, may put forward better legislations with gender equality. The paper has analysed the impact of more women in the law-making process on empowerment and capability building of society as well as the socio-legal status of women. It has examined the policy priorities of women legislators regarding their attitudes towards welfare policies, sexual violence, social exclusion, their role in improvement of legal system and resource management. One of the major challenges for women is their low representation in parliament/legislative assemblies. The paper has explored the aspect of impact of leadership and participation of women in the development of local self-governance. The paper has emphasized on the evolution of gender sensitization in judiciary.

Keywords: *Women in law-making, Gender Sensitivity, local self-governance.*

INTRODUCTION

Gender is not the only identity for women.[1] They represent a wider and diverse society and centuries of multiple lived experience.[2] The pivotal role of law in empowering women runs through socio-cultural, legal, political, and economic empowerment.[3] During the early Vedic period, women were not restricted. Gargi Vachaknavi gained appreciation for her rational political thinking and Apala and Lokmudra were renowned poets and intellectual of Vedic

[1] UN- Women, *Policy Brief, Women's Meaningful Participation in Transitional Justice: Advancing Gender Equality and Building Sustainable Peace* (UN-WOMEN 2022) 7. <Policy-brief-Womens-meaningful-participation-in-transitional-justice-en.pdf (unwomen.org)> accessed 2 August 2022.
[2] *ibid.*
[3] UN-Women, *Equality in Law for Women and Girls By 2030: A Multistakeholder Strategy for Accelerated Action* (UN-Women 2019) 27. <Equality-in law-for-women-and-girls-en.pdf (unwomen.org)>

times.[4] But after the beginning of the later Vedic period, women's position in Indian patriarchal society has deteriorated as they are considered a cause of misery. They were not allowed to participate in tribal council (Sabha), but child marriage was not customary, and women can attend lectures of gurus.[5]

After the establishment of Buddhist monastery women were acceptance as nuns, though is a rank below monks, yet a step forward towards the growth of education and social status of women.[6] Women were recruited as king's bodyguards, state's spies and performers etc. in Mauryan administration.[7] Later, Gupta Era (300-700 AD) was no different, though women were idealize in arts and also occupied positions of teachers and philosophers, yet they had subordinate classification.[8] During 800-1200 AD, Sati (a practice of suicide/ forced killing) was a popular custom, introduction of chivalry among upper-class and admiration towards masculine fighting skills.[9] During the Mughal era, the inferior position of women continued with the practices of pardah, separate corners in houses 'zenana' and are supposed to be protected by men; but, women in peasant class shared less seclusion an more freedom.[10] In the southern parts of India, during 900-1300 AD, the practice of devadasis and slavery was prevalent and only upper-class women and courtesans had some freedom to defy the conventional rules of the society.[11] However, a wave of change has been noticed in the Bhakti Era, where women were encouraged to participate in social gatherings and socio-religious reforms movement.[12]

At the time of struggle for independence of India, enlightened women appalled the doctrines of individualism and equality and marched the movements for social reform and freedom struggle.[13] The progress has been started in 1829 with the abolition of sati and legalisation to the widow remarriage.[14] Self-confident women leaders of 20th century have established and All India Women's Conference (AIWC) in 1927, with an egalitarian approach and objective to secure social justice, equal rights and opportunity for all.[15] The AIWC has made huge contribution towards legal reforms through formulation of some significant acts: Sarda Act

[4] TN, *History* (first published in 2007, TN Textbook and Educational Services Corporation 2015).
[5] D.N. Jha, *Ancient India: In Historical Outline* (Manohar, 2011) 56,
[6] Romila Thapar, *A History of Indi*a, Chapter:3 (first published 1966, Penguin 1990).
[7] Romila Thapar, *Early India: From the Origin to AD 1300* (Penguin 2002) 193.
[8] Thapar, (n 6) Chapter 7.
[9] Thapar, (n 6) chapter 11.
[10] Thapar, (n 6) chapter 12.
[11] Thapar, (n 6) chapter 9.
[12] Thapar, (n 6) chapter 13.
[13] Rajiv Ahir, *A Brief History of Modern India* (Spectrum 2019) 196.
[14] Regulation XVII, A.D. 1829 of the Bengal Code; The Hindu Widows' Remarriage Act 1856.
[15] Ahir, (n 13) 198.

(1929), Hindu Women's Right to Property Act (1937), Factory Act (1947), Hindu Marriage and Divorce Act (1954), Special Marriage Act (1954), Hindu Minority and Guardianship Act (1956), Hindu Adoption and Maintenance Act (1956), the Suppression of Immoral Traffic in Women Act (1958), Maternity Benefits Act (1961), Dowry Prohibition Act (1961) and Equal Remuneration Act (1958, 1976).[16]

Pandita Ramabai Saraswati struggle for medical education led to the establishment of Lady Dufferin College; Establishment of Home Rule League by Anne Besant; movement for girls' education and women's rights by Savitribai Phule are few examples of social reforms led by Indian women.

At international level frameworks have been formulated to guide the nations in developing gender quality in domestic laws and policies. The sustainable development goals (2030 Agenda) mentions achieving gender equality and women empowerment (Goal 5); justice for all (Goal 16).[17] Universal Declaration of Human Rights, 1948, paves a firm way to quality participation of women by providing rights and freedom to all (Art 2); recognition to all (Art 6); equality before law to all (Art 7) and effective remedy in case of violation of rights (Art 8).[18] The International Covenant on Civil and Political Rights (1966) provides for the equal civil and political rights (Art 3) and equal opportunity to participate in public affairs and open access to public service (Art 25).[19]

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, take measures to eliminate discrimination against women by ensuring their involvement in formulation and implementation of government policy (Art 7).[20] In ensuring equal access in power structures and raising their capacity, the Beijing Declaration and Platform of Action (1995) has formulated strategic objectives.[21] CEDAW and Beijing declaration are playing a significant role in structuring gender responsive laws.

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[16] Ahir, (n 13) 199.

[17] Sustainable Development Goals, <THE 17 GOALS | Sustainable Development (un.org)> accessed 2 August 2022.

[18] United Declaration of Human Rights, 1948, udhr.pdf (un.org), <Universal Declaration of Human Rights | United Nations> accessed 2 August, 2022.

[19] International Covenant on Civil and Political Rights | OHCHR, ccpr.pdf (ohchr.org), <International Covenant on Civil and Political Rights | OHCHR> accessed 2 August, 2022.

[20] CEDAW <OHCHR | Committee on the Elimination of Discrimination against Women> accessed 2 August 2022.

[21] United Nations, Beijing Declaration and Platform for Action: The Fourth World Conference on Women, Beijing, 15 September 1995. <N9627301.pdf (un.org)>, <Fourth World Conference on Women | United Nations> accessed 1 August 2022.

In order to achieve inclusive justice and promote all to participate actively in gender sensitivity, the European Union Council and African Union has adopted Conclusions on EU's Support to Transitional Justice (2015) and Transitional Justice Policy (2019) respectively.[22]

The meaningful participation of women through decision making at international level for promotion of peace and security is established under UNSCR, for justice transition.[23]

It is essential to review the progress that has been made so far, in order to ensure the involvement of the 50% of the world's population, their concerns, ideas and aspirations, as we are approaching 2030. To achieve this meaningful active participation and political awakening, reservations for women in Panchayat elections were initiated.

Women are taking various path to gain power in India.[24] To determine the influence of women on laws in various fields that has led to the empowerment of the society and to examine the effectiveness of the legislations made by women, the paper will look into 3 aspects: self-governance at local level; their priorities and evolution of gender sensitization in laws and in judiciary. The paper will deal with the following research questions in order to develop productive solution and reach a just conclusion:

1. What are the priorities of women lawmakers, their capability to empower and develop the society, with their power to legislate?
2. How effective is women's participation and leadership in the development of self-local governance?
3. How significant women's presence is for gender sensitization in judiciary?

RESEARCH OBJECTIVES

The objectives of this paper are to explore the following aspects:

1. To analyse the priorities of women legislators on empowerment and capability building of society as well as the socio-legal status of women.
2. To study the impact of leadership and participation of women in the development of local self-governance.
3. To assess the evolution of gender sensitization in the judicial system.

[22]The European Council,< pdf (europa.eu)> accessed 12 August 2022 ; African Union, <https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf > accessed 12 August 2022.

[23] UNSCR 1325: women, peace and security (2000), <N0072018.pdf (un.org)> accessed 2 August 2022; UN Secretary General's Guidance Note on Transitional Justice (2010), <TJ_Guidance_Note_March_2010FINAL (un.org)> accessed 2 August 2022.

[24] Nivedita Menon, *Gender and Politics in India* (Oxford 1999).

METHODOLOGY

The methodology of this paper is based on theoretical evaluation of the relationship between women's involvement and its impact on the legal system, social empowerment and gender equality. The paper is based on qualitative research where secondary data sources and materials are collected from various journals, books, research papers. An exploratory analysis of history, laws and judiciary is done to find out the reality of access to equality and justice.

LITERATURE REVIEW

The presence of women from diverse sections and their meaningful involvement at all levels is an essential for quality and effectiveness of their role and influence in law-making and justice.[25] Their participation influence outcomes and reflects society's wider interests and values.[26] A study on African countries showed that higher number of women legislators is likely to promote and implement gender sensitivity in laws.[27] And gender reservation has played a major role in generation higher number of representations in political system.[28]

Justice serves the needs of local women, engages them as experts and prioritize the methods locally.[29] Their entry into political and legal functioning, which could be productive for governance is constrained by the absence of gender sensitivity and mechanisms to ensure their meaningful involvement.[30] Women in most parts of the world, are either uninterested due to extreme political attitudes or due to absence of faith in their abilities to do effective functioning.[31] And their representation at global level is low.[32]

Higher representation of women may lead to fundamental reforms in political structures, legal and gender sensitization.[33] Women legislators are more likely to promote bills related to women, education, child-care and family health and are more effective than male lawmakers in having a firm control over their institutional position and personal characteristics.[34]

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[25] UN-Women, (n 1) 4.
[26] UN-Women, ibid.
[27] Elizabeth Asiedu and others, 'The Effect of Women's Representation in Parliament and the Passing of Gender Sensitive Policies' (2018) American Economic Associations <American Economic Association (aeaweb.org)> accessed 2 August 2022.
[28] *ibid.*
[29] UN-Women, (n 1) 9.
[30] S. Radha and Bulu Roy Chowdhary, 'Women in local Bodies, Kerala Research Programme on Local Level Development' (2002) CDS < 40 (cds.ac.in) > accessed 2 August 2022.
[31] *ibid.*
[32] R. Irwin, 'Dancing in the Lion's Den: Women Leaders in Local Government' (2009) Southern Cross University, Australia.
[33]UN-Women, Women's Meaningful Participation in Transitional Justice: Advancing Gender Equality and Building Sustainable Peace, UN-WOMEN (March 2022) 18. < Research-paper-Womens-meaningful-participation-in-transitional-justice-en.pdf (unwomen.org)> accessed on 2 August, 2022.
[34] Craig Volden and Alan E. Wiseman and Dana E. Wittmer, 'The Legislative Effectiveness of Women in Congress, Centre for the Study of Democratic Institutions' (2010) CSDI 1.

Over the time after independence the gender gaps in participation in voting has been reduced widely.[35] Women and men share equal proportion of population in the world and so, it is an inalienable right for women to equally represent politically.[36] However, the literature on legislators, whether men or women, and their performance is limited.

HISTORY OF WOMEN IN LAW MAKING AND ITS EFFECTIVENESS

Women's participation in decision making is not only a human right but an essential part of democracy and significant in order to consider their needs and interest.[37] By 2016, around 77 countries have either legislative candidate quota or reserved seats for women.[38]

The women's representation in national parliament has been increased from 13.1% (2000) to 25.5% (2020), however, in conflict-affected areas, it is 23.3% and only 22 countries have women as their Head of the State.[39] Till September 2021, in only 24 countries, 26 women are holding the position of Head of State/ Government.[40] Only 21% women are ministers with only 14 countries have 50% or more women ministers are in cabinets.[41]

Women's Position	**No. of countries**	**Percentage of women**
National Parliamentarian (world average)	194	26.3
National Parliamentarian	23	>40
Women Speaker (upper /lower house)	59	21.3

Table 1: Women Status as Parliamentarian as on 1st July 2022[42]

Developed Countries	**Women parliamentarian**
USA	28.6
Japan	9.9

Developing Countries	**Women parliamentarian**
China	24.9
India	14.4

[35] ECI, State-wise Voters Turnout, Election Commission of India (2019) <https://eci.gov.in/files/file/10971-12-state-wise-voters-turn-out/> accessed 11 August, 2022.

[36] Rai and N Shirin and Carole Spray, *Performing Representation: Women Members in the Indian Parliament* (Oxford 2019).

[37] Asiedu (n 27).

[38] Francesca R Jensenius, *Social Justice Through Inclusion: The Consequences of Electoral Quotas in India*, (Oxford 2017).

[39] UN Women, 'Facts and figures: Women, peace, and security' <Facts and figures: Women, peace, and security | What we do | UN Women – Headquarters> accessed 2 August 2022.

[40] UN Women, 'Facts and figures: Women's Leadership and Political Participation' <https://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures#_edn4> accessed 30 July 2022.

[41] Inter-Parliamentary Union and UN Women, *Women in Politics* (2020).

[42] IPU Parline, 'Speaker in Parliament' <https://data.ipu.org/speakers >Accessed 30 July 2022); IPU Parline, 'Women Speakers of National Parliaments' < https://data.ipu.org/women-speakers> Accessed 30 July 2022)

France	37.3
Germany	34.9
United Kingdom	34.7
Canada	30.5
South Korea	17.6
Norway	45
Australia	38.4
Singapore	29.1
Russia	16.2

Table 3: Women in parliament in developed nations as on 1st July 2021[44]

Brazil	14.8
Indonesia	21.9
South Africa	46.5
Mexico	50
Malaysia	15

Table 2: Women in parliament in developing nations as on 1st July 2020[43]

The data shows that no matter what the economical and advanced status of a country is, women representation is low. Whether developed or developing nations, mostly Asian countries has a poor record in participation of women as legislators. None of them has crossed the mark of 30 percent except Timor-Leste (40%), Nepal (33%) and Uzbekistan (33.3%). Most developed Asian countries such as Japan (9.9%), South Korea (17.6%) and Singapore (29.5%), have poor performance. However, we can see a sharp increase in women legislators in Latin American countries over 30 years.[45] Democracy is an important factor Latin American countries such as Argentina from 4% (2008) to 30% (2008) and 44.8% (2022); Croatia from 38% (2006) to 47.4% (2022) and Nicaragua with 51.7% (2022).[46]

With above data we can easily imagine the existing situation of women's meaningful participation, capacity building and gender sensitization in law-making. Reasons for a low

[43]IPU Parline, 'Global Data on National Parliament, Monthly Ranking of Women in national parliaments' < https://data.ipu.org/women-ranking> accessed 30 July 2022.

[44] IPU Parline, ibid.

[45] P Norris, 'Women's Legislative Participation in Western Europe' (1985) 8(4) West European Politics; Paxton and Hughes, *Women, Politics, and Power: A Global Perspective* (Pine 2007); R Inglehart and P Norris, *Rising Tide: Gender Equality and Cultural Change around the World* (Cambridge 2003).

[46] Sadia Hussain, 'Performance of Women in Parliament' (2022) 57(31) EPW; IPU (n 43)

representation may differ from country to country it may be a dominating religious belief;[47] or culture in Latin America;[48] or patriarchy in sub-Saharan Africa;[49] or lack of political will in US.[50] A democratic political structure have a positive impact on women representation. In India, as women are gaining education and becoming strong financially and economically, their political activeness has risen as an individual or as a part for local economic groups.[51] In India and other South Asian countries, where women held strong positions, could not change the scenario in favour of women as the leader themselves function under structures and principles written by men.[52]

Parliament/ State Assemblies	**Year of Election**	**Women contested (%)**	**Women Elected Representatives (%)**
Lok Sabha	2019	9	14.4
Rajya Sabha	2021	-	12.24
Bihar	2020	9.91	10.70
Chhattisgarh	2018	10.4	14.44
Haryana	2019	9.24	10
Jharkhand	2019	10.44	12.35
Punjab	2022	7.13	11.11
Rajasthan	2018	8.24	12
Uttarakhand	2022	9.97	11.43
Uttar Pradesh	2022	12.63	11.66
West Bengal	2021	11.34	13.7
NCT of Delhi	2020	11.76	11.43

Table 5: Women Reservation in Parliament and State Assemblies.[53]

[47] W Rule, 'Electoral Systems, Contextual Factors, and Women's Opportunity for Election to Parliament in Twenty-three Democracies' (1987) 40(5) Western Political Quarterly; M Reynolds, Critical Reflection and Management Education: Rehabilitating Less Hierarchical Approaches (1999) 35(5) Journal of Management Education; L Kenworthy and M Malami, 'Gender Inequality in Political Representation: A Worldwide Comparative Analysis' (2005) 78(235) Social Forces.

[48] P Norris (n 45).

[49] Mi Yung Yoon, 'Explaining Women's Legislative Representation in Sub-Saharan Africa' (2004) 29(3) LSQ 447-468

[50] Richard L. Fox and Jennifer L. Lawless, 'Entering the Arena? Gender and the Decision to Run for Office' (2004) 48(2) American Journal of Political Science 264-280.

[51] SA Prillaman, 'Strength in Numbers: How Women's Group Close India's Political Gender Gap' (2021) 34(3) American Journal of Political Science.

[52] Kamla Bhasin, *What is Patriarchy?* (Kali 2004).

[53] PIB, 'Women Reservation in Parliament and State Assemblies' Ministry of Law and Justice PIB (New Delhi 24 March 2022) <https://pib.gov.in/PressReleasePage.aspx?PRID=1809217 > accessed 30 June,2022.

In merely 10 states, the share of women elected representatives has touched 10%. The number of women contested in elections is low as compared to their male counterparts. The consequence of such low engagement can be seen in the attitude and behaviour of not just our society but also on the confidence level of women. In 2019 election, 78 women (out of 543 Lok Sabha members) entered into the lower house, this number is the highest ever since independence. However, this 14.4 % is inadequate to represent the 50% of the population.

1. Priorities, Empowerment and Capacity Building

Gender responsive law-making means considering women's needs and experiences, while formulating and policies.[54] Women with different perspectives, attitude and agendas, may put forward better legislations with social and gender equality. A study suggests that greater representation of women represents minority interests better.[55] It is essential to look into the impact of more women in the law-making process on empowerment and capability building of society as well as the socio-legal status of women.

The Constitutional rights in India have provided for the empowerment of women under Article 14, 15, 15(3), 16, 39a, 39b, 39c, 39d and 42, by providing them equal rights, protecting them from discrimination, allowing states to form laws to uplift women status through affirmative action and protection, ensuring equal pay and dignified working environment.[56] But the barriers the rights to equality, still exists in the real world.

Martha Nussbaum prioritizes central human capability which is based on having a universal intuitive idea integrated with political liberalism in respect of women gaining the ability.[57] These human capabilities include Bodily Integrity: an ability of women to treat one's body as sovereign; Practical Reason: an opportunity to have liberty of conscience; Affiliation: from institutions involved for freedom of speech; Sense, Imagination and Thought; and Control Over one's Environment: carries the right of political participation, free speech and to hold property.[58]

Women's need and priorities can never be envisaged without women equally participating as an agent to shape their future.[59] A quantitative analysis of the performance of Indian women

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[54] UN Women and IPU, *Gender-responsive law-making, Handbook for Parliamentarians No. 33* (2021). Handbook-on-gender-responsive-law-making-en.pdf (unwomen.org)

[55] A Lijphart, *Democracies: Patterns of Majoritarian and Consensus Governments in Twenty-one Countries* (Yale 1984).

[56] The Constitution of India, 1950.

[57] Marth C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge 2000).

[58] Nussbaum, ibid

[59] UN-Women (n 33) 17.

legislators in question hour session over 1999-2019, showed women as a silent-members who put forward their views only on softer issues such as child care, food, sanitation etc, without getting involved national matters.[60] To understand the impact of women's impact it is important to understand their participation in debates and questioning in the parliament house, questioning bring legislative accountability.[61] It is also true that access to power and more representation or participation does not solely indicate effectiveness of laws. It is crucial to find out the real motive behind maintaining the political representation, whether its intention is in the interests of the community, or it merely have a symbolic nature.[62]

Countries	**Subject matters of questions of women legislators**
Canada[63]	Agriculture
Britain[64]	Women, Gender and Men
India[65]	Health & family welfare, human resource development, home affairs, finance, agriculture and railway
Table 6: Subject matters of questions asked by women legislators in different countries	

In terms of India, considering women legislators 'silent-member' is an incorrect perception as their participate is more than double despite being less than 15% representation throughout 13th- 16th Lok Sabha.[66] On the other hand, male legislators are more likely to and have asked more question that are directly linked to women issues.[67]

The following four sub-categories are analysed to look into the effectiveness of laws where more women legislators are involved:

1.1 Welfare and Peace laws (related to education, health, labour and children)

In the US, women introduced and enacted more bills, their legislations are more likely on child-care, sexual harassment, minimum wage and paid family leave, to support women and

[60] Hussain (n 46).
[61] S Franceschet and JM Piscopo, 'Gender Quotas and Women Substantive Representation: Lessons from Argentina' (2008) 4(3) Policy and Gender 393-425.
[62] Hannah Pitkin, *The Concept of Representation* (California 1972).
[63] M Blidook and K Kerby, 'Party Policy Positions in Newfoundland and Labrador: Expert Survey Results in the Build-up to the 2011 Provincial Election' (2014) 44(4) American Review of Canadian Studies.
[64] K Bird, 'Gendering Parliamentary Questions' (2005) 7(3) British Journal of Politics and International Relations 353-70.
[65] Hussain (n 46)
[66] *ibid.*
[67] Hussain (n 46).

families.[68] In Belgium, women from different professions, were involved in juvenile justice system because of their natural intrinsic qualities which men lack, after a struggle for gender quality.[69] In France, women lawyers' and jurists' social movement against the legal discrimination, shape the political activism and legal reforms in laws related to mothers', married women's rights, work and political rights, in the first half of the 20th century.[70] In early 20th century, Alexandra Kollontai, a Russian diplomate, known for Marxist feminism, brought legal reforms for general women rights on suffrage, working conditions and health including legalisation to abortion.[71] Women leaders have an impact on gender perceptions and stereotypes and are role models for young girls.[72]

Women do not wish to work just for women's interests or bring anything new for women only.[73] Binding them to one homogenous community is unfair and dangerous for the growth as well. The influence of higher share of women not merely raise the quality of peace laws or negotiation agreement, but also implement it well.[74] The peace agreements play a pivotal role in transformative reforms which may affect the progress of women by breaking the traditional power hierarchies and empowering the society.[75] Inclusion of local women and women organisation from different backgrounds represent their interests and add quality and durability in peace negotiations.[76] In South Sudan, women group has a history of getting involved in peace process in 1999 and in 2017; In Philippines, women played important role in peace agreement on Bangsamoro conflict.[77] Despite the progress and support of women organisations

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[68] National Women's Law Center and Quorum, 'Women's Political Representation and Legislative Achievements: How Women are Changing State Legislatures' (2018) v2_final_NWLC_WomenStateLegFactSheet-4.pdf.

[69] Eva Schandevyl, 'An Introduction to Women in Law and Lawmaking in Nineteenth and Twentieth- Century Europe' (2014) 5-6.

[70] Sara L. Kimble, 'No Right to Judge: Feminism and the Judiciary in Third Republic France' (2008) 31/4 French Historical Studies 609-41; Eva Schandevyl (n 69) 7.

[71] Jinnee Lokaneeta, 'Alexandra Kollontai and Marxist Feminism' (2001) 36(17) EPW 1405-1412.

[72] Beaman and others, 'Powerful Women: Does Exposure Reduce Bias?' (2012) 124(4) Quarterly Journal of Economics.

[73] Lublin, 'Racial Discrimination and African-American Representation: A Critique of 'Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?' (1999) 93(1) American Political Science Review 183-86; T Skard, *Women of Power: Half a Century of Female Presidents and Prime Ministers Worldwide* (Bristol 2014); Diamond, *Sex Roles in the State House* (Yale 1977); M Htun, *Inclusion without Representation in Latin America: Gender Quotas and Ethnic Reservations* (Cambridge 2016).

[74] Duque-Salazar and others, 'Exploring the conditions of gender provision implementation: The Comprehensive Agreement on the Bangsamoro in the Philippines' (2020) Working paper, Department of Peace and Conflict Research, Uppsala University.

[75] Jana Krause and Werner Krause and Pila Bränfors, 'Women's Participation in Peace Negotiations and the Durability of Peace' (2018) 44(6) International Interactions.

[76] Krause ibid; Laurel Stone, 'Women Transforming Conflict: A Quantitative Analysis of Female Peacemaking' (2014) SSRN Electronic Journal.

[77] J Krause and Louise Olsson, 'Women's Participation in Peace Processes' in R. MacGinty, & A. Wanis-St. John (eds.), *Contemporary Peacemaking: Conflict, Violence and Peace Processes* (Macmilan 2020).

in war, they are limitedly consulted in peace negotiations.[78] A strongly criticised exclusion of women in Syrian peace negotiations since 2012 has led women to form their own group to fight for their advanced rights.[79] However, rather than focussing of quantity of participation, it is more essential to build local women's capacity to involve in peace process.[80]

1.2 Sexual violence and social exclusion

Sexual violence against women is so common across the world that it has been normalized and tolerated as inevitable.[81] It is the duty of a state and the citizen, to create open access and secure environment at workplace for women, to harness their true potential for the welfare of the society and nation. Due to the trust deficit in the legal system, #metoo movement has covered the world and united the women across the world. But its impact was limited, yet few countries including France passed Sexual and Sexist violence Bill, 2018; Spain is changing its penal code to make rape convictions speedy; and China and Japan have proposed legislations to deal with sexual harassment at workplace.

Feminist movements have always unveiled the discriminatory, suppressing and not gender-neutral attitude of the legal system and of the public institutions, against women.[82] Most of the transitions towards women rights have sprouted from the social movement led by women. Rosa Parks, who called out for the rights of black community, was honoured as the mother of the freedom movement and the first lady of civil rights in the United States.[83]

1.3 Resource management

Women legislators are most inclined towards long term public investments with firmly motivated to perform public missions and promote economic growth.[84] It is a misconception that welfare and family policies made by women legislators, compromises the economic growth of a country.[85] It is also not true that women legislators only focussed on women related matters, for example, road construction is an important indicator of economic growth as well

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[78] Krause ibid.
[79] Krause (n 75).
[80] Stone (n 76).
[81] Purna Sen, 'What Will It Take? Promoting Cultural Change to End Sexual Harassment' (2019) UN-Women, 9 <Discussion-paper-What-will-it-take-Promoting-cultural-change-to-end-sexual-harassment-en.pdf (unwomen.org)> accessed 2 August 2022.
[82] Eva Schandevyl (n 69).
[83] Rosa and Raymond Parks Institute, <BIOGRAPHY | Rosa parks> accessed 12 August, 2022.
[84] Thushyanthan Baskaran and others, 'Women Legislators and Economic Performance' (2018)Working Paper: Discussion Papers No. 11596 IZA 2. Women Legislators and Economic Performance (econstor.eu), https://docs.iza.org/dp11596.pdf
[85] Baskaran ibid 22.

as the to analyse the performance of a legislator and both men and women are equally inclined to these programmes.[86][ED1]

In India, women lawmakers are less involved in corruption and criminal cases, so better performance can be seen.[87] They are likely to question and debate on multiple matters including infrastructure and foreign affairs.[88] However, more representation does not imply an automatic increase in women's interest nor guaranteed to represent any matter better than men counterparts.[89]

1.4 Improvement in legal system

After struggle of Regina Guha's First Person's case[90] (1916) where the court rejected women's enrolment as a pleader, The Sex Disqualification Act (1919) was passed in United Kingdom to allow women's entry in legal profession and in 1921, Cornelia Sorabji become India's first legal professional.

