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Executive Managing & Editorial Board

EDITORIAL NOTE

A work of research isn't true research unless it leads to real change in law, practice, legal education, public policy and ideas. With the onset of Covid-19, the value of such research in the domain of human rights has grown manifold. The NLUO Human Rights Law Journal has strived towards promoting such research, knowledge and discussion on human rights law and ancillary law and policy framework.

The domain of human rights research is rife with opportunities to look at the human rights regime and its serious implications for questions of cultural diversity, the sovereignty of States, and the universality of human rights. The rising inequalities and entrenched discrimination in the human rights law and policy of a country has been aggravated by a situation like the Covid-19 pandemic. Be it the plight of the labourers undertaking reverse migration or the members of the TGNB community facing layers of discrimination in terms of access to dignified life and livelihood, a focussed study of existing State action to mitigate the difficulties of the vulnerable class has become imperative.

Further, with the growing discourse on 'Business and Human Rights', scrutiny of the role of non-state enterprises has intensified in view of repeated human rights violations by the non-state actors. There has been a clarion call for developing a framework at the domestic level to implement the General Principles on Business and Human Rights.

Lastly, it is high time to encourage inter-disciplinary research in field of human rights where authors while delving into the legislative regime must take stock of the political ecology or social ecology factors contributing to the human rights crisis.

The Editorial Board is privileged to have received numerous contributions from students, scholars and researchers for its sixth volume. This volume is published in consultation with the Editorial Board consisting of the faculties of National Law University Odisha, Editorial Advisory Board, consisting of distinguished experts on the subject of Human Rights and the Student Editorial Board of National Law University Odisha. Each of

the author's approach has done complete justice to the emerging literature in various aspects of human rights.

The article '***Defending Individual Autonomy through Navtej Singh Johar: An Analysis'*** by ***Ms. Snigdha Singh and Karan Singh Chouhan*** offers a very insightful approach into the jurisprudence and interpretation tools used by the Supreme Court in its ruling on Section 377 of the Indian Penal Code. In the process, the authors have skilfully highlighted the dichotomy between Section 375 and Section 377 of the Code and its implications for personal liberty. The authors claim that the judgement is successful in clearly establishing the rights of LGBT community and truly a case reflecting transformative constitutionalism. However, they have not refrained from criticising the decision for its shortcomings.

The global health crisis of Covid 19 has triggered a social and economic crisis that has hit harder some sections of the society, than others. In light of this, the articles by ***Ms. Aaratrika Pandey, 'Beyond Binaries: Queering Human Rights for TGNB Community in the Times of COVID-19***' and by ***Ms. Anjali Yadav, 'Mitigating the Vulnerabilities of Honest Micro-Entrepreneurs in Times of COVID 19'*** assume greater significance. Ms. Pandey outlines the impact of the Coronavirus outbreak on TGNB community and how it exaggerated their plight through a disproportionate and discriminative system and schemes within the domain of Article 14, 19 and 21 of the Indian Constitution, forcing them further out to the margins which resulted in their human rights violation. She highlights the 'invisibilization' of the TGNB community in various state policies and welfare measures, especially during the pandemic. Ms. Anjali through her article highlights the non-accommodating environment of policies and regulations after the enactment of the Street Vendors Act and worsening of the situation in the wake of the pandemic. A reading of the article will set a realization about the shortcomings of the legal framework, aggravated by the pandemic.

Drawing inspiration from some seminal work on Business and Human Rights, ***Mr. Kannu Upadhyay*** in his article '***National Framework for Human Rights Violation by Non-State Commercial Enterprises: The Development Story so Far'*** offers a wonderful critique of the Zero Draft of a National Action Plan prepared by the Indian Government. Mr. Upadhyay bases his critique on a three pillar structure – Protect: State's duty; Respect: Corporate Responsibility and Access to Remedy. Besides,

the article also presents brief factual account of various instances of human rights violations by private corporations in India.

Ms. Sonika Shekhar in her article titled '***Imprisonment on Wrongful Conviction in India: A Detailed Analysis***' underlines the importance of having in place a legal framework to deal with wrongful conviction in India. Placing reliance on a lot of data, she flags the effects of wrongful conviction on the condition of prisons in India. In her paper, she makes a claim for a 'right to compensation' for the grave damage inflicted on prisoners who are victims of wrongful conviction in India.

Moving further, ***Mr. Sidharth Jasrotia*** in his article '***The Indian Constitution viz-a-viz the Human Rights Regime: Exploring the Rights Matrix of Armed Forces Personnel in India'*** offers a critique of the existing military justice system in India in light of the Indian Constitution. The article by critiquing the hands-off approach of Indian Judiciary, highlights the need for scrutinizing the military justice system in light of the human rights regime, especially that of the armed personnel. Mr. Jasrotia concludes by proposing that Article 33 must be interpreted in a limited sense.

Mr. ***Pruthvirajsinh Zala & Ms. Aashvi Shah***in their case comment titled ***'COVID-19, Not a Blank Cheque to do Away with Labour Laws: A Case Comment on Gujarat Mazdoor Sabha v. State of Gujarat***' provide an analysis of the judicial approach towards upholding right of workers in the wake of a financial exigency. The authors hail the use of Article 142 of the Indian Constitution in this case to uphold the rights of the labourers. In the process, the authors also delve into the interpretation of 'public emergency' to answer the question if Covid-19 scenario could fit into the rubrics of 'public emergency' Thus the article not only provides a comment on the case, but also proves helpful for developing a good understanding of the emergency jurisprudence and rules of interpretation.

Given the wide array of articles and different perspective of authors in each of the articles, I hope this volume will be an engaging and insightful reading for human rights enthusiasts and researchers. I whole- heartedly appreciate and acknowledge the contribution and cooperation of the members of the peer review Editorial Board and the student editors for the hard work put in by them. Lastly I would like to thank all the contributing authors for choosing our Journal.

We hope to continue in our endeavours to engage with legal scholars in strengthening the existing framework of human rights law and policy under the ambit of National Law University Odisha's Human Rights Law Journal in days to come.

We look forward to your valuable feedback that shall enable us to develop the future editions. We are hopeful that with your support and goodwill, we will be able to achieve our effort with greater vigour and greater support.

Nikita Pattajoshi
Editor-in-Chief

CONTENTS

ARTICLES

DEFENDING INDIVIDUAL AUTONOMY THROUGH NAVTEJ SINGH JOHAR: AN ANALYSIS

Snigdha Singh and Karan Singh Chouhan[*]

1. INTRODUCTION

> *"Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion…(The Resolution) seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future."*[1]
>
> *—Jawaharlal Nehru*

The above quote, a part of the speech delivered by Nehru while moving the Objective Resolution in December, 1946 has been reiterated by the divisional bench in *Naz Foundation*[2] Judgment, explains the origin of the notion of equality in the given context and consequently the one of 'inclusiveness' which underlines the essence of the discussion on the subject at hand. The Supreme Court has observed:

> *"Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the lesbian, gay, bisexual and transgender (LGBT) are."*[3]

The narrow interpretation of the provisions of either the Constitution or of statutes would lead to an interpretation not in consonance with the fundamental principles of our Constitution and vision of our Constitution makers. But before we proceed to discuss the above balance of equality, inclusiveness and permissible discrimination in the subsequent part of the write-up, it would be worthwhile to attempt to understand what

[*] Assistant Professors of Law, Christ University, Bengaluru.

1. Constituent Assembly Debates, Lok Sabha Secretariat (New Delhi, 1999, Vol. I) 57-65.
2. *Naz Foundation* v. *State of NCT*, 2009 SCC OnLine Del 1762 : (2009) 160 DLT 277.
3. *Id*. 104, para 131.

§377 is all about. §377 of the Indian Penal Code, 1860 (IPC) criminalises 'carnal intercourse against the order of nature'. Justice Chandrachud in the judgement under discussion has traced the origin of the section. The language of the section has antecedents in the definition of 'buggery' found in Sir Edward Coke's late 17th Century compilation of English law[4]: "...Committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast."[5] The Buggery Act, 1533, England's first criminal (non-ecclesiastical) law, which was enacted by Henry VIII, made the offence of buggery punishable by death, and was replaced by the Offences against the Person Act, 1828. Buggery, however, remained a capital offence in England until 1861, one year after the enactment of the IPC. The Sexual Offences Act, 1967 was later enacted to decriminalise private homosexual sex between two men over the age of twenty-one and through subsequent amendment the age of consent was lowered to sixteen in 2001. India continued to retain §377 long after the same had been discontinued even by the British in their own country, who had imposed the penal code on India.

2. FACTUAL MATRIX

The foundation of the legal controversy around the subject at hand can be said to have been laid as early as in 2001, when a non-profit organisation or non-governmental organisation named Naz Foundation took up the responsibility to wage a legal battle for the protection of gay rights.It filed a public interest litigation (PIL) in the Delhi High Court challenging the constitutional validity of §377 of the IPC on the ground of infringement of Articles 14, 15, 19 and 21 of the Indian Constitution so far as the impugned section sought to penalise sexual acts between consenting adults in private under the ambit of the expression "unnatural offences". The Delhi High Court dismissed the PIL in 2004 and then a review petition was filed before the same Court. The review petition too was dismissed and it was only when the Supreme Court remanded the case to be reconsidered on merit when approached in 2006 that the matter was entertained and subsequently a historical judgement given by the Delhi High Court in

4. Arvind Narrain and Alok Gupta, *Law like Love*: *Queer Perspectives on Law* (Yoda Press, 2011) as cited in *Navtej Singh Johar* v. *Union of India*, (2018) 10 SCC 1, (Chandrachud J) , para 17.
5. Human Rights Watch, "This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism" (2008) as cited in Navtej Singh supra note 4) , (Chandrachud J), para 17

Naz Foundation v. *State (NCT of Delhi)*.[6] It held that §377 IPC insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution and hence unconstitutional.

The above verdict was challenged in Supreme Court in 2009 by an astrologer and the Supreme Court overturned the said judgment of Delhi High Court in *Suresh Kumar Koushal* v. *Naz Foundation*.[7]

The highest Court agreed to consider an open hearing after subsequent curative petitions were filed by the gay rights' activists in 2014.[8] The matter was referred to a constitutional bench in 2016 and the landmark judgment delivered in 2018. Another significant milestone which gave required impetus to the gay rights movement was when the same Court in 2017 observed that sexual orientation is an essential attribute of privacy, inherent under the fundamental right under 21 of the Constitution of India.[9]

The writ petition under discussion was filed for declaration of "right to sexuality", "right to sexual autonomy" and "right to choose a sexual partner" to be inclusive of right to life and personal liberty under Article 21 of the Indian Constitution. The constitutional validity of §377 was challenged and the Court has tested its validity on the touchstone of Articles 14, 15, 19 and 21. Consequently, reconsideration of *Suresh Kumar Koushal* was also sought and debated.

3. SUM AND SUBSTANCE OF THE JUDGEMENT

Misra CJ., delivered the judgment (for himself and Justice Khanwilkar while Justice Nariman, Justice Chandrachud, Justice Indu Malhotra concurred) in this case. Needless to say, that all the four judgements came to the same inference however, there were variations in few of the reasons furnished. The discussion that follows focusses mainly on the judgement authored by Misra CJ., with references to other opinions or judgments in the same case, wherever necessary.

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6. *See* "Supreme Court Decriminalizes Homosexuality — A Timeline" (*The Hindu*, 6-9-2018) <www.thehindu.com/news/national/supreme-court-decriminalises-homosexuality-a-timeline/article24882308.ece> accessed 10-10-201, Also See, "From 1861 to 2018: A Timeline of Section 377" (*The Indian Express*, 10-7-2018 <https://indianexpress.com/article/india/section-377-timeline-homosexuality-gay-sex-5253129/> accessed 15-7-2020.
7. (2014) 1 SCC 1 : AIR 2014 SC 563.
8. *Supreme Court*, *supra* note 6.
9. *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1 : AIR 2017 SC 4161.

Misra CJ., held that the approach to the questions in relation to "identity" should been seen from the constitutional spectrum and not judged from the social morality standards. Right of self- determination is inherent in the concept of identity. Both sexual orientation and choice of an individual are to be protected as long as the exercise of these rights are "constitutionally permissible."[10] Non-recognition of a right in its fullest or truest sense and denial of expression of choice as a part of the right by a provision of a statute like IPC and the same being approved by the apex court overruling the decision of Delhi High Court was considered to be the sum and substance of the legal issue involved.

Misra CJ., observed that the view of the divisional bench of the Supreme Court referred above upholding the constitutionality of the impugned section and the statement that the said right holders in question comprised "only a minuscule fraction of the total population" and the observation that section was being misused is not an indication of the validity of the same. In fact, the apex court added that, it is the duty of the judiciary to adopt a progressive interpretation in line with the living and dynamic nature of the Indian Constitution to necessarily protect the rights of that minority group so referred and to ensure inclusivity so that all the individuals could develop socially, economically and politically and realise their full potential without fear or fervour though an enabling atmosphere. Recognition of rights and dignity of an individual and provision for such an enabling atmosphere is warranted by transformative constitutionalism. It is this approach that even Pandit Nehru emphasised on while the objective resolution was being passed (extract of the same has been reproduced at the beginning of the introduction section).

Sexual orientation is inherent in an individual and is furthermore controlled by neurological and other biological factors, beyond one's control and therefore any discrimination on the said ground would mean violation of freedom of expression and consequently hindrance to the exercise of the right to live with dignity. It has particularly gained significance on account of the same Court according the status of a fundamental right to 'the right to privacy' (with right to sexual orientation as its one of the facets) by declaring it to be anextension of the fundament right to life and personal liberty.

10. *Navtej Singh Johar* v. *Union of India*, (2018) 10 SCC 1 : 2018 SCC OnLine SC 1350, para 9.

Misra CJ., further held that §375 is not subject to §377 of IPC after the amendment in 2013. The classification created through the expression "against the order of nature" which is undefined and adopted under the section has no reasonable nexus with its object as other provisions like Section 375 and the POCSO Act already penalise non-consensual carnal intercourse and such classification has discriminated against the LGBT group as it brings within its purview even consensual sexual acts.[11] Criminalisation of sexual acts of consulting adults in private space is both discriminatory and arbitrary and also amounts to unreasonable restriction in name of public morality and decency with respect to Article 19 as the same cannot be stretched to an unreasonable and illogical limit. While disposing of the writs and overruling the decision in *Suresh Koushal*, the Court held that §377 is partially struck down in so far it seeks topenalise sexual acts between consenting adults (homosexuals, heterosexuals or lesbians). The rest of the provision continues to be valid and constitutional.

Since the decision has already been reiterated and discussed above, let us also consider the in-principle arguments, challenges and resolution of the same. And in order to appreciate the ratio in *Navtej Singh Johar*, it will not be out of place to first discuss what the High Court and divisional bench of the Supreme Court held and opined on the same issue. §377 was primarily challenged on the ground of being violative of four important fundamental rights under Articles 14, 15, 19 and 21.

Chief justice A.P. Shah, who delivered the *Naz Foundation* judgment,[12] held that §377 is "facially neutral and apparently targets not identities but acts"[13], however in effect it ends up targeting a class, 'homosexuals' unfairly so far as it treats all constituent members as criminals and views "everything associated with homosexuality as bent, queer, repugnant" and perceives whole gay and lesbian community as deviant and perverse. The discrimination to the men having sex with men or MSM and gay community was found to be violative of Article 14 since it was unfair and unreasonable. The divisional bench of the Delhi High Court also held that sexual orientation was a ground analogous to sex and discrimination on the ground of sexual orientation is impermissible per se and further not allowed even on the horizontal application of the right elaborated under Article 15. Declaring that the subject possesses "high constitutional

11. *Navtej*, *supra* note 4, para 237.
12. *Naz Foundation* v. *State (NCT of Delhi)*, 2009 SCC OnLine Del 1762 : (2009) 160 DLT 277, para 104.
13. *Id*., para 94.

importance"[14] and thus judicial deference to legislative wisdom was not possible, it went on to hold that §377 contradicts our constitutional values and notion of human dignity which are considered to be the cornerstone of our Constitution in so far it criminalises consensual sexual acts of adults in private.[15] Since the infringement on the ground of 14, 15 and 21 was already established, the same on the ground of Article 19 was left open. It clearly held that §377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors while the same insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution and hence unconstitutional. As has already been stated before, the judgement of the high Court was challenged in the Supreme Court in the following case.

In *Suresh Kumar Koushal* v. *Naz Foundation*, the Court held that the application of the section does not take into consideration factors like age or consent. It does not target "a particular people or identity or orientation". It simply forbids a conduct not permissible "in light of the plain meaning and legislative history of the section" and therefore creates a reasonable classification between people who indulge in carnal intercourse against the order of nature and those who indulge in the same in ordinary course. Such a classification does not reek of arbitrariness or irrationality and therefore does not fall foul of Article 14. It was also observed that only a small fraction of the population has been charged and prosecuted under the said section and therefore the same cannot be said to be a good ground for reconsideration of its constitutionality vis-à-vis Articles 14, 15 and 21. The Court in *Suresh Kumar Koushal* went on to also observe that misuse of the section could be a ground for its reconsideration by the legislature and the same cannot be "a reflection of the vires of the section" which the judiciary can factor in. Such observations in relation to the arguments in reference to right of miniscule population as well as the ground of misuse was dismissed by Misra CJ., in *Navtej Singh Johar*[16] *as* "constitutionally impermissible". In effect, the Court overruled *Suresh Kumar Koushal*.[17]

Misra CJ., found §377 in *Navtej Singh Johar* to be violative of Articles 14, 19 and 21 and thus failing the 'litmus test for survival'. He predominantly

14. *Naz*, *supra* note 12, para 118.
15. *Id*., para 113.
16. *Navtej*, *supra* note 4, paras 115, 120, 169, 170 and 253(*ii*). Other judges have similarly opined on the issue.
17. *Id*., para 253(xviii).

uses choice as a ground to justify violations of the aforesaid provisions.[18] He applied both the tests namely, doctrine of classification and rule against arbitrariness to test the constitutional validity on the touchstone of Article 14. After giving reference to various authorities[19] he identified the twin essentials required for passing the old traditional classification test under Article 14 in the given case. The intelligible differentia was identified as 'indulgence in carnal intercourse' and the object sought to be achieved by the law in the given case as "protection of women and children from carnal intercourse". He declared that there was no rational connection between the two[20] and hence the section ranafoul of Article 14. He also found §377 to be patently arbitrary[21] so far as it seeks to criminalise "sexual acts of whatever nature between competent adults."[22]

Misra CJ., again after reference to established authorities[23] proceeded to "check whether public order, decency and morality" can be seen as limitations to restraint the right of LGBT community under Article 19. He came to the inference that said section amounts to unreasonable restriction and is "overboard and vague" and has "a chilling effect on an individual's freedom of choice"[24] so long as the section criminalises "carnal intercourse" between consenting adults within their private homes or space.