One of the reasons behind women's late access and low representation, is the portrayal of legal system with authority, objectivity of male image and resisting the feminine quality such as empathy, tolerance and indulgence, unsuitable for legal profession.[91] In France, the civil code and the constitution were the centre for disregarding women's eligibility on the basis of biological, social and political inequality.[92] However, even after getting the right to legal profession, it was only for symbolic purpose. In Europe, it was an impact of World War II that called for democracy and expansion of voting rights, provided much opportunity for women in judiciary and bar.[93] In Germany, the two major barriers in the legal profession for women were highly regulated state institutions; and male domination.

Presence of women in legal profession accelerate their capacities and empower society on three aspects: firstly, civil and political rights and their engagement in communicating ideas and expertise; secondly, getting themselves more involved in humanitarian works; and thirdly, evolve their professional identity and encourage legal consciousness.[94] A study showed that women legislators are more likely to provide underprivileged an access to legislatures; and

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[86] Baskaran (n 84) 4.

[87] Hussain (n 46)

[88] *ibid.*

[89] Hussain (n 46).

[90] *In Re: Regina Guha v Unknown* [1916].

[91] Schultz, Ulrika, and Gisela Shaw (ed.), *Gender and Judging* (Oxford: Hart, 2013) 5; Eva Schandevyl (n 69) 6.

[92] Kimble, (n 70).

[93] Eva Schandevyl, (n 69) 7; Xavier Rousseaux and Alain Wijffels (eds), *Histoire du droit et de la justice: Une nouvelle generation de recherches* (Louvain-la-Neuve, 2019) 565-77.

[94] Eva Schandevyl, (n 69) 9.

consider women as their successor.[95] Women's capability in understanding complicated matters and fight for justice has been displayed in the Shreya Singhal case which struck down the section 66A of Information Technology Act 2000, for being constitutionally vague [violative of Article 19(1)a and 19(2)] and open-ended.[96]

IPU has implemented a plan of action to develop gender sensitive parliaments by including the principles of gender equality in domestic legislations and policies.[97] Due to the efforts of Kenya Women Parliamentary Association, the prohibition of Female Genital Mutilation Act 2011 was developed and the gender responsive law reform was supported by all.[98] However, even after 10 years, Kenya is still facing implementation of the act. More than 100 gender equality committees have been established in 86 counties at parliamentary level between 2006-2013.[99] They have promoted gender equality commitments such as gender budgeting (South Korea), auditing national women's establishments and procedures (India), Audits for government's progress in mainstreaming gender equality (Canada) and comprehensive review of national policies on the basis of gender equality (Georgia).[100]

2. Self-governance at local level

India is one of the few countries in the world where women's representation is over 45% in elected local bodies.[101] The world average of women elected representator at local level is 36%, which is higher than that of at national parliamentary level (15%).[102]

Ancient India has a vibrant history of small republics and informal Village Panchayat System, however, women's role was limited. The Panchayati Raj Institution and municipalities were introduced with 73rd and 74th constitutional amendments respectively.[103] In the part IX under Articles 243D and 243T, it provides for the one-third mandated reservation for women in the

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[95] Eagleton Institute of Politics, 'Women State Legislators: Past, Present and Future' (2022).
[96] *Shreya Singhal v Union of India* [2013] 12 SCC 73.
[97] Inter-Parliamentary Union, "Plan of Action for Gender-sensitive Parliaments" (Geneva, Inter-Parliamentary Union, 2012). <www.ipu.org/resources/publications/reference/2016-07/plan-action-gender-sensitive-parliaments> accessed 1August 2022.
[98] <kenya_fgm_2011_en.pdf (africanchildforum.org)>accessed 12 August 2022.
[99] Marian Sawer, 'Beyond numbers: The role of specialised parliamentary bodies in promoting gender equality' (2015) 30(1) Australasian Parliamentary Review, 107.< (PDF) Beyond Numbers: The role of specialised parliamentary bodies in promoting gender equality (researchgate.net) >accessed 12 August 2022.
[100] Sawer, ibid 113; UN, 'First Comprehensive Review of Gender Equality Legislation and Policies' (30 January 2018). < Georgian Parliament unveils first comprehensive review of gender equality legislation and policies | United Nations in Georgia> accessed 12 August 2022.
[101] UN Women, Women in Local Government Database. Data compilation on SDG indicator (2020) < Women in Local Government|Global overview (unwomen.org)> accessed 1 August 2022.
[102] Ionica Berevoescu and Julie Ballington, Women's Representation in Local Government: A Global Analysis (2021) UN-Women. BerevoescuBallingtonLocal GovEP1EGMCSW65.pdf (unwomen.org) .
[103] The Constitution of India 1950.

elections of panchayat and municipal local bodies respectively.[104] This landmark initiative of handing over the reins of leadership to women worked well for the welfare of the self-governance at local levels. The initiative was termed as silent revolution towards decentralization.[105] With an assumption that higher participation of women in decision-making would improve the development and welfare, Kerala government raised the reservation to 50%.[106]

Women mandatorily entered into the political arena. Though representation of women is an indicator of their socio-political status, yet it is not sufficient enough as it faced certain external and internal challenges such as lack of experience as elected representative or mere extension of protection of the constituency of their male relatives; limited knowledge of administration and political awareness; difficulty in establishing their control over administrative power due to male dominant society; lack of support from family.[107] Studies conducted in majority of the states showed that high illiteracy among women is key hindrance as often male members dominate the women panchas and in unofficial institution of Sarpanch-Pati has been formed.[108] As the patriarchal system does not want to alter the status quo of political arena which must stay a masculine affair with women elected representative remain as a symbolic position.[109] It is also difficult for women belongs to lower caste to break into the political arena.[110]

However, with having more experience, women have gained a sense of confidence and empowerment to control the resources and invested more in civic issues such as drinking water, health, roads and education.[111]

Nevertheless, the active participation at grassroot level led to political empowerment, which the granted the power to raise question in the planning of development and getting themselves involved into it. A growth in Self-Help Groups in India is evident, which has led to mass

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[104] The Constitution of India, art 243D, 243T.

[105] 14th Report of the Standing Committee on Rural Development on the Constitution Amendment Bill (2009) Constitution_110_SCR.pdf (prsindia.org).

[106] Bodheshwar, 'Elected Women Representatives in Local Self Government Institutions: Issues and Challenges' 23rd August (2014)

[107] Bodheshwar, ibid; Jeffrey Kurebwa, 'Rural Women's Representation and Participation in Local Governance in The Masvingo and Mashonaland Central Provinces of Zimbabwe' Nelson Mandela Metropolitan University (2014) (PDF) women's participation in local governance (researchgate.net).

[108] Centre for National Policy Research, 'Representation in Absentia' (2021); Mary E John, 'Women in Power? Gender, Caste and Politics of Local Urban Governance' (2007) 42(39) EPW.

[109] Navaneeth M S, 'Reservations for Women in Kerala's Local Self-government Institutions: A Mere Tokenism?' SSRN, May 2020. Reservations for Women in Kerala's Local Self-government Institutions: A Mere Tokenism? by Navaneeth M S :: SSRN

[110] Navaneeth, ibid; Sonatan Paul, 'Women in Local Self- Government: A Case Study of Chapar Town Committee (Assam)' (2018) 6(2) IJCRT. IJCRT1812022.pdf.

[111] Dhruv Bhatt and Sweta B Parekh, 'Women Reservation and Local Government' (2015) 5(11) IJAR 161-163. <Women Reservation and Local Self Government - IJAR - Indian Journal of Applied Research (worldwidejournals.com)> accessed 2 August 2022.

mobilization of women, for instance Kudumbasree in Kerala.[112] Women legislators responds to the diverse need of women, sensitive towards them and ensures that male representative to take them seriously.[113] They change the attitudes of the society via three areas: voters, policy/law-makes and decision makers[114]

States/ UTs	Women Elected Representatives (%) in Panchayat
Andhra Pradesh	50
Assam	54.6
Bihar	54.8
Gujarat	49.9
Himachal Pradesh	50.1
Jharkhand	51.5
Karnataka	50
Kerala	52.4
Madhya Pradesh	49.9
Maharashtra	53.4
Manipur	50.7
Odisha	52.7
Rajasthan	51.3
Sikkim	50.3
Tamil Nadu	52.9
Telangana	50.3
Uttarakhand	56
West Bengal	51.4
Table 4: Women Elected Representatives at Panchayat level as on 2020[115]	

In 18 states, in the panchayat elections women's share is 50% or more. This scenario is totally different from the state assembly elections, where women barely touched 10% and that too in

[112] B. L. Biju and K. G. A. Kumar, 'Class feminism: The Kudumbashree agitation in Kerala' (2013) 48(9) EPW 22–26 Class Feminism : The Kudumbashree Agitation in Kerala | Economic and Political Weekly (epw.in).
[113] Kurebwa, (n 107)
[114] *ibid.*
[115] PIB, 'Representation in Panchayats, Ministry of Panchayati Raj 2020' <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1658145> accessed 31 July 2022.

a limited number of states. The initiative of mandatory reservation for women at panchayat level is attributed to this huge difference.

Merely granting quotas are not enough for meaningful participation and empowerment of women, a minimum quorum for women is needed in every decision-making at local level/panchayat/ gram Sabha meetings and special quorum, in order to eliminate the proxy attendance.[116] 44% of the countries have adopted the policy of gender quotas in order to deal with the historical imbalances.[117]

3. Gender sensitivity in legal system

The US Supreme court overturned the Roe v Wade judgement to lift the restrictions on the state laws against banning abortion, has started the debate on women's liberal choices and rights. Reproductive rights are gender-sensitive and affect the basic rights to life, health, privacy and against discrimination. An abolition of this constitutional right can be seen as a failure of the judicial system to protect women and their human rights. It is evident that criminalising or restricting abortion have a worse impact on women's health as it does not stop the abortion rate but prevent doctor from providing basic and safe treatment.[118] Denial of medical services is a form of discrimination and stigmatization based on morality.[119] World Health Organisation does not call for abolition for abortion rights but recommended method for safe abortion and quality care.[120] The good news is Indian apex court has adopted a liberal and rational approach towards abortion laws. Recently, a bench of Justice DY Chandrachud and Justice JB Pardiwala has indicated to ponder over interpreting the MTP Act to exceed the upper limit to 24 weeks to allow unmarried women to abort and also allowed the petitioner (24 weeks pregnant) to abort.[121]

In India, though the judiciary has given remarkable judgements in favour of women, yet we live in centuries old patriarchal mentality and the judiciary is not untouched by it. Even "The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013", does not include 'courts' under the definition of 'workplace'. Though Supreme Court have a Gender Sensitization and Internal Complaints Committee and directed high courts to constitute internal complain committees for sexual harassment matters, but are they enough?

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[116] Dr. Stephen V and Dr. Relton A, 'Women in local self-governance- A leadership Perspective' (2014) 4(12) IJAR. WOMEN IN LOCAL SELF GOVERNANCE – A LEADERSHIP PERSPECTIVE - Special Issues - IJAR (worldwidejournals.com)

[117] UN Women (n 101).

[118] Amnesty, 'Key Fact on Abortion' <Key Facts on Abortion - Amnesty International >accessed 8 August, 2022.

[119] Amnesty, ibid.

[120] WHO, 'Health Topics: Abortion' <Abortion (who.int)> accessed 8 August 2022.

[121] Medical Termination Pregnancy Act, sec 3

#Metoo movement is an epitome of the failure of the legal system and women's faith in it across the world.

One of the most criticized provisions under the Hindu Marriage Act 1955 is Restitution of conjugal rights (section 9), for being a concept to allow violence and discrimination against women.[122] The constitutionality of the provision has been upheld by the court, for not being violative of Article 14 and 21.[123] Digging into the history, the first voice raised against the concept in 1885 and the response of the judiciary was no exception to the patriarchal approach when it order her to live with her husband or face imprisonment of six months.[124] However, Andhra Pradesh High Court has called section 9, a barbarous and savage remedy and constitutionally void.[125] However, India is among few countries, where marital rape is has neither defined nor criminalise. The decisions of the court with narrow interpretation of the constitution have paralysis the women's trust in judiciary and indicates that the understanding of courts in the matters of gender sensitivity is low.

However, there are few decisions and observations that glow the beacon of progress of society and empowerment of women. Where the court observed that sexual violence takes away dignity which is an indispensable right of an individual under Article 21;[126] declare mother as a natural guardian;[127] triple talaq was declared unconstitutional;[128] and protected women's dignity against discrimination on biological difference.[129] Despite the landmark verdicts, women are still struggling for their practical implementation and acceptance by society.

In order to promote gender sensitization in the court premise, it called for a gender sensitization training among judges and public prosecutors and directed all the High Courts to formulate module on judicial sensitivity to sexual offences and directed Bar Council of India to introduce gender sensitivity course in LLB and AIBE syllabus.[130]

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[122] The Hindu Marriage Act 1955, sec 9: When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.
Explanation. —Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

[123] *Saroj Rani v Sudarshan Kumar* (AIR 1984) SC 1562; *Harvinder Kaur v Harmander Singh Choudhry* {AIR 1984 Del 66}.

[124] *Dadaji Bhikaji v Rukhmabai* [1885].

[125] *T. Sareetha v T. Venkata Subbaiah* AIR 1983 AP 356.

[126] *M.J Akbar v. Priya Ramani* [2021].

[127] *Gita Hariharan v Reserve Bank of India* [1999] 2 SCC 228.

[128] Shayara Bano v Union of India (2017) 9 SCC 1.

[129] Indian Young Lawyers' Association v State of Kerala [2018] SCC Online SCC 1690.

[130] *Aparna Bhatt V State of Madhya Pradesh*, 2021 SCC Online SC 230.

In a historic verdict the Supreme Court of India that has directed for the establishment of permanent commission for women in Indian army which will be applicable for the existing women officers under short service commission;[131] and asked for fresh evaluation criteria for permanent commission as the older one was arbitrary and irrational.[132] The apex court also recognized the wide difference between the opportunity for men and women to enter into defence forces and Sainik schools, as a violation of constitution under articles 14, 15, 16 and 19.[133]

The court decriminalizes the offence of adultery defined under section 497 of IPC for being violative of Articles 14, 15 and 21.[134] It is to eliminate the objectification of women that wife is not a property of husband but share equal rights and liberty of her choice. It was observed that the provision does not come under the purview of protective discrimination and when it was included, women were considered backward. Men and women are equal in the eyes of laws, society has progressed, and women's status has been raised since independence. In spite of that the reality is women are way behind in this male dominated society. Thus, although the judgement is way ahead of its time and progressive, its socio-cultural implications on the patriarchal society and women's condition needs to be studied properly.

At present, the Supreme Court of India has 11 women judges, which is a highest number of all time.[135] While determining the role of women judges in law-making, building capacity and gender sensitization, Justice Leila Seth is worth mentioning. She was responsible for two major reforms: 2013 Criminal law reform, that extended the provisions and concepts of rape laws; and 2005 amendment of the Hindu Succession Act that provides equal right to daughters in ancestral property.[136]

CHALLENGES AND WAY FORWARD

A meaningful participation of women in law making will challenge the existing discriminatory power structures and patriarchal hierarchy in the society across the world.[137] Patriarchy simply means men's control over women's productive/labour power inside and outside the household; their reproductive power and choices; their sexuality including shame and honour; their access to resources including property and inheritance; and their mobility.[138]

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[131] *The Secretary, Ministry of Defense V Babita Punia & others* [2020] 7 SCC 469.
[132] *Lt. Col Nitisha & Ors V Union of India & Ors*. [2021].
[133] *Kush Kalra v Union of India,* Writ Petition (Civil) No.1416 of 2020, 2021.
[134] *Joseph Shine v Union of India* AIR 2018 SC 4898.
[135] SC, <Chief Justice & Judges | SUPREME COURT OF INDIA (sci.gov.in)> accessed 12 August 2022.
[136] Criminal laws (Amendment) Act 2013: Sexual Offences; Hindu Succession Amendment Act 2005.
[137] UN-Women (n 1) 3.
[138] Bhasin (n 52).

Although low representation of women in national parliaments, cabinets and decision-making bodies is a major concern, but their categorisation in one gender category is most likely to harm their confidence and growth, as it defies their diverse identity and aim to work in various areas. Apart from the concern of proxy presence, the mandatory rotation system of reservation, rarely the same women representatives get appointed as the nominee, which incapacitate them in implementing their plans and affects their performance for the next election.[139]

A traditional and gender insensitive approach of our legal system which includes legislators, police and courts, is the reason behind the trust deficit among women. Most of the steps that have been taken to achieve gender equality are seemed to be as formality.

On the basis of study of various literature, some suggestions are deducted as follows:

1. Women quota in the political-legal system as a temporary measure until the barriers are removed.
2. Not just an open access to participation in decision making process of institutional bodies, but also creating conducive environment and working infrastructure.[140]
3. More research and data to the measures of success of women as legislators, reformists or gender sensitivity in legal or institutional professions.
4. Acknowledgement to the patriarchal structure in social and political as the major barrier to women's low representation.
5. Encouragement to the capability building of women and women organisations to raise their scope in leadership positions and survival in competition.

CONCLUSION

Of all these years of socio-political-economic awakening and empowerment has strengthen the confidence in women to realize their potential and build their capabilities towards performing their duties and asserting their power. Despite the prevailing gender discrimination and stereotypes, more women are gaining legal consciousness towards their multiple identities. As said by Hillary Clinton, when women participate in the economy, everyone benefits. It is in multiple studies that women leaders are working for all the subject-matters, with better governance and accountability and not just on women-centric matters. Legal profession that scarce women, engagement of more women will add gender sensitivity towards all the genders, which in turns connect with the society more.

[139] N. Buch, 'Reservation for women in panchayats: A sop in disguise?' (2009) 44(40) EPW 8–10, Reservation for Women in Panchayats: A Sop in Disguise? : | Economic and Political Weekly (epw.in); Navaneeth, (n 74).
[140] UN-Women (n 1) 7.

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IPU Parline: Global Data on National Parliament, Monthly Ranking of Women in national parliaments, https://data.ipu.org/women-ranking.

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DEVELOPMENT OF HISTORY OF MARITIME LAW

ABSTRACT

The very origin of Maritime Law is defined as the Intersection of Commercial Trade and the Sea. The Sea and the Oceans are the Ancient Channels of Transportation that are vastly in use, even in the present day. Since Ancient Times, these huge water bodies have been responsible for Wars and Conflicts. The earliest known instance regarding the existence of any law related to the Sea can be traced back to the Rhodian Law. Considered to be the oldest Sea Laws, the Rhodian Laws underwent rapid changes during the Roman Reign. The Romans are credited for revamping the Sea Laws. The Period in-between A.D.1000 to A.D 1300 is remarked for the Founding of the Three important Codes. The European Continent prioritized the necessity for the need of Sea Laws. The three codes were named as Consolato del Mare (Regulation of the Sea), Laws of Wibsy and Laws of Oleron. The Phoenicians, Greeks and the Egyptians are also acclaimed for their contributions to the making of the earliest Laws.

The Rhodian Sea Laws which were levelled up by the Romans, faced tough resistance within the Mediterranean Region with the Italians proposing their own Maritime Laws. However, the Roman updated Rhodian was widely used in the Mediterranean and Baltic Region. The Romans widely used this law for the revival of Trade and Commerce during the Ancient Times. The three codes proposed by the Romans, indicated the different regions that they were applied to. Consolato del Mare was primarily applied in the Mediterranean Region, Laws of Wibsy was primarily used in the Hanseatic League on the Baltic, while Laws of Oleron prevailed around the Region of France. The oldest among the three codes is Consolato del Mare, which consists of a series of compilation of all the rules and specific laws concerning the Sea.

The Origin of the Common Law System in England proved to be a boon for the advancement of Maritime Law. It paved the way for Maritime Law to be the Perfect blend of Ancient Principles and Modern Changes both national and International. The current practice of Maritime Law also applies the earlier principles “maintenance and cure” when it came to the treatment of sea men. Maritime Law has primarily developed through the combination of the United Kingdom Common Law System and the USA backed Advanced Naval Technologies.

With the passage of time, there was a need to bring in Uniformity into the System like the Ancient Times. This uniformity ruptured with the rise of Nationalism in the different Countries

and Continents. Comité Maritime International (CMI) was proposed in-order to catalyse the uniformity in the laws. Many National Maritime Laws also began during this time. In 1897, the International Maritime Committee came into existence along with many member countries. After Several Amendments and Conventions, the CMI was formed. The CMI was integrated into the International Maritime Organization, a branch under the United Nations Organization. The Organization has achieved its purpose of bringing in Uniform Maritime Laws which it continues to Propagate and Practice. The Research Paper has explained the same in-detail and has focussed immensely on all the topics covered in the abstract.

Keywords*: Comite Maritime International (CMI), Laws of Oleron, Laws of Wisbuy.*

INTRODUCTION

Maritime Law is considered to be the Oldest of all the existing laws, estimated to be around 3000 years old by Legal Historians. Maritime Law is often defined as the Intersection of Commercial Trade and the Sea. It is believed that one field of Laws, which has had immense growth since its birth almost three-thousand Years Ago. The International Trade of Shipping estimates that around 11 billion Tons of Goods are transported through the Maritime Route primarily through Ships and other existing modes of Transportation. As per 2022, the Global Population is estimated to be at 7.96 billion People[1], according to which, an average of almost 1.5 Tons of Goods is shipped per person, which is indeed a humongous and impressive figure. 80% of the total imports and exports of goods was accounted for by the European Union followed by having a leverage value share of 50% of these Goods[2]. The Shipping Industry in recent times has come off to be an essential, be it in terms of Transportation or Trade. Trade has always been one of the Sole and Primary reasons for the establishment of Maritime Laws. In the Present times, almost 1 billion Tons of Iron Ore and 2 billion Tons of Crude oil are transported through Maritime Routes[3]. With the Increasing Growth of Trade and Commerce, the Maritime Industry becomes an essential part of the same. Therefore, it is very necessary to study the Developmental History of Maritime Law.

[1] United Nations Organisation, 11th July 2022, https://www.un.org/en/observances/world-population-day (accessed 28th July, 2022).
[2]International Chamber of Shipping https://www.ics-shipping.org/shipping-fact/shipping-and-world-trade-driving-prosperity/ (accessed 28th July, 2022).
[3] International Chamber of Shipping https://www.ics-shipping.org/shipping-fact/shipping-and-world-trade-driving-prosperity/ (accessed 28th July, 2022).

EARLIEST HISTORY

According to Historians, the Phoenicians are regarded to be the Birth-Givers of Maritime Law. The Phoenician Empire back then regarded Trade to be a very essential aspect, much importance was laid to Trade and Commerce. Their Period of Reign was from 1500-300 B.C and their area of Control stretched from the Mediterranean Coast, which included the Islands of Aerad and Mount Carmel. Also, known as the Canaanites, their primary reason to occupy the Mediterranean Coast was because of their Exile from the Regions controlled by the Hebrews. The City of Tyre as their Primary Base, a possible reason for the same could have been its Proximity to the Sea, which in return benefitted them largely thus paving the way for Maritime Commerce to be Invented.

The Phoenicians were also regarded to be Good Voyagers and their expeditions extended all over Modern Day Europe. Some of the Regions they covered included Spain, Parts of Italy (Sicily to Sardinia), Greece and Gaul were also a part of their expeditions. The Threshold of the same was achieved with the Discovery of Great Britain. The Kingdom of Phoenicia Ruled the Waves and the Waters almost 1600 years before the Birth of Christ. The Phoenician Empire was termed to be the ***"Mistress of the Sea"*** during these times especially in-regards to the extent of Maritime Commerce they had achieved. By 611 B.C[4]. The Phoenicians had even navigated Sea Routes to Africa and had established friendly relations with the Egyptian Rulers.

THE END OF THE PHOENICIANS

The Rise of the Roman Empire Proved Problematic to the Phoenicians, the Romans began waging Wars on the Phoenicians, which eventually led to the Phoenicians losing control of their Colonies. The City of Tyre, which was their Main Commercial Hub for Sea Trade was Destroyed and Rebuilt multiple times. The City of Catharage was however developed to be a Good Alternative Option by the Phoenicians. However, the Phoenician Empire Completely Collapsed after the Three Punic Wars which soon remarked the end of their Commercial Success as well. But the Romans actively began using the same Maritime Routes to Expand their Empire as well as Trade and Commerce.

[4] George S. Potter, The Sources, Growth and Development of the Law Maritime (Jan 1902), Vol. 11, The Yale Law Journal, pp. 143-152.

THE RISE OF THE RHODES

Soon after the Phoenician Empire Perished, the Rhodes, the Persians, the Greeks and many other new competitors emerged to take control over the Seas. The Romans in the meantime had developed the city of Pisa to be their Maritime Capital. They possessed a very powerful Naval Base and controlled several fleets of Ships. The Romans were much advanced in their Naval Methodologies and enjoyed Prime Position in the growth of their Trade and Commerce. But the Roman Empire was also subjected to constant External Aggression by the Italians. This soon resulted in a huge tussle over which controls the waters. The Waters of the Adriatic proved to be the Naval Battle-Ground. Rialto proved to be the main base of exchange in regards to the tussle taking place. Venice soon emerged as the main Transactional Capital when it came towards the exchanges that took place. Venice was often created to house the First Public Bank but soon Venice faced tough Competition from Genoa. Initially Genoa started off to be Venice's Imitator but then soon its exponential Growth paved the way for it to be Venice's tough Competitor.

The Development and Introduction to Maritime Law can be credited to only a few countries particularly those belonging to the Regions of Northern Europe. Countries such as Portugal, Spain, Netherlands, Italy, France, and England can be credited to be the Instigators of the Development of Present-Day Maritime Law.

THE ROMANS RULE THE WAVES

Even though the Phoenicians were the first ones to Adapt and Introduce Sea Routes, the Rhodians take the Complete Credit of being the first ones to Introduce the Administrative aspect to the Maritime Industry, this was done through the Process of Implementing Certain Rules which could be termed as ***"Laws."*** The Rhodes were remarked to be people with a genuine interest in developing laws related to the Seas. They possessed the Fleet of Ships and also the People who had expertise with the same. The Rhodians are considered to be the first People to even explore the Concept of Maritime Jurisprudence, which is termed as Maritime Jurisprudence of Rome. Maritime Law of the Present day has inherited very disfigured precedents from the Rhodian Law[5]. The Law of Jettison, was later incorporated into Roman

[5] George S. Potter, The Sources, Growth and Development of the Law Maritime (Jan 1902), Vol. 11, The Yale Law Journal, pp. 143-152.

Civil Law. The Modern-Day Maritime Law can be described to be a Collaboration of the Roman Maritime Jurisprudence Law, with Influence of Civil Law.

REVOLUTION OF MARITIME LAW AFTER THE RHODES

The Law of General Average, which was created by the Rhodes, was incorporated into the Digest of Justinian nearly Fourteen-Centuries after the Rhodians had proposed it. But the Law of General Average which was incepted in the Jettison formed the basis of Maritime Commercial that was recognized by several nations. The Law of General Average was the principle adopted by the men in commercial business and the Individuals who calculated Marine Losses. The Same Principle was applied in most nations. The Carthagians, even though credited to be the first ones to introduce Maritime Law, they did not publish or organize these, Laws. The Rhodians and the Romans were the main Competitors when it came to who would be the Mistress of the Sea[6]. The Rhodians were very anxious and troubled by the growing Influence the Romans possessed over the Sea, they further incurred their biggest loss when they lost control over Macedonia. The Romans were well versed with the Naval Jurisprudence that was developed by the Rhodians which worked much to their advantage. The Roman Empire had emerged to be one of the most powerful empires, with much control and influence in the territories they controlled.

The Romans then began to gain control over the sea, as they had immense knowledge and expertise when it came to Marine Regulations. The Roman Digest can be described to be a Comprehensive Handbook of Ancient Maritime Regulations. The Court of Admiralty, are often remarked to be Courts of Equity as the Maritime Principles of Law are actually derived from Civil Law. Civil Law can be regarded to be the basis of Maritime Law at large.

THE THREE ROMAN CODES OF MARITIME JURISPRUDENCE

The Romans, even though not the creators of Maritime Law, learned to Improvise the Rhodian Law for their own benefit. The Three Codes of Maritime law have been said to be developed

[6] Aldo Chircop& Sarah Shiels, The Continuum of International Maritime Law and Canadian Maritime Law: Explaining a Complex Relationship, January 2013, Pg 295-328.

by the Romans during the time-period of A.D. 1000 and A.D.1300. The following are three codes of Maritime Jurisprudence:

1. ***Consolato del Mare*** **(Regulation of the Sea)**

Consolato del Mare also known as "the Consulate of the Sea" is a large compilation of laws related to Commerce and Naval Navigation. These laws are said to have Originated in the city of Barcelona. According to Hubner *Consolato del Mare* is described as ***"a collection of maritime and positive laws and of the particular ordinances of the middle and dark ages"***[7]. Hubner,a learned expert in the Historical aspect of Maritime Law, credits the creation of *Consolato del Mare* to the Pisans. Out of the three existing Oceanic Codes, *Consolato del Mare* is considered to be the most precise and seasoned. The credit for the same is awarded for the Pisans for their contribution to the development of Maritime Law. The Pisans, Rhodians and even the Romans had a very similar approach when it came to the creation of laws pertaining to the sea. Most Subjects related to Naval Trade such as Wages of Sailors, the Ownerships of Ships and other Vessels have been covered under this code. *Consolato del Mare* is said to have formed the basis of *Law of Oleron*. The Spaniards were the first ones to compile *Consolato del Mare* into a book, whose purpose was solely to maintain regulations related to Maritime Law. The earliest or the first version of the *Consolato* is dated back to around 1075, it was later in the 14th-15th Century that the Barcelona Version of the same was Published.

2. ***Laws of Oleron***

The Laws of Oleron, are the most cited and referred to when it comes to judging cases related to Maritime Disputes. They are also known as the Moves of Oleron. It's called the Law of Oleron as it is said to be published on the Island of Oleron, which lies distant to the coast of France, near an area named Rochelle. Queen Eleanor, then Duchess of Guienne is said to be the creator of this code. The Consolato and the already existing Rhodian Law served as the inspiration for the Duchess, while she was camping in the Eastern Mediterranean with her then husband King Louis VII of France, she seriously took upon the idea to create a new code that facilitated the functioning of the already existing Naval Admiralty. When she first compiled the laws, she termed her work as ***"Role d'Oleron"***. The Laws were published in the year 1150 and mostly discussed all aspects related to Travel, Trade and Commerce in the Sea.

[7] George S. Potter, The Sources, Growth and Development of the Law Maritime (Jan 1902), Vol. 11, The Yale Law Journal, pp. 143-152.

England, however, is known to have benefited the most from the creation of these Laws. Eleanor was soon married to Henry II, making her the then Queen of England. During her Reign as the Queen of England, her main focus lay on improving the British Naval Admiralty. The British Naval system during the reign of Henry II before his wedding to Eleanor mostly followed Land-based Law, the naval operations were also governed by the same. This however, was subjected to several changes with the passage of time.

3. *Laws of Wisbuy*

Considered to be one of the most celebrated codes of Maritime Law. The Laws of Wibsy were compiled in the city of Wisbuy. The Laws of Wisbuy are also known as the Laws of Gotland. Their Origin can be traced back to the city of Gotland which is located close to the Baltic Sea, this particular code was developed by the Merchants and Other local Inhabitants in this region. The Laws of Wisbuy is estimated to have been developed around the 12th Century but later improvised during the 16th Century. In Maritime Jurisprudence the Laws of Wisbuy is considered to be the most standard law. The Laws of Wisbuy, were the first of the Codes that possessed laws which included Life Insurance and other peculiar Marine Laws. In the past, the Laws of Wisbuy were also covered under the Laws of Oleron. According to Wisbuy legislation, the master or owner of the ship is responsible for covering the expenditures incurred if a seaman becomes incapacitated after being transferred off the ship for an unusual service. The seaman is also entitled to receive full pay for their voyage[8].

COMITE MARITIME INTERNATIONAL

Comite Maritime International is regarded as the oldest international organization. The International Law Association is considered to be the basis upon which Comite Maritime International[9] is based upon. But, the Credit of being the first Maritime International Maritime Organisation that was purely dedicated to Maritime Law. The exact period at which the Organisation came into existence is unknown. The Reason as to why CMI came into existence can be attributed to the country of Belgium, because of whose Political and Commercial Leaders the initiative of introducing a uniform Maritime Organisation began. The Process and Idea for establishing CMI began way before than it was formed, that is around the 17th Century. But it was during the 19th Century that the idea of International Law and Idealism began to

[8] Hart v. The Littlejohn, 1800 U.S. Dist. LEXIS 8, 2-3 (D. Pa. 1800)].
[9] By F. L. Wiswall, A Brief History of Comite Maritime International.

emerge and this eventually served as the basis for the formation of CMI. The Concept of Declared Uniform Principles which was commonly applied in the United States of America[10] and England[11] also clearly highlighted the necessity and need for a uniform Maritime Law.

The 19th Century proved to be the time in which the concept of International Uniformity was being emphasized on, the Antwerp Rules was being adopted at the ILA Conference that was held in 1890. The active discussions that were held by the Belgian Government and their role to integrate the ILA and the CMI was successful, and the same was announced on 2nd July, 1896. CMI began to function as a formal body only from 1897, and its main task was the unification of National Maritime Law into a comprehensive International Maritime Law.

The Concept of ***'Grand Unification of the Law of the Sea'*** was something that was initiated by Louis Farrack, who was an Antwerp maritime barrister. He along with Charles LeJeune, Auguste Beernaert are the founding fathers of International Maritime Law. Beernaert played a major role in the development of CMI. These three Intellectuals were supported by the Belgian Government and ***"Belgian Association for the Unification of Maritime Law"*** was formed. Beernaert and LeJeune were elected President and Vice-President, Secretary of the same[12].

The Belgian Association for the Unification of Maritime Law, actively ventured to induct the Countries that were interested to join them. Comite Maritime International was formed when the Belgian Government and eight other nations came together[13]. The Comite Maritime International has played very important roles when it comes to that off wars. During the Second-World War, the advent of the war prevented three of the instruments that was adopted during the 1937 Conference, which include: (1). Penal Jurisdiction in cases of Collision, (2). Civil (3). Arrest of Ships, this proposal was presented to the Belgian Government, and this was to be awarded based on Diplomatic Relations. The CMIs Role when it came to mitigation of Wars and other Maritime related problems has certainly helped mitigate many dangers.

The CMIs structure was subjected to certain changes especially during the period of 1899-1955, it experienced several changes during this phase one of them being the increase in number of Titulary Members each country had to represent. Comite has also been credited for drafting so many conventions and protocols especially related to the sea, some of which include the IMO Legal Committee except the 1969 Intervention Convention and 1973 Protocol and the 1996 HNS Convention and many others.

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[10] Comite Maritime International, https://comitemaritime.org/ accessed on 29th July 2022.
[11] Comite Maritime International, https://comitemaritime.org/ accessed on 29th July 2022.
[12] F. L. Wiswall, A Brief History of Comite Maritime International.
[13] F. L. Wiswall, A Brief History of Comite Maritime International.

CMIs biggest achievement is immense, especially in the area of Maritime Law in regards to Trade and Transportation. CMI has also been involved in various other activities including the formation and maintenance of Maritime Codes especially related to the Trade, Transport and Business. The rules of Seaway Bills were adopted in 1990. The Comite has also been the designated custodian of York-Antwerp Rules, which has been revised in 2004. These rules were regarding adjustment of general averages.

The Comite Maritime International has nearly completed a Century in the field of Maritime Law and has also worked with UNCITRAL (the United Nations Commission on International Trade Law) and other organisations to help contribute to bring in active development in International Maritime Law. Maritime Law has also constantly been subjected to several changes in the growing current times as there exists an increase in the aspects of Trade and Business, which is growing rapidly and the same must be achieved through competent authorities and intellectual minds whose genuine interest lies in Maritime Law, which is a much-needed subject and also a subject which is bound to incur more development in the upcoming times.

CONCLUSION

Water has been the best mode of transportation and has contributed immensely to the development of both Trade and Commerce. The Ocean has been the most integral part for all including everything from Trade and Commerce to War and Peace. Making and Maintaining Laws related to something so vast and essential certainly proves to be a challenge. However, the developmental aspect of the same, has been a very long and tedious process which will certainly be further subjected to improvement and further development as well. The Laws and Codes related to Oceans have been subjected to immense tests and have proved to sustain the same. The ***"Welfare of the Mariner"*** is a concept that has strongly been held as a very important principle when it comes to making laws related to the Oceans and everyone else involved with the same.

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3. *Aldo Chircop& Sarah Shiels, The Continuum of International Maritime Law and Canadian Maritime Law: Explaining a Complex Relationship, January 2013, Pg 295-328.*
4. *F. L. Wiswall, A Brief History of Comite Maritime International.*
5. *Comite Maritime International, https://comitemaritime.org/*

INDIAN OCEAN: TRACING INTERNATIONAL TRADE AND CONFLICT SINCE DAWN OF CIVILISATION

ABSTRACT

The Indian Ocean is the third largest water body in the world comprising almost 20 percent of water on earth's surface. The Indian Ocean stretches from the cape of good hope following in an arc to Arabia, India, Malaya Peninsula, Sumatra, and the west coast of Australia. In the south it is bound by the Southern Ocean. It lies at the junction of key trade routes in the world. The Ocean has always been a key hub of international and regional trade, from trade between the Indus Valley Civilization and Babylon to the Mughals and Europe. Around its rim states and empires have flourished and competed for survival and resources. The contest for trade routes of the Indian ocean has shaped human civilization till the discovery of a new world (Americas). Trade and war were a common feature for the control of goods like silk, perfumes, sandalwood, Ivory, spices, etc. From the conquest of Egypt by Rome to Ottoman-Portuguese wars for the dominance of trade.

The trade routes were dominated by Arab merchants who took goods far and wide, the East Indies to Egypt. Their dominance was challenged by Europeans who were able to establish their supremacy by the end of the 19th century. The ocean has also provided for great exchange of culture, religion, art and literature. Christianity and Islam spread to modern Kerala and Indonesia respectively via these trade routes. The spread of Indian art and culture to Malaya and East Indies was also facilitated by this trade.[1]

The paper will discuss the importance of the Indian Ocean, its history and with emphasis on trade networks linking different parts of the world. The question that the paper tries to answer is how the Indian ocean shaped the politics of the region and the world.

Keywords: *Indian Ocean, World Trade, Arabian Sea, Geopolitics, Indosphere.*

[1] THE OXFORD ILLUSTRATED HISTORY OF THE WORLD (Felipe Fernandez Armesto ed. Oxford University Press 2019) 189

INTRODUCTION

The Indian Ocean has served as a vital conduit for communication throughout history, giving countless people access to the areas that its waters have washed or allowed them to engage in trade and other activities. Although the distances travelled were great, the richness that might be reaped made the excursions worthwhile.[2] The regions of the littoral have consistently provided raw materials to many other peoples. Spices, gold, ivory, exotic woods, and rare luxury products from the area and the far reaches of China were the main draws for the Egyptian, Greek, and Roman markets before and after the advent of Christianity.[3] By travelling across the ocean from China to Africa, from the northern coast of Australia to the Persian Gulf, crafts from the Indian subcontinent, the Arabian Peninsula, and the Indonesian archipelago engaged in this trade, which led to the significant mingling of cultures and peoples that is a defining aspect of the history of the region.[4]

GEOGRAPHY OF THE INDIAN OCEAN AND THE RIM REGION

The Indian Ocean extends for approximately 75 million square kilometers. It is surrounded to the west by the Arabia and African coast Arabi, to the east by the Thai–Malay peninsula, the Indonesian coasts, and further to the south by western Australia. The Asian continent runs along its northern border, with the Indian subcontinent forming a broad peninsula that bifurcates the northern Indian Ocean into eastern and western parts (the Bay of Bengal and the Sea of India, respectively). The western part of the Indian Ocean extends along both sides of Arabia (Red Sea and Persian Gulf), with a narrow entrance opening onto the Persian Gulf (Strait of Hormuz) to the north and the Red Sea to the south (Bab Al-Mandab Strait).[5] The region that is affected by Indian ocean further extends to Rift valley and Ethiopian highlands in Africa, running across Arabia, Levant, following the mountain ranges of Zagros, Alborz to Himalayas, and further affecting the Indo-China and Western Australia.

SIGNIFICANCE OF THE REGION

The Indian Ocean lies at the heart of international trade and commerce with the Indo-Pacific accounts for 40% of global trade and 62% of the world's GDP today. The region is also home

[2] McPHERSON, KENNETH. "The History of the Indian Ocean Region: A Conceptual Framework." The Great Circle, vol. 3, no. 1, 1981, pp. 10–19. JSTOR, http://www.jstor.org/stable/41562359. Accessed 29 Aug. 2022.
[3] Ridgway, Peter. "INDIAN OCEAN MARITIME HISTORY ATLAS." The Great Circle, vol. 27, no. 1, 2005, pp. 34–51. JSTOR, http://www.jstor.org/stable/41563180. Accessed 29 Aug. 2022.
[4] McPHERSON, K. (1981). The History of the Indian Ocean Region: A Conceptual Framework. *The Great Circle*, *3*(1), 10–19. http://www.jstor.org/stable/41562359
[5] Lincon Paine 'The Sea and the Civilization A maritime history of the world (ALFRED A. KNOPF 2013) 93

to important choke points like Strait of Hormuz, Suez Canal, Strait of Malacca. The region also has many active conflict and contest zones like Somalia, Yemen and the Gulf region.

This trend is nothing new and the Indian Ocean has always been a hub for commerce owing to monsoon winds and availability of different goods in different locations with a merchant community. The powers in the region have always tried to capitalize on that trade to increase their revenue through taxation.[6] The Chinese traded silk, porcelain paper, gun powder, etc. India was a source of textiles, crafts, perfumes, spices, slaves, etc. To the east Rome and Egypt sent tin, and other goods. The trade and conflict framework will help us understand the cosmopolitan nature of the Indian Ocean and to trace the evolution of the region in terms of Identity and culture. The region also served as an important ground for the development of financial and trade regulation, a precursor to international law of trade and finance.[7]

FROM DAWN OF CIVILIZATION

The first set of civilizations that dot the Indian ocean were established in the Bronze Age (**3300 BC to 1200 BC**). They were the Indus valley around Indus, Hittaites in Anatolia, Babylon and Mesopotamia, and Egypt. The trade linked these civilizations from Lothal in the east to the ports on the shores of East Africa. During the Bronze age the exchange of goods like textiles, tin and other metals, Timber etc was done through the Indian ocean. Many seals, gems and pottery have been found at different sites across the region. Lapis lazuli mined in Afghanistan was found at many sites in the Indus valley and Mesopotamia. Then the cargo was limited by the size of ships. The fall of bronze civilization reduced trade to a large extent.

ANCIENT TRADE AND CONFLICT

State formation was an important landmark in the history of the Indian Ocean, it allowed for larger control over territories and protection to civilians. This also facilitated a greater amount of trade and use of force to preserve the structures of the State for further expansion. This also facilitated an agriculture surplus that allowed for specialization of labor and development of different classes as well as commerce.

First States to be established for city states in Mesopotamia and Greece, they subsequently gave way to Egypt, Babylonian Empire, Hittites. This state formation culminated in establishment

[6] Varma, Ravindra. "STRATEGIC IMPORTANCE OF THE INDIAN OCEAN." The Indian Journal of Political Science, vol. 28, no. 1/2, 1967, pp. 51–61. JSTOR, http://www.jstor.org/stable/41854203. Accessed 29 Aug. 2022.

[7] The Oxford Handbook of History of International Law (Bardo Fassbender and Anne Peters ed. Oxford University Press 2012) 299

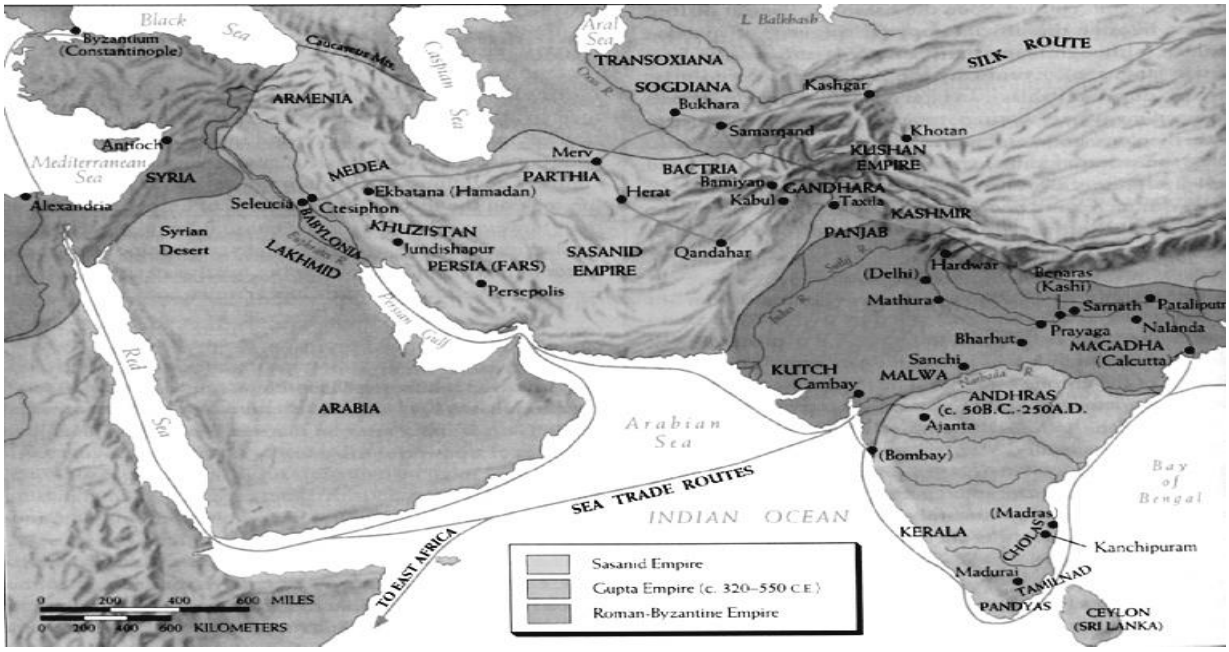
of the Achaemenid Empire.[8] Meanwhile states were being formed in the Gangetic plain. Strongest among them Magadha established itself as an Empire under the Haryanka dynasty.
The creation of empires facilitated long distance travel and security that lead to even more trade and commerce. By the time of conquest by Alexander, India, Iran, Egypt, Greece were well connected by trade. For control of large chunks of resources there have always been a tussle between powers still trade flourished.[9]
The Han Dynasty in China (202 BCE-220 CE), the Mauryan Empire in India (324-185 BCE), the Achaemenid Empire in Persia (550-330 BCE), and the Roman Empire (33 BCE-476 CE) in the Mediterranean were all significant empires that participated in the Indian Ocean trade during the classical era (4th century BCE-3rd century CE). Their aristocracy were adorned with Chinese silk, Indian coffers were filled with Roman coinage, and Mauryan settings were adorned with Persian jewels.[10]
The accounts of Indian trade were recorded by different scholars, travelers of ancient times, in books like the Periplus of erythrina sea. Another important account is that of Herodotus (Father of History, who notes in his book, History, Book IV (5th century B.C.)
"*The Phoenicians set out from the Red Sea and sailed the southern sea [the Indian Ocean]; whenever autumn came, they would put in and sow the land, to whatever part of Libya [Africa] they might come, and there await the harvest"*
The Periplus of the Erythraean Sea is a 6300-word anonymous Greek treatise that focuses mostly on trade but also touches on production, navigation, geography, anthropology, history, and ranging from Egypt in the west to the Malay Peninsula, and conserva-In the east, sula. Date, author, and even the intended audience are all Text are up for discussion. In the past, the majority of scholars have as-

ROMAN LINKS TO INDIA

India and the Roman Empire had thriving trade between the second century BCE and the second century CE. India had a significant role in the Chinese silk trade in addition to exporting commodities to the Mediterranean. Because of the unrest in Parthia in central Asia, traders tended to steer clear of that region of the Silk Route from the reign of the Roman emperor

[8] The Oxford Handbook of Iranian History (Touraj Daryaee ed. Oxford University Press 2012) 122
[9] Lewis, Archibald. "Maritime Skills in the Indian Ocean 1368-1500." *Journal of the Economic and Social History of the Orient*, vol. 16, no. 2/3, 1973, pp. 238–64. *JSTOR*, https://doi.org/10.2307/3596216. Accessed 29 Aug. 2022.
[10] Seland, Eivind Heldaas. "Archaeology of Trade in the Western Indian Ocean, 300 BC—AD 700." *Journal of Archaeological Research*, vol. 22, no. 4, 2014, pp. 367–402. *JSTOR*, http://www.jstor.org/stable/24018067. Accessed 29 Aug. 2022.

Augustus (27 BCE–14 CE).[11] A portion of the trade was rerouted via land to India and then via the sea from Indian ports to the Roman empire. From north India Chinese goods, particularly silks, were carried through Persia or by sea to Alexandria, Rome's principal port for trade using the Indian Ocean.[12]



Source – commons. Wikipedia

Through northern Indian ports like Barbaricum (Karachi) and, most importantly, Barygaza (Bharuch), where the approach and anchorage were so perilous that pilots were dispatched to guide ships into port, Roman money flooded into Kushan territory.[13] For individuals who were untrained or unfamiliar with the currents, navigating the approach to both ports was exceedingly risky. 92 As soon as they set foot on shore, traders discovered pepper, spices, ivory, and textiles, including finished silks and silk thread. It was an emporium that brought items from China, Central Asia, and all of India, and it brought the Kushan extraordinary wealth.[14]

East Africa and Ethiopia

Ethiopia/ Aksum controlled International Trade, Aksum's location and expansion made it a hub for caravan routes to Egypt and Meroë. Access to sea trade on the Mediterranean Sea and Indian Ocean helped Aksum become an international trading power. Traders from Egypt,

[11] Raoul McLaughlin 'The Roman Empire and the Indian Ocean the Ancient World Economy and the Kingdoms of Africa, Arabia and India', (PEN & SWORD MILITARY 2014) 88
[12] Philip's Atlas of World History (Patrick O Brien e.d. 2002) 47
[13] Xinru Liu 'The Silk Road in World History' (Oxford University Press 2010) 37
[14] *ibid.*

Arabia, Persia, India, and the Roman Empire crowded Aksum's chief seaport, Adulis, near present-day Massawa. Aksumite merchants traded necessities such as salt and luxuries such as rhinoceros' horns, tortoise shells, ivory, emeralds, and gold. In return, they chose from items such as imported cloth, glass, olive oil, wine, brass, iron, and copper.

MEDIEVAL EXCHANGE AND ISLAM

In the Indian Ocean basin, trade grew significantly between 400 and 1450 CE. A strong western node for the trade routes was created by the emergence of the Umayyad (661-750 CE) and Abbasid (750-1258 CE) caliphates on the Arabian Peninsula. The Prophet Muhammad was a trader and caravan leader, and Islam regarded merchants highly. Additionally, wealthy Muslim cities fueled a huge demand for luxury products. Meanwhile, China's Tang (618–907) and Song (960–1279) dynasties placed a heavy emphasis on trade and industry while fostering maritime trade and forging close commercial relations via the land-based Silk Roads. To combat piracy on the eastern end of the route, the rulers of the Song dynasty even established a strong imperial navy.[15]

The Arabs sailed to the southernmost parts of India before and after the sixth-century birth of the Prophet Mahomed, where their descendants still reside today. Indian traders and priests interacted with the Malay and Indo-Chinese peoples, fusing their native cultures with those of Buddhist and Hindu India. To settle in Madagascar, the Indonesians launched themselves over the center of the ocean's wastes. Arab crafts predominated by the seventh century, and by the fifteenth, their trading ports extended from Mozambique on Africa's east coast to the eastern islands of the Indonesian archipelago.[16]

The Chinese made substantial ventures into the Ocean between the thirteenth and fifteenth century. huge state-controlled fleets, but they largely fell short of confronting the Arab monopoly.[17]

By the fifteenth century, the area not only had a thriving Arab internal market, Chinese, Malay, Malaysian, and Persian traders travelled from Canton to South-East Africa, but Additionally, it was a significant source of supplies for the later, quickly developing markets. historical Europe. Past the quick region of the Indian Ocean, Arab dealers handled multitudes of products

[15] Wink, André. "From the Mediterranean to the Indian Ocean: Medieval History in Geographic Perspective." Comparative Studies in Society and History, vol. 44, no. 3, 2002, pp. 416–45. JSTOR, http://www.jstor.org/stable/3879375. Accessed 29 Aug. 2022.