Yet again, in the light of authorities cited, he asserted that impugned section abridges identity, dignity, and privacy of LGBT community which are all facets of right to life and personal liberty under Article 21 of the Constitution.[25]

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18. *Navtej*, *supra* note 4, paras 229, 230.
19. *Sunil Batra* v. *Delhi Admn*., (1978) 4 SCC 494 : AIR 1978 SC 1675, *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 : AIR 2007 SC 71, *E.P. Royappa* v. *State of T.N*., (1974) 4 SCC 3 : AIR 1974 SC 555, *Budhan Choudhry* v. *State of Bihar*, AIR 1955 SC 191.
20. *Navtej*, *supra* note 4, para 237.
21. *Id*., para 239.
22. Few of the reasons advanced by him were that the said section fails to draw a line between consensual and non-consensual sexual acts among competent adults, it fails to analyse if such private sexual acts between competent adults actually harm the society or not, etc. For more, see *Navtej*, *supra* note 7, paras 239-240
23. *Chintaman Rao* v. *State of M.P*., AIR 1951 SC 118, *S. Rangarajan* v. *P. Jagjivan Ram*, (1989) 2 SCC 574, *Shreya Singhal* v. *Union of India*, (2015) 5 SCC 1.
24. *Navtej*, *supra* note 4, paras 245-247, 253 (xvi).
25. *Id*., paras 149, 228-231.

3.1. Transformative Nature of the Interpretation of Carnal Intercourse: *§*375 & 377

The judgment of *Navtej Singh Johar* briefly touched upon another important issue, which is the relationship between §375[26] and §377.[27] The petitioner, in *Navtej Singh Johar*, raised a contention that the judgement in *Suresh Koushal* case[28] "failed to take into account the 'Criminal Amendment Act 2013' which has rendered sexual carnal intercourse against the order of nature between man and woman as permissible."[29] It has to be noted that after the Criminal Amendment Act 2013 (hereinafter as 2013 amendment),[30] the actus under § 375 Rape has been expanded to, apart from the earlier actus of peno-vaginal penetration, also include non-penile-vaginal penetration, penile or non-penile penetration on any orifice (urethra, anus etc.).[31] As Mishra CJ., observes that the question at the heart of the debate here is regarding the meaning of 'Carnal Intercourse against the order of nature'.[32] According to Misra CJ, the interpretation of 'Carnal Intercourse' seems to be shifting when read along with 2013 Amendment under § 375. The interpretation of 'carnal intercourse' was negative in nature,[33] in the sense that any sexual activity which doesn't result in procreation can be deemed to be a carnal activity against the 'order of nature'.[34] Hence, if a man and a woman engage in a consensual and wilful 'carnal intercourse'[35] (like fellatio) then although such an act won't be considered as 'Rape' under §375, but they will still incur criminal liability

26. Penal Code, 1860, Section 375.
27. Penal Code, 1860, Section 377.
28. *Suresh Kumar Koushal* v. *Naz Foundation*, (2014) 1 SCC 1.
29. *Ibid*
30. The Criminal Law (Amendment) Act, 2013.
31. The Criminal Law (Amendment) Act, 2013, Section 375.
32. *Navtej*, *supra* note 4, para 212.
33. So much so that even Macaulay refused to define it in a certain term "Clauses 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible be said. We leave without comment to the judgment of his Lordship in Council the two Clauses which we have provided for these offences. We are unwilling to insert, either in the text, or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision." *Navtej*, *supra* note 4, paras 34, 283.
34. *Id*., paras 214 and 135.
35. The same interpretation has been used in earlier cases.

under §377.[36] Misra CJ., termed this to be an anomaly,[37] and a very creative interpretation was applied using the logic that the intention of parliament, in passing of the Criminal Law Amendment Act 2013, was to remove 'intercourse which doesn't lead to procreation' from the ambit of §377 and transplant it under §375 under the ambit of 'Sexual Intercourse' and therefore acts which could have been categorised as 'carnal intercourse' (like fellatio) under §377, are now categorised as sexual intercourse under §375, therefore criminal liability is only attracted if there is no consent or willingness (apart from other conditions).[38] Based on this argument, Misra CJ., held that sexual intercourse between heterosexuals not leading to procreation is not criminalised, likewise if any homosexual male engages in a similar activity, his conduct should also not be criminalised under § 375, as it is both discriminatory and arbitrary.[39]

Further R.F. Nariman, J. shared a similar opinion to that of Misra, CJ, wherein he observed that if §377 continues to penalise such consensual sexual intercourse, an anomalous position would result[40] wherein a male, though not liable for Rape, can still be liable under §377.[41] Chandrachud, J. in his judgement goes further than the above observation and concede to the argument which calls into question the very meaning of 'unnatural' to be redundant in light of Criminal Law Amendement Act 2013.[42]

However, Indu Malhotra, J, differed slightly on the relation between the amended §375 and its relation with §377. In her judgement, she observed that the expression of 'sexual intercourse' under §375 and 'carnal intercourse' under § 377 are different.[43] The meaning of 'carnal intercourse' is also nowhere defined, and it keeps getting interpreted differently with time;

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36. "Such an anomaly, if allowed to persist, may result in a situation wherein a heterosexual couple who indulges in carnal intercourse with the wilful and informed consent of each other may be held liable for the offence of unnatural sex under Section 377 IPC, despite the fact that such an act would not be rape within the definition as provided under Section 375 IPC." *Navtej*, *supra* note 4, paras 220 and 138.
37. *Ibid*
38. *Ibid*.
39. *Id*., para 21.
40. *Navtej*, *supra* note 4, paras 93 and 258.
41. *Id*., paras 94 and 258.
42. "Section 375 is a clear indicator that in a heterosexual context, certain physical acts between a man and woman are excluded from the operation of penal law if they are consenting adults." Chandrachud J. in *Navtej*, *supra* note 4, para 31.
43. Indu Malhotra, J., in *Navtej*, *supra* note 4, para 12.2.

> *"The test for attracting penal provisions under Section 377 changed over the years from non-procreative sexual acts in Khanu v. Emperor, to imitative sexual intercourse like oral sex in Lohana Vasantlal Devchand v. State, to sexual perversity in Fazal Rab v. State of Bihar ...."*[44]

Further, she accedes that the expanded definition does create a dichotomy between §377 and §375, based on a similar logic to what have been discussed above.[45] However, dichotomy in itself is not enough, as she further clarifies that criminalisation of 'carnal intercourse' is based on the sexual orientation and may lead to misuse against the homosexual. Thus, it is 'manifestly arbitrary' and hence violative of Article14.[46]

3.2. Certain Implications: Dichotomy between §375 & §377

There are certain issues which may arise due to the conflating of §375 and § 377, as has been done in this case. The authors will try to address a few of them in the current paper.

Gender Specific: The first issue is in relation to the dichotomy created by the amended § 375's 'sexual intercourse' and §377's 'carnal intercourse', as has been observed in this judgement. One may argue that these two expressions have been treated separately by courts, as has been observed by Justice Malhotra, and the amended actus of 375 cannot influence the meaning of 'carnal intercourse' which is the actus under § 377, as both have a different meaning attached to them. The Actus under §375 is a 'sexual intercourse' between man and a woman involving penetration (hence gender-specific) while the Actus under §377 is gender-neutral and involves 'carnal intercourse against the order of nature'. Interestingly, if one concedes to the observation made in this judgement regarding the transplantation of the acts of 'carnal intercourse' of §377 to 'Sexual intercourse' under § 375, then such transplantation can only be said to be meaningful in case of an 'unnatural' act committed by a male person, since §375 is gender-specific,[47] thus leading to an unfortunate situation where an only female person can be said to commit a 'carnal intercourse'. Missing out such an important distinction in this judgement shows how androcentric our legal interpretations are.

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44. *Id*., para 12.4.
45. *Id*., para 14.7.
46. *Id*., para 14.9.
47. It essentially implies that only a male person can commit the offense of rape.

Unnatural Lust & Private Defence: The second issue also flows from the conflating of 'sexual intercourse' and 'carnal intercourse'. The Actus Reus of §377 is that it is an act amounting to "carnal intercourse against the order of nature", which has been interpreted to mean 'unnatural' in various case laws.[48] Lord Macaulay's draft also mentions about 'unnatural lust' under the clause 361[49] and 362,[50] which, although not directly responsible for the insertion of §377, can be said to have influenced the insertion of 'unnatural crimes' within the criminal jurisprudence in India. The demarcation between 'natural' and 'unnatural' has been a part of criminal jurisprudence in India since then. In *State of Kerala* v. *Kundumkara Govindan*,[51] the Court held that thrusting of the male sexual organ between the thighs is carnal intercourse amounting to an unnatural offence under § 377. However, Justice Chandrachud goes on to observe in *Navtej Singh* case about the futileness of differentiating 'natural' and 'unnatural' sexual intercourse;

> *"If it is difficult to locate any intelligible differentia between indeterminate terms such as 'natural' and 'unnatural', then it is even more problematic to say that a classification between individuals who supposedly engage in 'natural' intercourse and those who engage in 'carnal intercourse against the order of nature' can be legally valid."*[52]

However, the distinction between 'natural' and 'unnatural' is not just present under §377, but also present in Private Defence: §100 Fourthly, when the right of private defence of the body extends to causing death[53] to protect oneself from assault with the intention of gratifying unnatural lust.[54] In Samir Nijam Landge v. State of Maharashtra[55] the accused person

48. *State of Kerala*., *infra* note 51, para 51.
49. "Whoever, intending to gratify unnatural lust, touches for that purpose any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall be liable to fine." First Draft of the Macaulay Code.
50. *Id*. "Whoever, intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine."
51. 1968 SCC OnLine Ker 138 : 1969 Cri LJ 818.
52. *Navtej*, *supra* note 4, para 22 (Justice Chandrachud).
53. Penal Code, 1860, S. 100 fourthly.
54. *Ibid*.
55. 2006 SCC OnLine Bom 525 : 2006 Cri LJ 3429.

went to repair the TV of the deceased person, whereupon after arriving, the deceased person started removing his clothes with the intention to have unnatural sex with the appellant, and for the purpose of gratifying his 'unnatural lust' he attacked the appellant. However, during the scuffle, when the accused person apprehended that he might be the subject of 'unnatural sex' hit the deceased person with a sattur, leading to death. In this case, the Court accepted the plea of private defence, stating that circumstances were such that the appellant was justified in exercising his right of private defence to protect himself from unnatural lust.

Further, §367 of IPC[56] also provides that "Whoever kidnaps or abducts any person in order that such person may be subjected, or maybe so disposed of as to be put in danger of being subject to grievous hurt, or slavery, or to the *unnatural lust* of any person……". Since even the meaning 'unnatural lust', for the purpose of §100 fourthly and § 367, is not defined anywhere, the reliance has to be placed upon interpretation of the 'unnatural act' § 377 which is meant to include 'carnal intercourse against the order of nature'. However, by observing in this case that the 'carnal intercourse' has been transplanted to 'sexual intercourse' and obscuring the difference between 'natural' and 'unnatural', the judgement is making the other provision redundant. Similarly, to § 100 *fourthly*, there is also a §100 *thirdly*, which extends the rights to private defence in case of rape.[57] The presence of these two distinct private defence criterion under § 100 shows that 'unnatural' and 'sexual act amounting to rape' should be treated differently, otherwise § 100 fourthly might become redundant, which again couldn't be the intention of the parliament. The reliance on Criminal Amendment 2013 to sustain the argument that the parliament intended to transplant 'carnal intercourse' into 'sexual intercourse' lacks any strength, as there is no evidence to prove that the parliament also wanted to narrow down § 100 fourthly or § 367, as might happen due to such an interpretation.

The Absurdity of retaining§ 377: The above discussion shows that 'sexual intercourse' and 'carnal intercourse' are a separate class of

56. Penal Code, 1860, Section 367, "Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.—Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subject to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."
57. Penal Code, 1860, Section 100 thirdly.

offences. The majority judgement forayed into an area whereby conflating § 375 and § 377, thus leading to anomalies, which the parliament would not have intended. The judgement of Indu Malhotra, J., can be said to have some saving grace, as she sidestepped the question of 'transplantation' of carnal intercourse to sexual intercourse and observed that 'carnal intercourse' itself is manifestly arbitrary to homosexuals and hence violative of Article 14.[58] Interestingly, it was held that consensual sexual acts among adults, which were criminalised under § 377, are violative of Article 14.[59] However, it was also held that non-consensual sexual acts between adults would continue to be governed by §377.[60] The judgement, in this case, puts the actus of 'carnal intercourse' almost comically into a 'Schrodinger's cat paradox', whereby 'carnal intercourse' is recognised and not recognised at the same time for criminalisation purpose. A more preferred alternative would have been to discard the victorian-era moral sensibilities which crept into the penal code and getting rid of the concept of 'carnal intercourse' entirely, and more reliance could have been placed on 'harm principles' for the criminalisation of certain acts. Even if the observation is to be believed that there is a relationship between §375 & §377 (after the Criminal Law Amendment 2013) and there is a spill-over effect,[61] then even in that circumstance, retaining the terminology of 'unnatural acts and carnal intercourse' in § 377 cannot be justified and even reading 'consent' into §377 doesnot change the interpretation of 'unnatural sexual acts'.[62] Till the time these Victorian-era terminologies remain within the criminal jurisprudence of India,[63] it will be a very difficult task to provide true equality to the people irrespective of their sexual orientation. It will be a grave mistake to assume that the struggle for true quality for the LGBTQ is over with the *Navtej Singh* judgment,

58. *Navtej*, *supra* note 4, para 46.
59. "In view of the aforesaid findings, it is declared that insofar as Section 377 criminalises consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, is violative of Articles 14, 15, 19, and 21 of the Constitution." *Navtej*, *supra* note 4.
60. The provisions of Section 377 will continue to govern non-consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of bestiality.
61. John Sebastian, "The Opposite of Unnatural Intercourse: Understanding Section 377 through Section 375", (2017) 1 Indian Law Review 232–249.
62. An act remains unnatural, irrespective of the consent provided.
63. For example, it would include cases such as "carnal intercourse against the order of nature".

and as Ashley Tellis beautifully put it across "*The honest toil on the question of homosexuality in India remains to be done.*"[64]

4. CELEBRATING NAVTEJ SINGH JOHAR WITH A FEW TAKE AWAY

Misra CJ., sets the tone of the judgment by quoting German thinker Johann Wolfgang von Goethe who had said: "*I am what I am, so take me as I am*". He quotes other thinkers and philosophers to convey very quickly what the judgement is likely to end in.

In terms of legal content, the Court was correct in overruling *Suresh Kumar Kaushal* case and observing that it is the duty of the Court to protect the interests of the minority as much as that of majority. Misra CJ., very aptly dismissed the ground of "a miniscule fraction of the country's population" being a consideration by describing the factor as "meaningless" like "like zero on the left side of any number."[65] It is appalling to even consider such an argument for denying any group a right in a country,the constitution of which boasts of equality, liberty, fraternity and the culture of which prides itself of dissent, pluralism, accommodation and inclusiveness.

The judgment is successful in clearly establishing the rights of LGBT community by partially striking down §377. However, the Court has failed to throw any significant light on the scope or meaning of the expression which forms the backbone of the impugned section which is "carnal intercourse against the order of nature". The Court has correctly observed that the expression has not been defined anywhere in the penal statute but went on to observe that "if the coitus is not performed for procreation only, it does not per se make it against the order of nature". The significance of this omission gains ground since the section is still partially valid in case of non-consenting adults and sexual activity with animals. Increasing discussion and awareness in relation to animal rights also cannot be absolutely ignored in this regard.

The judgment like almost all delivered by the Indian Judiciary is bulky and runs into hundreds of pages. Though one can understand that issues of constitutional importance cannot be trifled with and require detailed in-depth analysis, but one cannot help but fail to appreciate the use and reiteration of numerous observation of foreign courts to drive home 'the

64. Ashley Tellis, "The Lack of Honest Toil" <http://www.india-seminar.com/2019/721/721_ashley_tellis.htm>accessed 27-7-2020.
65. *Navtej*, *supra* note 4, paras 115, 120, 169-70 and 253(ii).

purpose of transformative constitutionalism' for example (in this case observations of the Constitutional Court of South Africa),[66] after already having ascertained the scope and purpose of the concept by reference to few earlier domestic pronouncements and subsequently thereafter. It is respectfully submitted that a conscious effort to reduce volume of any judgment which does not compromise with the principles and required interpretation enunciated therein will help solve many issues including the backlog of cases to begin with.

Lastly, this judgment like few others in the recent past have to be lauded for ushering in the era of progressive realisation of rights at a wholly different level and even at the cost of shaking few established perceptions of our society which to an extent has visibly created unrest. It truly is a case reflective of transformative constitutionalism and therefore should be celebrated by all of us.

66. *Navtej*, *supra* note 4, paras 99 and 105.