[16] Upinder Singh A History of Ancient And Early Medieval India From The Stone Age To The 12th Century (Pearson 2008)1322

[17] *ibid.*

which they conveyed into the Mediterranean world, the Persian Gulf, across the Suez isthmus and along the Tigris and incredible Muslim exchanging urban areas of the eastern Mediterranean. Inside European traders, chiefly from Italian city states, conveyed abroad. They even went to the edges of mainland Europe [18]

Also, along the East African coast, a number of commercial towns developed in the ninth century. These towns had the same religion, language, and way of life. Although they were African, these Swahili-speaking Islamic towns were located along a major commerce route that connected the Red Sea, southern Arabia, and India. As a result, they assimilated many elements of the surrounding civilizations. From the early locations of Manda and Shanga, Swahili towns and settlements had substantially grown by the fourteenth century, extending from Mogadishu south to Chibuene, with colonies on the Comoros and Madagascar. Fine multi-story homes made of coral could be seen in towns like Kilwa, and the locals there had a cuisine high in rice, spices, and coconut—tastes from the diverse Indian Ocean.[19]

Slaves were the principal export from the Horn of Africa, and they were transported to the Arabian Peninsula via the Red Sea. In exchange, a range of manufactured items were imported, including ceramics from China, Persia, and Arabia as well as armaments from the Arab realm. Along the length of the East African coast, where Swahili mansions were constructed with rows of wall niches to display their porcelain collections, ceramics were also a significant import. Sugar, spices, and textiles were among the additional imports. The trading of copper, gold, and iron ore made Great Zimbabwe very wealthy, and the coastal trading cities had control over the export of a variety of goods from the interior, including metals, ivory, and slaves, which they conveyed as beads.[20]

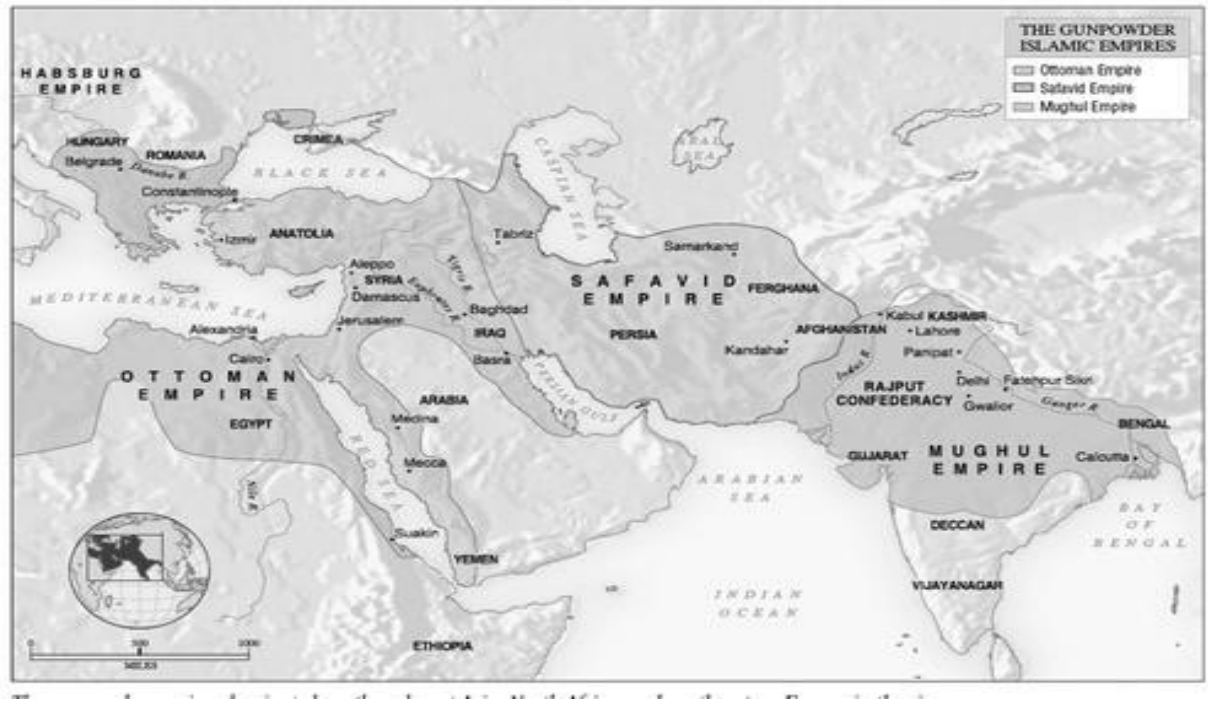
Muslims traded in rice and cotton in India, ivory and slaves in East Africa, pearls and gold in the Persian Gulf, silk, tea, and porcelain in China. The growth of Islam and China both contributed to the spread of Arab trade in the Indian Ocean. The Tang dynasty in China and the Mohammedan state in Medina both came into existence in 618 and 622, respectively. The Tang dynasty re-energized the bureaucracy, established a powerful central government in China, and actively pursued the establishment of marine commerce ties with the Indian Ocean

[18] Subairath C.T. "CALICUT: A CENTRI-PETAL FORCE IN THE CHINESE AND ARAB TRADE (1200-1500)." *Proceedings of the Indian History Congress*, vol. 72, 2011, pp. 1082–89. *JSTOR*, http://www.jstor.org/stable/44145720. Accessed 29 Aug. 2022.
[19] Philip's Atlas of World History (Patrick O Brien ed. 2002) 82
[20] *ibid*

to the south. The predicament was comparable to the period in antiquity when the Han dynasty controlled in the east of the Indian Ocean and the Roman Empire governed in the west.[21]

IN THE AGE OF GUN POWDER EMPIRES

The gunpowder empires refer to the three Islamic empires established through advances in gunpowder technology that was developed in China. They were Mughals in India, Safavid Persian empire in Iran, ottoman empire in Anatolia, Eastern Europe and parts of Africa. These were prosperous empires with large economies. These empires were in conflict for border regions but the trade amongst them was also quite significant. There was also movement of people for Haj, and there was regular exchange of envoys.[22] The casual exchange does not mean that everything was peaceful; they contested for the control of Kabul and Kandhar. The similar situation existed between Safavids and Ottoman, there was conflict for the control of Tigris and Euphrates basin. Ottoman and Mughals followed Sunni Islam while Iran was a Shia State, all of them home to diverse sets of people. The Mughal India was an important source for exquisite textiles, spices, perfumes, and other goods. There was a burgeoning trade from the ports of Gujrat to Ottoman and Iranian shores. [23]



Source: commons. Wikipedia

[21] FITZPATRICK, MATTHEW P. "Provincializing Rome: The Indian Ocean Trade Network and Roman Imperialism." *Journal of World History*, vol. 22, no. 1, 2011, pp. 27–54. *JSTOR*, http://www.jstor.org/stable/23011677. Accessed 29 Aug. 2022.
[22] Michael Pearson 'The Indian Ocean' (Routledge 2003) 212
[23] History of the World Map by Map (Rob Houston ed. DK London, Penguin Random House Company 2018)162

Portuguese and the Ottomans Strange new seafarers first appeared in the Indian Ocean in 1498. [24]Vasco da Gama's (1460–1524) crew of Portuguese seafarers crossed the southern tip of Africa and sailed into unknown waters. The Portuguese were keen to participate in the Indian Ocean trade because there was a huge demand in Europe for expensive items from Asia. But there was nothing for trade in Europe. The inhabitants of the Indian Ocean basin had little use for iron cooking pots, wool or fur apparel, or any of Europe's other modest exports. As a result, rather than as traders, the Portuguese entered the Indian Ocean trade as pirates. They took coastal cities like Calicut on India's west coast and Macau in southern China by using a combination of bluster and guns. The Portuguese started to plunder and extort both foreign commerce ships and local manufacturers. They still carried the scars of the Moorish Umayyad invasion of Portugal and Spain (711–788), and they saw Muslims in particular as the adversary, plundering their ships at every chance.[25]

ARRIVAL OF OTHER EUROPEANS

The Dutch East India Company, a ruthless European power, debuted in the Indian Ocean in 1602. (VOC). The Dutch sought a complete monopoly on profitable spices like nutmeg and mace rather than integrating themselves into the existing trade pattern, as the Portuguese had done. With the help of their British East India Company, the British entered the VOC's fight for control of the trading routes in 1680.[26] Reciprocal commerce ceased as European countries achieved political dominance over significant portions of Asia, turning Indonesia, India, Malaya, and most of Southeast Asia into colonies. While the previous Asian trading empires became poorer and fell apart, goods travelled more and more to Europe. With it, the 2000-year-old Indian Ocean trade network was at least severely damaged and at worst destroyed.[27]

CONCLUSION

Based on a discussion we can conclude that the Indian ocean has shaped the course of Civilizations in the region. On one hand it separates many parts of land but through shipping commerce and trade it connects many parts as well, its winds have allowed for regular travel between its coasts. On one hand many empires, communities and kingdoms have sustained on

[24] Robert D Kalpan 'Monsoon Indian Ocean and future of American Power (Random House 2010) 57

[25] HOFMEYR, ISABEL. "Universalizing the Indian Ocean." PMLA, vol. 125, no. 3, 2010, pp. 721–29. JSTOR, http://www.jstor.org/stable/25704470. Accessed 29 Aug. 2022.

[26] i*bid*

[27] S.A. A. Rizvi, 'Wonder That was India' (Picadoor India 2005) 223

the basis of its trade on other hand many have met their doom when other powers entered their domain. The Kingdom of Sri Vijay is one such example. It is not only a passage to carry goods and persons but with them it also allows for exchange of ideas, knowledge religion, culture and practices.

ROLE OF WOMEN IN LAW MAKING

ABSTRACT

Women have always been an integral part of society. Be it homemaking or law making, the role played by them in forming the same is impeccable. This project will analyse the role played by some of the many women in law making.

The first woman who played an integral role in law making and made history in the legal field is **Indira Gandhi**. Indira Gandhi's attractive personality masked her iron will and autocratic ambition, and most of her Congress contemporaries underestimated her drive and tenacity. The 42nd Amendment Act, 1976, is one of the most important amendments to the Indian Constitution. It was enacted by the Indian National Congress headed by Indira Gandhi then. Due to the large number of amendments this act has brought to the Indian Constitution, it is also known as 'Mini-Constitution.

The second woman that we will talk about is **Rajkumari Amrit Kaur,** she was one of the 15-woman Constituent Assembly Members in the Constituent Assembly and was the first woman Cabinet Minister of free India. Kaur was a co-founder of the All-India Women's Conference in 1927 and the Indian Council for Child Welfare in 1952. She worked towards the eradication of the purdah system, child marriage, child illiteracy, and the devadasi system. In a piece titled "Gandhi and Women", she argued that Gandhi was uncompromising in the matter of women's rights.

Next in line is **Jayalalithaa**, original name Komalavalli, an Indian film actress, politician, and government official who long served as the leader of the All-India Dravidian Progressive Federation, a political party based in Tamil Nadu, India. By becoming the first Chief Minister to win two elections in a row after three decades, AIADMK General Secretary Jayalalithaa is only continuing a tradition of her own: that of a tradition breaker.

Constituent assembly, that was largely male dominated, had some of the most influential women in it, who changed the course of history and perspective of the world that how will one see them. One of them was yet another powerful lady, **Hansa Jivraj Mehta**, whose victory in the 1937 election for the Bombay Legislative Council helped define her political career. Mehta actively participated in the All-India Women's Conference at this time, rising to its presidency in 1946. Women's civic rights and gender equality were advocated in the Indian Women's Charter of Rights and Duties, which was written during her presidency.

Though it was not possible to include each and every woman in this small research project, the author has tried to delve into the broad horizons of the roles played by women in law making. These prominent ladies have played an integral role in not only the evolution of women rights, but political course altogether. Although some of them have been criticised pertaining to the fact that they have seldom used extensive measures to assert the rightness and ethics they hold, there is no denying the fact, that they have changed the course of history and have played a colossal role in law making.

Keywords: *Justice, Women, Law making, Constitution, Welfare.*

INTRODUCTION

"If you educate a man, you only educate a man, if you educate a woman, you educate a generation."[1]

The quote stated above is very evident and justifies the fact that it is to educate a woman in order to educate an entire society. When we talk and discuss about the role of women in any field per se, we cannot deny the very fact that without their existence in the given arena, the modern society would not have been what it is today.

The society in which we live, the way we live, and many other intrinsic factors are linked to the very fact that there is a huge role played by women of the state in the same. If it were not them, we would not be able to do things that today, we do so easily.

When we talk about role of women, particularly in the arena of law, in this research project, the author will talk about what was the role played by women in the same. Since covering all the women in a single research paper is a bit unfeasible, the author will restrict herself to four major women, who have played a significant role in shaping modern law, specifically in India. Our goal should be to attain equality for women judges, including representation at all levels of the judiciary and on judicial councils that make policy. This is good for women, but it is also right for the advancement of a more just system of law.[2] Women judges are strengthening the legal system and increasing public trust. This thus proves that women can play a pivotal role in bolstering the existing legal system, as they have done before, and they can play a great role if we see to the future perspectives. Talking about the existing legal system, we have seen that

[1] Brigham Young, sept. 1999.
[2] Sonam Chandwani 'Contribution of women in legal field is immense'. March 5,2021 < https://www.99acres.com/articles/womens-day-the-contribution-of-women-in-the-legal-field-is-immense.html> accessed on 19/07/2022

there is a lower representation of women in comparison to men in the country. This unequal figure needs to get equal, and hence there should also be efforts to do the same.

RELATION BETWEEN WOMEN AND LAW

There is an oddly paradoxical relationship between politics, law, and gender. On the one hand, issues of gender are clearly central to any understanding of the law. On the other hand, both the practise and the study of politics have long been notoriously masculine endeavours. so much so that many commentators have argued that politics and law have historically been the most explicitly masculine human activities of all. It has been more exclusively limited to men and is more self-consciously masculine than any other social practice.

Feminist discussions have opened areas for reconsidering gender in law, and both feminists and male political theorists have addressed the topic from their own perspectives. The contradiction is that feminism is openly political despite the fact that feminists have long asserted that politics has continually excluded women. According to Anne Philips, feminism is "politics."[3] It is political in the sense that it seeks to change the balance of power in favour of women. In addition, when politics adopts the "institutional" form of government, women are excluded. The contradiction is that an exclusionary body cannot thus be considered to be an "inclusive" one, which presents another challenge to decision-making in a long-term analysis.

Furthering the discussion of gender and law, Pateman claims that politics is inherently resistant to the feminist argument due to something in it or the character of it. According to her, the patriarchal construction of the categories used by political theorists "excludes from inspection and is deemed irrelevant to political activity and democracy." Similar claims are made regarding the exclusion of women from the dominant conception of legal studies, which Lovenduski states is "largely due to the fact that women do not hold positions of public authority, are members of political elites, or have significant influence within governmental institutions and the judiciary."

Rendering in all the comments about the relationship between both, law, and the role of women in propounding the same has been a great one. When we talk about the role played by women, it is a major one. We will see the same further in the research project, but for time being, we should stick with the reference given to the relationship between the two.

[3] Anne Phillips, "Feminists theories" Oct 2002

INGRESS OF WOMEN IN LEGAL DOMAIN

Watching flamboyant black women battle for human rights in court is not an uncommon sight. The list of notable female lawyers in India includes Indira Jaising, Flavia Agnes, Kamini Jaiswal, Meenakshi Lekhi, Karuna Nundy, Vrinda Grover, and Rebecca John. But India's first female lawyer, Cornelia Sorabji, was born in 1866. Cornelia achieved a number of firsts. Her admission to the Allahabad High Court made her the first female graduate of Bombay University. She was the first Indian student to attend a British university and the first woman to study law at Oxford University in 1889.

Finally, she became the first woman to practise law in all of Britain as well as India. Cornelia was one of the nine children raised by Reverend Sorabji Karsedji, a Parsi, and his wife Francina Ford, a Parsi who was adopted and reared by a British couple. Francina founded several girls' schools in Pune and was an advocate for women's education. She was frequently consulted by local women for property disputes and inheritance issues, and she had a significant impact on a young Cornelia. Her father home schooled Cornelia in a few of their mission schools.

The legal field had opened its doors to women in India beginning with Cornelia Sorabji's admission to the High Court of Allahabad in 1921 to practise as an advocate. Formally, Indian women were given the opportunity to pursue a career in law and work as advocates in courts of law after the Legal Practitioners (Women) Act, XXIII of 1923[4] repealed the prohibition against women practising law. The fight for justice for the "pardanashin" women of her time, who were susceptible to being duped by the legal men or their touts due to their illiteracy and lack of formal education, was pioneered by Cornelia Sorabji.

Since independence, the Indian Constitution has protected these people's rights to equality and freedom from gender-based discrimination in their pursuit of higher education and employment. Despite this right, women did not increasingly choose the legal field as a career because it required a foundational education for them to be aware of their rights. And for a female population that was largely illiterate due to factors like poverty, strict caste restrictions, constrictive social customs, cultural practises decrying women working outside of the home, etc., to name a few, the Independence era had managed to ignite dreams of higher education and pursuing a profession, even if only in the form of a consciousness of being a subjugated and repressed part of the society that contributed greatly to the era's problems.

[4] Legal Practitioners (Women) Act, 1923 [Repealed], ACTNO. 23 OF 1923.

PROMINENT WOMEN IN LAW MAKING AND THEIR CONTRIBUTIONS

Many women contributed significantly to the development of modern law. The law that we see today has evolved through a lot of deliberation and mind-crunching, in all of that, the role that women have played is of great significance. Because every woman who has contributed in the field cannot be mentioned in the given research project, for the sake of clarification, the author will mention some of the many women who have helped shape the modern-day law as it is today. The focus will be on four major women, they are as:

Indira Gandhi

Most of her Congress colleagues underestimated Indira Gandhi's energy and persistence because of her soft-spoken, alluring manner, which concealed her steely determination and ambition. She travelled to Washington, D.C., during her first year in government, where she secured significant backing for India's struggling economy.[5] Her subsequent trip to Moscow was a continuation of her father's nonalignment policy. The world's attention was drawn to India after a woman was elected as its prime minister. Indira was featured on the Time magazine cover in America under the caption, "Troubled India in a Woman's Hands." "Probably no woman in history has assumed a larger burden of responsibility, and surely no country of India's stature has ever previously given so much power to a woman," observed English journalist John Grigg in the Guardian.[6] Indira never saw herself as a feminist, even though her election coincided with the expansion of the feminist movement in the West.

After Jawaharlal Nehru and Lal Bahadur Shastri, Indira Gandhi was elected as the third Prime Minister of India, becoming the first woman to hold the position. After years of training, taking on responsibilities, going on work assignments, and helping her father, she finally assumed control of the Indian government.

Contributions of Indira Gandhi

The 14 largest commercial banks were nationalised by an edict issued by the Indian government, led by Prime Minister Indira Gandhi, with effect as of midnight on July 19, 1969.

[5] Austin, Granville, 'Indira Gandhi: In Context and in Power', Working a Democratic Constitution: A History of the Indian Experience (Delhi, 2003; online edn, Oxford Academic, 18 Oct. 2012), https://doi.org/10.1093/acprof:oso/9780195656107.003.0009, accessed 11 August, 2021.
[6] Richard L.Park, Asian park, Vol. 15, No.11. pp 996-1031< https://www.jstor.org/stable/2643553>, accessed on 15 July, 2022.

The legislation was titled "Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969."[7] Significant economic progress was made here. The government nationalised 14 banks that held 70% of India's deposits. In 1980, another six banks were nationalised. Imperial Bank became the State Bank of India after being nationalised in 1955.

Foreign-owned private oil corporations had refused to provide fuel to the Indian Navy and the Indian Air Force during the 1971 war with Pakistan. Gandhi responded by nationalising the oil industry in 1973. Oil companies, including the Indian Oil Corporation (IOC), Hindustan Petroleum Corporation (HPCL), and Bharat Petroleum Corporation (BPCL), were required to maintain a minimum stock level of oil upon nationalisation in order to supply the military when necessary.

Prime Minister Indira Gandhi nationalised ESSO and Burma Shell in 1974 and 1976, respectively (Caltex and IBP were also nationalized). She established the Oil Coordination Committee to guarantee a consistent oil supply and maintain stable prices. In order to set the cost of petroleum goods, she also established the "Administered Pricing Mechanism."

After Indira Gandhi was elected prime minister in 1967, the nuclear programme was once again actively pursued. Chemical engineer Homi Sethna made a crucial contribution to the creation of weapon-grade plutonium, whereas Ramanna conceived and produced the full nuclear device. Due to the sensitivity of the first nuclear weapon project, no more than 75 scientists were employed. Instead of uranium production, the nuclear weapons programme is now focused on producing plutonium.

Indira Gandhi introduced the Twenty-Point Programme in 1975, and it was subsequently reorganised in 1982 and once again in 1986. In a radio address, Prime Minister Indira Gandhi unveiled plans to boost the economy and enhance her reputation as a socialist leader. Among the pronouncements were the increase in the income tax exemption threshold from Rs. 6,000 to Rs. 8,000, the seizure of smugglers' homes, ownership and occupation restrictions on unoccupied property, and the purchase of surplus land. Laws governing land ceilings would be severely enforced, and surplus land would be handed to impoverished people in rural areas.[8]

[7] THE BANKING COMPANIES (ACQUISITION AND TRANSFER OF UNDERTAKINGS) ACT, 1970 ACT NO. 5 OF 1970 [31st March, 1970]

[8] Simran Singh, “https://indiragandhi.in/en/timeline/index/prime-minister-timeline” Indira Gandhi as Prime Minister of India. Accessed on 22 July, 2022.

The emergency provisions were also used for the very first time in India during the tenure of Indira Gandhi, and it was then that we realised how important the separation of powers is in the Indian legal system so that all three organs work within their own vicinity and do not encroach upon the areas of one another. Speaking about the changes bought by Indira Gandhi in the major constitutional amendment, that is, the 42nd amendment[9] (also called the "mini constitution"), the majority of the changes that were bought in the said amendment are still present and are validly considered. They are recognised by the constitution of the country. The major changes that were made through the amendment were large in nature and are still continuing.

Rajkumari Amrit Kaur

Rajkumari Amrit Kaur played a great role in the making of the constitution, and hence played a huge role in the making of the law. She was the first female Cabinet Minister of independent India and one of the 15 female members of the Constituent Assembly. Kaur was reared as a Christian and was born to Prince Harman Singh, who had converted to Christianity. She received her education in London before returning to India, where she participated in the fight for the country's independence and promoted women's rights. She was greatly influenced by Gandhi. She wrote to him in 1918 to express her desire to serve against her parents' objections. Gandhi urged that she must not go against her parents' desires with her deeds.[10] Kaur didn't start working as Gandhi's secretary until 1930, following the death of her father- a position she held for 16 years.

Contributions of Rajkumari Amrit Kaur

Kaur, who represented Central Provinces and Berar in the Constituent Assembly, served on the Sub-Committee on Fundamental Rights and the Sub-Committee on Minority Rights. She supported the Uniform Civil Code and women's marital equality at the Sub-Committee stage. She pointed out that the Uniform Civil Code would defend women from unfair personal law practises. In a letter to Sardar Patel (chairman of the Advisory Committee), Kaur argued in favour of adding the Uniform Civil Code to the list of fundamental rights and making it a justiciable right.

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[9] 42nd constitutional amendment act,1976

[10] Kruthika R
<https://www.constitutionofindia.net/blogs/assembly_member_of_the_week__rajkumari_amrit_kaur" Constitutional of India> 5th February 2018.

Kaur was part of many important sub-committees that have helped in the making of the constitution and has hence played a major role in the process of making laws.

On a Congressional ticket, she was chosen to represent the Central Provinces and Berar Province in the Constituent Assembly. Kaur was a member of significant subcommittees in the Constituent Assembly and helped shape various constitutional provisions, even though she didn't speak much during the sessions. She was a well-known representative on both the Minorities and Fundamental Rights Sub-Committees of the Assembly. She voiced her disagreement with the subcommittee's inclusion of the right to freedom of religion since it may offer constitutional protection to a number of discriminatory practices including purdah, sati, the devadasi system, etc.[11] Her protest had an impact since the Constitution finally included the stipulation that the right to practise did not exclude the state from passing measures for social improvement.

When she joined Prime Minister Jawaharlal Nehru's temporary cabinet in 1947, she became independent India's first health minister and held the position for ten years. She was also the first woman to serve in the government after independence. She presented the AIIMS Bill to Parliament in 1956, paving the path for the creation of the All-India Institute of Medical Sciences (AIIMS) and enhancing medical education in the nation. She also pushed for the establishment of several nurse training facilities as a fervent supporter of the nursing field. For the following several years, her work was mostly focused on promoting health and education. In 1945 and 1946, she served as the Indian delegation's deputy leader at UNESCO.[12] She headed India's delegation to the World Health Organization on multiple occasions between 1948 and 1953, and in 1950 she was elected as the first female and Asian president of the World Health Assembly.

Rajkumari Amrit Kaur was, at her time, one of the most educated women. She understood the time and need to educate women about their rights, and made the provisions regarding the same. The constituent assembly was aware of her qualifications and utilised them; she made provisions regarding health and education, not only for women but for the public at large. The provisions suggested by her are still practised and incorporated time and again in the field of law.

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[11] Sansad TV "https://www.insightsonindia.com/2022/08/06/sansad-tv-makers-of-indian-constitution-rajkumari-amrit-kaur/" dated 12 August, 2022.

[12] Hansa Jivraaj Mehta, "*constitutionofindia.net."* accessed on 20 July, 2022

The contributions that she made to the law in the fields of health and education are, therefore, impeccable. In order to do the same, she plays an immensely large and important role.

Jayaram Jayalalithaa

Between 1991 and 2016, Jayaram Jayalalithaa, the Chief Minister of Tamil Nadu, held the position for more than fourteen years over six terms. She served as the fifth and longest-serving general secretary of the All-India Anna Dravida Munnetra Kazhagam (AIADMK), a Dravidian party, from 9 February 1989 to 5 December 2016. Her cadre saw her as their "Amma" (mother) and "Puratchi Thalaivi" (revolutionary leader). In the middle of the 1960s, Jayalalithaa initially made headlines as a notable cinema actress. Jayalalithaa worked a lot, despite her reluctance to enter the field; her mother had encouraged her to do so in order to help the family. Between 1961 and 1980, she had 140 film appearances, mostly in Tamil, Telugu, and Kannada. Known as the "Queen of Tamil Cinema," Jayalalithaa was praised for her acting range and dance prowess.

The youngest and first-time chief minister of Tamil Nadu, Jayalalithaa, assumed office in 1991. She had a reputation for concentrating state authority in the hands of a small group of bureaucrats; her council of ministers, whom she frequently moved about, served mostly as ceremonial advisors.