BEYOND BINARIES: QUEERING HUMAN RIGHTS FOR TGNB COMMUNITY IN THE TIMES OF COVID-19

*Ms. Aaratrika Pandey**

ABSTRACT

The philosophy of human rights is founded on the single ground that all people are equal. Equality necessarily demands the right to life and live with dignity is part of equality. In Naz Foundation v. State (NCT of Delhi), the Court interposed that:

"...the Constitutional protection of human dignity requires us to acknowledge the value and worth of all individuals as members of our society."[1] *Protecting marginalized and vulnerable community from the COVID-19 pandemic is a prudent obligation, predominantly since they are at higher exposure for number of reasons. One such community is TGNB. COVID-19 has left these people at greater risk of deprivation and discrimination in healthcare amenities, livelihood, housing and other fundamental needs as majority of them are homeless and their living is mostly dependent on begging, entertaining in social events, etc. or are they unemployed. The paper considers the impact of the Coronavirus outbreak on TGNB community and how it exaggerated their plight through a disproportionate and discriminative system and schemes within the domain of Article 14, 19 and 21 of Indian Constitution, forcing them further out to the margins which results in their human rights violation. The paper will also provide valuable recommendations for reducing the current woes of TGNB people during COVID-19, based on thorough analysis of the situation.*

1. INTRODUCTION

It is a truism that catastrophe amplifies prevailing disparities which are replicated within the social and economic hierarchal structures that

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1. 2009 SCC OnLine Del 1762 : (2009) 160 DLT 277.

predate the pandemic. Across the globe, injustice is something that lies in plain sight, even in average days, as a deciding factor in vulnerability to human rights violations.

Even in the best of circumstances, Transgender and Non-Binary ('**TGNB**') individuals lack employment, accommodation, healthcare services and other disadvantages arising from a combination of persistent racism and inadequate protection and safeguards against discrimination. Amongst other vulnerable group that requires attention, members from this community also endeavour to cope physically, mentally, and financially.

Earlier in this pandemic, it was very prevalent to hear that, "the virus is the great equalizer."[2] However, the deep disparities in having access to the required basic elements of healthcare were quickly highlighted by this crisis. This is particularly true for the TGNB population, which has been profoundly impacted in a variety of ways by the pandemic, including the possibility of exposure to the virus and its adverse effects, delays in access to gender-affirming treatment, and reduced access to social support, which is vital for shielding against the implications of stigma and prejudice. These problems are taking place alongside of legal and interpersonal complexities.

A number of people have been affected by the coronavirus pandemic: migrant workers, labourers, corporate job holders and people in general too. However, current pandemic has intensified the problems faced by society's vulnerable and oppressed communities, which already experiences extreme discrimination. While Section 377,[3] which criminalises same-sex relationships, has been repealed, the TGNB community's acceptance has been sluggish, if at all. And it is the community that has been calling for inclusiveness and basic rights time and again. As we battle COVID-19, their plight has become more evident. Amnesty International, underlining the dilemma of the transgender and non-binary gender community, stated: "As the world comes together, the transgender community of India is battling COVID-19 alone."[4] Underneath these twofold jolts of social

2. Stephen Mein, "COVID-19 and Health Disparities: The Reality of 'the Great Equalizer' " (2020) 35 Journal of General Internal Medicine 2439 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7224347/> accessed 6-9-2021.
3. Penal Code, 1860.
4. Nadia Rahman, "Governments have Failed to Protect Trans People from Murder – and from COVID-19" (20-11-2020) <https://www.amnesty.org/en/latest/news/2020/11/governments-have-failed-to-protect-trans-people-from-murder-and-from-covid19/> accessed 6-9-2021.

distancing and the Covid-19 virus, this organisationally discriminated community has become ever more vulnerable and disadvantaged.

Warning and cautionary posters were allegedly trapped in Hyderabad illustrating people not to speak to TGNB community as they are the source of novel coronavirus and mere talking to them might spread the virus. As a result, transgender people have been forced to leave their rental homes. They wrote to the various ministries requesting urgent assistance in the face of increased stigma and trans phobia during the pandemic. COVID-19 is more dangerous to individuals who have a damaged immune system, such as those who have HIV/AIDS. Homeless people, a group that includes many individuals from TGNB community, are less likely to safeguard and protect themselves by increasing their exposure to contagion through physical distance and safe hygiene practises. Thus it puts the transgender community in a situation where their issues are apparent but little is done to fix them. Transgender people are at adverse risk, which is far worse than most citizens.

First and foremost, they are susceptible to abandoning their meagre means of survival. "Most of them are trapped in the confines of their house, which does not contain essential needs or revenue generation flows."[5]

Secondly, healthcare services have fewer access to them. Although the world is struggling to bring its public health management on board, in the midst of this global pandemic, only the wealthy are able to access health care facilities. The TGNB population is more vulnerable to diseases, has a weakened immune system, and lacks insurance, all of which add to their problems. "Most of them are worried that they won't have access to hormone therapy, medication for HIV/AIDS or sex-reassignment surgery."[6]

Eventually, they are trapped in a vicious cycle of systemic prejudice, isolation, and abuse. The increase in hate crimes has also affected the community badly. Since they can be seen as possible bearers of the virus, there has been an upward increase in stigma and trans phobia. It is not untrue to say that the idea of 'social distancing' is not new to them. They have become very distant from mainstream society. In recent years,

5. *Ibid*.
6. Lock L., Anderson B. and Hill B.J., "Transgender Care and the COVID-19 Pandemic: Exploring the Initiation and Continuation of Transgender Care in-Person and through Telehealth" (2021) X:X Transgender Health 1 <https://www.liebertpub.com/doi/full/10.1089/trgh.2020.0161> accessed 6-9-2021.

hate-mongering has been widespread, leading to the removal of TGNB people from their rental homes.

The state governments, as well as the central government bodies took few relief measures. However, because the initiatives were more majoritarian in nature, the minorities are still lurking within the periphery.[7]

Author discourses significant perspectives to meet the needs of this group. During COVID 19 and beyond, it is critically important to address this population's special needs as a more nuanced outlook is needed. This paper will also address the vulnerability factors for TGNB community through specific suggestions for abovementioned issues.

2. COVID-19 SITUATION IN INDIA

On January, 30th, 2020, Director-General of World Health Organization, Tedros Adhanom Ghebreyesus declared the pandemic of novel coronavirus as an International Concern and should be treated as a Public Health Emergency.[8] On the very similar day, in Thrissur, in Kerala India reported its first case.[9] On the evening of March, 24th, 2020, the appropriate authorities responded to the pejorative situation and declared a nation-wide lockdown for twenty one days to combat novel corona virus pandemic.

The main objective of this lockdown was to curtail the movement of all individuals and postponement of all the events except few essential services such as healthcare, grocery, telecommunication, etc. The government also urged people to stay at home, administering social distance interventions. Although this led to a haywire of challenges specifically for marginalized and vulnerable community like TGNB. Eventually, the lockdown extended for few more months. Gradually the appropriate authorities started to gradually reopen services outside the containment zones.[10]

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7. Vikramaditya Sahai, Aj Agrawal and Almas Shaikh, Exclusion Amplified: COVID-19 and the Transgender Community (CLPR, Bangalore, 2020) <https://clpr.org.in/wp-content/uploads/2020/07/ExclusionAmplified.pdf> accessed 15-3-2021.
8. World Health Organisation, Novel Coronavirus (2019-nCoV) Situation Report – 1 (31-1-2020).
9. Perappadan, B.S, "India's First Coronavirus Infection Confirmed in Kerala" (*The Hindu*, 30-1-2020).
10. "Lockdown 5.0 Guidelines In India (State-Wise): New Lockdown Extension Rules Announced; Night Curfew Relaxed" (*The Financial Express*, 30-5-2020).

Countries other than India that imposed less restraining and restrictive lockdowns tended to see spike in cases initially and followed by a peak although after some time the number of new cases reduced. But troublingly, in India the lockdown did not lead to a downward trend in terms of new cases[11] As on February, 28th 2021, 1,07,58,619 confirmed cases and 1,54,428 overall deceases were listed in India.[12]

3. ORIGIN AND STATUS OF RIGHTS OF TGNB IN INDIA

To comprehend the violation of any right, we have to understand the origination of such right. There is now near-universal recognition that all citizens, regardless of situation, are entitled to such human rights. Certain civil liberty and political rights are among them, the most basic of which is the right to life and physical protection. In all of our practices, civil rights are the manifestation of the need for justice, tolerance, universal respect, and human dignity. When we speak of rights, we're voicing the notion that all people are represented in the sense of morality and justice.

The Yogyakarta Principles[13] (2007 and 2017), have become a central reference document in International Human Rights Law for governments, activists and authorities concerning with the rights of people with different Sexual Orientation and Gender Identity than mundane binary world. The 2007 principles are known as first principles while 2017 principles are known as supplementary principles, both principles are meant to be created, "for the larger purpose of seeking a human rights response to stigma, violence, and discrimination against people based on their sexual orientation, gender identity and expression, and sex characteristics."

To guard human rights is to make sure that all individuals be given same degree of fair, reasonable and decent humane treatment. Violations of the human rights, rob people of their procedural safeguards. In certain cases, it's treating them as if they're less than normal, incapable of respect and honesty. Limiting the state's unrestrained authority is an important feature of international law and these measures are often enforced by

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11. Venkataramakrishnan, R., "What Does the End of India's COVID-19 Lockdown Mean for You?" (Scroll.In, 9-5-2020).
12. World Health Organisation, Novel Coronavirus Disease (COVID-19) Situation Update Report - 20 (5-3-2021).
13. International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, <https://www.refworld.org/docid/48244e602.html> accessed 7-9-2021.

governments. The concept of non discrimination, as well as the idea that such fundamental perils must be met, are at the core of legislation banning various crimes against humanity.

When a State fails to guarantee the economic, cultural and social rights without prejudice, or when it fails to value, protect, and fulfil them, an infringement of those rights exists. An infringement of one of the rights often leads to violation of another.

The Indian Constitution is among few in the world that serves the needs of every segment of society. Since the framers of the Indian Constitution understood the value of human integrity and worthiness, hence used the expression 'dignity of all the individuals' in the preamble. Basic rights are the most significant aspect of the Constitution. The framers and engravers of the Indian Constitution took it from the United States and included it as a separate chapter in Part III. Right against exploitation, right to liberty and freedom, right to freedom of worship, right to cultural and educational opportunities are some of the most precious, inalienable, universal, and inherent rights stated in the Constitution. The Constitution provides that all citizens have equal access to human rights. Fundamental rights guarantee that individual integrity is maintained and secured. Articles 14,15,16,19 and 21 of Indian Constitution provides protection to basic human rights as right to be treated equally, right not to be discriminated on the foundation of religion, caste, race, sex or place of birth, equal opportunity for employment, right to speak freely and express themselves and last but not the least right to live with human dignity and safeguarding abovementioned rights of all the individuals including marginalized and vulnerable.

Even our judiciary encourages and upholds human dignity above all. The Supreme Court of India upheld that, "right to life embodied in Article 21 of the Indian Constitution, is not merely a physical right but it also includes within its ambit, the right to live with human dignity."[14]

4. CHALLENGES FACED BY TGNB IN THE TIMES OF COVID 19

Emphasizing the dilemma of TGNB individuals, Amnesty International stated: "As the world comes together, India's TGNB community fights COVID-19 alone." Since so many Trans individuals are low-wage workers and social distancing has become especially problematic for them. Many

14. *Maneka Gandhi* v. *Union of India,* (1978) 1 SCC 248 : AIR 1978 SC 597.

of them lack basic identification, such as ration card, Aadhaar card, voter ID, or bank accounts self-identifying their name, sex and gender, and thus are unable to enter government social security and welfare schemes such as *Pradhan Mantri Garib Kalyan Anna Yojana, Public Distribution Scheme, PM-KISAN scheme, MNREGA Ujwala scheme, Prime Minister Awaas Yojana Urban* and other schemes too, making it hard to live during these tough periods of the pandemic. Additionally, the "Transgender Persons (Protection of Rights) Act 2019", which is in contravention of the 2014 NALSA judgment, puts a "vague bureaucratic procedure to be followed for legal gender recognition and does not allow transgender persons to self-identify themselves".

Apart from Kerala administration, no other state partook the thought to safeguard the TGNB community's rights while promising assistance to other disadvantaged communities. Even the Finance Minister's announcement of the Pradhan Mantri Garib Kalyan Yojana made no mention of the TGNB society. Even in the middle of a lockdown, there was an invisibilization of them.

Orthodoxy places non-binary people at risk of contracting the coronavirus as they are socially disadvantaged minority who are expected to live in slums where social segregation is difficult, making them a hotbed for Coronavirus. Furthermore, the lack of healthcare backup and lack of awareness in the community heightens the looming fear of COVID-19's imminent impact. Before the pandemic, there was a high incidence of economic poverty and social discrimination, which exacerbated their condition with lack of food, funds, security/ protection, and mental health issues during the pandemic. TGNB people's human rights are gaining momentum around the world, contributing to the introduction and enforcement of numerous legal guarantees in a variety of countries, including India. "Right to life include the right to live with human dignity with bare necessities of life such as: adequate nutrition, clothing, and shelter over the head and facilities for: reading writing, and expressing oneself in diverse form."[15] Via the preamble, the Indian Constitution reflects "civil, political and economic equality of status for all." The right to equal and fair treatment under the law is enshrined in the Constitution of India.

During this pandemic, community members faced a number of obstacles, some of which are very severe. The bulk of the government's initiatives

15. *Francis Coralie Mullin* v. *UT of Delhi*, (1981) 1 SCC 608 : (1981) 2 SCR 516.

target minorities, senior citizens, and those who are differently able and unwilling to meet the needs of TGNB people. Members of the group are particularly vulnerable to mental health problems owing to a lack of strong and social resources. As a consequence, it's important to reach out to them and provide assistance. Few challenges faced by them in the times of Covid-19 are discussed below:

4.1.1 Access to Health Services: "In a welfare state, the government's primary responsibility is to ensure the welfare of its citizens, and it is also the government's responsibility to provide sufficient medical services for its citizens without any discrimination."[16] When TGNB individuals seek medical treatment, they often face stigma and bigotry, resulting in inequalities in healthcare coverage, quality, and affordability. In several nations, there has been comprehensive evidence of healthcare disparities focused on gender identity/expression and sexual orientation. This bigotry will make TGNB people more vulnerable to COVID-19.

4.1.2. Enlarged Discrimination in Health-Care Facilities: The access to necessary healthcare services is a basic human right that transgender people are refused time and time again. The implications of healthcare workers refusing fundamental healthcare rights to TGNB people during the COVID-19 pandemic are far-reaching. The systemic exclusion of the transgender population from the healthcare industry is a product of social bias that leads to discrimination. According to the National Centre for Transgender Equality,[17] transgender people's immune systems are more vulnerable to coronavirus infection. Consequently, the nature of their work makes them vulnerable to coronavirus infection. Furthermore, COVID-19 is more likely to affect children and elderly people from the community due to visible inequality in the availability of healthcare entitlements. If coronavirus infects a transgender person, they may be quarantined in either a female or male ward, obliterating their gender identity. This will enrage the COVID-19-affected transgender patient ever more. The transgender person battling coronavirus faces not only physical and mental pain, but also nasty looks and sarcastic remarks from healthcare professionals and other ward patients.

16. *Paschim Banga Khet Mazdoor Samity* v. *State of W.B.,* (1996) 4 SCC 37 : AIR 1996 SC 2426.
17. The National Centre for Transgender Equality was founded in 2003 by transgender activists who recognized the urgent need for policy change to advance transgender equality in Washington, DC.

TGNB individuals have a legacy of inequality in the healthcare system, which keeps them from disclosing signs of coronavirus infection, speeding up the transmission of the virus. Despite the Indian government's efforts and international human rights regulations, the transgender community continues to face discrimination in healthcare facilities. The transgender community's access to treatment is either undervalued or vulnerable. During the ongoing national lockdown, the Indian government has closed public places to deter the spread of COVID-19, which causes a number of transgender people to run out of funds, raising the transgender community's fatality rate. While the rest of the planet is battling the COVID-19 pandemic, the transgender population is experiencing eras of societal isolation and layers of oppression that have been placed on them because of their unusual gender identity.

4.1.3. De-prioritization of gender affirming health services: treatment of TGNB individuals is interjected or deprioritized, including HIV medical care, testing, gender affirming surgeries and hormonal therapy.

Individuals suffering from gender dysphoria have to schedule and organize ahead of time in order to undergo medically appropriate gender-affirming interventions. As a result, avoiding these medically required treatments will prolong pain and misery in an otherwise complicated and convoluted method. Furthermore, early teenage puberty suppression is highly time-sensitive due to an optimum window for successfully avoiding the initiation and development of pubertal changes; hence, postponement of treatment due to the pandemic has a particularly detrimental influence on young transgender and non-binary individuals. COVID-19, has impacted the community as travel bans, state-by-state quarantines, and the possibility of infection, can reduce people's choices for gender-affirming surgeries in another state or region, or have an effect on their post-operative care plans.

Conclusively scrambling back all healthcare services should be scientific and research and data based, and should not replicate bias against TGNB community. This condition is more likely to get worsen in rural areas where healthcare services are only restricted to Primary Healthcare Centres, Community Healthcare Centres and government managed hospitals. Furthermore, many Transwomen having HIV are undergoing various influences on their livelihoods.

4.2. Lack of Livelihood: TGNB individuals are more probable to be unwaged and unemployed as compared to other people in general. Most

TGNB individuals earn their livelihood through the private sector and do not have access to paid leaves, insurance or any unemployment care. "Right to life includes right to livelihood because no person can live without the means of living."[18]

Poverty and inequality are mutually reinforcing. Bullying at school and alienation from family will lead to low grades and reduced opportunity later in life. Because of occupational discrimination, some TGNB individuals are constrained to those forms of jobs, mostly in the informal sector, with no protection and little benefits. Even at the best of days, these are insecure work. They nearly disappear in a pandemic.

4.2.1. Clogged Income Stream: Since a majority of transgender people are solely reliant on dealing with public and community oriented jobs, they are walloped in the times of pandemic. Like daily wage earners, the transgender people also earn on an everyday basis from their gig jobs. They are adversely affected by the pandemic outcome and are forced to focus on their savings. The red light zones were closed, weddings and other kinds of events were cancelled or delayed, due to the full lockdown.

Amongst the community of transgender people, there are precisely two categories: those who have acquired prominent positions in the mainstream society or have earned money over the years and those who are within the age-group 18-25 years and are engaged in minimal jobs. However, it is observed that those who fall under the second category are in disarray as they are discarded by their parents and have migrated to the cities recently. In order to fulfil their daily needs during the lockdown, they borrow from multiple loaning sources. The money is usually not borrowed from banks rather from private money lenders as they do not have proper documentation or identity proof to open a bank account. Moreover, there is a constant suspicion among transgender people on the safety of their money in the bank accounts, owing to a general lack of education. However, during this dismal situation of the pandemic, the government needs to pay heed to its community of transgender people because this community is never given its due with dedicated policies that are specifically meant for them.

4.2.2. Deprived of a Square Meal Daily Food insecurity: COVID-19 has resulted in food insecurity among TGNB people. Since transgenderism under poverty is a pervasive reality played out in daily

18. *Olga Tellis* v. *Bombay Municipal Corpn.,* (1985) 3 SCC 545 : AIR 1986 SC 180.

life, the transgender section is especially affected by the coronavirus outbreak. "The right to food is a constitutional, expandable, legally enforceable, reviewable, totally justiciable, inalienable part of right to life and a basic human right."[19] Before pandemic, transgender people faced heightened barriers to food security due to longstanding issues ranging from social ostracization to lack of employment opportunities to wage gap. However, after the outbreak of COVID-19 leading to nationwide lockdown, the Intersex community is at amplified risk of starvation and poverty since largely their livelihood depends on un-dignified work such as begging, *badhai (*ceremonial collections on auspicious occasions*)*, street entertainment, and paid sex due to lack of education. Non Binary people have the opportunity to go back home and depend on their family members when they are penniless. However, most of them are deprived of families, so they stay together. If the Government is providing 10kg rice for a family of 4- 5 members, what will it do for a cluster of 25 transgender people living together? It is a matter of woe that the Indian government is very less concerned about food insecurity among transgender people.

Many states of India have yet not taken any step inclusive of TGNB people in their proposals related to financial aid, food distribution, and welfare schemes. This is because the states lack records of the actual population of transgender people in their official database. Since most of the transgender people have left their parental homes at an early age, they do not have their education degrees or date-of-birth proofs which are the essential documents to get an Aadhaar Card. Further, many of them are yet to receive their Transgender cards or residential proofs, which makes it difficult for them to receive Ration cards. Without having the Aadhaar Card or Ration Card, as such, transgender people are deprived of getting the benefits meant for the downtrodden. However, in this quarantine, the primary source of distress for the Transgender community is the lack of food. Therefore, if the government considers transgender people as poor people and categorize them under below poverty line and other welfare schemes, then they can fare better.

4.3. Stigmatization and discrimination of the TGNB community: There have been instances of the TGNB people being responsible for events, both natural and manmade, in the past, and there are occurrence of such erratic incidents during this pandemic.[20] According to news,

19. *People's Union for Civil Liberties* v. *Union of India*, 2001 SCC OnLine SC 5.

20. Rabbi Meir Mazuz, "Parades against Nature" (Al Arabiya English News, 28-3-2020) <https://english.alarabiya.net/en/News/middle-east/2020/03/28/Coronavirus-Iraqi-

homophobic and Trans phobic discourse is on the rise in certain nations.[21] COVID-19 guidelines have also been used by police to strike and target TGNB organisations, according to studies.[22] The State of Emergency has been invoked in at least one country to recommend a decree banning TGNB individuals from changing their identity legally on identification papers.[23]

4.3.1. Domestic violence, hate speech and abuse: When religious figures condemn TGNB citizens for spreading the infection as divine retribution, those who are unable to take shelter in the safety of their homes face the brunt of the abuse that accompanies these offensive comments. Many TGNB youths are curbed in violent conditions with unaccommodating and non-cooperative family members or co-habitants due to stay-at-home constraints. This can make them more vulnerable to violence, as well as make them more nervous and depressed. They are humiliated and threatened both in the household and in society.

5. UNUSUAL MENTAL HEALTH DUE TO UNCERTAINTY AMID COVID-19

Transgender people living in hostile environment even in their families undergo stress and trauma in the current lockdown, particularly those who have gone through Sex Reassignment Surgery lately Transgender communities every so often suffer from discrimination in every aspect of social, cultural, legal and economic life due to which various psychological issues which definitely affect their mental health The hospital system across the country has suspended sex and gender assignment surgeries and procedures to prioritize care for COVID-19 patients. Gender confirming medical and surgical care is essential for transgender people but is currently considered as one of the non-emergency surgeries, thereby keeping them on hold. However, postponement of these essential but non-emergency

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Shia-cleric-blames-gay-marriage-forcoronavirus> accessed 4-3-2021.

21. Neela Ghoshal, "Uganda LGBT Shelter Residents Arrested on COVID-19 Pretext" (Human Rights Watch Press, 3-4-2020) <https://www.hrw.org/news/2020/04/03/uganda-lgbt-shelter-residents-arrested-covid-19-pretext> accessed 4-3-2021.
22. Kikonyogo Kivumbi, "Ugandan Fear of Covid-19 Leads to 23 Arrests at LGBT Shelter" (African Human Rights Media Network, 30-3-2020) <https://76crimes.com/2020/03/30/ugandan-fear-of-covid-19-leads-to-23-arrests-at-lgbt-shelter/> accessed 4-3-2021.
23. Lydia Gall, "Hungary Seeks to Ban Legal Gender Recognition for Transgender People" (Human Rights Watch Press, 3-4-2020) <https://www.hrw.org/news/2020/04/03/hungary-seeks-ban-legal-gender-recognition-transgender-people> accessed 4-3-2021.

surgeries has taken a dangerous mental toll in transgender patients who have either undergone the preliminary stages of the surgical care or for those who are on the verge of the medical care. This postponement may bring anxiety, depression, traumatic stress, and anger in them. They are exposed to intense depression and anxiety issues due to increased social isolation, job loss, and financial stress. Amid this lockdown, the transgender community is battling depression, anxiety, panic attacks, trauma, and stigma along with the lack of access to hormonal therapies, medicines, foodstuff, and money, which are the need of the hour.

5.1. The Impact of Social Isolation: The COVID-19 has hindered Transgender and non-binary individuals' access to vital emotional and structural social support system, which is important to their mental health. Many TGNB people rely on peer networks and gender affirming organisations and meet up groups for social reinforcement since their communities of origin do not always support them. Peer and community resources are crucial to one's sense of well-being, and they are particularly valuable for TGNB people when they experience identity growth, stigma, and bigotry.

6. A NEW DIGITAL WORLD ORDER

The digital world pushed us into reimagining touch in order to fulfil human needs of intimacy while living in a socially distanced world. In other words, gender and sexuality are wired into our bodies, and how much of it is visible beyond the framework of violence and victimhood is linked to our positive health beyond the absence of disease.

While the woes are many, the resilience of queer communities is such that they refuse to be invisibilised even when defenceless. The cancellation of pride events, which are remarkable for bringing together queer communities, this year, following social distancing protocol, nudged many to shift online for curating live shows, podcasts, digital exhibitions, open mic segments, and listening circles.

The scarcity of screen time has only proliferated creative and cultural expressions, in rich and provocative ways. Apart from reimagining cultural spaces for queer expression, they continued to forge political solidarities through virtual protests against the unlawful arrests of anti-CAA protesters, Dalit and Adivasi rights activists, students, and dissenters that continued routinely unabated during the lockdown. Solidarity has been a critical resource in these remote and unsettling times.

Online mutual aid initiatives have opened up avenues for amplifying solidarity efforts to sustain the livelihoods of marginalised queer persons. These initiatives are run by queer persons and grassroots organisations to create multiple forms of support, including but not limited to food grains, clothing, financial support for gender-affirming surgeries, accommodation, wage assistance, and mental health support. The gift of gender euphoria, in my eyes, is the warmest kind of solidarity.

Still reeling from the aftershocks of the pandemic, with a promise of its end in sight, these past few months have had both material and emotional significance, some of which have been socio-political threats to the ways we live as queer individuals. Despite, and because of these odds, they have prevailed and transformed in our strength, they are learning to love their own selves and one another, in their communities they found refuge and resilience. Bidding adieu to a tumultuous year, they have carried the hope for a reimagined future and greater possibilities for community-building, despite the discouraging circumstance.

7. SUGGESTIONS

Many transgender people lack even the most basic identification, such as an Aadhar card, voter ID, or birth certificate. As a result, they are excluded from traditional government social security programmes such as pensions and rations. The initiative started by government to combat outcomes of COVID-19 also fails to address the needs of transgender people. Many state governments have not even attempted to address their basic human needs. Despite this, the transgender community has been reported to have offered assistance to members of their communities, despite the fact that their future appears to be bleak.

The draught rules on "The Transgender Persons (Protection of Rights) Act 2019" were released by the government on April 18th, in the midst of a community in desperate need of bread and butter. These guidelines were supposed to be an initiative to counter the widespread disapproval of the Act, which was passed in 2019.

Despite the marches, the fundamental flaw is still there. The laws refuse to derive the right to self-identification/self-determination, which the Supreme Court of India upheld in the NALSA ruling. Furthermore, the laws infringe on Trans people's right to residence, do not fix the criminalization of sex work, and do not address the systemic obstacles to healthcare. Trans, non-binary, and gender-fluid people of the country must

explicitly engage, be represented, and have their voices heard in such laws in the times of Covid-19 and beyond.

It is important to stress that such a prolonged procedure is more likely to be used to institutionalise the fundamental right to human dignity than to foster a society that encourages human civility. There has never been a more compelling need for equality.

7.1. Tips for Policy Prescription: The government must incorporate disputes of the section of transgender people in their policies and schemes for disaster vindication given the COVID19 outbreak. Owing to the prejudices that the community of transgender have handled since centuries and keeping an eye on heightened vulnerability during the COVID-19 lockdown, specific measures should be taken by Government of India in favour of the community of transgender people,

7.2. Ensuring Food Security: Documentation must not be a ground for denying ration to the transgender community. Further, the community of transgender must be provided with free ration to tide over the pandemic. The State coordinators of transgender cell functioning under the social justice department need to gear up by instructing all districts to distribute free rations among transgender people. Vehicles must be made available at the district level to distribute foodstuffs in remote areas of every state. The community of transgender must be included under the purview of all policies, actions, and financial aid.

7.3. The Endowment of Financial Aid: The majority of transgender people have lost their jobs as a result of COVID-19's national lockout. The transgender people's wealth has diminished to zero, making it impossible for them to thrive. Regardless of identity documents, the government can guarantee cash payments in this community's favour. The Indian government should order nationalised banks to encourage transgender people to register in every state to facilitate cash transactions.

7.4. Access to Health-care Services: HIV positive transgender patients need Antiretroviral Therapy (ART) monthly. It should be considered an essential and emergency process that should not be neglected during the COVID-19 pandemic. Although ART drugs are used for the treatment of COVID 19, the administration should guarantee sufficient provision of the drugs for HIV positive transgender patients. Continuous supply of all vital medication to TGNB individuals comprising tuberculosis care, ART medicines, hormone therapy, and other gender-affirming surgeries

and procedures should be ensured. Healthcare professionals should ensure that the transgender individuals showing the symptoms of coronavirus infection should not be harassed and denied treatment at hospitals. Further, police should strictly monitor that no transgender person should be harassed while travelling to collect their medication.

7.5. Ensuring Shelter Security: It is recommended that the Government should ensure that the house owner cannot force a TGNB to evacuate their rental flat due to their failure in paying rent. Additionally, the government should notify guidelines to all property-owners to mitigate the situation in the times of Covid-19. TGNB residing in slums should be provided with food, water, and sanitation facilities at their doorstep to curtail their physical movement.

7.6. Making Sanitation Essentials Accessible: It is important to provide a proper sanitary facility so as to avoid the transmission of Covid-19 infection. The majority of TGNB individuals live in overcrowded purlieus with little or no access to water and sanitation. They are vulnerable to coronavirus infection due to their unsanitary and unhealthy lifestyle in the slum. Furthermore, owing to their financial vulnerability as a result of the lockdown, they are unable to purchase soaps, sanitizers, or masks. The government should take action to make the above things accessible for free through *Anganwadi* centres and other non-governmental organisations.

7.7. Access to Documentation: Access to documentation is one of the critical problems faced by the community of transgender people. However, it should not act as a limitation to access the welfare services extended by the government examining the records on case-by-case basis. Every state has primary responsibility and capacity to protect community rights across the world, particularly in the face of such a severe health crisis. Therefore, access to the documents may be made available favouring the interest of the TGNB community.

There is already a pressing need in the healthcare sector to create more inclusive environments free of bigotry, racism, and cultural bias. We can't always rely on activists, humanitarians, and human rights organisations to satisfy the state's obligations to its people. The state would have to take steps to meet its constitutional obligation by respecting the minorities in question.

Another idea is to go to the Supreme Court and reaffirm the right to self-identification and discuss the shortcomings of the legislation. The method

itself, on the other hand, can be time-consuming and exhausting in terms of money, attention, and inspiration in this time of a pandemic. It's unclear if the government would pay attention to the demonstrators' cries. In such a situation, the Supreme Court would have to move in once again to defend the community's rights. In light of the latest surge of positive rulings, it's fair to say that the judiciary has backed the TGNB communities' basic human rights in general.

8. CONCLUSION

The TGNB community is part of India's large informal economy, where everyday salaries and gig employment are the only sources of their income. Since the majority of transgender people are daily wage earners, social distancing which is the best way to get rid of the virus' claws, has hit them. As a result, they are vulnerable to unemployment and disaster as a result of missed economic prospects during the COVID19 lockout. Due to a lack of necessary paperwork or a bank account, they are not eligible for any benefits or social security services which makes life impossible to survive through these stressful periods during this pandemic.

As a consequence, a protracted scenario like todays could prove to be a silent killer by deteriorating transgender people's socioeconomic status and psychological condition. As they have been steadily establishing their legal and social identities, they must not be left to their fate during the current pandemic, as any identity they have created would be in vain. Furthermore, specific policy prescriptions for the aforementioned community's benefit should be in place so that they can be more than everyday wage earners. It must be assured that transgender people are trained enough to be prepared for a viable career in the future, so that they can work from home during pandemic and beyond. Formal preparation and capacity creation for transgender people must be channelled so that their safety is not jeopardised in the event of a national lockdown. To this end, the binary culture must be made responsive and aware of the presence of transgender people, legally, socially and culturally, so that they do not drop out of school or college due to humiliation by peers and teachers.

NATIONAL FRAMEWORK FOR HUMAN RIGHTS VIOLATION BY NON-STATE COMMERCIAL ENTERPRISES: THE DEVELOPMENT STORY SO FAR

Kannu Upadhyaya[*]

ABSTRACT

Commercial enterprises being non-state actors are not subjected to existing rigorous international human rights obligations but activities of the commercial enterprise are resulting in gross human rights violations which are analyzed by the author in the chapter on case studies of this research paper. This brings us to a question -what policies states and international organizations are bringing in to minimize human rights violations and bring corporations under obligations to protect human rights. The human rights commission (HRC) in 2011 passed guidelines describing three pillars on "business and human rights" and called upon member states to present a "National Action Plan" at the earliest. Indian under this international obligation prepared a zero draft and opened it for suggestions and discussions. This research paper aims at analyzing the zero draft in respect to each of the three pillars of the guiding principle. This paper has drawn upon limitations of the zero draft in protecting human rights violations by private corporations. The author in this research article has tried to suggest a recourse under each of the three pillar which India can adopt to minimize the violations of human rights by private corporations.

1. INTRODUCTION

One of the major challenges faced by the international community in the 20th century is how to deal with human rights violations committed by non-state actors. The United Nations (hereinafter UN) Guiding Principles (hereinafter GP) on business and human rights adopted by the Human Rights Council (hereinafter HRC or council) in 2011 are based on the following three pillars.

The first pillar cast a duty upon the state to protect human rights. The second pillar cast a duty on corporate to protect human rights. The third pillar cast a duty of access to effective remedies on both state and corporate[1]. UN working group on human rights and business enterprise strongly encourages every state to enact a national action plan (hereinafter "NAP") describing the duties of corporations to protect and ensure human rights[2]. This shall be done by state responsibility to enact the GPs. In June 2014, HRC passed a resolution calling upon states to develop the national action plans and as of February 2019 45 states, including India are either at the drafting stage or have submitted their NAP.[3] The ministry of corporate affairs is undertaking "rigorous consultation" to formulate a NAP[4] and have invited comments. Implementing a national framework for business human rights will also be in accordance with Article 51 of the Constitution of India.[5] With this background, the author under this paper will first analyze the several reasons as to why India needs a national framework to implement GPs as India already has ratified various international treaties to cast a duty upon corporations to protect human rights. Secondly, the paper will dwell into the details and content of such framework and finally, the paper will propose certain principles which shall be implemented to make the process of making corporation liable transparent. Another major debate that comes into the picture while having a national framework for business human rights is as to whether this will extend the protection of fundamental rights against companies.

2. INSTANCES OF HUMAN RIGHT ABUSES BY CORPORATES IN INDIA

Human rights abuse by corporations in India fall under different categories like violation by Indian companies, violation by multinational

1. United Nations Human Rights office of The High Commissioner, *Guiding Principles on Business and Human Rights* (United Nations New York 2011) <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf > accessed 2-11-2020.
2. United national office of The High Commissioner, *Working Resolution 17/4, the UN Working Group on Issues of Human Rights and Transnational Corporations and Other Business Enterprise*s, <https://www.ohchr.org/en/issues/business/pages/wghrandtransnationalcorporationsandotherbusiness.aspx> accessed 2-11-2020.
3. "Govt to Formulate a National Action Plan on Business and Human Rights" (*The Financial Express*, 13-2-2020) <https://www.financialexpress.com/industry/govt-to-formulate-national-action-plan-on-business-and-human-rights/1873145/> accessed 2-11-2020.
4. *Ibid.*
5. Constitution of India, Art. 51.

corporations situated in India, violation by the Indian subsidiary of foreign companies, violation by government agencies, and violation by Indian companies operating abroad.[6] Bifurcating these categories is on eminence because the nature and modus operandi of violations and their regulatory responses varies to a huge extent. It's imperative here to refer to few case studies under the respective categories to understand the respective challenges.