Contributions made by Jayalalithaa

Nearly ten years after she became leader of the M.G. Ramachandran-founded AIADMK, Ms. Jayalalithaa reinvented herself as a key figure in Tamil Nadu politics. She had a terrible defeat in the 1996 Assembly elections. Everyone foresaw her political demise. Then, in 1998—her "annus mirabilis"—she returned to the Lok Sabha elections. Ms. Jayalalithaa ventured to take a stand against a powerful DMK-Tamil Maanila Congress combination that had recently dealt the state's major parties a devastating loss two years prior.[13] She courted the MDMK, which was perceived as being casteist; the BJP, which was perceived as being communal; and the PMK (which was fighting to stay relevant).

She stood out in a field that was largely male-dominated and fought all her battles there. Despite numerous attempts to belittle her, she was a firm believer that she would do things better than her male counterparts. She framed rules and regulation in favour of women who wanted to

[13] R.K Radhakrishnan "The Hindu centre for public and politics" dec 9,2016. <thehinducentre.com> accessed on 19 July, 2022

participate in a field that is traditionally not considered an arena where females should enter. In defiance of pollster predictions, her coalition secured 27 seats[14], making her the dominant figure in the Atal Bihari Vajpayee-led NDA government. The end of national parties stealing the majority of votes from the state in the Lok Sabha elections was also marked by that election.

The action taken by Ms. Jayalalithaa prompted the DMK to support the BJP. The DMK joined the NDA after she toppled the Vajpayee administration. The PMK and the MDMK also secured seats in the incoming NDA administration.

The major parties have long restricted Dalits to reserved constituencies, despite their claims that they are empowering them. By breaking the mould and fielding Dalit Ezhilmalai, a former Union Minister and well-known figure among Dalits since his days in the PMK, Ms. Jayalalithaa ensured his victory over the DMK-BJP coalition candidate.

This proved that Jayalalitha was a victorious figure, who advocated the rights of weak and marginalised and has also helped in empowerment of marginalised sections of society.

Hansa Jivraj Mehta

On July 3, 1897, Dr. Mehta was born. Her father, Manubhai Nandshankar Mehta, was the then-Dewan of Baroda, and she came from a wealthy family. After completing her studies in journalism and sociology in England, she returned to India. Sarojini Naidu and Mahatma Gandhi started to have a big impact on her life around that time. Soon after, she became fully involved in the struggle for liberation, taking a leading role in the Swadeshi and the non-cooperation movements. Inqilab Zindabaad was yelled as Kamala Nehru and Hansa Mehta arrived at the Delhi Railway Station in 1930. The British forced train engines to honk continuously to block out the shouts for revolution because they were so fervent. The British soon became aware of her active engagement, and she and her husband were both jailed. She ran for the Bombay Legislative Council after being freed. She ultimately prevailed in the provincial elections. She served two terms, from 1937 to 1939 and from 1940 to 1949. She thereafter became a member of the Constituent Assembly (CA).[15]

Mehta also participated in the 1946 United Nations subcommittee on the situation of women. She served as Eleanor Roosevelt's vice-chair on the UN Committee on the Universal

[14] A.S. Nazir Ahmad, T. Aravind "The making of Jayalalithaa, the poll strategist" May 26, 2016. Accessed on 1 August, 2022.
[15] Special correspondent "Jayalalithaa defends making statements under rule 110" May 13, 2013. Accessed on 2 August, 2022.

Declaration of Human Rights. Additionally, she made history when she was appointed to SNDT University in Bombay, making her the country's first female vice chancellor.

Contributions made by Hansa Mehta

One of the 15 women who helped draught the Indian Constitution was Mehta. On the platform of the Congress Party, she was chosen to represent Bombay in the Constituent Assembly. She spoke out vehemently in favour of women's rights during Assembly deliberations on the unified civil code and reservation. Mehta served as the representative of India to the UN Human Rights Commission. She was instrumental in modifying the wording of Article 1 of the Universal Declaration of Human Rights (or "UDHR")[16] from "All men are born free and equal" to "All human beings are born free and equal." Through Article 16 of the UDHR, Hansa Mehta and Eleanor Roosevelt guaranteed marital equality for women.

She was the one who spearheaded efforts to abolish both the devadasi system and child marriage. She frequently raised women's rights concerns, even though she was a CA member. She gave her support to BR Ambedkar's recommendations for the Hindu Bill about changes to the laws governing divorce, adoption, and inheritance. Making the Uniform Civil Code (UCC) a part of the Indian Constitution was one of her most important efforts. UCC eventually evolved into the non-justiciable directive principle.

Males need protection from women, according to Rohini Kumar Chaudhari, a member of the Assam Province, since women are attempting to "elbow" men out of every aspect of life. Women were able to accomplish this, in Chaudhari's opinion, because of men's "exaggerated sense of civility" or because they had sway over those in positions of power. He said, "This Constitution has some protection for cows, but there is absolutely no provision for protection from cows. Furthermore, there is no protection for women under this Constitution." Hansa's response to this remark was quite harsh. At a time when it was frowned upon to marry the person of one's choice, Hansa, a member of the Nagar Brahmin community, married Jivraj Narayan Mehta and Vaishya Mehta. She, fortunately, received support from the Maharaja of Baroda, Sir Sayajirao Gaekwad III[17], who finally convinced her father.

Such huge contributions made by this woman of steel was of such a sheer stealth and valour, that a woman from the time period where she was born would have not imagined of doing this.

[16] United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A)
[17] The Leaflet, march 10, 2021.

She championed human rights, especially the rights of women and other marginalised groups. She ensured that constitutional provisions should be made that ensure the same. This made her one of the most important pioneers of constitution-making. Advocating the rights and liberties of marginalised people and practising things that eradicate any kind of discrimination was what Hansa Mehta did. This contribution of hers is what has shaped a major part of constitution today that incorporates in itself provisions to safeguard the rights of public at large. Her contributions paved the way to formulate policies in such a way that ensured that the basic rights of the public at large should not be curtailed in any way.

CONTEMPORARY STATUS OF WOMEN IN LAW MAKING

"Unfortunately, only 17 of the 37 women who were recommended to High Courts (by the Supreme Court Collegium) have been appointed thus far.[18] The government is currently processing the others. There are several reasons why women are underrepresented in the court. "Our society's established patriarchy is the main cause," according to former Chief Justice of India N.V. Ramana.

Despite women's growing participation in public life, they are still disproportionately underrepresented in positions of power. In reality, there aren't many women in the judiciary today or in the past, especially in positions of high leadership. To ensure that courts reflect their inhabitants, answer their problems, and issue good rulings, women must be represented in the judiciary. Women judges improve the credibility of courts by virtue of their very existence, conveying a strong message that they are open and available to all who seek recourse to justice.

The Advocates Act of 1961's Section 3[19] created the State Bar Councils as statutory organisations. They serve as governing organisations that establish regulations for the legal industry and state-sponsored education. Additionally, they represent state advocates and hence operate in their best interests.

Ratio between women and men representatives of State Bar Councils

1. Andhra Pradesh: 1:25
2. Bihar: 2:23
3. Gujarat: 0:26
4. Delhi: 0:15

[18] Bar Council of India, as per census of 2020.
[19] Advocates act of 1961, 196125.

5. Himachal Pradesh: 1:14
6. Jharkhand: 1:24
7. Karnataka: 0:27
8. Kerala: 0:26
9. Madhya Pradesh: 1:26
10. Maharashtra and Goa: 0:27
11. Punjab & Haryana: 0:28
12. Rajasthan: 0:26
13. Tamil Nadu & Puducherry: 1:22
14. Telangana: 1:26
15. Uttarakhand: 0:21
16. Uttar Pradesh: 0:26
17. West Bengal: 0:26
18. Assam, Nagaland, Mizoram, Arunachal Pradesh, and Sikkim: 1:24.

Out of a total of 441 representatives on the above-mentioned Bar Councils, only nine are women.[20]

The general consensus was that, despite women's passion, commitment, honesty, and efficiency, the legal profession continues to be a male-dominated environment and they are not encouraged to pursue positions of power. The establishment of a rule requiring a minimum amount of female participation on bar councils was one of the recommendations.

The fact that there is a gender pay gap in the court is troubling, and it is made worse by the fact that few women lawyers have been appointed to the bench. Direct promotions from the Bar to the Bench and promotions of trial court judges are the two sorts of appointments that happen in HCs. Only 61 of the 150 women chosen to serve in the 25 HCs since 2006 were cases of direct elevation; the others were judges of trial courts who received promotions. 32 of the 66 female judges[21] who are now on the bench are attorneys who were recommended for direct appointment.

This underrepresentation of women in the legal domain strengthens the fact that law is largely a male-dominated field. When women are underrepresented in any field, this also ensures that

[20] *ibid.*
[21] BHADRA SINHA and TUSHAR KOHLI. "Alarming gender disparity in judiciary: 4 women judges out of 33 in SC, 66 out of 627 in HCs". 13 October, 2021

the whole of the community of women are at a disadvantage. The underrepresentation also ensures that the gates of justice are denied or restricted to a large section of society. There have been instances where women are reluctant to go to the doors of courts because they feel that their voices will not be heard. Thus, steps should be taken to ensure that more and more women participate in the field of law making, thus making access to justice more and more accessible to all corners of society.

MEASURES TO ENSURE PARTICIPATION OF WOMEN IN JUDICIAL DOMAIN

At the lower judicial level in India, quotas for women have been imposed in a number of states. In spite of these reservation regulations, there hasn't been a consistent trend towards better female appointment practises in the judiciary. Although states like Kerala frequently report a high percentage of female admissions at lower levels of the judiciary, this shouldn't be interpreted as the product of quotas. These high rates are partly attributable to the more advanced socioeconomic status of women in these states. This leads us to a more crucial question: if not discrimination, what else can we do to diversify the judiciary? The most apparent is to concentrate on providing women with higher postsecondary education and introducing young females to job opportunities in the judicial services. Then, more substantial systemic reforms are required. According to Article 217(2) of our Constitution, high court justices must be chosen from the bar or the judicial services. Alok Prasanna Kumar's research highlights how the appointment procedure is heavily biased towards choosing judges from the bar rather than the services. Without a doubt, the candidate pool from the services is more diversified than the bar practitioners. As a result, diversity is badly impacted by the bias against judges in the services, and high court judges are often men as a result. We need to nominate judges in a more open manner in order to resolve this problem. This is where the planned National Judicial Appointments Commission (NJAC)[22] would have been extremely helpful. India may also consider setting up such a body to address the issue of the underrepresentation of women in the judiciary. The number of women in India's judiciary has unquestionably increased, but this shift has not occurred at the rate that society needs for advancement. Instead of advocating for a reservation policy that is doomed to fail, we should focus more on these fundamental issues and lay the groundwork for systemic changes that are sure to be successful.

[22] University of oxford, faculty of Law. “law.ox.ac.uk/news/2018-10-31-women-legal-profession-india” Legal analysis of legal status in India

CONCLUSION

We consider women a minority, but the reality is that they are half the population of the world. They are not a minority; they are a larger part of society. Therefore, the representation of women in the judiciary will not only ensure the representation of women in a part of government that is responsible in proportion to the law, but it will also ensure that the policies and judgements are in favour of women. When we ask as to why altogether is the representation of women necessary? It is first of all a matter of equity and human basic rights, both of which are cornerstones of a democracy, so India being the same, we should mandatorily have representation of women in judiciary.

The second reason why should we have representation of women and what role will they play in judiciary; they will ensure that the viewpoints and justifications of women will be represented equally in the judiciary that will help in propounding judgements that are in positively in favour of them.

WOMEN AND EDUCATION: REVISITING HISTORY TO MAP THE FUTURE

ABSTRACT

Savitribai Phule and Fatima Sheikh opposed both the higher caste Hindus and the orthodox Muslims when they founded the first girls' school & the Indigenous Library in their own home. Sadly, over time, their names were buried in the annals of history. Savitribai Phule, who bravely fought against the oppressive caste and gender hierarchies to challenge untouchability and educate girls, among other crucial social interventions, will be familiar to anyone who has even a passing familiarity with the history of education in India. Fatima Sheikh was the woman who launched the Beti Padhao movement as early as the 1840s. "BBBP: Beti Bachao, Beti Padhao," The Government of India has launched the campaign "Save the Daughter, Educate the Daughter," which aims to increase awareness and boost the effectiveness of government aid programmes for young women in India. The plan's Underpinning funding was Rs.100 crores ($14 million). It primarily focuses on the clusters in Delhi, Uttar Pradesh, Haryana, Uttarakhand, Punjab, and Bihar. This perspective empowered women's identities by defining them as marginalised members of Indian society. To assist in achieving Sustainable Development Goal 5 on gender equality and empowerment, the United Nations places a strong emphasis on closing the gender participation gap. The scholars would explore the achievements of these two social reformers in this review study to advance gender equality and education laws and policies. The researchers would then investigate the current BBBP scheme, India's worldwide commitment to the SDGs, and Niti Ayog's most recent reports. Through the lens of gender equality, the scholars would remap history using current educational legislation and programs.

Keywords: *SDG, History, Gender Equality, Education, Savitribai Phule, Fatima Sheikh*

INTRODUCTION

Since the inception of this earth, the greatest of the epics believed that men and women are the fruit and flower of a single tree and recognised the significance of women enjoying economic freedom, engaging themselves with teachings, and having absolute control over gifts and property. The Ancient Indian culture gave the teaching that *"Yatra naryastu pujyante, Tatra Bramante devata."* It means that where women are worshiped, God's presence is there.

This country has an elongated history with a rich and enriched culture, where the Vedas acknowledged the intellectual and literary abilities of women scholars like *Gargi* and *Maitreya. Draupadi, Anasuya,* with great willpower and deeds. India was believed to be a land of snake charmers and magic, but it is a land where the power is believed to emanate from *Shakti*- the feminine energy, represented in mortal form as a woman.

Despite, such a synagogue of ancient presence in scriptures, the status of women remains complex in the social hierarchy. The opportunity for girls' education is certainly a weapon that will yield the stigma present in society for upliftment from societal evils. The government of India has taken major initiatives to eradicate and improve the status of women's education in India by overcoming barriers for girls. The parental attitude, lack of infrastructure, and socio-economic barriers pose a major challenge to promoting the educational standard among women. Out of the total population, literacy among girls is 65.5% in comparison to boys' 82.1%, as per the 2011 Census Report. An annual average dropout rate of higher secondary level is 1.61% and for senior secondary girls 17.79%. The government of India has launched To reduce the school dropout rate, the government of India is also accepting responsibility for constructing girls' restrooms in every school. The Annual Status of Education Report (2014) states that "in middle and high schools, there is a connection between the number of dropouts and restroom availability." The study's objectives are to state the current situation and difficulties with girls' education in India and offer potential solutions for overcoming the difficulties in Indian females' education.

VISION OF THE SOCIAL REFORMERS

It is believed that having wisdom and understanding is better than having silver or gold. One such pioneer who worked for assigning agency to the very personhood of women by striking out Casteism and accentuating education was Savitribai Phule (1831-1897), modern India's first women teacher who chaired the liberation and education of masses of women while ambushing the caste and patriarchy, through her academia. Her vision emerged as one of the leading voices for the Dalit movement in the 19th century. She influenced the early development of anti- caste literature and made significant contributions to women's education. She abandoned the false dichotomies in the realm of public and private areas in the 19th century by constructing women as the sole custodians of society. Progressively working in political activism to showcase that the Dalits wrestle for their rights in education, equal living, potentiality, and freedom is reservedly in connection with the radical politics that place Dalit

women as eminent agents and delinquent subjects for social reform. She made the world understand the derision of the metaphor through the works of Phule *"Tritya Ratna" (third jewel)* wherein she identified the very acumen as a jewel of liberating the Dalit women and the community at large, in the Brahmanical hegemony. Time and again, she challenged the caste system's endogamy through her poems, portraying the intimacy of education and the dignity of a life filled with equal opportunities.

She was ahead of the cadence, in bringing to light cultural discontent coupled with agendas of modernization of education and harmonizing only the conservative dominant caste. Savitribai's advocacy blazed a trail by focussing on the inclusivity of diversity that we envision in today's Indian Education system, with branches reclining into the egalitarian gender correlation and the impaired entitlement. This vision gave autonomy to the identity of women, identifying them as marginalised characters within Indian society.

M. Fathima Beevi, the first female Supreme Court judge, is an enigma whose name has been permanently stitched into Indian judicial history. Her appointment to the highest court of the land almost after four decades of independence was indeed a momentous appointment for the representation of women in the judiciary at par equal to men. She stated, "However, there should not be any discrimination between candidates on [gender basis]. A woman should get equal treatment and equal consideration."

CURRENT GENDER DIVIDE

The COVID-19 pandemic induced has certainly elongated the economic fallout and its retrospective effect on gender equality. The recent trends during the pandemic illustrate that the global GDP growth can be achieved to $1 trillion lower in 2030 if women's unemployment is tracked to that of men in each sector. The magnitude of inequality is conspicuous: the female job loss rates during the COVID-19 pandemic are nearly 1.8 times higher than the male job loss rates, at 5.7 percent versus 3.1 percent, respectively. The shape of gender implication suggests that female jobs are 19 percent more at risk than their male counterparts; the reason behind this is that women are dispersed and represented in sectors negatively affected by the pandemic crisis. The shadow of the pandemic has penetrated the current emergency poised to deeply aggravate.

True democracy is one where education is universal, people understand what is good for them and the nation, and they know how to govern themselves. But the current situation suggests

that education in this country has transformed into a “luxury.” It has certainly taken a toss in the Country. The education policy is planned uniformly, but the experience shows the problem to be region and gender-specific. The COVID-19 pandemic has brought unprecedented disruption to education. The recent UNESCO reports suggest that nearly 11 million girls may not even return to school between the ages of 12 and 17 in lower-income countries. Gender equality data agonizes over the safety and societal norms that prevent girls from going to school. Child labour, increased poverty, and lack of digital access have further limited the opportunity to learn. Only 30 percent of children surveyed in India had access to a phone, out of which 26 percent of girls had access versus 37 percent of boys. The unstable financial condition of families through the pandemic has forced many families across the country to pull their daughters out of school, either to work or because they could no longer afford it. Many have also opted to get them married while prioritising the education of their sons, due to the persisting patriarchy.

Education should be used as an agent for basic changes in the status of women. Education, as a human right, must include the principles of non-discrimination, equality, and justice. It cannot be a commodity sold to those who can afford it. It should be a right, and a right guaranteed by the government. We should be considered a landmark in women's empowerment, leading to national development that enables women to respond to challenges to protect the better lives of themselves and their children. These realities cannot be separated from the planning and implementation of education policies. Therefore, in the absence of constructive, purposeful, and progressive legislative changes, it is clear and consistent and can effectively deal with these facts, and the goal of the development of the Millennium will always be a hoax.

Equality is, beyond any doubt, a strong word guaranteed by the State bodies. In defiance of being pledged, a section of society has been out of recognition of such rights as per the recent data. The closure of schools, the shortage of teachers, the poor quality of education, the lack of a high school, and the old and inadequate hostel facilities have resulted in some students taking up jobs and others opting for marriage. A large-scale absence of students has been attributed to the ducked delight in online classes and families migrating for work. As the divide is not unique to India, the pandemic has intensified the gap between those with the means and knowledge to benefit from online access to technology and those without, which has exacerbated the levels of inequality in economic growth.

The recent Odisha government Education Department report elucidates that out of 5.71 lakh students who had filled out forms for the Class X exam, 43,489 did not show up. Following the closure of schools due to the pandemic, many girls who had studied in government hostels for scheduled castes and scheduled tribes returned to their villages, where the community had made them vulnerable to marriage; nearly 122 child marriages have taken place in the past two years in just three villages in one panchayat. All Indians are not able to benefit from the initiative of digitization; only 20 percent of Indians know how to use digital services.

As per the 2011 consensus, the overall literacy rate stood at 73.45. The genders gap also remains high at 18% (male-82.40; female-64.36; 2011 Census), an indication of gender bias. Women have fared better in literacy because of several entitlements provided by the state, such as the Sarva Siksha Abhiyan. Further assessment of dropouts and new methods of bringing in the girl child would bring them on equal ground with the boys.

There exists a disparity between the general masses and indigenous people. Women from the ST communities remain excluded, and though enrolment is increasing, dropout is very high. The state has taken up schemes such as the provision of bicycles to ST/SC girls and special hostels, but the situation remains critical in tribal areas. There is a wider gap in Scheduled Tribe (ST) literacy as girl children in many rural tribal areas remain out of school. [1]

CASE STUDY: BBBP SCHEME & OTHER EDUCATIONAL PROGRAMME, POLICIES

In January 2015, referring to the remarkable low child sex ratio all over the country, the Prime Minister Narendra Modi-led government initiated the pioneering *Beti Bachao Beti Padhao* to save the girl child, educate her, and replenish the Preconception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994 (amended in 2003), prevention of the abuse of the Medical Termination of Pregnancy (MTP) Act 1971 (amended in 2002). The basic objective behind this campaign launch is to provide social security to girl children all over the country, focusing on areas such as Delhi, Uttar Pradesh, Haryana, Uttarakhand, Punjab, and Bihar. As per Khichi & Bir (2012), "Discrimination between a male and female child is very much prevalent in society and starts from childbirth itself. The reasons for not preferring female children are dowry and the perception of girls being paraya dhan. It has also been stated that

[1] India, Ministry of Human Resource Development Dept. of Secondary and Higher Education 2005- 2006 in http://planningcommission.nic.in/sectors/sj/Literacy%20of%20SCs%20&%20STs.doc.

investing in girls is a waste with no returns and security reasons, especially sexual offenses against girls."[2]

Through its various programmes, the Ministry of Women and Child Development has implemented the enumerated schemes and programs for empowerment.

- Ladli Laxmi Yojna (2005) in Madhya Pradesh
- Sukanya Samridhi Account (2014)
- Ladli Scheme (2005) in Haryana and (2008) in Delhi
- Girl Child Protection Scheme (2005) in Andhra Pradesh
- Beti Bachao, Beti Padhao (2015)

These schemes aim to prevent gender-biased sex selective elimination, ensure the survival and protection of the girl child, and ensure the education and participation of the girl child. Free and compulsory education is an essential need to cater to females as they can cater to themselves during exigency. Hence, there is a need to change the behavioural attitude and approach of society. This initiative was launched to erase the myths relating to female childbirth, to educate them, and make them self-resilient and independent.

A recent survey revealed that nearly 63% have never heard about the "*Beti Bachao. Beti Padhao"* campaign, neither the cause nor the benefits. The educational benefits are not being catered to every girl child that was envisioned by the Constitutional framers. There is still a reluctance in sending daughters to work, and education as it is believed then they lack extra care and safety, so rather just held them back in the clutches of society. Despite much awareness, the cause still lacks to muster itself. The actual development is with the change of the real mentality of the society.

Girl child education is one of the most effective tools to eradicate poverty in a developing country like India. Since independence, and especially in the last ten years, the percentage of female students has consistently climbed. From 8.86% in 1951 to 29.75% in 1981, 39.29% in 1991 to 54.16% in 2001, and now to the 2011 census report, girls' literacy rates have increased to 65.5% (Census Report, 1951-2011). Girls are now studying at higher rates than they were in 1995. The primary obstacle in India, rural living, low caste, and low economic status, all factors

[2] Khichi, S. K., & Bir, T. (2012). Declining child sex ratio: perception of ASHA in Rewari district of Haryana state. Health and Population: Perspectives and Issues,35(3), 95-103.

that affect females' education, according to the conventional perspective on girls' education in general. These things tend to negate the opportunity for a girl to pursue an education. The Indian government has implemented several efforts to enhance the education of women. Here are some of them:

Article 15 forbids discrimination based on one's religion, caste, sex, and place of residence; Article 45: The state shall work to ensure that all children have access to early care and education, up until the time they turn six years old.

Mahila Samakhya (MS) is a continuing programme for women's empowerment. This was started in 1989 to translate the objectives of the National Policy on putting education into a practical programme for rural women's empowerment, especially individuals from economically and socially disadvantaged populations. (MHRD Annual 2014–15 Report)

KGBV, or Kasturba Gandhi Balika Vidyalaya Scheme, was launched in the year 2004. It aims to the education of underprivileged and rural areas, where the literacy level for girls is comparatively low.[3]

The Government of India has certainly taken many initiatives, to uplift the status of girls' education from an increased expectation level. For the complete development of our human resources, the upgrading of houses was highlighted by the Indian Education Commission from 1964 to 1966, and for shaping children's personalities throughout their most formative years. Girls' education is more crucial than boys' education in infancy. However, the alteration. Changing the public's perspective on females' education would make a significant difference in the circumstance.[4]

SDG GOAL: INDIA'S CONTRIBUTION

The United Nations emphasises bridging the gap in women's participation in the decision-making process by envisioning its significance to help achieve Sustainable Development Goal 5: gender equality and empowerment. India became independent at the stroke of midnight on August 15, 1947. The constitution did not happen to descend upon the people, it was rather

[3] Ministry of Women and Child Development. (2015). Beti Bachao Beto Padhao. Retrieved from http://wcd.nic.in/BBBPScheme/About_BBBP_Scheme.pdf

[4] Ministry of Women and Child Development Report, (2015). Empowering Women India: Towards a New Dawn. Government of India.

produced and reproduced in everyday encounters. For the last hundred 1 has been in the strong pillars to fight against societal evils to establish the constitutional values of liberty, equality, fraternity, dignity, and justice. Fundamental Rights guaranteed under Part III of the constitution of India have been customarily termed as the paucity of research conducted on the genesis of the peculiarities of these constitutional ideals.

The fight for gender equality is a contemporary one in the case of India. As per the 17 Sustainable Developmental Goals (SDGs) laid out by the United Nations (UN), SDG 5, which stands for gender equality, has been the toughest to fight for and establish in India. Other than the states of Chandigarh, Sikkim, Kerala, Andaman, and the Nicobar Islands, all other states lie in the "red zone" or the "aspirant zone" which essentially means that these states haven't started making any sort of progress towards gender equality, according to the latest reports by the SDG India Index Baseline Report (2018).[5]

These targets primarily revolve around ending all forms of discrimination against all women and girls everywhere and eliminating all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation.[6]

It is believed that having wisdom and understanding is better than having silver or gold. Education has immense potential to act as a weapon to earn a living in human society. The right to education is a human right considered indispensable for the exercise of other human rights. The Indian view of this is the Right to Education provision guaranteed under Article 21(a) of the Constitution as a Fundamental Right to all the citizens of India. Originating from the apparent motion that the state must provide education to its citizens, the right is about the entitlement to claim the substance of it; it relates to the possibility of demanding the right to education and making it justiciable.

India is a regional power, and for it to rise to strong diplomatic levels of power, it needs to have a strong base of literate men and women. Increasing her goals and standards for women's empowerment will not only help women in India but will also help the country set higher goals for her international position in the interplay of international relations. India has a potentially strong soft power that can be increased and strengthened by empowering women and by acting

[5] SDG Index India, Baseline Report, 2018

[6]UNDP(https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-5-gender-equality/targets.html)

as a role model for other developing and underdeveloped countries. Thus, it can prove to be a very important asset for her international status.