2.1. Coca-Cola Plachimada plant tragedy 2000

Name of the firm: Hindustan coca-cola beverages private limited | Type: Indian subsidiary of a foreign company.

In march 2000 coca-cola under its Indian subsidiary Hindustan coca-cola beverages private limited commenced operations at its plant at Plachimada in Kerala, India. Over the next few years, the people living in the area surrounding the plant began to feel the plants hazardous effects as groundwater got contaminated and toxic waste was being released.[7] In addition, the company extracted too much groundwater which resulted in a water shortage. This has led to battel both Inside and outside court between the affected community and the company.[8] The Kerala high court while hearing a writ petition against the company held that "groundwater was a public property held in trust by a government and that it had no right to allow a private party to overexploit the resources to the detriment of people.[9]" Recently in 2017, the Supreme court gave out its final judgment on the matter where the court held that coca-cola by making personal use of groundwater has violated several environmental laws and rights of people of the community.

6. Surya Dev, "Background Paper for National Framework of Business and Human Rights in India" (2014) Ethical Trading Initiative 23. <https://www.ethicaltrade.org/sites/default/files/shared_resources/india_national_framework_bhr_background.pdf.>.
7. D. Rohan Mathews, "The Plachimada Struggle against Coca-Cola in Southern India," (Ritimo Organisation, 1-7-2011) <https://www.ritimo.org/The-Plachimada-Struggle-against-Coca-Cola-in-Southern-India> accessed on 2-11-2020.
8. *Ibid.*
9. *Perumatty Grama Panchayat* v. *State of Kerala*, 2003 SCC OnLine Ker 500: 2004 (1) KLT 731.

2.2. Orissa mining project violations 2014

Name of the firm: Vedanta India | Type: Indian Subsidiary of a foreign firm.

Vedanta India in collaboration with a state-owned mining corporation was subjected to various allegations mainly because the excavation site included the Niyamgiri hills which are regarded as sacred by the local tribal community.[10] Besides, various concerns were raised about the adulterated environmental impact assessment. The legal issue was that as the parent company was incorporated in the UK so where the case shall be filed. Ultimately the United Kingdom national contact point logged a complaint against Vedanta under organization for an economic corporation and development guidelines for multinational companies.[11] Although the tribal community remains unsatisfied with the remedies granted on a brighter side, Vedanta had to shut the mine now.

2.3. Pesticide poisoning in Yavatmal 2020

Name of the firm: Syngenta | Type: Multinational corporation in India.

Syngenta a global pesticide seed producer has long been subjected to allegations of gross violation to food and health of human along with putting undue influence on small scale farmers.[12] In September 2017 hundreds of farmers suffered from pesticide poisoning in Yavatmal. A survey by an NGO concluded that many different pesticides were used by those suffering from adverse health impacts. According to RTI filed by Miss *Meena Menon*, As of 25th October 2017 more, than 450 cases of poisoning and 23 deaths have been reported in Yavatmal medical college hospital.[13] Documenting pesticide poising cases in rural India has its own set of challenges as farmers rarely keep purchase bills or records of

10. *Supra* note 7.
11. A final statement by the UK national contact point for OECD Guidelines for multinational corporations. <http://www.oecd.org/corporate/mne/43884129.pdf>.
12. "Pesticide Poisonings in Yavatmal: Those affected taken on Agribusiness against Syngenta" (Business Human Rights Resource Center, 1-11-2020) <https://www.business-humanrights.org/en/blog/pesticide-poisonings-in-yavatmal-those-affected-take-on-agribusiness-giant-syngenta/,> accessed 3-11-2020.
13. Menon Meena, "Yavatmal Pesticide Poisoning: Lack of Accountability, Negligence, and Abysmal Medical Facilities Behind Farmers Deaths" (*Firstpost India*, 30-10-2018) <https://www.firstpost.com/india/yavatmal-pesticide-poisoning-lack-of-accountability-negligence-and-abysmal-medical-facilities-behind-farmers-deaths-5464981.html> accessed 3-11-2020.

medical treatment.[14] It's, an additional challenge when the loss of income has to be proved when income is non-documented. These set of challenges are even more difficult to overcome when the company engaged in pesticide production is headquartered outside local jurisdiction. Despite these difficulties as of 17th September 2020 wives of two farmers have filed a civil suit against the peace judge of Switzerland. In addition to the civil suit, 51 farmers have submitted a complaint to the organization of economic and corporation and development.[15] Framers have alleged that the company marketed and sold the pesticides despite being aware of the severe repercussions it follows. As of 21st October 2020, Syngenta has released a public reaction that their pesticides are not responsible for the damage caused.[16]

2.4. Anantapur's design company protest for minimum wages 2020

Name of the company: Indian design exports private limited | Type: Indian Firm.

Over 800 female garment workers in Indian design exports, private limited in Hindupur town in Andhra Pradesh have gone on an indefinite strike demanding an increase in their wages.[17] These workers were paid as low as 6000 rupees per month. The workers in addition to complaints about less wages have also alleged harassment by the management and exploitative working conditions. The leader of Centre India trade union has that there has been no increase in wages of workers in the last 7 years.

3. DOES INDIA NEED A COMPREHENSIVE FRAMEWORK ON BUSINESS & HUMAN RIGHTS?

The privatization, liberalization, and globalization policy in the last three decades has been accompanied by a dramatic increase in multinational

14. Untold Realities of Pesticide Poisoning in Yavatmal District in Maharashtra (Pesticide Action Network (PAN) India Assessment Report, 3-10-2020). <https://pan-india.org/untold-realities-of-pesticide-poisonings-in-yavatmal-district-in-maharashtra/> accessed 3-11-2020.
15. *Ibid.*
16. *Ibid.*
17. "Over 800 Female Garment Workers in Andhra Pradesh Stage Protest for Minimum Wages and Protection against Harassment" (Business and Human Rights Resource Center, 17-8-2020) <https://www.business-humanrights.org/en/latest-news/india-over-800-female-garment-workers-in-southern-state-of-andhra-pradesh-protest-for-minimum-wages-and-protection-against-harrassment/> accessed on 3-11-2020.

enterprises impacting the business sector. While multinational enterprises contribute to the economic welfare of the country and promote the enjoyment of certain human rights it might at the same time frame also hurt human rights. As we have detailed above in the chapter on case studies. Coming of multinational may generate employment and growth but it may affect the displacement of indigenous people as happened in the Orrisa mining project case or it may affect the right to people to livelihood by taking away their right to use of the natural resource as happened in Coca-Cola case or when they breach the labor rights as happened in Andhra Pradesh design company case. Such human rights violations are in abundance in the present globalized economy but the question which arises here is are there enough parameters and effective regime to make corporations honor their liability and citizens' right. This chapter will analyses whether India needs a business human rights framework. For this the author will analyze every pillar of guiding principle, whether the current framework to ensure implementation of the pillar is enough and what does the zero drafts of the national action plan proposes and its pitfalls. The three-pillar or "Protect, respect and remedy" forms the basis for zero drafts on a national action plan.

3.4.1. Pillar I - Protect - States Duty

States must protect people against human rights violations by third parties including businesses. They are expected to prevent, investigate, punish and redress through appropriate policies, legislation, regulation, and adjudication.[18] The current system in India has a twofold approach for the protection of human rights by the state. The first is through the implementation of effective policies and regulations. Protection of human rights is embedded in the Constitution of India under Part III in the name of fundamental rights. The only challenge while making corporations liable for breach of fundamental rights is that only certain fundamental rights like Article 14,[19] Article 17,[20] Article 21,[21] Article 15[22] under *horizontal effect*[23] the scheme is directly applicable to both state and non-state actors.

18. "Business and Human Rights Ambitions and Actions in India" (Centre of Excellence for Sustainable Development, 2019) <https://docs.wbcsd.org/2019/08/WBCSD_Business_Human_Rights_India_Issue_Brief.pdf> accessed 5-11-2020.
19. Constitution of India, Art. 14.
20. Constitution of India, Art. 17.
21. Constitution of India, Art. 21.
22. Constitution of India, Art. 15.
23. Horizontal effect means extending liability to non-state actors through the state by enacting certain laws.

Corporations being non-state actors are many a time able to evade liability on this basis. Though the supreme court has made liberal interpretation of the term "other authorities" under article 12[24] and made public sector undertaking liable for violations of human rights under many instances such as *Zee Telefilms Ltd.* v. *Union of India,*[25] *Chander Mohan Khanna* v. *National Council of Educational Research and Training*[26] and *Tekraj Vasandi* v. *Union of India*[27] the Supreme Court has failed to regard certain bodies performing state functions as other authorities. Thus, it can be said that the action of the Supreme Court is not enough to bridge the gap between making non-state actors liable for breach of fundamental rights.

In addition to the Constitution, tort law has been very prevalent in the protection of human rights against violation by corporations. Principals of negligence and nuisance have been most prevalent in the use of enforcement of human rights in many jurisdictions to hold corporations liable for violations.[28] To hold a subsidiary of a foreign company liable principal of agency has also been widely used as it's the most convenient remedy available. With the evolution of the notion of "constitutional torts"[29] tort law has played a key role in developing the principles of constitutional law horizontally.[30] The absolute liability principle,[31] the polluter pays principle[32] and the precautionary principle[33] have been subsequently utilized to hold enterprises liable for the human rights of citizens. It is safe to say that the challenge faced by victims of tort litigation by experiences of the Bhopal gas tragedy is that the prolonged process shall be reduced by the introduction of new rules of procedure and changing the doctrine of the burden of proof.

24. Constitution of India, Art. 12.
25. (2005) 4 SCC 649.
26. (1991) 4 SCC 578: AIR 1992 SC 76.
27. (1988) 1 SCC 236: AIR 1988 SC 469.
28. Richard Meeran, "Tort Litigation against the Multinational Corporation for Violation of Human Rights: An Overview of the Position Outside the United States" (2011) 3(1) City University Hong Kong Law Review 17.
29. Constitutional torts are those torts whereby human rights violations by the state and its agents are also perceived as torts.
30. *M.C. Mehta* v. *Union of India,* (1987) 1 SCC 395 : AIR 1987 SC 1086.
31. *Ibid.*
32. *Indian Council for Enviro-Legal Action* v. *Union of India,* (1996) 3 SCC 212.
33. *Vellore Citizens Welfare Forum* v. *Union of India,* (1996) 5 SCC 647.

India has world largest youth population with 28% of total population falling within 10-24 years of age.[34] For investors, this indicates a strong young motivated pool of workers. Human resources and labor are major components of manufacturing as well as service-based industries. India has an elaborated regime of labor laws comprising 44 central laws and more than 100 state laws dealing with every aspect ranging from wages to remuneration to layoffs. The labor laws in India were generally regarded as pro-labor because India was a mixed economy until the 1990s but since the 1990s when India adopted free-market economy labor laws have been considered to be a clog in the process of reform.[35] The world bank considers India as one of the most rigid labor markets in the world[36] and called for a change in labor laws which has now taken place in 2020 but experts still are of the view that though the changes are pretty liberal at some points other points are completely omitted from the new code. These codes are very new what how will they impact the market would be interesting to watch. As regards older laws, they are filled with loopholes" To protect workers interest on wages and remuneration Payment of wages act 1936 and minimum wages act 1948 are in place but as can be seen in Andhra Pradesh India design company act these provisions are not enough to protect the interest of the community as strikes and lockouts are new information in the labor market in India.

The link between environmental laws and human rights violations is well established. As seen in the Orissa mining case, Bhopal gas tragedy case, and Coca-Cola case corporations have been infamous to implement a protocol to protect the environment. A healthy environment is a recognized human right in India as well as in the world. India has a long list of laws protecting the environment like water (prevention and control of pollution act) 1974, Forest Conservation Act 1980, Hazardous Waste Handling and Management Act, 1989. The entire regime of Indian environmental laws applies to corporations directly or indirectly. For example, Section 16 of the Environment Protection Act[37] deals specifically with companies. The law carries both civil and penal liabilities and has managed very well to hold corporations liable for their wrongdoings". Environmental law and

34. "United Nations Peport on World Population and Sustainability: India has World Largest Youth Population" (*The Economic Times*, 3-7-2014) <https://economictimes.indiatimes.com/news/politics-and-nation/india-has-worlds-largest-youth-population-un-report/articleshow/45190294.cms?from=mdr>.
35. *Supra* note 30.
36. *Ibid.*
37. Environment Protection Act, 1986.

tort litigation have been intervened by victims of human rights violations to achieve justice.

In addition to these laws, the Companies Act[38] has a twofold approach were in the first fold provisions of the actors cast a duty upon corporations to be followed to safeguard the interest of citizens and in the second fold on the failure of corporations to adhere to these provisions the state shall bring into investigation the actions of the corporations to make them liable for violations. There are several other specific legislation aimed to protect human rights of citizens against corporations. For example corporations, many a time to extract natural resources excavates deep into the forest as what happened in the Vedanta mining case which might result in the local tribes or other forest dwellers getting displaced or even losing out their right to converse their regional identity which is not only a recognized human right throughout international jurisdiction but also a fundamental right recognized under our Constitution. In addition to the government has enacted a special law Schedule Tribes and other Forest Dwellers (Recognition of Forest) Act.[39] The legislation aims to correct this injustice done to the traditional forest dwellers by taking away their ancestral land and habitats often without consent and/or without adequate compensation granted to them. Section 5 of the Act[40] cast a duty upon corporations as well to protect the biodiversity" With Regards to transparency and accountability measure for corporations to promote transparency and accountability. The Right to Information (RTI) Act[41] was enacted. The issue with the RTI Act is that the act does not apply to private corporations. Furthermore, the Lokpal and Lokayukta Act"[42] was enacted which setups an inquiry commission for investigating allegations of corruption against *"public functionaries*" but again even this act does not apply to private companies" Prevention of corruption act[43] is the principal anti-corruption legislation of the country but does not make a company liable but only the individual. To promote financial transparency laws like the Benami. Transaction Act[44] and Fugitive Offenders Act[45] are enacted. To protect

38. Companies Act, 2013.
39. Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest) Act, 2007.
40. *Id.*, S. 5.
41. Right to Information Act, 2005.
42. Lokpal and Lokayuktas Act, 2013.
43. Prevention of Corruption Act, 1988.
44. Benami Transaction (Prohibition) Act, 2016.
45. Fugitive Economic Offenders Act, 2018.

Whistleblowers several legislative measures are adopted with specific legislation being the Whistleblower Protection Act.[46] However, just like the RTI Act even this does not provide enough legislative safeguards to protect victims from human rights abuses by private companies and is only applicable to protection against a public servant and his willful misconduct.

The amalgamation of these acts to protect the human rights of citizens are not enough as evident from the case studies and the challenges which every legislative measure possesses. Therefore, the question comes as to whether these acts are enough to protect the interest of the citizen. I believe most of these acts are archaic and lacks protective measures through which the corporations find loopholes and abuses the human rights of citizens to gain profit. The liberal interpretation by the judiciary also has its limits as interpretation outside the scope of legislative intent may amount to judicial activism. Though the legislative measures are still developing year by year like increasing corporate social responsibility rules. India still might need a robust framework to protect the interest of the citizen.

3.4.2. Pillar II - Respect – Corporate responsibility

This pillar of guiding principle in the simplest term means that every business has a responsibility to respect human rights to do so every corporation must realize and address the adverse human rights impact that may result from its activities and its business relationships. This chapter will analyze the corporate responsibility enshrined in the existing legal framework and zero draft issued by the ministry of corporate affairs. The government in 2011 passed national voluntary guidelines on social, environmental, and economic responsibilities of business (NVGs) and in 2018 the government passed national guidelines on responsible business conduct (NGRBC). Both of these guidelines were implemented to provide measures to the corporate which they shall adhere to respect the human rights of the citizens who are affected by their corporate actions. In addition to this, the chapter will also analyze the legislative measures of companies act which caste a duty upon corporate to act in accordance to respect the human rights of individuals affected by its corporate actions.

The ministry of corporate affairs resorted to a soft law approach to encourage Indian enterprises towards recognizing their responsibility

46. Whistle Blowers Protection Act, 2014.

to protect human rights. UNGP was adopted in 2014. Long before that in 2011, the government enacted NVGs which were a comprehensive set of guidelines that encompasses[47] social, economic, and environmental responsibility of business. NVGs aimed to encourage businesses to adopt a level of higher governance. The only Issue with NVGs was that they were voluntary in nature. Experts argue that NVGs failed because corporations were expected to achieve way too higher standards than just basic corporate governance with the voluntary nature corporations evaded the implementation of guidelines.[48] On the account of the failure of NVGs Ministry of corporate affairs then issues the 2018 NGRBC which are still voluntary in nature but are drafted in the alignment of UNGPs and set a realistic standard for corporations.[49] Key Drives of 2018 NGRBC along with UNGPs are the Paris climate agreement, core conventions[50] (minimum age of employment of children and worst form of child labor) and United Nations sustainable development goals. Another highlighting factor of the 2018 guideline is they apply to all irrespective of size, sector, nature, or headquarter location of the corporation. 2018 guidelines also urge the corporation to look at the possible implementation in its supply chain as well and not only on direct corporate actions. Principal 5 of the 2018 guidelines specifically recognizes that the business must respect and promote human rights in their corporate actions. It suggests that businesses should introduce policies that demonstrate respect for human rights. Such a process must "*Identify, prevent, mitigate and account for how they address adverse human rights impacts*". Principal 6 lays down that businesses should respect, protect and make efforts to restore the environment. Additionally, the principle requires corporations to promote awareness and realization of human rights not only through direct corporate actions but also through indirect ones. Annexure 3[51] of the

47. Zero Draft, National Action Plan on Business and Human Rights (Ministry of Corporate Affairs, 2018) P. 13"<http://www.mca.gov.in/Ministry/pdf/ZeroDraft_11032020.pdf> accessed 2-11-2020.
48. S.S. Rana & co. Advocates, "National Voluntary Guidelines on Social, Environmental, and Economic Responsibilities of Business" (Mondaq, 7-9-2018) <https://www.mondaq.com/india/human-rights/734156/national-voluntary-guidelines-on-the-social-environmental-economic-responsibilities-of-business> accessed 3-11-2020.
49. *Ibid.*
50. Core convention 138, 1973 and Core convention 182, 1996, International Labor Organization.
51. Business Responsibility Reporting Framework:National Guidelines on Responsible Business Conduct (Annexure 3) (Ministry of Corporate Affairs, 15-3-2018). <https://

2018 guidelines also envisages a voluntary *reporting framework* which is based on 3 sections. Which talks about disclosure related to financial and ownership related information, management and process disclosure covering the structure, policies, and processes to integrate the guidelines and performance indicator covering how well the business is performing in pursuit of these guidelines.[52] The 2018 framework also has a Grievance redressal mechanism under principle 3, principle 5, and principle 9. Although, the guidelines are comparatively very new experts have a positive outlook on the guidelines.

Companies Act 2013 is another legislative measure that cast a duty upon corporations to respect the human rights of individuals. Companies Act 2013 confers a fiduciary duty upon the director not only towards shareholder but also towards stakeholders of the corporation, employees of the corporation, and for the protection of the environment.[53] Further schedule IV of the Companies Act 2013, that provides a code of conduct for an independent director which requires them to "*safeguard the interest of all stakeholders, particularly the minority shareholder" and also "balance the conflicting interest of the stakeholder*." Section 135 of the act[54] cast a duty upon corporations with a turnover of 500 crores or above to contribute two percent to the corporate social responsibility fund. Corporations in financial year 2018-2019 contributed around 1,00,000 crores.[55] The list of activities under schedule VII to which the company has to contribute the money is such eradicating hunger, poverty, and malnutrition. The companies could also contribute to the swatch Bharat mission. Activates promoting education, gender equality, women empowerment, setting up of old age homes, ensuring environmental sustainability, ecological balance, protection of flora and fauna, protection of national heritage, training to promote rural sports, contribution to prime minister national relief fund and slum area development. India was one of the world's first countries to implement the law on corporate social responsibility and the legislative measure has to contribute quite well to society.

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www.mca.gov.in/Ministry/pdf/NationalGuildeline_15032019.pdf> accessed 8-11-2020.

52. *Ibid.*
53. Companies Act, 2013, S. 166.
54. Companies Act, 2013, S. 135.
55. India CSR Report Five Years and 1,00,000 Crore (CSR box 28-8-2019) <https://csrbox.org/India_CSR_report_India-CSR-Report--Five-Years-and-INR-100,000-Crore_64> accessed on 4-11-2020.

Corporations to respect human rights have also taken up some voluntary measures as pointed out in the zero drafts. Around 74 Indian companies are signatories to the United Nations global compact (UNGC). Signatories to these compact commits to honoring the 10 principles of the UNGC.[56] An Indian industry association also released a voluntary code of conduct that shall be adopted by its member companies to conduct business in accordance with human rights standards. The institute of company's secretaries (ICSI), has also formulated a corporate anti-bribery code that may be voluntarily adopted by the private sector.[57] A certain industry association has provided a draft to the ministry of corporate affairs of a code which provide action points for member companies which includes preparation and publication of human rights policy statement, carrying out human rights due diligence to first identify and then mitigate human rights abuses overtime.[58]

Under the pillar of respect of human rights as corporate responsibility, the government as pointed out in zero drafts has taken every legislative step to make sure that corporations respect human rights but as seen in case studies the abuses still are prevalent. The voluntary measures adopted being adopted are remarkably excellent but it's too early to judge their effectiveness and potential. I believe after the research that the 2018 guidelines are very new and it will take time to analyze the real effectiveness of those guidelines. Although I believe that these guidelines which are non-obligatory in nature shall be made obligatory in from of a national framework of business and human rights to make an enterprise more accountable.

3.4.3. Pillar III - Access to remedy

Pillar three stresses upon the effective remedies for victims of human rights abuses by the corporation. The guiding principle of business and human right focus on three folds under the remedy pillar. Fold one is a state-based judicial mechanism. The second fold is state based non-judicial mechanism and the third fold is a non-state mechanism like arbitration, mediation, collective bargaining, and many others. The zero draft of the national action plan beautifully outlines the use of a state-based judicial and non-judicial mechanism for victims of human rights

56. *Supra* note 51, at p.15.
57. Corporate Anti-bribery and Model Governance Code (Institute of Companies Secretaries of India, 2017).
58. *Supra* note 51, at p. 16.

abuses but fails to encapsulate the effectiveness of the non-state based remedial mechanism.

The Supreme Court is the apex court of the country has both original and appellate jurisdiction under Article 32(2),[59] the Court is empowered to issue directions or orders or writs whichever may be appropriate for enforcement of any of the fundamental rights. Under Article 226[60] the High Courts enjoy a concurrent power to not only enforce fundamental rights but also issue an order to "any other purpose". The potential of Article 32 and Article 226 to address violation of fundamental right even by corporate actors have received impetus by number of factors. First, as has been mentioned by the SC has taken a liberal interpretation of Article 12 of the Constitution of India. Second, the SC has expanded the scope of fundamental rights by interpreting several directive principles of state policies into the right to life guaranteed under Article 21 of the Constitution of India. These developments have made victims capable of framing most of the corporate human rights abuses as fundamental rights. Third, while exercising its powers in public interest litigation cases the court has modified the requirements of locus standi and has been liberal in treating applications or letters as public interest litigation. The courts have also been very strict in public interest litigation cases by appointing a fact-finding mission for evidence collection. Fourth, the court has adopted an approach to offer relief in diversity. The Court has not only limited its power in remedy but also compensation. Despite these judicial marvels door to seek remedy against business enterprise significant hurdles are still present. Like all fundamental rights are not available against non-state actors. Even if this is overcome, the principle of separate personality and limited liability is the biggest barrier to justice against corporations.[61]

Labor courts hear cases related to an employment dispute. The right to employment can be found in Article 23 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Economic, Social, and Cultural Rights. Labor courts and industrial tribunals set up under the Industrial Dispute Act, 1947 comes off as a viable forum to resolve the dispute between companies. However, in practice, several problems like a complicated procedure, weak trade union, disputed

59. Constitution of India, Art. 32.
60. Constitution of India, Art. 226.
61. "Injustice Incorporated: Corporate Abuses and the Human Rights to Remedy" (Amnesty International, 4-9-2014) <https://www.amnesty.org/download/Documents/POL3070372017ENGLISH.PDF>, accessed 7-11-2020.

collective bargaining arises which makes dispute resolution even more difficult.

Protection of Human Rights Act, 1993 establishes the National human rights commission (NHRC). Section 12 states that NHRC shall power of *suo motu* cognizance of any pending matter before any court in the country. NHRC is also empowered to review the factors affecting the enjoyment of human rights and to recommend appropriate remedial measures. Term human rights under the act mean rights guaranteed by (1) Indian Constitution (2) embodied in ICCPR and ICESCER. Though NHRC has a very ambit of power yet there is no specific provision dealing with corporate human right abuses on its own they can only do so after a request by the court.[62] Though recently NHRC has made interventions in cases relating to human right abuses by corporate.[63] The NHRC has been very effective in tackling cases of human rights abuses by the corporation. There are several special commissions like the special commission for women, the national commission for protection of child rights, national commission for SC and ST. The national commission for women was established under the national commission for women act 1990. Section 10 of the Act empowers the commission to (1) Investigate all matters relating to safeguarding the dignity of women (2) take up cases of violation of provision mean for safeguarding women (3) Undertake promotional and educational research to suggest ways of ensuring due representation. The commission has been very active. Discrimination against women in the workplace has been one area where the commission is very active as nondiscrimination has been a foundation stone for the universal deceleration of human rights. The national commission for ST and SC gains its power from article 338(5) of the Indian Constitution. Experts have argued that the potential of this commission has been invoked to address the human right abuses by corporations.[64]

National tribunals like the National Green Tribunal have also been very active in safeguarding the environment from the activities of corporate. The national green tribunal has been established to achieve "environmental democracy". Tribunal has the power to impose penalties up to 10 crores and Jail term up to three years. *M.P. Patil* v. *Union of*

62. V.S. Malimath Report on National Human Rights Commission of India <https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf>.
63. Case no. 663/19/1999-2000; Case no. 513/7/1998-99; Case no. 22/212/96.
64. *Supra* note 7, at p. 8.

India[65] the tribunal found thermal power corporation of misrepresenting facts to obtain environmental clearance. The tribunal also stressed the importance of rehabilitation and resettlement of displaced people. Right to natural resources under the environment is a settled principle of human right as seen in the coca-cola case where the Kerala high court said that groundwater resource does not belong to the company but rather to every member of the community equally. It has been reported that the central government may strip the tribunal of its judicial power and might make it only an advisory body, if this happens tribunal might only become an arm of the executive and corporation, might get away with human right abuses once again.[66]

India can be said to have a very balanced approach with remedial Judicial and non-judicial mechanisms. They have their own set of challenges but has also managed to be very effective. The only problem with India's remedial system is the absence of a non-state remedial mechanism. These non-state operating bodies could be business-led, civil society-led, multi stakeholder-led. They can approach dispute resolution through any of the alternative dispute resolution forums. The Indian supreme court has itself in various judgment said that alternative dispute resolution shall be a part of dispute resolution.[67] Collective bargain through mediation in employment dispute has been given recognition in section 4 of the Industrial Dispute Act. The use of arbitration and mediation in resolving human rights abuses by corporations has still not become very popular in India. Alternative dispute resolution tools could be very useful in dispute resolution between victims and corporations as the cost of proceedings could be reduced, challenges posed by judicial interpretation could be narrowed down and transparency could be maintained. This whole process could help get the victims justice faster and easier but corporations due to obvious reasons would not submit themselves to alternative dispute resolution and hence I believe that a robust framework with compulsory mediation followed by litigation shall be enacted to make sure the victims get speedier justice.

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65. *M.P. Patil* v. *Union of India*, 2013 SCC OnLine NGT 1223.
66. Choudhary Yukti, "Tribunal on Trial" (*Down to Earth,* 11-6-2015) <https://www.downtoearth.org.in/coverage/tribunal-on-trial-47400> accessed 5-11-2020.
67. Agarwal Eshwar, Singh Bani and Mohan Ram, "We Need Alternative Dispute Resolution Mechanism in India", (*The Week*, 9-7-2020) <https://www.theweek.in/news/india/2020/07/09/opinion--we-need-alternative-dispute-resolution-mechanisms-in-in.html> accessed 5-11-2020.

4. THE WAY AHEAD

It is a widely recognized fact that corporations in any country of any size from any industry can have a positive and negative impact on human rights, at any stage of their value chain. The Indian government's commitment to implement the guiding principles on business and human rights stem from India being a signatory to the resolution of these principles. India in this regard has prepared a zero draft on the national action plan which was open for comments and was to be finalized by 2020 which is still pending. In addition to this, the government to meanwhile achieve the goal laid down by guiding principles issued NVGs and NGRBC. Both of these guidelines being non-obligatory in nature had their own set of challenges which were analyzed in-depth in the above chapters. Although the government learned from its mistake of 2011 NVGs and implemented a more robust and friendlier NGRBC in 2018 the guidelines still had their challenges. The zero drafts provided the Indian government an opportunity to assess its legislative measures which affect corporations abusing human rights. This paper has analyzed the zero draft under each pillar of guiding principle and the challenges faced by every legislative measure. The analyzes of the legislative measures simply helped the author conclude that the current framework is not at all enough to protect against human rights abuses as the abuses are still prevalent. As seen in the chapter on case studies ranging from 1984 to 2020 corporations have little regard for the human rights of the citizens. Developing a coherent framework on business and human right would ensure that the economy while being on the path of economic development is sustainable, inclusive and respect the human right of the citizens getting affected by actions of the corporate.

The zero draft of the national action plan marks a decisive step towards the recognition of principals in the United Nations Guiding Principles on Business and Human Rights. The zero draft takes into account myriad aspects but still misses out on some of the fundamental aspects of state protection towards reducing the human right abuses by a corporation, corporate responsibility, and remedial mechanism. This chapter will try to point out the various aspects under each pillar which the zero draft misses. The ministry under the zero draft of the national action plan has merely played down the existing legal framework has not tried to include aspects that are fundamental in achieving the objectives of UNGPs. Experts at the time when the government announced that it will make a draft for a national action plan were worried about the fact that the plan would

be a product of state-business nexus and it might actually lack effective implementation or even make things worse for human rights defenders.[68] As the research has already highlighted in the chapters the challenges faced by the respective legislative measures it is safe to conclude that the current framework is not enough to protect the human rights abused by corporate actions. This chapter will focus on what the zero-draft missed and what shall be future scope. Although the legislation should set the broad contours of the regulatory framework for all types of businesses, some flexibility should be built into the mechanism to allow for differential treatment between small and medium-sized enterprises and the informal sector. In other words, despite having one robust framework, one size framework should not fit all corporations.

Under pillar one, of "protection" the zero draft has merely played down the existing legal framework. The existing legal framework continues to without any significant proposed amendments to form more stringent laws. The draft also fails to address the question of political influence that exists in the state-business nexus as the state is both a regulator and an enabler for business. In addition, the draft fails to address the point where the state finds itself engaged in the contraction of regulating the conduct and being a promotor of ease of doing business. There is no mention of any plan to bring a constitutional amendment to amend Article 12 of the Constitution to ensure the protection of fundamental rights is afforded to victims against non-state actors. Section 8(2) of the South African Constitution could be a very good option to follow which allows fundamental rights to be implemented against a non-state actor. Besides, the high court's rules may be amended to allow every high court irrespective of original and appellate jurisdiction to deal with violations of fundamental rights by corporations. Considering commission like the national human rights institutions have a key role to play in ensuring that companies respect their human rights responsibilities it may be desirable to amend the Human Rights Act 1993 to confer explicit jurisdiction on the NHRC as well as state Human Rights Commission to take up complaints of violations by corporations and to develop policies and action plan to assist companies to comply with their corporate responsibilities. Another major overhaul which the existing framework requires is in the company act. The existing legal measure of ensuring liability of a parent

68. Voices from the Margins: Community Consultation Report on National Action Plan on Business and Human Rights, (Partners in change, 2019) <https://www.picindia.org/studies>accessed 1-11-2020.

company by piercing corporate veil has not worked for victims and other alternatives shall be explored like the principle of escaping due diligence. Much needed reform on labor law is here but it's very new to comment on its impact. It shall be the duty of the state to strike a balance between the need of companies to do business in a hassle-free environment and the realization of human rights guaranteed to citizens of the country.

Under pillar two, the entire zero draft has focused on soft law in NGRBC and NVGs in ensuring corporate responsibility but little attention is paid to hard law. The question of enforceability of these principals is largely unaddressed even after the recognition that these principals have failed to show the effectiveness. Often questions of jurisdiction is faced by the court when cases involving multinational companies are brought forward the new national action while enacting a business human rights framework may include a specific chapter to bring some clarity. There needs to be hard law on due diligence of companies like in the national action plan of the European Union.

Under the third pillar, the draft restricts itself to courts and other legal remedial mechanisms established by states. There is a strong need to include non-state based or internal based dispute resolution mechanism. It shall be very critical to strengthening the non-judicial based mechanism like the national green tribunal and national commission for women. The current judicial system suffers from delays and high-cost litigation. Steps shall be taken to minimize the lack of transparency. In addition, the draft also misses out on the importance of legal aid that shall be afforded to the victims of human rights abuses by the corporations.

In the way forward, India seeks to demonstrate its commitment towards the UNGPs and preparation for a national action plan for this Indian government must have a coordinated working group consisting of a representative from various ministries/government department, SEBI, NHRC, and business chambers and association who will be responsible for the implementation of the UNGPs in India by reviewing existing laws and policies, preparing time-bound policies, identifying key areas and regular multi-stakeholder consultations. Corporations by proactive understanding and addressing their human rights impacts, companies can bring transformative, positive change to lives of millions of people who are affected by business operations. At the same time, they can make an immense contribution to the vision of sustainable development goal envisaged by United Nations. Forward-thinking companies are aware

of this opportunity to be taken as a boost to public relations and are constantly working towards raising the bar of human rights standards while collaborating with peer's government and civil society.

IMPRISONMENT ON WRONGFUL CONVICTION IN INDIA: A DETAILED ANALYSIS

*Sonika Shekhar**

ABSTRACT

Imprisonment on wrongful conviction is a common occurrence in India. The national legal framework of India does not explicitly provide for a mechanism of wrongful conviction. Further, the right to compensation for imprisonment on wrongful convictions differs from case to case and has often been ignored by the Courts in India. The absence of a mechanism for wrongful conviction leads to the overcrowding and understaffing of prisons, as widely reported in India, resulting in a deterioration of physical and mental health. The International Covenant on Civil and Political Rights, 1966 has specifically emphasized on compensation for the victims of wrongful convictions. The Law Commission of India, in Report Number 277, has also recommended a framework for the protection of those who are victims of wrongful prosecutions and convictions. These measures need to be incorporated in the legal framework of India to prevent wrongful convictions and safeguard the human rights of prisoners who are victims of wrongful convictions.

1. INTRODUCTION TO WRONGFUL CONVICTION IN INDIA

One of the earliest and most important international agreements dedicated to the protection of the rights of human beings, namely, the Universal Declaration of Human Rights, 1948,was codified with the utmost cooperation of India. The active support of the country towards the safeguard of human rights did not end there. Not only does the Constitution of India provide for the effective protection of a plethora of basic human rights, known as, fundamental rights, but India also continues to recognise human rights issues at the international platform.

However, certain human rights issues, which have grave consequences, have not been addressed in the seventy-three years of independence of

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the nation. One such issue that urgently requires attention is the rights of people who have wrongfully been convicted of offenses in India.

Wrongful conviction in India has been a topic of deliberation over the years, with multiple such instances having arisen throughout the course of the nation's judicial decisions. The national legal framework of India does not explicitly provide for compensation or other measures of redressal to those who are wrongfully convicted.

The main drawback in the legal framework of India in regard to wrongful convictions is that there is no specific and uniform law that deals with it in its entirety, covering all the circumstances and aspects. Further, the Courts may order the State to pay compensation to the aggrieved party, but there is no statutory mechanism to determine the right to such compensation. This results in the judiciary determining the compensation on a case-to-case basis which makes the remedy arbitrary, episodic and indeterminate.[1]

This complication was highlighted in *Babloo Chauhan* v. *State (NCT of Delhi)*[2] where the requirement of a comprehensive legislative framework to compensate those who are imprisoned on wrongful convictions was specifically highlighted.