CONCLUSION

It started with the “American Mission” that commenced the school for girls in 1824 in Bombay. The government took responsibility to promote and propagate the education of girls, empowering women's identities by defining them as marginalised members of Indian society. Enrolment in girls' tertiary education has also increased since 1995. Indian girls are not educated because they live in rural areas, are of low caste, and have low economic status. Traditional attitudes towards girls' education as a whole. These factors tend to deny educational opportunities for girls. While generally educating female students has progressed, and today in many departments and departments of universities. There are more girls than boys in college. Despite the significant educational progress made by girls and women in recent years, there is still a long way to go before their historical disadvantage is eliminated. Similar to many other social institutions, India's education system has always discriminated against women.

FORGOTTEN LAWYERS OF THE INDIAN FREEDOM STRUGGLE: AN ANALYSIS IN CONTRAST TO CONTEMPORARY LAWS

ABSTRACT

This research paper provides an interesting perspective on the legal history of India and its colonial past. The lawyers introduced in this article are not famous among many Indians. Still, they were instrumental in the fight for freedom against British colonial India and the development of the legal system. This article talks about the significant yet unvisited work of the Indian lawyers during British law and how their contributions helped significantly shape India's independence from British rule and will forever remain a part of their rich history. It deals with the work of the lawyers like CR Das, who gave a seminal presentation in the historic trial of the Alipore bomb case in 1908 by rescuing Sir Aurobindo Ghosh and 37 other revolutionaries suspected of having been engaged in illegal activities like sedition in the British court.

Now, 75 years after independence, the Chief Justice of India (CJI) has questioned why colonial legislation of sedition used to prosecute M.K. Gandhi and Bal Gangadhar Tilak is still included in the legal code. Sedition, or Section 124A of the Indian Penal Code, was said to be subject to abuse by the government, according to the Chief Justice. The article further talks about the contributions of Violet Hari Alva. She was the first woman advocate in India to have argued a case before a full High Court Bench in 1944. In 1947, Alva served as an Honorary Magistrate in Mumbai; from 1948 to 1954, she served as the President of the Juvenile Court. In 2021, the Juvenile Justice Act 2015 was updated to make several amendments. Both notification and presidential assent have been granted. However, its execution has not yet been ordered. Furthermore, it discusses Madhusudan Das, a law practitioner who has dealt with some significant cases from his era, including the Keonjhar Riots Case and the Puri Temple Administration Case, and many more. Therefore, in contrast to the laws of the present day, we will essentially be analysing the contributions of these lawyers to Indian law.

Keywords: *British rule, Indian Law, Legal History, Lawyers, Court.*

INTRODUCTION

The 1857 - 1859 revolt, also known as the First War of Independence, was a sepoy mutiny, an unsuccessful rebellion against the rule of the British East India Company in India. It was a widespread mutiny, but a large part of the country remained unaffected. Although the rebellion was not a success in its entirety, 1857 was a remarkable year in the history of India, as it determined the future of the nation, a completely new chapter in the freedom struggle.[1] A.O Hume and W.C. Banerjee established the Indian National Congress, allowing the people to discuss and share their grievances and devise a plan of action. This was the first time that Indians realized that violence was not the only means of fighting a battle, and in the years to come, ahimsa and satyagraha would become the two pillars on which the freedom struggle rests.[2]

The 1857 mutiny was a formidable moment on the path of securing India's lost identity. The war marked a rebellion against injustice, inequality, and depletion, and pivoted less on arms and more on strategy. To put it concisely, it was a war of words, which entailed the acts of lawyers to a great extent.

This article provides an interesting perspective on the legal history of India and its colonial past. The lawyers introduced in this article were instrumental in fighting for freedom against Britain. Two types of laws governed British holdings in India during the 18th century; British laws and customary Indian laws. The lawyers would work with members of one or both groups to ensure that justice was being served, as the legal system was deficient in the trust of the citizens. Their contributions helped significantly shape India's independence from British rule and will forever remain a part of its rich history. Their significant contribution to Indian Law has provided many reforms and made us aware of our rights.

When the British came to India, they brought along with them their laws and rulings. This meant they would make decisions on charity, marriage, and business, but not necessarily on crime. Most of these laws dealt with colonial situations under the British legal system. In many cases, legal British judicial systems are stated as having been intended as a *rough-and-ready instrument*.[3]

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[1] Peter Robb, 'On the Rebellion of 1857: A Brief History of an Idea', (2007) 42 EAPW 19, p. 1698, <https://www.jstor.org/stable/4419572> accessed on 16th Aug 2022.
[2] W. Travis Hanes, 'On the Origins of the Indian National Congress: A Case Study of Cross-Cultural Synthesis', (1983) 4 JWOH, p. 70.
[3] M.P. Jain, 'Studies in Judicial History of British India', (1973) 15 JILI 3, p. 529.

The Native Laws Act,1834 made it illegal for any Indian to use their law in a court of law, so until then, most Indian laws were practiced in the courts. This made it easier for the British to draft rules that could be enforced. The British created a parallel legal system called the "Native Courts of Justice" in certain areas. These courts were separate from the British legal courts and operated on British and Indian laws, which were more specific to conditions in India. These two types of judicial systems were partly independent, with the native justice bodies being able to make decisions based on local customs but not under those customs alone.

One major step in creating this parallel system was the introduction of an "Indian Legal Code" or "the Hindu Law." This was a large part of the entire legal system used to guide judges and legal authorities in the "Native Courts." It was created by three Indian judges at Calcutta: Baron Justice Sir Burdett Coutts, A.D. Hope, and Sir Henry Strutt. The code was used to determine criminals' punishment and help settle problems between Hindus and Muslims.

By 1860, there were sixteen "Native Courts of Judicature." These courts dealt with civil cases but not criminal matters. They also had the power to try or punish criminals according to Hindu laws; they would use these laws as part of the appeal process towards other courts in India or England. These courts allowed the British to keep a close eye on the "native element" and were used to check against disorder.

The Indian judicial system did not change much after 1860, but at this point, they were still respected in British law. This article looks at the lawyers who were not as popular but played an essential role in India's freedom struggle. Though not popular with the masses, lawyers who fought for Indian Independence still contributed significantly to the fight.

MADUSUDDAN DAS

Madhusudan Das (28 April 1848 – 4 February 1934) was an Indian Lawyer and a social reformer. He was the lawyer who unified Odisha and reformed the Indian Judiciary. He led the linguistic moment in Odisha that united Odisha.

He was known as Madhu Babu, Kulabruddha, and Utkala Gouraba. He contributed to the social and economic upliftment of the people of Odisha. He founded the Utkal Sammilani in 1903 to campaign for Odisha's unification and social and industrial development. In Odisha, his birthday is celebrated as Lawyer's Day every year on 28 April. Madhusudan Das was born on April 28, 1848, in a Zamindari Karana family at Satyabhamapur, 20 kilometres (12 mi) from

Cuttack, when India was still under Company rule. His mother's name was Parbati Debi, and his father's name was Choudhury Raghunath Das.[4] Earlier his name was Gobindaballabh. He had a younger brother named Gopalballabh as well as two older sisters. Gopalballabh was Ramadevi Choudhury's father and a Bihar Province magistrate. He became a Christian, which resulted in him being boycotted in the village, forcing him to leave and build a little cottage on the outskirts of the town.

The residence was known as "Madhukothi" or "Balipokharikothi" and eventually served as the state office of the Kasturba National Memorial Trust, where Anganabadi, Balbadi was operated in part. Sailabala Das and Sudhanshubala Hazra were two Bengali girls whom Madhusudan had adopted. The renowned Sailabala Women's College of Cuttack was established in honour of Sailabala, an educationist trained in England. Sailabala was a Bengali; her parents had left her in Madhusudan Das and Soudamini Devi's guardianship in Calcutta.

In 1864, he passed Matriculation from Cuttack, and after that, he was inclined to become a teacher and began his career at Balasore for three years. 1866 was the year of an acute famine in Odisha, called the "Naanka Durviksha," when more than one lakh people died of hunger. This year he converted himself to Christianity and changed his name to Madhusudan Das from his last name of Gobinda Ballav Choudhury. Sudhansubala Hazra was also Bengali, the first female lawyer in British India. Madhu babu was the resident tutor of Sir Ashutosh Mukherjee, the former Vice-Chancellor of Calcutta University in Calcutta.

After his early education, he moved to Cuttack High School, which offered English education. In 1864, he passed the entrance examination and went to Calcutta University. Despite exceptionally challenging conditions, he lived in Culcutta for almost fifteen years, from 1866 to 1881. In 1870, he became the first Odia to complete his B.A. He continued his studies at Calcutta and earned his M.A. in 1873 and an LLB degree in 1878, thus becoming the first scholar from Orissa to be educated.

After returning to Orissa from Calcutta in 1881, he started his legal practice. His insight and knowledge in this field helped him to earn sufficiently and spend for the commoner. He handled essential cases of his time, such as the Puri temple administration case, the Keonjhar Riots

[4] Barik, Radhakanta 'Gopabandhu and the National Movement in Orissa' 1978 6 social scientist, p. 40 - 52. <https://doi.org/10.2307/3516577> Accessed 13 Aug 2022.

Case, etc. He was a source of inspiration for the lawyers in Orissa and India. His birth anniversary is observed as Lawyer's Day in Odisha.

By 1885, India as a whole was governed by the British. The colonial authorities tried to control all significant institutions connected to Indians' religious and cultural heritage. Dubyasingh Dev, the Gajapati king of Puri, was found guilty of murder that year. He was given a life-long expulsion order. In his place, Mukund Dev, a minor at the time, was crowned. As a result, British authorities had the opportunity to try and seize control of the Shree Jagannath Temple.

The colonial rulers filed a civil suit against the Gajapati king to take possession of Shree Jagannath Temple in Puri. The queen of that time, Rani Surjyamani Pattamahadei, challenged this as the mother guardian of minor king Mukund Dev. She approached the illustrious Odia legal expert and champion of Odia pride Madhusudan Das to represent her in the court as a lawyer.

Although a Christian, Madhusudan successfully defended the Patatmahadei in this case with the single aim to protect and preserve the sanctity of Shree Jagannath Temple, one of the four revered Dhams of Hinduism as well rights of Puri Gajapati as the first servitor of the deities. Gajapati of Puri, despite being a ruler of the masses, comes out with a broom in hand to perform Chhera Pahanra (sweeping of chariots during Gundicha and Bahuda of Rathyatra). With British rulers taking over the Shree Jagannath Temple, the Gajapati kings of Puri would have lost this right.

The lower court passed an order in favour of the British Government. The District Judge appointed a receiver to take over the temple's management. Madhusudan rushed to Calcutta to consult eminent Barristers like Gurudas Banerjee, Evans, and Woodruff regarding the case. All these prominent lawyers of that time opined that there was no chance for Madhusudan to win the case against the British regime. They saw no chance of success for the defendant in the High Court.

But Madhusudan was not deterred. He decided to fight the case on his own. He prepared the case briefings and spent money to get the required papers printed. He appealed against the lower court decision in the High Court. This case drew the interest of people all over India. The Division Bench of Calcutta High Court hearing the case had given three days to appellant lawyers to argue the case. On the day of the hearing, the courtroom was jam-packed.

Pleading for Pattamahadei, Madhusudan finished his pinpointed argument in just three hours. The judges were awe stuck by the legal acumen and argument style of Madhusudan. The Judges were so impressed that they invited him to an evening party where he was introduced to other judges and eminent persons of Calcutta.

After Lt. Governor of Bengal invited Madhusudan to chalk out a compromise with the Pattamahadei over the Puri temple affairs. In 1888 an agreement deed between the Gajapati king of Puri and the British Government came into being. This agreement safeguarded the dignity of Puri's Gajapati king and the sanctity of the Shree Jagannath Temple. Madhusudan successfully defended the honor and dignity of the historic Temple of the Hindus as well as the pride of Odias.[5]

Present scenario –

Recently, in a historic decision, the Odisha state cabinet approved amendments to the Sri Jagannath Temple Act of 1954. In 1806, the then British government issued regulations for managing the Jagannath temple, referred to as the Juggernaut temple, by the colonial rulers. Under these regulations, pilgrims who visited the temple were expected to pay taxes.

The British government was entrusted with appointing senior priests at the temple.

The temple's management powers were passed on to the King of Khordha after three years while the colonial government retained some control.

After India gained Independence, the Jagannath Temple Act was introduced in 1952, which came into effect in 1954.The Act contains a provision on land rights of the temple, duties of the sevayat (priests), administrative powers of the Shri Jagannath Temple Managing Committee, rights and privileges of the Raja of Puri, and other persons connected with the management and administration of the temple.

The power will now be delegated to temple administration and concerned officials for the sale and lease of land in the name of Jagannath temple. Unlike earlier, no approval will be required from the state government for the process. Section 16 (2) of the act states that no immovable property taken possession of by the temple committee shall be leased out, mortgaged, sold, or otherwise alienated except with the previous sanction of the State Government.[6]

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[5] Sib Kumar Das, 'Madhusudan Das had stopped the British Government from taking over Shree Jagannath Temple' (04 February 2022)

[6] Aishwarya Mohanty, 'Amendment to the Jagannath Temple Act' Indian Express (January 6, 2022)

CR DAS

Chittaranjan Das (5 November 1870 – 16 June 1925) was a lawyer, human rights activist, and revolutionary who fought for the freedom of India.

He was born in Calcutta. He actively participated in Dadabhai Naoroji's election campaign while still a student in London. His outstanding defense of Aurobindo in the Alipore Bomb Conspiracy case in 1908 garnered widespread attention. With the titles Malancha in 1895, Mala in 1904, Antaryami in 1915, Kishore-Kishoree and Sagar Sangit, both in 1913, he also published five volumes of poetry. Additionally, he founded the Bengali magazine Narayana and composed vaishnava kirtan songs. During the Bengal Literary Conference's Poona session in 1915, he was chosen as President of the Literary Section. In October of 1923, he launched his newspaper, “Forward.”

In 1917, C. R. Das presided over the Bengal Provincial Conference session at Bhowanipore. Additionally, he participated in the Congress' special session in Bombay in 1918 and spoke out against the Montague-Chelmsford Report. Additionally, C. R. Das served on the Congress Enquiry Committee, which was established to investigate the Jallianwallah Bagh Massacre in 1919. He was against the Government of India Act of 1919 being accepted. He was chosen by the Bengali Congress as "supermom" to direct oppositional actions. For his actions, he was sent to jail on December 11, 1921, and was eventually freed in July 1922.

Despite being chosen to serve as the President of the Ahmedabad Congress, he was unable to chair the congress because he was in prison, awaiting prosecution. Following his release, he was chosen to lead the Congress in its Gaya session.

He founded the All India Swaraj Party in 1923. He was the President along with Motilal Nehru, serving as secretary. The name of the party was the Congress Khilafat Swaraj Party and its manifesto was issued at Gaya in December 1922. The party was committed to achieving Swaraj through all peaceful and legal means. The Swaraj Party quickly rose to prominence as a significant figure in the opposition and ran candidates for both the provincial councils and the Indian Legislative Assembly. He was almost a horror to the Bengal Government, and he was effective in thwarting significant government projects. The Swaraj Party was acknowledged by Congress as its council entrance wing in 1924 as a result of the Calcutta Pact between Mahatma Gandhi and C.R. Das. The Swaraj Party and the Indian National Congress amalgamated during

the Kanpur session of the Congress in 1925. In 1924, C. R. Das was chosen to serve as the first mayor of the Calcutta Corporation. The industrialization of India along European lines was fiercely resisted by C. R. Das, who was loyal to the agrarian movement. This does not imply that he opposed trade and business. On the contrary, he was aware of the potential of labour and desired inexpensive capital for businesses so they could generate returns. He supported workplace laws and the unionization of industrial workers in 1923 while serving as the chairman of the All India Trade Union Congress session in Lahore. In 1924, he also presided over the All India Trade Union Congress session in Calcutta. Swaraj was everything to C. R. Das. He gave up his lucrative bar practise in order to fully commit to the cause. For him, swaraj represented a better and richer life for the Indian masses rather than the elite classes acquiring new privileges. His friends and colleagues began referring to him as Deshbandhu Chittaranjan because of his dedication, which was matched by his love of poetry and his lawyer's analytical mind. He was a prominent politician with original political ideas. Initially, Deshbandhu adhered to Brahmo Samaj. He converted to Vaishnavism and saw everything as a revelation of God. Deshbandhu shared the belief of his contemporaries Bankim and Aurobindo that the Indian country was divine. He developed the Das Formula to balance the claims of various populations in Bengal. He was a staunch supporter of Hindu-Muslim coexistence and early recognized the threat that imperialism posed to international peace. He made a distinction between the urge for self-development and self-fulfilment and militant nationalism. He supported the idea of fundamental rights, which he believed should involve both political freedom and the development of one's moral character. The contemporary political theories of the West were also familiar to him. His support for rural panchayats and his five-point plan for re-establishing the government were examples of his prophetic vision and political acumen. The five-point plan called for the establishment of local centres based on the old village system, the expansion of larger groups as a result of the integration of these local centres, a similar expansion for the creation of a unified state, autonomy for the village centres and larger groups, and the retention of the remaining power of control with the central government. On June 16, 1925, Deshbandhu passed away in Darjeeling. His remains were returned to Calcutta, where he was honored by a large number of people as well as leaders like Gandhi. He was a poet, a lawyer, a wonderful leader, and a devoted Christian who was willing to do anything for his country. [7]

[7] G. K. Lieten, 'C.R. Das, Gandhi and the Working Class' 1986, Social scientist 14 6, *STOR*, <https://doi.org/10.2307/3517412> Accessed 3 Aug. 2022

CR Das defended Aurobindo Ghosh and 37 others in Emperor vs. Aurobindo Ghosh and others, a case of sedition. The 'Alipore Bomb Case' was "the first state trial of any magnitude in India". A number of young revolutionaries, including Sri Aurobindo, Barindra Ghose, a major Nationalist leader at the time, and others were detained by the British government. They were accused of "conspiracy" or "waging war against the King," which are both considered high treason and are both punishable by hanging.

The trial in Sessions Court involved 1438 exhibits and 206 witnesses after preliminary hearings in the Magistrate's court had 1000 artifacts as evidence and 222 witnesses. The inmates who were awaiting trial at the time were forcibly imprisoned in Presidency Jail and subjected to cruel treatment (including solitary confinement).

After a drawn-out one-year trial, Judge Beachcroft ultimately issued the verdict on May 6, 1909. Aurobindo was acquitted of all charges with the Judge condemning the flimsy nature of the evidence against him. Of the thirty-seven prisoners on trial, Barindra Ghose, as the head of the Secret society of revolutionaries, and Ullaskar Dutt, as the maker of bombs, were given the death penalty (later commuted to transportation for life), seventeen others were given varying terms of imprisonment or transportation and the rest were acquitted. This was all possible because of CR Das and his efforts.[8]

Present scenario –

Supreme Court in *Kedar Nath Singh vs State of Bihar* case 1962, limited application of sedition to “acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence”. Thus, invoking sedition charges against academicians, lawyers, socio-political activists, and students is in disregard of the Supreme Court’s order. In February 2021, the Supreme Court (SC) protected a political leader and six senior journalists from arrest, for allegedly tweeting and sharing unverified news, in multiple seditions FIRs registered against them. In June 2021, the SC while protecting two Telugu (language) news channels from coercive action by the Andhra Pradesh government emphasized defining the limits of sedition. In July 2021, a petition was filed in the SC, that sought a relook into the Sedition Law. The court ruled that “a statute criminalizing expression based on unconstitutionally vague definitions of ‘disaffection towards Government’ etc. is an unreasonable restriction on the

[8] SINGH, KARAN. ‘Aurobindo: The Revolutionary.’1990 *India International Centre Quarterly* 17 p. 122–29. *JSTOR* < http://www.jstor.org/stable/23002456> Accessed 1 Aug. 2022.

fundamental right to free expression guaranteed under Article 19 (1)(a) and causes constitutionally impermissible 'Chilling Effect' on speech".[9]

VIOLET HARI ALVA

Violet Alva was the first female deputy speaker of India's Rajya Sabha, or Upper Chamber. In 1944, she presented a case before the whole High Court bench for the first time as a female counsel in India. In 1952, she became the first woman to be elected to the All India Newspaper Editors Conference's standing committee. She was born Violet Hari to a Protestant family on April 24, 1908, and she attended Government Law College and St. Xavier's College in Mumbai for her education. She met Catholic Joachim Alva at the latter. She began engaging in social work, journalism, and the independence struggle after they got married. During the Quit India Movement in 1942, Violet was imprisoned together with her little child. She launched The Begum, a women's publication that would later become Indian Women, in 1944. She served as the Agripara Rehawasi Sevamandal's secretary in Mumbai from 1945 to 1953. She served as the Bombay Municipal Corporation's vice chairwoman in the years 1946 to1947. She worked in Mumbai as an Honorary Magistrate in 1947. She presided over the juvenile court there from 1948 to 1954. Violet participated actively in a variety of social organisations, including the International Forum of Women Lawyers, the Business and Professional Women's Association, and the Young Women's Christian Association. In 1952, she won a seat in the Rajya Sabha. When Jawaharlal Nehru was prime minister from 1957 to 1962, she served as the Union's deputy minister for home affairs. She twice held the position of Rajya Sabha deputy chairperson, from 1962 to 1966 and again from 1966 to 1969. She left the Rajya Sabha on November 17, 1969, and passed away from a heart attack on November 20, 1969. In 2007, a statue honouring the first Parliamentarian Couple, Joachim and Violet Alva, was unveiled in the House of Representatives. President Pratibha Devisingh Patil unveiled a commemorative stamp honouring the late Joachim and Violet Alva in New Delhi in November 2008, which also happened to be Violet Alva's centennial year of birth. Margaret Alva, their daughter-in-law, is a significant figure in the Indian National Congress.

[9] Centre seeks more time from SC to respond to petitions challenging constitutional validity of sedition law, Indian Express(3 may 2022)

SAIFUDDIN KITCHLEW

Maulana Saifuddin Kitchlew (27 November 1888 – 6 March 1936) was an Indian Muslim scholar, politician, and freedom fighter. He was born in a Zamindar family of Quitindra village in Amritsar district (now Ludhiana district), British India. He studied religion and law at the Darul Uloom Deoband, where he received his first degree in the ʿĀlimiyya. Maulana Kitchlew fought against the British Raj and is regarded as one of the leaders of Muslims in India during the early 20th century. In 1930 he was elected to the Punjab Legislative Council (equivalent to State Assembly). In 1932 Kitchlew was elected to the Legislative Assembly of the Punjab as a member of the Indian National Congress.

Maulana Kitchlew is considered to be one of the great leaders who emerged in India for the Muslim cause. In 1931, he founded and became first Chairman of Dera Ghazi Khan District Council, which was responsible for providing basic facilities such as irrigation and road construction, and also acted as a municipal body. He died in Srinagar on March 6, 1936. The "Maulana Saif-ud-din Kitchlew," an elementary school was named in his honour.

Kitchlew was born on 27 November 1888, in Quitindra village, Amritsar District, British India. His father, Maulvi Muhammad Abdul Ghani, did not want his son to take part in politics and also asked him to stay away from the Darul Uloom Deoband. But Kitchlew's mother Saiqa Begum insisted on bringing up her son to be a lawyer. Kitchlew's father agreed to it on the condition that he would never practice his profession in their village.

After completing his early education at a local primary school and later from a local high school, Kitchlew enrolled at Darul Uloom Deoband, where he studied religion and law. He completed his Alimiyya in 1910 or 1911. Kitchlew became a militant activist during his study period at Deoband. In order to remove the British yoke from India, he along with other students of Darul Uloom organized processions and formed patriotic associations. This brought him into conflict with British officials and several times they raided his house to confiscate the revolutionary books they found there. In one such raid, the police put him in jail for 2 years.

Kitchlew started practising law in his village where his father was a respected Qazidar. In pre-independence days of the British Raj, he also fought against Hindu domination, and became known as a great Muslim leader of India. He later became Assistant Jafferi to Maulvi Abdul Ghani Mian in Jhang. Maulana Kitchlew who was a disciple of Maulvi Mian was his lawyer and assisted him in the Dewanee case which goes down as one of the most important cases at that time, because it delivered justice to an oppressed Muslim class.

When the Khilafat Movement started in India, he became active in the movement and was arrested twice. In 1920, Kitchlew served as a legal advisor to the Congress Party. He participated in the second session of Indian National Congress held at Amritsar from November 27 to December 30, 1921. During this session, Kitchlew engaged in discussions with T. W. H. Clarke on behalf of the Muslim delegation for nearly five days on various issues ranging from civil disobedience to peasant movements and non-cooperation with British authorities to financial reforms (the infamous Salt Tax) which were obstructing India's freedom and development.

In 1923, Kitchlew started publishing a newspaper called "Azad Hind" from Lahore. "Azad Hind" was banned from 1920 to 1924 and the government arrested Kitchlew three times during the period. He was also sentenced to imprisonment for 2 years for writing articles in Azad Hind newspaper against the British Raj. However, after release from jail in 1924, Kitchlew resumed his agitation for Indian independence. During this time he participated in many satyagraha movements like Dandi March and Civil Disobedience Movement with other leaders including Maulana Abul Kalam Azad, Maulana Azad and Maulana Shaukat Ali. Kitchlew was also involved in the Punjab School Boycott Movement (1930) . The boycott was directed against the British system and its policy as it led to poverty in the villages and increased unemployment among students. Kitchlew raised his voice for Indian education. He visited several schools and colleges of Punjab. His aim was to have Indian education in the villages, where illiteracy still remained a major problem. He campaigned vigorously for reform of the system of primary education, providing adequate facilities for schools, and making higher education accessible to all children through a national university at Lahore or Delhi.

In 1930, he was elected to the Punjab Legislative Council. In 1932, Kitchlew was elected to the Legislative Assembly of the Punjab as a member of the Indian National Congress. He won by a margin of nearly 6,000 votes in a predominantly Muslim constituency in Lahore.

In 1933, he became President of the All India Muslim League for two years. He served on many committees for national and provincial governments as well as at national level with prominent leaders such as Sir Muhammad Iqbal and Maulana Abul Kalam Azad. During his legislative career from 1932 to 1936, Kitchlew started two major bills and introduced resolutions in both houses of the state legislature. One was the "Rates Bill" which proposed a flat rate of tax on all transactions and property in Punjab, and second was the "Laws

(Secularisation) Bill" which sought to put an end to the practice of Hindu and Sikh institutions becoming affiliated with religious bodies.

Maulana Kitchlew died at Srinagar on 7 March 1936. He left behind a large family including his three sons, seven daughters and numerous grandchildren who continued his legacy after him. His son Maulana Muhammad Akbar Kitchlew became another well-known politician of Pakistan, who served as Chief Minister of Sindh in the 1960s. Maulana Shafqat Ali Kitchlew (b. 1934) continued to pursue the vision of his father, who was the first president of Pakistan's Senate. Kitchlew had a long-term influence on the political decisions of Pakistan and Islam in South Asia. He supported Mohammad Ali Jinnah's two key goals: a united nation and Muslim rule in that nation.