The human rights of wrongfully convicted individuals, most of whom are imprisoned for long periods of time, have nowhere been taken into account as innocents often receive no redressal for the loss of years, reputation and all other forms of physical and emotional trauma that they have faced as a result of wrongful conviction. The lack of protection of their rights has been highlighted in the backdrop of a prominent decision, where the Court was reluctant to provide compensation to those who are acquitted after years of imprisonment.

The case in this regard is *Adambhai Sulemanbhai Ajmeri* v. *State of Gujarat*[3], commonly referred to as the Akshardham temple case. The attack at the Akshardham temple, Gandhinagar on September 24, 2002, injured and killed a large number of people. The said case is an appeal

1. Law Commission of India, Wrongful Prosecution (Miscarriage of Justice): Legal Remedies (Report Number 277, 30-8-2018) <https://lawcommissionofindia.nic.in/reports/Report277.pdf> accessed 17-11-2020.
2. *Babloo Chauhan* v. *State (Govt. of NCT of Delhi)*, 2017 SCC OnLine Del 12045 : (2018) 247 DLT 31.
3. *Adambhai Sulemanbhai Ajmeri* v. *State of Gujarat*, (2014) 7 SCC 716.

against the convictions on charges of terrorism and criminal conspiracy by six individuals. Varying punishments of imprisonment were awarded by the Special Court under the Prevention of Terrorism Act, 2002 to each of the convicted and the sentences were confirmed by the High Court of Gujarat.

It was argued by the appellants that there were procedural irregularities such as creation of evidence by the police, unreliable confessions due to their retraction at the earliest possible opportunity available to the accused and other violations of the rights of these people during imprisonment, including police brutality.

On May 16, 2014, the Supreme Court of India ultimately observed that the circumstances under which the evidence was recorded were indeed extremely suspicious. Further, it was observed that the confessional statements of the accused persons and the accomplices did not complement each other to form a chain of events leading to the offence. The depositions of the prosecution witnesses were also contradictory, thus disrupting the chain of events. This added to the discrepancies in the story and defeated the roles of each of the accused persons which were allegedly performed by them. None of the stated events of the alleged criminal conspiracy were supported by independent evidence.

The conclusion drawn by the Court was that the basic legal principles while admitting the statement of witnesses was ignored by the previous Courts and the accused persons were innocent with regard to the charges levelled against them. The decisions of the Special Court and the High Court of Gujarat were set aside. The accused were acquitted.

The Court also recognised the incompetence of the investigation process as carried out by the investigating agencies, especially in a situation that was immensely grievous in nature as it involved the integrity and security of India. The Court stated that the police caught innocent people and got imposed the grievous charges against them instead of booking the real culprits.

However, even after acknowledging the flaws in the investigation that led to the conviction and subsequent sentencing of innocents who were imprisoned for over a decade, the Court did not provide any compensation for the multiple human rights violations arising out of these wrongful convictions. The judgement was silent in this regard.

Subsequently, in July, 2016, compensation was sought by these six acquitted persons for the wrongful arrest in the aforesaid case. However, this plea for compensation was refused by the Supreme Court which believed that such compensation for acquitted persons will create a dangerous precedent.[4] It was also stated that acquittal by a Court did not automatically entitle the acquitted individuals to compensation. This led to the withdrawal of the petition.

This is where the problem arises. As reflected in the facts and the judgement of the said case, it is clear that due to various inadequacies in the process of investigation and so on, there was a grave curtailment of the rights of the individuals who were proved innocent after a long period of breach of human rights during imprisonment. No protection or compensation was provided to these innocents in an attempt to mitigate their grievances.

Wrongful convictions are a common occurrence, a plethora of which have been witnessed over the years. Another relevant case is *State* v. *Mohd. Naushad,*[5] known as the 1996 Lajpat Nagar Bombing case. This case arose out of a bomb blast in the central market of Lajpat Nagar which led to thirteen deaths along with injuries and damage to property. An appeal was filed by four of the convicts.

The Court observed grave prosecutorial lapses such as the lack of proof to connect some of the accused to the bombing, lack of proof of phone calls as evidence and so on. Additionally, a flaw in the presumption of guilt was observed as there was disregard of the principle that the burden of proof is on the prosecution to prove the accused person's guilt and not on the accused to prove his innocence. The Court further stated that the prosecution has alleged that the accused has committed crimes of a nature so grave that it has the duty to ensure that the minimum standard of proof in a criminal trial must be satisfied. The police was observed to have had acted in a casual manner as the statements of the witnesses had not been recorded properly and so on.

Two of the accused who appealed against their conviction were acquitted of the offenses relating to terrorism. Through this verdict, the death sentences

4. "Akshardham Terror Attack Case: Supreme Court Denies Compensation Plea of Acquitted Persons" (Firstpost India, 5-7-2016) <https://www.firstpost.com/india/akshardham-terror-attack-case-supreme-court-denies-compensation-plea-of-acquitted-persons-2875032.html> accessed 10-11-2020.
5. *State* v. *Mohd. Naushad*, 2012 SCC OnLine Del 5810.

of three of the appellants were set aside. However, this judgement is silent on the right to compensation of the victims of wrongful conviction.

Further, in *Mohd. Aamir Khan* v. *State,*[6] an individual was convicted by the Additional Sessions Judge, Delhi for an explosion that had injured a number of people and caused damage to a shop. This conviction was challenged by the individual. On analysing the witness statements, the Court observed that besides the evidence of two witnesses, there was no substantive material to connect the accused with the explosion and that the testimonies of the witnesses did not lead to the conclusion as earlier drawn. The Court stated that the Prosecution had miserably failed to provide evidence that connected the accused-appellant with the charges framed and had not proved them. Hence, the conviction was set aside. However, there was no mention of compensation for the wrongful conviction.

In *Mohd. Jalees Ansari* v. *CBI,*[7] appeals against convictions for multiple bomb blasts in various trains were made by fifteen individuals. On an analysis of the witness statements and other evidence, four of these individuals were ultimately acquitted due to the earlier wrongful convictions as the evidence with regard to them was insufficient.

One of the accused, Mohammad Nissarudin, was booked for multiple attacks at different instances, resulting in long sentences and ultimately a sentencing to death after a confession that was taken in police custody. With respect to this accused appellant, the Supreme Court ruled that the said confession, which formed the basis of the conviction, was inadmissible as it did not have did legal sanction. Despite being finally acquitted of all charges, this appellant had already suffered through a 23 year long wrongful incarceration. No compensation was granted for his suffering.

The consequences of the lack of compensation to the acquitted are manifold. Not only is there no redressal for the human rights violations over the term of the imprisonment, there is also an increased possibility of the right to dignity, a fundamental human right under right to life, being compromised due to the stigmas that exist in the Indian society, as a result of a fear of and prejudice against such people. Along with the social stigma, the economic rights of the person are also at a risk of

6. *Mohd. Aamir Khan* v. *State*, 2006 SCC OnLine Del 866 : (2007) 138 DLT 759.
7. *Mohd. Jalees Ansari* v. *CBI*, (2016) 11 SCC 544 : AIR 2016 SC 2461.

being severely affected. Such a grave damage to the social and economic standing of a person is immensely difficult to overcome without adequate support via compensatory mechanisms.

Wrongful convictions expose the flaws in the process of collection of evidence, efficiency of the police and so on. Error on the part of the system leads to an inaccurate verdict of pronouncing an innocent person guilty of an offense that has not been committed by them. However, India does not explicitly provide for a mechanism for the dealing of wrongful convictions in order to provide relief to the individuals who are subjected to such convictions which entail terms of imprisonment amongst other punishments such as fines. This results in a gap in the law, which creates hurdles in ensuring the protection of the human rights of individuals who have not committed the offenses that they are being punished for.

2. EFFECTS OF WRONGFUL CONVICTION ON THE CONDITION OF PRISONS IN INDIA

In India, the rules and regulations with regard to prisons and the rights of prisoners along with the duties of the officers, jailor and so on are prescribed for in the Prisons Act, 1894. The main aspects of this legislation with respect to the condition of prisoners is the arrangements for the sanitary conditions, health and employment of prisoners. However, the said legislation has failed to provide for the rehabilitation and the reformation of prisoners, resulting in poor conditions of those in prison. The large numbers of prisoners of wrongful convictions play a role in the poor living conditions of prisoners.

The Prison Statistics India, 2019,[8] prepared by the National Crime Reports Bureau, shows that a total of 9233 convicts were released subsequent to the acquittal on appeal from Higher Courts. The previous year, in 2018, 9586 convicts were acquitted in such a manner. Every year, a similar number of people are acquitted, clearly indicating a large number of victims of wrongful convictions due procedural irregularities and other such fallacies, which form a portion of the aforesaid figures.

The impact of a larger number of prisoners as a result of wrongful convictions is grave as it worsens the condition of prisons in India as analysed below.

8. Government of India, Prison Statistics India, 2019 (National Crime Records Bureau, 30-12-2019) <https://ncrb.gov.in/en/prison-statistics-india-2019> accessed 20-11-2020.

2.1. Overcrowding

According to the prison statistics, the occupancy rate of prisons has increased from 117.6% in 2018 to 118.5% in 2019. This means that the occupancy rate at the end of 2019 was 118.5 per cent, an increase from 117.6 per cent the previous year. With respect to female prisons, the statistics reveal that Uttarakhand has the highest female occupancy rate in prisons of 170.1 per cent. This is followed by Chhattisgarh and Uttar Pradesh at 136.1 per cent and 127.3 per cent respectively.

The aforesaid data outlines two major problems with regard to prisons in India. Firstly, the prisons have been overcrowded for years, with a significantly larger number of prisoners well above the capacity of the prisons. The occupancy rate of 2019 is 17.6 per cent in excess. This indicates that the prisons and their infrastructure, facilities and so on are being overused. Secondly, the occupancy rate is only increasing as time progresses. An increase of 0.9 per cent in the average occupancy rate from 2018 to 2019 implies that not enough effort is being put in order to relieve the pressure on the existing prisons from overcrowding.

As per the said statistics of 2019, Delhi has reported the highest occupancy rate of 174.9 per cent. Uttar Pradesh and Uttarakhand have reported the rates to be 167.9 per cent and 159 per cent respectively. These rates show that the number of prisoners is over one and a half times of the ideal number that they can sustain.

The consequences of such statistics are dangerous. Overcrowding leads to decreased access to facilities and infrastructure of the prison due to the sheer number of prisoners utilising the same at any given point of time. It also has a direct relationship with health, since overcrowding results in deterioration of cleanliness and hygiene standards, in turn creating health risks for the prisoners. The spread of diseases is also quicker due to the same reason. The prevalence of the Coronavirus disease (COVID-19) only increases the possibility of exposure of this virus to large numbers of prisoners.[9]

The health of the prisoners is at risk across the prisons in India. Due to poor sanitation, low ventilation and poor nutrition, which are direct consequences of overcrowding, the spread of diseases is rampant in

9. Divya Trivedi, "Prisons Become Breeding Grounds for the Coronavirus" (The Hindu, 28-8-2020) <https://frontline.thehindu.com/the-nation/tinderbox-prisons/article32296969.ece> accessed 15-11- 2020.

prisons. One example of a disease to which the prisoners in India are at risk is tuberculosis. The notification rates of tuberculosis in prisons are said to be many times greater than that for the general population.[10]

Overcrowding also results in shortages of supplies to the prisoners such as medicines and first aid, food and so on. The National Human Rights Commission observed in 2019 that poor diet is a common problem across jails. Various prisoners have stated that they were provided contaminated food and water for consumption.[11] Many prisoners maintain their diet by purchasing food from jail stores in order to supplement the food provided. However, prisons consist of a large number of vulnerable groups with an unfortunate socio-economic condition. They are unable to afford food outside of what is provided to them. The impact of poor diet is significant of them as they are entirely dependent on the jail diet for their nutritional needs.[12] Malnutrition becomes an inevitable side effect of poor diets in prison.

Shortages and low quality of water, food and so on have often arisen in prisons in the past. An instance of the same was witnessed in Byculla jail, Mumbai in 2018, where 81 female inmates were hospitalized due to alleged food poisoning which was a result of the unhygienic environment. These women experienced nausea, vomiting and diarrhoea.[13]

Lack of access to resources and necessities due to overcrowding results in the breach of various human rights of the prisoners which have been protected under legislations, most importantly the Constitution of India. One such human right that could possibly be violated is the fundamental right to life, enshrined under Article 21 of the Constitution, protecting a

10. Prisons in India: An Overview of Reforms and Current Situation (Government of Rajasthan 2011) <https://home.rajasthan.gov.in/content/dam/pdf/StaffCorner/Training-Material/Useful-Presentations-And-Videos/Overview%20of%20prisons%20in%20India.pdf> accessed 22-11-2020.
11. "Women Prisoners Recount Custodial Torture, Rape and Health Crisis at Public Hearing" (SabrangIndia, 21-1-2019) <https://sabrangindia.in/article/women-prisoners-recount-custodial-torture-rape-and-health-crisis-public-hearing> accessed 20-11-2020.
12. Minutes of the Open House Discussion (National Human Rights Commission, 29-6-2018) <https://nhrc.nic.in/sites/default/files/minutes_prison_29062018_13122018.pdf> accessed 21-11-2020.
13. Plight of Women in Indian Prisons (Citizens for Justice and Peace, 9-3-2019) <https://cjp.org.in/plight-of-women-in-indian-prisons/#:~:text=As%20per%20the%20most%20recent,These%20are%20the%20official%20figures.> accessed 22-11-2020.

plethora of rights with respect to the conditions of living and the dignified life of the people.

Overcrowding of prisons arises due to the presence of large numbers of wrongfully convicted prisoners who are made to spend years in prison. Not only are their human rights violated as a result, but also the burden on the facilities and infrastructure of prisons increases, creating an unhealthy atmosphere for all the prisoners.

2.2. Understaffing

According to the Prison Statistics India, 2019, the sanctioned strength of medical staff was 3320 while the actual strength was 1962 as on 31st December, 2019. Further, the sanctioned strength of the jail staff was 87,599 while the actual strength was 60,787. This wide gap between the sanctioned strength and the actual strength of the staff is a cause of concern as it indicates that prisons are understaffed. An instance of the same is Delhi's Tihar Jail, the manpower recruited inside this prison is observed to be almost 50 per cent less than its actual requirement.[14] The statistics also state that at the end of 2019 there were 4,78,600 prisoners in total.[15] This is a large number for which there must be adequate staff to ensure basic living conditions.

The consequence of understaffing is immense. Firstly, with limited health workers to look after prisoners, their physical and mental health could deteriorate due to delayed access to medical services. Secondly, the low number of jail staff also implies that all functions are slowed down, such as, sanitation, monitoring the environment, providing food and so on. Thirdly, officers and staff are overburdened with work which decreases efficiency. Fourthly, not only is the staff performing the basic functions at prisons less than the required number, the correctional staff which comprises welfare officers, psychologists, lawyers, counsellors and social workers are also considerably less in number. Such professionals are indispensable and have crucial tasks to perform for the holistic development of prisoners. In their absence, a plethora of human rights of the prisoners such as the right to legal aid, right to life, right to healthcare and so on will be denied.

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14. Basant Rath, "Why We Need to Talk About the Condition of India's Prisons" (The Wire, 26-7-2017) <https://thewire.in/uncategorised/india-prison-conditions> accessed 17-11-2020.
15. *Ibid.*

The India Justice Report 2019,[16] an initiative of Tata Trusts, made keen observations in this regard. According to the report, on an average in India, vacancies with respect to prison staff range from 33 per cent to 38.5 per cent. An alarming observation is that such vacancies increased by 10 per cent between the years 2012 and 2016. The report also stated that overcrowding and staff shortages prevail at all levels, namely, officers, cadre staff, correctional staff, medical staff and medical officers. Additionally, long hours with low pay, coupled with poor training is common in prison administrations in the states of India.[17]

Due to menstruation and maternity, women are in need of facilities to maintain their health. The shortage of female jail staff as well as healthcare staff, such as gynaecologists, to look after the condition of female prisoners is an added concern with grave consequences.

Therefore, understaffing has a terrible effect on the prisoners. Right to legal aid, right to life and right to healthcare, which are rights protected by the Constitution of India, are denied for long periods of time due to the inability of the small proportion of the staff to look after the food, sanitation, legal aid, physical and mental health and the overall welfare of the prisoners.

The root cause of understaffing is that the prisons are overburdened with prisoners, a large portion of whom do not even belong there as they are innocent victims of wrongful convictions. With stringent laws to check wrongful convictions, the prisons would not be overburdened and the number of staff and personnel would be somewhat adequate.

2.3. Mental Health

Mental health refers to the emotional, psychological, cognitive and behavioural well-being of a person. The consequences of an unstable mental health include a plethora of complications to the state of mind, such as depression, schizophrenia, bipolar disorder and post-traumatic

16. Tata Trusts, 'India Justice Report: Ranking States on Police, Judiciary, Prisons and Legal Aid' (TATA, October 2019) <https://www.tatatrusts.org/upload/pdf/overall-report-single.pdf> accessed 18-11-2020.
17. Sonal Khetarpal, "Prisons Understaffed by 33% and Overcrowded at 114% Occupancy Rate, Says Report" (Business Today, 8-11-2019) <https://www.businesstoday.in/current/economy-politics/indian-prisons-understaffed-by-33-per-cent-overcrowded-at-114-per-cent-occupancy-rate-says-report/story/389250.html> accessed 20-11-2020.

stress disorder. If left unchecked, such problems could persist and worsen into suicidal tendencies. Mental health is a major concern that affects the existence and daily functioning of human beings.

As per the Prison Statistics India, 2019, there were 7394 prisoners who were suffering from mental illness as on 31st December, 2019. The year 2018 recorded 6,623 prisoners suffering from mental illness. Not only are these figures alarmingly large, but they have also increased over the past years.