MIMANSA PRINCIPAL OF INTERPRETATION, REVISITING THE ANCIENT RULE OF VEDAS: A CRITICAL ANALYSIS

ABSTRACT

There has been tremendous development in every field, be it science, philosophy, or any other, since independence, and so is the case with law. The alien rule has deprived us of various developments by putting under the myth that Indians are a race with no worthwhile achievement to their credit. This is an indisputable fact that the current legal system has more western influence even after seventy-five years of independence despite the fact that India has one of the best judicial systems since the time of Veda. When it comes to interpretation of statutes, It is pretty disappointing that in our legal systems, attorneys cite Maxwell and Craies. Still, no one ever refers to "The Mimansa Principles of Interpretation". So, the "Jaimini" established the Mimansa, or the Purva Mimansa Rules, in his sutras, which were published approximately 600 B.C. The fact that they are mentioned in numerous Smritis, which are also very old, is evidence that they are exceedingly old. The basic idea behind such a rule was since there were several smritis at that time and there were very often conflicts between them so, to resolve such issues mimansa rule of interpretation worked as the silver line. Mimansa principle provides a set of systemized particular methods for legal issues. This study aims to explore and revisit the idea of the mimansa rule of interpretation. In what manner this rule would have been applied to different judgments, and in what way it could have affected those judgments. One such judgment which we will touch upon in this paper is the Sabarimala issue, where the issue involved was a perfect case for the mimansa rule application as there were conflicting fundamental rights concerned. Our paper is focused on the theme "Indianization of judicial administration". In this paper, we have also analyzed the overall aspect of the mimansa rule and the need for due consideration of the application of such a rule in the legal fraternity.

INTRODUCTION

It is to be regretted that the subjects of interpretation of ancient times have not gotten the appropriate amount of attention in modern times. The rules of interpretation may very well be considered a significant subset of what is known as the adjective law. The role that these rules play in the administration of justice is by no means less significant than the role played by the rules of procedure or the role played by the rules of evidence. There are thousands of rules with respect to interpretation from ancient times to English law and many other fields of law. Since ancient times India has had its own system of interpretation i.e., Mimansa rule of interpretation which needs to be introduced to the legal fraternity because this rule holds immense relevance and importance for modern interpretations of statutes. The Vedas of ancient times uses such a complex and tricky language that was very difficult for the common man of that time to understand and follow the same. Now in order to abide by the rules and guidelines of Vedas, it was necessary to get the interpretation of those texts in simple language and also to resolve the conflicting rules which was a difficult task for the common man so in order to overcome these grey areas of Vedas Rishi Jamini took it upon himself to accomplish this and composed a sutra later known as “Mimamsa sutra”.

This sutra has varied salient features such as the nature of its methodology and its approach is very scientific and logical. Just like a modern adjudication this also runs in a logical sequence that is arriving at a conclusion presided by a discussion. Any topic which is not clear or conflicting in Vedas stated, now objections or ambiguities related to that stated and considered and arrived at a conclusion resolving that issue. Secondly in Indian philosophy Vedas were somewhat similar to the constitution for that period of time because it explains the hierarchy of law. According to this sutra, vedas are supreme also they are transferred from generation to generation by word of mouth. They hold significant importance as it is known to hold divine revelations. Whereas smritis are heard, recollected and retold. The rules laid down in the Mimamsa rule of interpretation were for both sruti and smritis. Now when this rule was applied to smritis by two different commentators it came up as two different schools of Hindu law i.e, Mitakshra and Dayabhaga incorporating customary laws. According to Mimamsa if any conflicts arise between Vedas and smriti. Veda will preside over any other smriti and that part of smriti will be of no importance just like in the modern system of law where the constitution is considered as the guardian of all the laws and any law or statute in conflict with the constitution will be null. Mimamsa had given many provisions one of which is vidhi can be called a substantive provision and also consist of proviso and exceptions(Arth Veda). In case

of conflict, Vidhi will always preside over arth Veda just like the current system where substantive provisions preside over proviso and exceptions etc.

HISTORICAL INTERPRETATION

The complex and tricky language of all such scriptures was in a such way that is near impossible for a common man to delve into them and find the deeply rooted meaning of such texts. This is not limited just to some region or some particular scriptures this was the case with each and every scripture. There is also reasoning that at those times it was very rare that people to have had an education it was limited to a very few extents and it was very normal for those scholars to use such language. One more reason is the use of such language makes the laws less lengthy and hence less cumbersome so that a few letters may contain varied possible situations because making it simple will unnecessarily make it lengthier and cumbersome. But the conclusion which comes is what is the sense of using such language when it is not going to be understood or comprehendible to the common man for whom it is being made and who is supposed to abide by those rules and regulations.

Law and statecraft were combined in the ancient world on a global scale. Legal and moral evil were indistinguishable from one another. In order to interpret and explain the holy texts, which contained all sins and punishments, all expertise and talents in interpretation were applied. India was no different to this. It is incredible that all civilizations developed along parallel lines despite the lack of communication and transport methods. There are some amazing similarities between ancient western laws and Hindu texts. The earliest recorded discussion of law was written around 3000 BC and was distinguished by rhetorical speech, social equality, and objectivity. Then we have the code of Ur-Nammu(ca 2050) followed by laws Eshunna (ca 1930 BC), Codex Lipit-Ishtar of Isin (ca 1870 BC), and Codex Hammurabi (1796-1750). All of these writings featured social norms based on acceptable behaviour rather than technical legal regulations. They established penalties for breaking those agreed standards.

The contemporary time in India is known as the Vedic period(4000-1000BC).[1] India at this time is noticeably distinct from the western nations. While in the west social conventions or quasi-legal provisions developed at this time, India benefited from its divine instruction. Torah is also described as God instructing Moses. Greek laws were the forerunners of western laws,

[1] History of Dharmasastra, P.V. Kane, Bhandarkar Oriental Research Insrtitute, Poona, 1958, Vol. 5, Part 2, pp. xi-xii.

and they were developed by great philosophers like Socrates, Plato, and Aristotle. Socrates never put his ideas and teachings on paper. His pupils Plato (423–348 BC) and Aristotle (384–322 BC) created the framework for Greek law[2]. Similar to this, the Twelve Tables, the first code of Roman law, was enacted in 451-450 BC. Kautilya was a contemporary Indian intellectual who wrote the Arthasastra in the fourth century BCE. As a result, the period from the sixth to the fourth century BCE was a global golden age that gave the world norms for creating and maintaining a disciplined and orderly civilization. For improper behaviour, sanctions, prescriptions, and injunctions were offered. The King was tasked with making sure these rules were followed. This time period in India is notable not only for the formation of the legal system and the advancement of the justice delivery system but also for the peaking of knowledge and wisdom. Panini in the area of grammar and linguistics, Jaimini in the area of interpretation, and Kautilya the lawgiver were the three beacon lights of this era.

Jaimini introduced the Mimâmsâ or Purva Mimâmsâ system of interpretation in India between 500 and 200 BC. It consists of rules or guidelines. Interpretation sutras. In India, Jaimini was the one who proposed not only a set of interpretational guidelines but also such a system. True, these guidelines were proposed theories for Vedic interpretation[3], but that does not downplay their significance for interpreting the law because the principle, not the context, is what matters. It does not form but the substance that counts. The intent was to understand the yagas' Vedic norms, but only the fundamentals, at least in terms of language (lexical and syntactical), and logical interpretation are appropriate for any text, including legal texts. in this book, we'll talk about the guidelines presented by Jaimini (these have been published by renowned writers and judges, like N.V. Thadani[4], Kishori Lal Sarkar[5], Madan Lal Sandal[6], P.V. Kane[7] and justice Markandey Katju[8]) as regards the principles derived from Mimamsa sutras to the extent they can be applied to modern legal interpretation.

Mimamsa was written about 2500 years ago but was discovered much later and translated to English still later. Only in 1905 did Kishori Lal Sarkar, in his Tagore Law Lectures, seek to

[2] Principles of Hindu Law by Sir Dinshaw Furdunji Mulla,section 8(1) and (2), 10th Ed, (Calcutta: Eastern Law House),P.9. Source: www.archive.org/details/dli.bengal.10689.15640/page/n73/mode/Zup
[3] See Encyclopedia of Crime and Justice by Joshua Dressler, 2nd Ed., 2002
[4] Mimamsa: The Secret of the Sacred Book of The Hindus,translated by .V. Thadani, 1952.
[5] K.L Sarkar, The Mimánsa Rules of Interpretation as Applied to Hindu Law, Tagore Law Lectures, 1905 (Calcutta:Thacker, Spink & Co., 1909).
[6] The Mimamsa Sutra of Jaimini, translated by Mohan Lal Sandal, Panini Office, Allahabad, 1923; https://archive.org/details/mimamsasutra00jaimuoft.
[7] History of Dharmasästra, PV. Kane, Bhandarkar Oriental Research Institute, Poona, 1958, Vol. 5, Part 2.
[8] Mimamsa Rules of Interpretation, Tagore Law Lectures,1905, 3rd Ed., 2011.

adequately portray the samerules or principles of interpretation (even though this was limited to their application to Hindu Law) (published in 1909). The ancient Indian knowledge has met this terrible end[9]. For instance, following Emperor Ashoka's rule, the Kautilya's Arthasâstra was lost and wasn't found and translated until 1912 by Prof. R. Samasastry[10]. Due to the terrible turns of historical events, these and similar masterpieces were unable to reclaim their rightful acclaim and appreciation. As a result, as we painfully recognise, we consistently look to the West for knowledge and direction. Still, the richness of our ancient scriptures has always been recognized and appreciated[11].

ANCIENT INDIAN SYSTEM

The Vedas are considered to be infallible, everlasting, self-existent, and not the product of any human or divine author in Indian philosophical systems. Dharma (responsibilities and values, both personal and communal, ruler and the ruled guidelines for acceptable behaviour (does and don'ts). They create and provide an explanation recognised and worshipped by all Hindu believers. These treatises or knowledge databases include containing, among other things, instructions for sacrificial fire By making sacrifices (Yaga) in order to find salvation and peace and success (perhaps through appeasing the Vedic deities; however, the Mimsakas do not think that the prize of The deities offers the sacrifices. They hold that the atonement provides the believer's abilities to accomplish their goal). These gods were distinct from today for the aforementioned reasons.

NYAYA THEORY

The Nyayasastra, also known as the Nyaya-Vaisesika theory of knowledge (ascribed to Gautam and elaborated by the Ganges; Buddhist philosophy – 600–300 BC), may be referred to as the science of the conditions and procedures of accurate knowledge of objects and correct cognition. It is an effective instrument for determining the veracity or untruth of facts or information in the context of procedural law. The Nyayasastra uses a method of inference that

[9] India: What can it teach us? E. Max Müller, KM, 1883, p. 15
[10] Kautilya's Arthasästra translated by R. Samasastry, Government Press, Bangalore, 1915.
[11] Ancient Law by Henry Sumer Maine, 4th Ed., 1870,Digitized by Google, p. 2. Source: https://www.google.co.in/books/edition/Ancient_Law/jQel3q2DYP8C?h1=en&gbpv=18dq=ancient+law+henry+S.+maine&printsec=frontcover.

combines both deductive and inductive reasoning. The definition of logic in the passage is "the science of proper reasoning or the science of dialogue." The standard and recognised method of adjudication was to ask the petitioner and respondent questions and counter-ask them until a resolution was reached. The system is fairly similar to the adversarial adjudication process used today. The Nyayasastra states that "knowledge means a true belief with a confidence of its truth."

Five methods of determining if knowledge is valid are acknowledged by the Nyaya theory: perception, inference, comparison, testimony, and argument. All of these are accepted as legitimate tests by the law of evidence everywhere. This was clarified by the fire illustration. If someone visits the location, he will think there is a fire because smoke is coming out. Perception can be of material things, attributes [Nyaya theory recognizes 24 kinds of attributes or Guna: colour (rupa), taste (rasa), smell (gandha), touch (sparsa), sound (sabda), number (sankhya) etc. perception is also an important aspect in Mimamsa.

MIMAMSA SUTRAS

The Mimâmsâ Sûtras are principles of interpretation that were developed for the purpose of interpreting Vedic texts. The Vedas are believed to be timeless and without a known author. (Be it heavenly or human). Thus, there was nobody to examine explain or make clear the intentions behind these texts. The Mimâmsâ (Mimâmsakas) authors were primarily focused on resolving disputes, inconsistencies and ambiguities found in the Srutivakyas (Vedic phrases), as they were the origin of obstacles faced by the average person performing the yagas correctly. Consequently, the Mimâmsakas, therefore, developed hyperfine theories to determine the significance of these writings which created a complex structure of interpretation. These were finally formalized in the form of aphorisms by jamini[12].

This was important to reduce the possibility of errors when executing yaga. These aphorisms, which were originally used to interpret Vedic writings, were eventually applied to the Smrtis, scriptures that dealt with Hindu personal law such as adoption and inheritance. Before Hindu law was codified in 1955, commentators and the courts both employed Mimamsà to interpret the Smrtis. Since the principles or rules of interpretation generally hold for all sorts of writings, including legal documents, these rules employ an interdisciplinary and convergent approach

[12] Maxwell v Mimamsa, Justice BN. Srikrishna (2004)6 SCC (J) 49 at p. 52.

using concepts of grammar, exegesis, and logic. As a result, they are still applicable today. They can be used with caution and due diligence on any text. The Mimâmsà norms of interpretation are addressed in this book against this backdrop, and an effort has been made to adapt them to the interpretation of contemporary legal writings as much as practical and possible.

Mimamsa is bifurcated into two parts: theological (theology – the study of gods). The other part is ascribed to jamini and is commonly called Purva Mimamsa. The Purva Mimamsa is also known as the Karma Mimamsa because it discusses the practical applications of karma or religious practice to be used for particular purposes. On the other hand, the Vedanta, also known as Brahma Mimamsa, only addresses theological issues. Here, the Purva Mimamsa, or simply Mimamsa, is the subject[13].

The goal of the Mimamsà is to understand the Vedic writings, which prescribe the people's duty (dharma) in the form of a directive or command[14]. Mimamsa is described as the process of looking at a subject of conversation and drawing a conclusion from it[15]. The Mimâms' interpretational guidelines are presented as sutras or aphorisms in accordance with various chapters, sections, and topics (adhikaranas). As a result, the text is divided into 12 Adhyayas (chapters) that span 2668 Sûtras and 731 Adhikaranas. The strength and beauty of Mimâmsâ norms of interpretation are that each topic is addressed in five logical steps, creating a system of interpretations:

1. An explanation of the statement or concept that will be discussed (vishaya).

2. Considering any and all objections, doubts, or questions that might be raised on that issue (samasya).

3. A statement of the primary defence against the objections (purvapaksha).

4. Outlining the response to the challenged conclusion (Siddhanta).

5. Providing the reasoning or connection (sangati).

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[13] See Essays on the Religion and Philosophy of the Hindus, H.T' Colebrooke, 1858, pp. 189-190. Source:http:/google.catbooksid=3V2dEP9wuusC&printsec=frontcover&edq=editions:ISBN1362856665&output-html-text& source-gbs_book_other versions r&cad=5.

[14] History of Dharmasastra, P.V. Kane, Bhandarkar Oriental Research Institute, Poona, 1958, Vol. 5, Part 2, Ch. XXVIII, p. 1154.

[15] See Essays on the Religion and Philosophy of the Hindus, H.T. Colebrooke, 1858, p. 192. Source: http:/google.cat/books?id=3V2dEP9wuusC&printsec-frontcover&dg-editions ISBN1362856665&output-html_text&source-gbs, book. other versions r&cad=5.

Because of this, Mimâmsâ is a practical "process of 'research' into a matter of discussion and getting to a decision thereon," and the logic of the Mimamsâ principles of interpretation is the logic of law. The Indian Courts do not apply the Mimâmsa principles despite their inherent practicality. Lamenting the current situation and acknowledging the legal community's ignorance of the Mimâmsa principles upheld by the Supreme Court[16].

" It is quite terrible that in our legal systems attorneys cite Maxwell and Craies, but no one cites them according to the Mimamsa Rules of Interpretation[17]. Lawyers wouldn't have known about them at all. Our so-called educated people today are mainly unaware of our grandparents' remarkable intellectual accomplishments and the intellectual treasure they possessed have left for us. The Mimamsa Guidelines for the ultimate intellectual treasure include interpretation. However, it is upsetting to observe that, in addition to the reference to these ideas in Sir's judgement John Edge, a former Allahabad High Court Chief Justice Beni Prasad v. Hardai Bibi, court case 1892 ILR 14 All 67 (FB), a century ago, and in some rulings. There has been almost no mention of one of us (M. Katju, J.) application of these ideas even within our nation."

Based on these presumptions, we will now briefly describe these principles. According to P.V. Kane[18], some of the key Mimâmsà teachings (principles) that Jaimini advanced and which were further clarified by Sabara, Kumärila Bhatt, and others are as follows:

(a) The Vedas are infallible, eternal, self-existent, and did not originate from any human or divine author.

(b) The relationship between language and meaning is eternal. The Mimâmsakas believe that the Word, its meaning, and its connection are eternal.

(c) The entire universe is not actually created or destroyed. The universe as a whole has no beginning and no end, even though its component pieces may come and go. Even though it has little bearing on legal matters, this proposition is exceedingly scientific and is well recognised as a "conservation of matter."

(d) The Veda states that anyone seeking heaven must provide a sacrifice (svargakamo yajeta). According to one interpretation, it indicates that a person lacks the ability or potential to accomplish svarga (heaven). He must do yâga for this, but if he doesn't carry out all the

[16] Vijay Narayan Thatte v State of Maharashtra AIR 2009 SC (Supp) 1952: (2009)9 SC.
[17] India: What can it teach us? E. Max Müller, KM, 1883, p. 6.
[18] Source: History of Dharmaastra, PV. Kane, Bhandarkar Oriental Research Institute, Poona, 1958, Vol. 5, Part 2, Ch. XXIX.

necessary rites—both primary and minor—he won't be able to obtain the desired result—the svarga. This is referred to as the Apurva doctrine. This idea further postulates that each subordinate rite (anga) therein likewise grants certain capacities for obtaining part of the total outcome, but that only the whole rites done as specified make the performer capable of or entitled to the result. The rites' procedures are known as Vidhi.

This can be interpreted in modern words as stating that legal action must be performed in accordance with the legal requirements.

(e) Svatah Pramanya (self-validity of cognition): This theory holds that all cognitions—knowledge, including perception, as opposed to emotion—are inherently valid in themselves.

They do not need any outside assistance to verify their validity, but the invalidity of cognitions must be established externally by demonstrating a flaw in the organ that created it or by establishing subsequently that a particular cognition was incorrect. The Mimâmsa then went on to interpret the Vedic writings based on these essential precepts. It should be recognised right away that Mimams is essentially divided into three sections: theory of words, theory of sentences, and order or sequence.

APPLICATION OF MIMÂMSÅ PRINCIPLES TO INDIAN LAWS

(CASE RULINGS)

Sir John Edge, Chief Justice of Allahabad High Court sitting on a Full Bench, rightly used the Mîmâmsă principles of interpretation in **Beni Prasad v Hardai Devi**.[19] The question was whether the adoption of an only son was unlawful under Hindu law, as stated by Vashishtha in his Dharmastra (Chapter XV, sutras 2-4). These principles are as follows:

2. As a result, the father and mother have the authority to donate, sell, and abandon their children (son).

3. However, he must not give or receive (through adoption) an only son.

4. For he (must stay) to carry on the forebears' line.

[19] (1892) ILR 14 A11 67 (FB).

It is also very pertinent to note that 13 years before Kishori Lal Sarkar gave his Tagore Law Lecture on the applicability of the Mimamsa Sutras to Hindu law in 1905,[20] the Court properly used the principles for the construction of the texts of the holy books of Hindu law. Sir John Edge made the observation in Beni Prasad (at page 70)

"It must clearly" be construed according to the rules for the construction of the texts of the sacred books of Hindu Law, if authoritative rules on the subject exist; that rules for the construction of Hindu sacred text-books do exist, cannot be disputed, even if those rules have been overlooked or not referred to by Judges or English text book writers."

It is worth noting that this insight was cited by K.L. Sarkar in his *"Introductory Lecture on the Subject of the Rules of Interpretation in Hindu Law, with Special Reference to the Mimansa Aphorisms as applied to Hindu Law"* for the Tagore Law Professorship in 1903. This observation seems to have motivated Sarkar and bolstered his opinion that:

"... the principles of construction found in the Mimansa Sutras may be extended to the interpretation of contracts and deeds and are relevant to the formation of any system of law, ancient or contemporary."[21]

The Court in Beni Prasad pointed to Vashishtha's opined text and Mandlik's Vyavahara Mayukha, and both agree that adoption is for the obsequies of the ancestor, or to save the adopter from Put, or Hell. Because the precept is justified in the text, the court held that the passage should be interpreted as a religious guideline rather than a positive and obligatory ban. For it is a law of the Mimamsa of Jaimini, or the Purva Mimamsa, that any passages backed by a reason are to be regarded as arthavada, or recommendatory, rather than vidhi. As a result, it was determined that the wording was not injunctive and that the adoption was not null and invalid. Observing that the disputed injunctions are treated as only monitory and leave individual freedom of choice, and that no system of law makes the province of legal obligation co extensive with that of religious or moral obligation; the Board issued its final adjudication that, although the giving in adoption of an only son was, according to Hindu law, sinful, and to that extent contrary thereto, it was not void, and the doctrine of quod fieri non As a result, the High Court's decision in Beni Prasad was upheld. [22]

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[20] K.L. Sarkar, The Mimânsă Rules of Interpretation as applied to Hindu Law, Tagore Law Lectures, 1905, (Calcutta; Thacker, Spink & Co., 1909).
[21] "Introductort lecture….." p.19, (Calcutta S.L. Sarkar)
[22] Sri Balusu Gurulingaswami v Sri Balusu Ramalakshmamma 1899 SCC Online PC 5: (1898-99)26 IA 113: (1899)9 Mad LJ 67.

In another instance, the widow of her brother's son's adoption was disputed. The High Court relied on its previous decision in Jai Singh Pal Singh v Bijai Pal Singh[23], which held that an adoption by a Hindu widow pursuant to an authorization to adopt granted to her by her husband was permissible.

According to Hindu Law, the widow's adoption of her brother's grandson or son by her deceased husband is not an invalid adoption because the adoption is not to herself but to her deceased husband, and the test of eligibility of the adopted son for adoption in such a case must be the test that would have applied had the adoption been made by the husband himself during his lifetime. Using this standard, the adoption was found to be legal. This is consistent with Mimâms' interpretation guidelines. The established condition that the husband cannot adopt a kid whose mother he cannot marry is a stringent requirement. In Mîmâmsă, such regulations are known as niyam vidhi[24] (also referred as Viniyoga vidhi and referred to as doctrine of Niyoga by the Board). This adoption limitation is known as niyam vidhi for adoption. Using this standard in the instance where the husband lawfully approved her wife to adopt her brother's kid, the Privy Council Board upheld the High Court's verdict and decree.[25]

The issue in *Narayan Pundlik Valanju v Lakshman Daji Sirsekar*[26] was whether daughters of prostitutes might inherit property gained via prostitution. In this instance, the dead prostitute mortgaged her property and was unable to redeem it during her lifetime. After her death, the plaintiff acquired the equity of redemption from her sister and filed the redemption claim. The mortgagee maintained in defence that the sister could not inherit her prostitute sister's property, which must escheat to the Crown, and that the plaintiff, as the sister's purchaser, was not entitled to redeem. According to the Vyavahara Mayukha, the sister could not inherit the land since she was neither a Gotraja nor a Sapinda, and the uterine sister was unknown as an heir under Hindu law.

In contrast, the authorities *in Ram Pergash Singh v Mussammat Dahan Bibi;*[27] *and Advyapa v Rudrava*[28]*; Viswanatha Mudali v Doraiswami Mudali*[29] it was said that under Mitakshara law,

[23] (1904) ILR 27 All 417.
[24] See Mîmâmså Rule 1, Sûtra [3.6.40]
[25] Puttu Lal v Musammat Parbati Kunwar 1914 SCC Online PC 32: (1915)2 LW 881: (1914-15)42 IA 155: AIR 1915 PC 15: (1915)13 All LJ 721: (1915)29 Mad LJ 63: (1914-15)19 CWN 841.
[26] (1927) ILR 51 Bom 784: (1927)29 Bom LR 930.
[27] (1923) ILR 3 Pat 152.
[28] (1879) ILR 4 Bom 104.
[29] (1925) ILR 48 Mad 944.

sons of a prostitute with heritable blood between the mother and the brothers would inherit to the property of the prostitute mother and each other.

APPLICATION OF MIMÂMSÅ PRINCIPLES TO SECULAR LAWS

(CASE RULINGS)

While acknowledging that Maxwell's principles would be more relevant in certain cases and Mîmâms principles would be more appropriate in others, the Supreme Court said in *Surjit Singh v MTNL*[30] that there is no reason why we cannot utilise the Mimams principles on appropriate times. It was criticised that these principles were seldom applied in our law courts (for interpretation of subjects other than Hindu law), especially because no legislation required us to apply solely Maxwell's interpretation rules.

The Court observed that practically all Mîmâmsâ texts are written in Sanskrit. Obviously, the Court was unaware of the English translation, as well as the original Sanskrit version by Pandit Mohan Lal Sandal.

The Court addressed various Mimämsä principles, such as linga, vakya, prakarana, and pranabhrit, and declared that the linga and pranadhrit principles relate to the matter at hand, in which the need of prompt payment of telephone bills was in dispute. The Court, however, did not address how these principles are relevant to the case and how they apply. Despite extensive discussion of Mimämsä principles, the case was determined on the Maxwellian principle of purposeful interpretation.

Large expanses of land were given as a consequence of the Bhoodan movement, which was started by Acharya Vinoba Bhave and then carried on by Jaya Parakash Narain. These lands were to be allocated to landless agricultural labourers under the movement's plan. The UP. Bhoodan Yagna Act 1952 was passed in order to put this concept into action. However, it allowed for the allocation of land to landless people rather than landless agricultural labourers. Section 14 of the Act stated:

14. Land distribution to landless people. The Committee or such other authority or person as the Committee may, with the consent of the State Government, designate either generally or in

[30] (2009)19 SCC 722.

respect of any region, may give lands which have vested in it to landless individuals in the manner provided,.....

The Act's Statement of Objects and Reasons specifically referenced landless agricultural labourers, and Section 15 of the Act mandated that the award be provided in line with the U.P. Bhoodan Yagna Scheme. Of fact, section 14 was the product of faulty drafting, which was addressed by an amendment only 23 years later, in 1975.

After referring to the Statement of Objects and Reasons, the Bhoodan Yagna Scheme, the Mischief rule, and legislative intent, the Supreme Court concluded in U.P. Bhoodan Yagna Samiti v Braj Kishore[31] that the term "landless persons" could not have been interpreted other than as "landless agricultural labourers."

The Court then abruptly read an old shloka in para 12:

Abhyaso Uppurwatta Falam Arthwadoppatti Ch Lingam Tatparya Nirnaye Upkramop Sunharo

The Court held in para 13 that the significance of the shloka is that when you have to draw a conclusion from a work, you must read it from beginning to finish. If there is a new invention (uppurwatta) or anything new, it should be noted, as well as the outcome of such innovation. It is necessary to identify the author's aim and context.

The Court then finally states in paragraph 14 that "You can only understand the true meaning by understanding the reference, context, and circumstances in which it was stated, as well as the problems or situations that were intended to be addressed by what was said, and it is only when all of this background, context, and problems that must be addressed that you can truly understand the true meaning of the words. This is the concept that has to be examined ".

The Supreme Court noted in *Gujarat Urja Vikas Nigam Ltd. v Essar Power Ltd*,[32] echoing the opinion of H.T. Colebrooke,[33] that the Mimâmsă principles were so rational and logical that they subsequently began to be used in law, grammar, logic, philosophy, and so on, i.e. they became universally applicable. In that instance, the subject for adjudication was whether, if the parties agreed to arbitration, the arbitrator would be selected by the relevant Commission under

[31] (1988)4 SCC 274.
[32] (2008)4 SCC 755.
[33] Essays on the Religion and Philosophy of the Hindus, H.T. Colebrooke, 1858, p. 202, Source: http://google.cat/books?id =3V2dEP9wuusC&printsec=frontcover&dq=editions:ISBN 1362856665&output=html_text&source=gbs_book_other_ versions_r&cad=5.

the Electricity Act 2003 or by a court under section 11 of the Arbitration and Conciliation Act 1996. To address the difficulties, the Court advantageously employed the Mimâmsă principles of Badha, Vikalpa, and Samanjasya, as well as the Gunapradhan axiom.

Section 174 of the Electricity Act of 2003 was deemed to be the pradhan (primary) provision, whereas Section 175 was seen to be the guna (secondary) provision. As a result, section 175 cannot be read in isolation and must be read in conjunction with section 174. In order to do so, the following words must be added to section 175: "unless where there is an explicit or implicit contradiction between a provision in this Act and any other legislation, in which case the former will prevail." After overcoming this obstacle, the rest was simple. As a result, it was decided that the relevant Commission would designate the arbitrator(s), but that the requirements of the Act of 1996 would apply to the proceedings.

In Ispat Industries Ltd. v. Commr. of Customs,[34] the Court used Mimâms principles of interpretation in addition to Maxwellian principles to interpret a regulation made under the Customs Act 1962 that was in apparent contradiction with the parent Act.

The Gunapradhan Axiom is one of the Mimamsâ principles. "Guna" refers to a subordinate or accessory, but "pradhan" refers to the main. According to the Gunapradhan Axiom:

"If a word or phrase attempting to represent a subordinate notion conflicts with the main idea, the former must be altered or ignored entirely."

This notion is also conveyed by the popular proverb "matsya nyaya," which means "the larger fish consumes the smaller fish." According to this theory, the aim of section 14 is "primary" (pradhan), while the criteria in Rule 9(2) are "accessories" (Guna). As a result, the "accessory" must serve the "primary."

As can be shown, the Mimamsa sutras have been taken out of context, without reason, in a number of situations. In other circumstances, however, the sûtras have obviously been correctly administered.

The preceding explanation provides no question concerning the intrinsic interpretive features and aspects of the Mimams rules.[35] However, improper application of these principles by the

[34] (2006)12 SCC 583: 2006(9) SCALE 652.

[35] Extracts from judgments in some of these cases viz. Balusu Gurulingaswami v Balusu Ramalakshmamma 1899 SCC Online PC 5: (1898-99)26 IA 113: (1899)9 Mad LJ 67: (1895) ILR 18 Mad 53; Puttu Lal v Musammat Parbati Kunwar 1914 SCC Online PC 32: (1915)2 LW 881: (1914-15)42 IA 155: AIR 1915 PC 15: (1915)13 All LJ 721: (1915)29 Mad LJ 63: (1914-15)19 CWN 841; Narayan Pundlik Valanju v Lakshman Daji Sirsekar ILR (1927)51 Bom 784: (1927)29 Bom LR 930; V. Subramania Ayyar v Rathnavelu Chetty (1918) ILR 41 Mad 44;

Courts has occurred for a variety of reasons. One of the reasons cited by Justice B.N. Srikrishna[36] is that courts are seeking to employ Mimâms principles for conflict settlement in circumstances that do not include shashtraic Hindu law. In this regard, the author believes that Justice Srikrishna is swayed by I K.L. Sarkar's Tagore Law Lectures: "The Mimânsă Rules of Interpretation as applied to Hindu Law", 1905, and (ii) judgments of Bombay and Madras High Courts, as well as one judgement of Allahabad High Court, which give the impression that Mimämsä is primarily applicable to Hindu law. This is not correct. Mîmâmsă norms, according to K.L. Sarkar, may be applied to all laws, contracts, deeds, and so on.

CONCLUSION

In India, however, Jaimini created a system of interpretation called as Mîmâmsâ or Purva Mimâms, which consisted of rules or sutras of interpretation between 500 and 200 BC. In India, Jaimini proposed not only the norms of interpretation, but also a mechanism for applying them. True, these rules were written to understand the Vedas, but that does not diminish their significance for legal interpretation since what counts is not the context but the principle, not the form but the content. The goal was to interpret the Vedic regulations for ygas, but the concepts of linguistic (lexical and syntactical) and logical interpretation are valid and relevant to any document, including legal writings.

The Court has the authority to choose and apply acceptable principles of interpretation, with the sole requirement that they be reasonable and rational. There is no legislation that prescribes or endorses a certain rule/system of interpretation, and there never will be.

The Maxwellian and Indian systems of interpretation are separated by thousands of years rather than hundreds of years. As a result, there will inevitably be differences in methods. Naturally, the two systems share many techniques and have certain benefits over one another in various areas. Some commonalities between the two systems are noteworthy to note.

Although the author does not aim to compare these two systems since doing so would not advance the goal of legal comprehension or justice, it is worth noting that certain of the principles recognised by Mimâmsă are noticeably lacking from the framework of Maxwellian

Ispat Industries Ltd. v Commr. of Customs (2006)12 SCC 583 and Gujarat Urja Vikas Nigam Ltd. v Essar Power Ltd. (2008)4 SCC 755 are given in Appendix 1 for better appreciation of the matter.

[36] Maxwell v Mimamsa, Justice B.N. Srikrishna (2004)6 SCC (Jour) 49 at pp. 56, 63 and 64.

interpretation. In such instances, Mîmâmsâ principles might be used to augment Maxwellian concepts.

The author would like to note respectfully that the preceding interpretation of Mîmâms sutras is far from final and comprehensive. With the assistance of the Taittiriya Samhitâ and its Bhashya, more informed persons with a grasp of the two classic languages Sanskrit and English may come up with further [Mimamsa] principles of interpretation or improve on the foregoing. In his modest offering, the author has endeavoured to start a new chapter and expose the legal community to the old, yet contemporary, Indian theory of interpretation.

PLACING ALTERNATIVE SEXUALITIES IN INDIAN HISTORY[1]

ABSTRACT

If there is one constitutional tenet that can be said to be an underlying theme of the Indian Constitution, it is that of inclusiveness. However, many marginalized sections of the society are excluded and discriminated from the social structure based on gender, caste, colour and religion. Another such discrimination is based on sexual orientation. This section of society does not have the social and professional acceptance, representation, and rights equal to a common citizen of India.

The palette in sexuality exists from time immemorial, extending back to the earliest historical records and cultures. Alternative sexuality is the umbrella term for all sexual and romantic attractions that go beyond opposite-sex attraction. It is defined as behaviours, identities, and communities that stand in contrast and/or opposite to socially and culturally dominant sexualities. Alternative sexualities make up the gender identity rainbow which includes lesbians, gays, bisexuals, transgenders, and queer (LGBTQ) among others. In our culture, Hindu festivals and sects celebrate homosexual acts. Transgenderism (like Koovagam festival), the description of sodomy in Kamasutra, the court customs of Babur, references to women loving women in the Mahabharata and the Ramayana, and the description of tantric initiation rites which evoked the idea of universal bisexuality in human personality is discussed widely. The behaviour has been existent in our culture for centuries, however, the framework to understand and interpret these experiences as gay and lesbian, bisexual, and transgender identities developed only later in western societies. The cultural landscape of India changed when British administrators and educationists imported their homophobic attitudes into India. This was made overtly manifest after Lord Macaulay implemented Section 377 of Indian Penal Code 1860. Disgust and contempt have been central themes of section 377 since its inception. In criminalizing homosexual acts, Section 377 has meant that those practicing them had to remain at the margins of society and excluded from human rights.

A beam of hope took place after the 1990s when activists, NGOs, and queer people raised their concern against the prevalent discrimination. A long battle is fought by the LGBTQ community

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for their rights and there have been significant changes visible in the government policies and landmark judgments of the courts but there is still a long way to go.

This paper is an attempt to highlight sexual liberalism in India. Antiquated India was more liberal in its attitude towards accepting different shades of sexuality. Our ancient culture, reflects the openness of our society, whether in form of homosexual sculptures embedded on the walls of the temple or in literary works. But over time Indian sexual liberalism bore the brunt of Victorian values.

Keywords – *sexuality, colonialism, Indian culture, decolonization, criminalization*

INTRODUCTION

If there is one constitutional tenet that can be said to be an underlying theme of the Indian Constitution, it is that of inclusiveness. However, many marginalized sections of society are excluded and discriminated against from the social structure based on gender, caste, color, and religion. Another such discrimination is based on sexual orientation. This section of society does not have the social and professional acceptance, representation, and rights equal to a common citizen of India.

The palette in sexuality exists from time immemorial, extending back to the earliest historical records and cultures. Alternative sexuality is the umbrella term for all sexual and romantic attractions that go beyond opposite-sex attraction. It is defined as behaviors, identities, and communities that stand in contrast and/or opposite to socially and culturally dominant sexualities. Alternative sexualities make up the gender identity rainbow which includes lesbians, gays, bisexuals, transgenders & queers (LGBTQ) among others.

Hindu rituals and sects in our culture condone homosexual behaviour. Transgenderism (such as the Koovagam festival), the Kamasutra's description of sodomy, Babur's court customs, references to women loving women in the Mahabharata and the Ramayana, and the description of tantric initiation rites that suggested universal bisexuality in human personality are all topics of extensive discussion. Although the practice has been a part of our culture for many years, the conceptual framework for understanding and interpreting these experiences as belonging to gay and lesbian, bisexual, and transgender identities only emerged later in western societies. The cultural landscape of India changed when British administrators and educationists imported their homophobic attitudes into India. This was made overtly manifested after Lord

Macaulay implemented Section 377 of the Indian Penal Code 1860. Disgust and contempt have been central themes of section 377 since its inception. In criminalizing homosexual acts, Section 377 has meant that those practicing them had to remain at the margins of society and excluded from human rights.

A beam of hope took place after the 1990s when activists, NGOs, and queer people raised their concerns against the prevalent discrimination. A long battle is fought by the LGBTQ community for their rights and there have been significant changes visible in the government policies and landmark judgments of the courts but there is still a long way to go.

This paper is an attempt to highlight sexual liberalism in India. Antiquated India was more liberal in its attitude towards accepting different shades of sexuality. Our ancient culture, reflects the openness of our society, whether in form of homosexual sculptures embedded on the walls of the temple or in literary works. But over time Indian sexual liberalism bore the brunt of Victorian values.

It is often claimed that same-sex love and relationships are a western import. Assuming that the west is a single, homogeneous entity, the term "western" itself is anomalous; nevertheless, it is a different problem. Same-sex relationships and love have been a part of Indian civilization for a very long time and are not an alien import. Ironically, rather than homosexuality, it was homophobia that was an import from the west.

ANCIENT INDIAN TEXT AND HOMOSEXUALISM

The presence of same-sex relationships in ancient India is depicted in tropes of friendship, rebirth, and sex change. Ruth Vanita and Saleem Kidwai in the book, Same-Sex Love in India, use the ancient and medieval texts to highlight different aspects and the existence of homosexuality and homoeroticism from the shreds of evidence of friendship, marriage, miraculous birth, co-parenting, same-sex parent, dual motherhood, or sex change.

In the historic Hindu epic Mahabharata, Krishna, and Arjuna—often referred to as "the two Krishnas"—reflect friendship ties that transcend marriage and procreation. The truth is that ‘Krishna explicitly asserts that Arjuna is more essential to him than wives, children, or

kinsmen- there can be many brides and sons, but there is only one Arjuna, without whom he cannot live.'[2]

Mahabharata numerous examples of gender fluidity and queerness in ancient India. Shikhandini, the period's feminine or transgender warrior who was in charge of slaying Bhishma, is the subject of an intriguing tale in the Mahabharata. King Drupada's daughter Shikhandini was brought up as a prince to exact revenge on Hastinapur's Kurus kings. Shikhandini was even wedded to a woman by Drupada. Her wife was horrified when she realized the truth. Divine intervention gave Shikhandini his manhood during the night, saving the day. Shikhandini started acting more and more like a hermaphrodite.

Krittivasa Ramayana, the most popular Bengali text on the past times of Lord Rama narrates the tale of two queens that conceived a child together. According to the text, King Dilip had two wives and perished without an heir. After that, Lord Shiva showed up in the queens' dreams and predicted that they would conceive a child if they made love to one another. When the bereaved queens followed the instructions, one of them became pregnant and ultimately gave birth to King Bhagiratha. He is a well-known ruler who is credited with bringing the Ganga from heaven to earth.

The Kama Sutra, also known as the "Aphorism on love," was composed by Vatsayan and contains references to same-sex sexual behaviour. The book is universally acknowledged as a great, premodern work on sexuality, and describes homosexual acts in great detail. It contains descriptions of both male and female homoerotic acts that are discussed in the chapter on Auparishtaka, which confirms the widespread use of oral sex.

It defines the three types of genders—man, woman, and third sex or third gender —as pums prakriti, stri prakriti, and tritiya prakriti respectively. The third sex is a term used to refer to individuals who do not conform to the gender binary. This can refer to those who identify as being neither male nor female, as being both male and female, or as being a third gender altogether.

Svairini, a strong-willed and independent lady who indulged in sexual relations with other women, is also mentioned in Chapter Purushayita. Men who are drawn to the same gender are

[2] Ruth Vanita and Saleem Kidwai, *Same Sex Love in India: Reading from Literature and History* (Penguin India 2008) 6

mentioned in the book as well. Kamasutra also recognizes eight different kinds of weddings. For instance, the phrase "gandharva vivah" recognized lesbian or gay marriage.

The Matsya Purana contains a fascinating tale of Lord Vishnu changing into the lovely woman "Mohini". He planned to deceive the demons to get the gods to consume all of the Amrut (holy water). Lord Shiva also fell in love with Mohini after viewing her, and as a result of their union, Lord Ayyappa was born, who is worshiped devoutly in South India.

MEDIEVAL INDIA AND HOMOEROTICISM

Homoerotic was casually discussed during the medieval era. With the Arab-Persian-Islamic cultural invention into the subcontinent, homosexuality received "official patronage." At the time, Urdu and Sufi poets lauded the tradition of boy-girl love at the court of Muslim monarchs. In his work Tuzuk-i-Babri, Babur, the first Mughal monarch of India, romanticized his relationship with the boy Baburi at Andezan (Baburnama).[3]

Vanita and Kidwai claim that while there are sporadic references to same-sex love in early medieval literature, there is a vast body of literature about homosexual relationships in the late medieval period. The homoerotism in that era is also suggested by medieval sculpture. The Chandela rulers of medieval India built the Khajuraho temple, which contains carvings that date back a thousand years. These carvings show ladies hugging other women erotically and men showing off their genitalia to one another.

Additionally, amorous and erotic interactions between males beyond class and religious boundaries are depicted in medieval poetry. A Muslim and a Hindu man fall in love with one another in Mir's ghazal Shola-I-Ishq. Males attracted to men not only met in bazaars but also in pubs and brothels. In his journal, Muraqqu-e-Delhi, Dargah Quli Khan, a representative of the princely state of Hyderabad, observed homosexual relationships and activities in Delhi's daily life.[4]

Harems and slavery are two more institutions that expanded significantly. Even while there was domestic slavery in pre-Islamic India, it was considerably more organized and primarily included young boys during the medieval era. The slaves included a sizable proportion of

[3] Sherry Joseph, *Social Work Practice and Men Who Have Sex with Men* (SAGE Publications 2005) 75
[4] Ruth Vanita and Saleem Kidwai, *Same Sex Love in India: Reading from Literature and History* (Penguin India 2008) 108

eunuchs. Because they were regarded as the most dependable slaves, eunuchs were a highly valued commodity. The closest personal ties they had were with their owners. As a result, they were frequently given the most important roles. The harems, which served as the institutions that established the sex dynamics among the ruling elite, were protected by eunuchs.

BRITISH COLONIAL INTRUSION AND HOMOSEXUALITY

The colonial state's attitude towards queer sexuality became more pronounced after the Sepoy Mutiny of 1857 when the British decided to exercise more authority in a bid to strengthen the security apparatus. Following the direct supervision and administration of India by Queen Victoria, British rule in India grew more military and isolationist.[5] During this time, there was a greater emphasis on maintaining racial purity by British isolation on the social, sexual, and cultural levels. To maintain and emphasize the division between British colonizers and Indian subjects, mainstream discourse and colonial policy were increasingly preoccupied with doing so.[6]

Before the Mutiny, it was a more liberal period – where the British wanted to understand the society and wanted to bring reforms while maintaining the balance and incorporating the tradition and customs of Indians. But after the transfer of power in 1858 from the East India Company to the Crown we come across to see the application of Victorian values in Indian society.

Numerous steps were taken in the first half of the 19th century to preserve the racial purity of the British people by forbidding the intermarriage of British officers. These and other sexual laws were influenced by the purity campaign, a political movement in the United Kingdom that called for the adoption of a strict sex code and the "canonization of sexual acceptability" in the British metropolis. The rhetoric of the purity movement changed how homosexuality was perceived in Europe, turning it from an isolated crime to an illness that can be diagnosed.[7]

Before the 1860s, marrying between British army officials and Indian women was common and accepted socially, according to Ronald Hyam in his book Empire and Sexuality. One estimate states that by the middle of the eighteenth century, approximately 90% of British

[5] Suparna Bhaskaran. 'The Politics of Penetration: Section 377 of the Indian Penal Code' in Ruth Vanita (ed), *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society* (Routledge 2002) 16
[6] Ibid
[7] Ronald Hyam, *Empire and Sexuality: The British Experience* (Manchester University Press 1990) 65

colonizers were engaged in such unions.[8] In addition, until the 1860s, commanders frequently housed an Indian lady as a sexual partner.[9] However, as the atmosphere of British imperial control turned toward isolationism, it became more and more dishonourable for officers to engage in any kind of sexual activity with Indian subjects. English women started being yearly imported to the British colonies during the post-mutiny era via newly built railways and improved steamship technology to be married off to officers who were otherwise feared to turn to "Oriental vices of Sodom and Gomorrah."[10] These Englishwomen, known as "memsahibs," were frequently characterized as culturally isolated individuals who only engaged with other British people and had nothing but contempt for native Indians.[11]

The introduction of the Indian Penal Code in 1860 was an efficient tool used by British rulers to formally control and prosecute the social and sexual lives of colonial subjects to enhance their authority. It enforced a uniform code of law across the Indian colony.[12] The code was mostly based on English systems of law, notwithstanding British leaders' claims that they had spoken to Hindu and Muslim leaders to include native rules into the standardized system.[13] By codifying native court and trial practices, English invaders created a uniform framework through which they could impose and uphold British morality. Such a law was seen as an effective civilizing tool by the British and a way to educate and reform Indian people to meet British ideals.[14]

Indrani Chatterjee claims that the entrance of British legal systems affected discussions of same-sex partnerships even before the Indian Penal Code was formally implemented. According to Chatterjee, the language used in British police reports and witness testimony allowed European conceptions of gender and sexuality to be enforced.[15] For instance, British records of native sodomy reports misrepresent conflict by disregarding social status breaches and emphasizing gender as the cause of the sodomy crime.

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[8] *ibid* 116.
[9] *ibid* 118.
[10] *ibid*.
[11] *ibid* 199.
[12] Suparna Bhaskaran. 'The Politics of Penetration: Section 377 of the Indian Penal Code' in Ruth Vanita (ed), *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society* (Routledge 2002) 16
[13] *ibid* 19.
[14] Anjali Arondekar, *For the Record: On Sexuality and the Colonial Archive in India* (Duke University Press 2009) 81
[15] Indrani Chatterjee, 'Alienation, Intimacy, and Gender: Problems for a History of Love in South Asia' in Ruth Vanita (ed), *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society* (Routledge 2002) 68-69

In addition, homosexuality was described as a mutually exclusive alternative to heterosexuality in the testimonies of British troops accused of sodomy, such as in the case of William Orby Hunter. This introduced a binary notion of sexual desire that was absent from the pre-colonial discourse.[16] This line of thinking positions homosexuality in moral and social contrast to heterosexuality. According to indigenous knowledge, gay relationships could coexist with heterosexual ones, and just because one engaged in one act did not preclude them from engaging in the other. This binary concept of sexuality is a Western construct that indigenous Indians did not embrace.

The first direct reference to criminalizing homosexuality was in 1860 when Section 377 was introduced in the Indian Penal Code to punish 'buggery' and 'unnatural offences'. This law was further strengthened and amended in 1864, with the aim of 'preventing the offense against the order of nature.

Section 377 in The Indian Penal Code read –

377. Unnatural offences—Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with impris-onment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.[17]

There is plenty of room for a liberal interpretation of what constitutes an act of sodomy in Section 377 of the Indian Penal Code, which outlaws all "carnal intercourse against the order of nature." The expression "against the law of nature" came to refer to transgressions of the British moral principles that served as the basis for the Indian Penal Code's rules, allowing British courts to charge native people with crimes based on their innate "unnaturalness." The Victorian purity drives in the metropole served as the inspiration for British sexual laws like Section 377, which allowed British rulers the power to criminally persecute Indians for their innate moral depravity.[18]

[16] *Ibid* 69.
[17] The Indian Penal Code 1860, s 377
[18] Alok Gupta, *'Section 377 and the Dignity of Indian Homosexuals'* (2006) 41 Economic and Political Weekly 4815, 4816

The "purity of blood" legislation, which tried to control the sexuality of indigenous populations, was also passed by the British colonial administration. The Victorian purity movement, which aimed to purge the Indian community of its "unhealthy" sexuality, took this form.

One of the earliest anti-sodomy trials under Section 377 serves as an example of how this law was applied to prosecute the locals due to their innate sexual and moral depravity. Khairati was found guilty of sodomy in the case of Khairati vs. Queen Empress (1844) even though there was little other evidence than an "extended anal orifice," which was a sign of a "habitual catamite."[19] The Khairati were known for "singing disguised as a woman" and "habitually wearing woman's attire," which was used to defend the decision.[20] Several factors make this case interesting. Khairati was prosecuted by the court for engaging in behaviour that was acceptable by native norms but went against British moral standards by linking his offence to his "habitual" character. This decision illustrates how British conquerors might prosecute native people for adhering to local moral and social norms thanks to the codification of law. The fact that a native subject could face legal action for adhering to indigenous social norms, such as cross-dressing and singing in a womanly voice, is an example of how the criminalization of native identity as a whole preoccupied Indian law codifier much more than the prosecution of specific crimes.[21] Such interpretations of colonial criminality have been dubbed the "Criminal Tribes" phenomena by Satradu Sen, whereby those in authority perceived crime as inextricably linked to local culture and profoundly ingrained in Indian civilization.[22]

Not everyone who was tried for sodomy charges was labelled as having a habitually gay disposition. For instance, aristocratic Indians convicted of violating anti-sodomy legislation frequently received lighter sentences, as was the case with Chitaranjan Das, who received the lightest penalty of any defendant under Section 377: two months in prison.[23] According to the judgment, Chitaranjan Das was a “highly educated and cultured individual suffering from mental aberration,” which has quite different ramifications than being a “habitual sodomite.” This decision is consistent with colonial popular culture, which tended to link hyper virility and degenerate sexuality with the lower classes while hyper effeminacy was associated with

[19] Anjali Arondekar*, For the Record: On Sexuality and the Colonial Archive in India* (Duke University Press 2009) 67
[20] *ibid* 69.
[21] *ibid* 70.
[22] *ibid*.
[23] Suparna Bhaskaran. ‘The Politics of Penetration: Section 377 of the Indian Penal Code’ in Ruth Vanita (ed), *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society* (Routledge 2002) 26

the upper classes' elite society.[24] Such preconceptions were supported by sexologists like Havelock Ellis, who advanced the social Darwinist hypothesis that "savage races" were more likely to engage in "degenerate sexuality."

The extent to which British people were prosecuted under Section 377 is unknown because most of the cases were handled internally within the military, were deemed classified, and were not recorded in historical archives.[25] The defendants in each case where the phrase "habitual sodomite" was used to support prosecution were all native Indians; similar terminology did not once appear in the trials of British personnel.[26] British conquerors created a native gay identity that was fundamentally unlawful according to British morality incorporated in the laws of the Indian Penal Code by prosecuting native homosexuality as an identifiable condition. In contrast to the lawful British colonizer, who avoided the legal penalty, this criminal identity imparts a further level of inferiority to the essence of the local.

CONCLUSION

The narrative of sexuality in India has been constructed through the lens of the heteronormative family. The dominant sexuality in India has been that of the heteronormative family, which is described as a family where the husband provides for the family's needs and the wife stays at home to care for the children. On the other side, homosexuality has been described as a departure from the heteronormative family. This dichotomy of sexuality has been used to stifle the voices of people who do not fit into the heteronormative family and to support heteronormativity. Western conceptions that entered Indian taxonomy as a result of colonial control are the framework that is used to define gender and sexuality in binary terms. Despite the end of colonial rule, the paradox of the situation is that it is still in use and still controls the social structure of today.

Terminology restricts and liberates several categories relating to sexual orientation, gender, and identity, which serves as both a victimizer and a means of acknowledgment. People's perceptions that their rights are being infringed present a possibility for discrimination and

[24] Mrinalini Sinha, *Colonial Masculinity: the 'manly Englishman' and the 'effeminate Bengali' in the Late Nineteenth Century* (Kali for Women 1997) 19
[25] Anjali Arondekar, *For the Record: On Sexuality and the Colonial Archive in India* (Duke University Press 2009) 83
[26] Suparna Bhaskaran. 'The Politics of Penetration: Section 377 of the Indian Penal Code' in Ruth Vanita (ed), *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society* (Routledge 2002) 24

stigma to end; actions taken by grassroots organizations are crucial in this regard. More obviously, it is the specific social environment that an LGBT person lives in. Due to the sensitivity of emotions, there are no clear answers to the causes of "homo-/transphobia" or set solutions to acts of hatred. Further, families and close groups of friends have the capacity for compassion and can impart life lessons that could help those who are struggling.

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