Further, among the 165 unnatural deaths of inmates in 2019, 116 inmates committed suicide. Suicide is the usually the consequence of a mental health complications. The said figures may not be exact to the fact that the cause of death of 66 inmates is unknown. These statistics prove that the efficiency of assistance with regard to mental health in prisons is lacking.

As per the publication on suicides in prison by the National Human Rights Commission in 2014, on an average, the propensity to commit suicide, that is, the likelihood of a person committing suicide, is one and a half times more in prison than outside.[18] Further, in India suicide death accounts for almost 71% of unnatural deaths reported in prison.[19] According to this report, a major characteristic of prisons that contributes to suicidal tendencies is the lack of counselling facilities.

With the inception of the Mental Healthcare Act in 2017 along with the expansive scope of Article 21 of the Constitution of India with respect to healthcare, along with other such rights, the prisoners with mental health disorders must necessarily be assisted and protected. The Mental Healthcare Act, 2017[20] extends to prisoners the right of persons with mental illness to access quality treatment, and obliges prison authorities to ensure the fulfilment of this right.

However, the statistics, as reflected above, indicate that due care is not being taken for the protection of the rights of those with mental health disorders in prison. There is an inadequacy implementation of the legal framework with respect to mental health as a result of understaffing or inadequate staff to ensure the welfare of the large numbers of prisoners.

18. Sanjay Kumar Jain, 'Suicide in Prison' (National Human Rights Commission, 10-12-2014) <https://nhrc.nic.in/sites/default/files/SUICIDE%20IN%20PRISON%202014.pdf,> accessed 24-11- 2020.
19. *Id*., at 17.
20. The Mental Healthcare Act, 2017.

Therefore, there is a need for a stringent framework for wrongful convictions which not only provides for redressal to the victims of wrongful conviction but also reduces the occurrence of wrongful convictions at the first instance.

3. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966

On analysing the legal framework of India with respect to wrongful convictions and its impact on the prisons of India, it is essential to study the international framework on wrongful conviction.

The International Covenant on Civil and Political Rights, 1966 (ICCPR) is a multilateral human rights treaty adopted by United Nations General Assembly on 16th December, 1966. The Covenant outlines the civil and political rights of individuals, such as right to life, freedom of religion, freedom of speech and so on. One such right is the right to compensation for wrongful conviction.

The ICCPR creates an obligation on the State where there has been miscarriage of justice which resulted in wrongful conviction of an individual. The obligation on the State is that it has to compensate the innocent who was been wrongfully convicted and thereby punished.

Article 14(6) of the ICCPR is relevant in this regard. It states that, for the grant of such compensation, there must be an initial conviction, which was final in effect, on a criminal offense, followed by a reversal of the conviction or pardon on the ground of miscarriage of justice, which means that a new fact came to light proving the factual innocence of the accused. The provision will not apply in a situation where it is proved that the non-disclosure of the unknown fact that could lead to a reversal or pardon is wholly or partly attributable to him. In such a case, the burden of proof lies on the State.

The International Covenant on Civil and Political Rights has been ratified by 172 States, including India. Some of these States have also worked towards the aforesaid provision of the agreement to incorporate them into the domestic laws of the State. India is a part of that group of States that is yet to convert this international obligation into national law.

The States have followed through with their international commitment in a variety of ways which are as follows. Firstly, via incorporation of the provision or a restructured form of the provision directly into domestic

legal framework. This results in the creation of a statutory right to compensation. Secondly, some States have allowed an administrative or judicial body to use its discretion in order to determine whether compensation should be paid from case to case. Lastly, certain States have utilised the general power of the national governments to make ex gratia payments as compensation.[21]

The States that have incorporated the aforesaid provision of compensation of the victims of wrongful convictions in their domestic legislations, with the aim of remedying the miscarriage of justice, have provided for pecuniary compensation or non-pecuniary compensation or both as the responsibility of the State. In order to bring this into effect, additional substantive and procedural aspects have been outlined in the legal frameworks. These involve the quantum of compensation including the minimum and maximum limits in cases, factors to determine the right to compensation, assessment of the amount, the procedure to claim such compensation, the institution set up and so on.[22]

According to the federal law of the United States of America, a person claiming compensation for unjustly being convicted and imprisoned for an offence against the State can be eligible for relief. The relief can be granted in the circumstances of pardon for innocence, reversal of conviction or not being found guilty at a new trial or rehearing.[23]

Having analysed the national legal framework on wrongful convictions in India, it can be stated that there is no fixed mechanism for compensation to individuals who are wrongfully convicted of offences and have to undergo a significant number of years in prison for the same.

India has not ratified Optional Protocols under the ICPPR, due to which individuals and groups affected by discriminatory laws and practices cannot access international forums of adjudication on the said matter, making it immensely difficult for the victims of wrongful convictions.

India has an international commitment to establish a legal mechanism for the compensation of innocents who have been victims of wrongful convictions. The judiciary has had an inconsistent stand on such compensation as these decisions differ from case to case. In most cases, the victims of wrongful conviction serve the whole or a large portion of the

21. *Law Commission of India, supra* note 3.
22. *Ibid.*
23. *Ibid.*

term of punishment before the reversal of the conviction. Such individuals must receive compensation as outlined in the International Covenant on Civil and Political Rights, 1966.

4. RECOMMENDATIONS MADE BY THE LAW COMMISSION OF INDIA REPORT NUMBER 277

The Law Commission of India drafted a detailed report on wrongful prosecutions in India. It outlined the national and international framework on wrongful prosecutions with respect to miscarriage of justice. As wrongful convictions are most often the end result of wrongful prosecution, that is, the inefficiencies of the investigative agencies, tampering of evidence and so on which ultimately results in the conviction of innocents, it is important to study the recommendations provided by the Law Commission of India with respect to wrongful prosecutions.

After a detailed analysis of the legal framework with regard to wrongful prosecution, the Commission came to the conclusion that even after the acquittal of the wrongfully prosecuted, they may not be able to go back to the life they lived before the ordeal. They may have faced long criminal proceedings, a tarnished name and reputation and prison time for a crime they did not commit, the consequences of which could be severe.

Therefore, compensatory assistance by the State for the years lost, social stigma, emotional and physical harassment, expenses incurred and so on is stated to be required to help the innocent victims of miscarriage of justice to rehabilitate, adjust to their future, and reintegrate into society.

It was observed in the Report that under the set of remedies available, claim and grant of compensation is still complex and uncertain as the amount and payment of compensation remains arbitrary and lacks transparency. No fixed legislative principle or explicit law for determining compensation or its amount has been established.

The Commission highlighted the State's statutory obligation to recompense the victims of wrongful prosecution, along with the requirement of a dedicated judicial mechanism to give effect to the same.

Based on the aforesaid observations, the Commission made certain recommendations. Firstly, a structured statutory and legal framework in order to establish the mechanism for deciding the claims of wrongful prosecution. This would include the payment of compensation to be awarded by the State. Secondly, the creation of a statutory obligation on

the State to compensate the victims of wrongful prosecution along with a corresponding statutory right of compensation for the victims was stated in the Report. As the State would compensate the individuals on account of the acts of its officials, indemnification was suggested to be sought by the State, along with the initiation of any proceedings, as appropriate, against the concerned officials, in accordance with law.

For swift and speedy remedy for the victims of wrongful prosecution, having already faced hardships, the Commission recommended the creation of special courts in each district to specifically adjudicate upon the claims of compensation for wrongful prosecution.

With respect to the matter of who can apply for compensation as per this Report, any accused can claim so for the injury from wrongful prosecution, in terms of loss of reputation, harm to mind or body and so on. An agent of the person can also file the claim. In case of death, any or all of the heirs or legal representatives of the person can claim the compensation.

The Report recommended the standard of proof for such cases to be balance of probabilities.[24] Further, the burden of proof would be on the claimant to prove that the misconduct led to wrongful prosecution, and/or that the misconduct during the prosecution made it wrongful.

With regard to the determination of compensation, the Report stated that it is not feasible at this point that the law fixes the amount of monetary compensation to be paid. However, the law could include guiding principles or factors for the special courts to follow while determining the compensation.

Apart from the pecuniary or monetary compensation to the victim of wrongful prosecution, non-pecuniary assistance or services such as counselling, mental health services, employment skills development, and so on were also suggested be included in the legal framework. Such assistance would also include services for removing the disqualifications attached to the wrongfully convicted individuals with respect to employment, admission in educational institutions and so on.

The determination of the compensation as a whole would be based on financial factors or loss and other factors. The other factors would

24. *Mahesh Dattatray Thirthkar* v. *State of Maharashtra*, (2009) 11 SCC 141 : AIR 2009 SC 2238; *State of Rajasthan* v. *Netrapal*, (2007) 4 SCC 45; and *Sarjudas* v. *State of Gujarat*, (1999) 8 SCC 508 : AIR 2000 SC 403.

encapsulate a wide range including the seriousness of the offence, length of incarceration, damage to health, psychological and emotional harm, loss of educational opportunities or livelihood, harm to reputation, loss of earnings and other related factors.

These are the recommendations that were made by the Law Commission of India in its Report Number 277 in 2018, titled, "Wrongful Prosecution (Miscarriage of Justice): Legal Remedies". These recommendations have been drafted well, taking into consideration the international framework on wrongful prosecutions and wrongful convictions, as well as the human rights of such victims. This Report is a step towards creating accountability of the authorities and ensuring a remedial mechanism to innocents.

5. CONCLUSION

Wrongful convictions in India not only affect a plethora of rights of the victims, but also increase the burden on the prisons of the nation. These ill-effects of wrongful convictions must be sought to be eliminated through a stringent legal framework.

A study of the international framework, which specifies the right to compensation for wrongful prosecution and conviction, highlights that the complications of innocent prisoners in India who are victims of wrongful convictions already have solutions in the ICCPR, to which India is a party.

On the application of Article 51(c) of the Constitution of India, the country must endeavour to foster respect for international law and treaty obligations. The right to compensation for wrongful conviction, as stated in the ICCPR should also be incorporated in the legal framework of India as it has also proven effective in the preservation of human rights in various nations, the United States of America being the prime example.

The inclusion of the recommendations of the Law Commission of India Report Number 277, is the need of the hour. The right to compensation for the grave damage inflicted on prisoners who are victims of wrongful conviction is a human right that must not be denied. Innocents must be protected from the damage caused by external factors at all costs and their lives and future must be safeguarded by aiming to eliminate wrongful convictions. In pursuit of this goal, redressal for the effect of the wrongful convictions at present is necessary.

Therefore, the implementation of the aforesaid suggestions would be efficient in preserving the human rights of the people who are imprisoned on wrongful conviction.

THE INDIAN CONSTITUTION VIZ-A-VIZ THE HUMAN RIGHTS REGIME: EXPLORING THE RIGHTS MATRIX OF ARMED FORCES PERSONNEL IN INDIA

*Siddharth Jasrotia**

ABSTRACT

In the Indian set-up, where armed forces operate even domestically, the whole institution of military is seen as a threat to individual rights and liberties. As a result of this prejudicial notion, human right violations of the individuals associated with this institution are often overlooked. This comment endeavours to underpin how the constitutionally mandated differential treatment of armed forces personnel by virtue of Article 33 have grossly impacted their human rights. The colonial military justice system which was kept intact by the Parliament is extremely arbitrary and violate rights in the nature of equality, liberty and fair trial. The Indian Courts have found this system to be immune from any constitutional scrutiny. By taking this system as a reference, this comment challenges the authority of the Indian Constitution to abrogate the most basic and fundamental human rights of the armed forces personnel. The comment concludes by critiquing the hands-off approach of Indian Judiciary, and highlights the need for scrutinizing the military justice system in light of the human rights regime and the liberal spirit of the Constitution.

1. INTRODUCTION

Owing to their monopoly over arms, military forces are generally perceived as State's machinery for aggression. Since emergence of new security challenges in the form of terrorism and insurgency has refocused the role of armed forces from an external defender to an internal stabilizer, it becomes highly significant to emphasize on the human rights of the armed forces personnel so as to 'civilize' their behavior.

Article 33 of the Constitution of India empowers the Parliament to enact such laws that have the capacity of 'restricting' or 'abrogating' the

application of fundamental rights to the armed force personnel so as to ensure 'proper discharge of their duties' and 'maintenance of discipline' in the forces.[1] Absent minor changes, the Indian Navy, Air force and Army Acts passed by the Parliament in furtherance of Article 33 are an exact replica of the British Indian Army Act, 1911 that bestowed unbridled and arbitrary powers on the military commanders enabling them to keep lower-ranked personnel under their leash.[2]

The Indian judiciary has been very hesitant to interfere with the matters of the military. The light casted by the judiciary on Part III of the Constitution so as to expand the horizon of fundamental rights of civilians, has not reached the members of armed forces because of the veil of Article 33. The Supreme Court in *Ram Sarup* v. *Union of India*[3] ("*Ram Sarup case*"), held that the Army Act and the Army Rules are immune from Constitutional scrutiny, even if they violate the most basic rights in the nature of right to equality, life and fair trial. On similar lines, it was held in *Jitendra Singh Sahi* v. *Union of India*[4] that the principles of natural justice, not explicitly codified in the Army Act, will not be of any aid to the members of the armed forces.

The military justice system prevalent in India has been rendered immune from constitutional scrutiny on grounds of fundamental rights violation by virtue of Article 33. Building on the analysis of this arbitrary and unfair system, the very authority or standing of the Constitution to 'abrogate' the most basic rights such as fair trail, have been challenged in this essay from a naturalist conception of human rights. The essay concludes by suggesting that the Indian Judiciary should forego its hands-off approach, and must actively endeavour to scrutinize the military laws in light of the human rights regime and the liberal spirit of the Constitution.

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1. Constitution of India, Art. 33:
   "33. Power of Parliament to modify the rights conferred by this Part in their application to Forces,
   etc.—Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their
   application to, —
   (a) the members of the Armed Forces; or
   (b) the members of the Forces charged with the maintenance of public order; or
   (c) persons employed in any bureau or other organisation established by the State for purposes of
2. U.C. Jha & Sanghamitra Choudhury, *Human Rights in the Indian Armed Forces: An Analysis of Article 33* (Vij Books India Pvt. Ltd, 2019), 8-13.
3. *Ram Sarup* v. *Union of India*, AIR 1965 SC 247 : (1964) 5 SCR 931.
4. *Jitendra Singh Sahi* v. *Union of India*, 1992 SCC OnLine MP 192.

2. MILITARY JUSTICE SYSTEM IN INDIA

The Indian military justice system provides for two types of justice redressal mechanism, namely Summary Disposals and Court-Martials.

2.1. Summary Disposals

Summary disposals are generally convened by the accused's commanding officer or any other officer of a higher rank depending upon the rank of the accused. The punishments imposed under this format include detention, confinement to the lines, and imprisonment in military custody or a combination of all these up to forty-two days for Army and Air force personnel, and up to three months for Navy personnel. Other penalties in the nature of deprivation of rank, forfeiture of badge pay, fines et al. can also be imposed independently or conjointly with the aforementioned punishments.[5] Even though summary disposals constitute up to 85% of the military trials in India, the procedure adopted under this format is extremely arbitrary and directly conflicts with the principles of natural justice.[6]

The same officer assumes the role of the judge, the prosecutor and the defence i.e. the commanding officer alone frames the charges, investigates the charges, adjudges upon the innocence of the accused, disposes of the charges and imposes the sentence 'on the spot'. Even though the accused is allowed to present and cross examine witnesses, the witnesses are not put on oath, and owing to the hierarchical relationship between the witnesses and the commanding officer, the probability of them being influenced is extremely high. Moreover, such cases are disposed of in an extremely expeditious manner as there is no requirement of maintaining records of the proceedings.[7] Neither the accused is permitted to have any legal representation/seek any legal advice nor is there any requirement for application of rules of evidence.[8] Furthermore, the accused does not have any right of appeal against a punishment imposed under this format.

The Armed Force Tribunal Act, 2007[9] which was enacted to establish an appellate redressal forum, initially provided that the Tribunals so

5. Army Act, 1950, Ss. 79, 80, 83, 84 and 85; Navy Act, 1957, S. 94; Air Force Act, 1950, Ss. 81, 82 and 86.
6. *Supra* note 3, at 88.
7. *Ibid*.
8. Army Act, 1950, S. 133; Navy Act, 1957, S. 130; Air Force Act, 1950, S. 132.
9. Armed Force Tribunal Act, 2007.

formed under this Act will have appellate jurisdiction against Summary Disposals, however the same was withdrawn from the draft Bill on account of the objections raised by the Defense Ministry. Referring to the sanctions imposed under Summary Disposals as 'minor punishments', the Ministry of Defense while discussing draft of the Armed Force Tribunal Bill argued that no appeal shall lie against an order of summary disposal as such powers are necessary for (a) expeditiously meeting 'justice', (b) maintaining discipline, and (c) preventing floods of litigation. However, a bare perusal of the imposable punishments showcase that the terminology 'minor punishments' is in fact a misnomer because of the capacity of such punishments to have long-term impacts on career and other prospects of an individual. The argument of Ministry that such provisions are necessary for meeting expeditious justice and maintaining discipline, runs contrary to the entire concept of justice itself as the removal of this provision from the Bill implies that the commanding officers have unfettered power and control over the lives of their inferior ranked personnel, and the decision taken by them howsoever arbitrary, cannot be questioned.[10]

Acquittals in Summary Disposal are very few, and the only remedy available against conviction is a review in the form of grievance petition. However, this remedy is available only under the Army and Air Force Acts,[11] and not under the Navy Act. This review system is inherently flawed as the individual is kept outside the review process and the decision of the review petition is not required to be a reasoned order. Furthermore, no time limit is prescribed under which a grievance petition is to be reviewed.

Under all the three Acts, an individual can file for a grievance petition if he deems himself to be wronged, ill-treated or oppressed by his commanding officer, or if he has been kept devoid of any redress entitled to him.[12] However, this remedy comes with certain qualifications which render its benefit moot. Before filing a complaint, an individual has to undertake that, if his accusations are proved to be false, it would render him liable to disciplinary action.[13] This qualification is nothing less than 'legalized victimization', where an individual who is already at a disadvantageous position owing to the power dynamics between him and

10. U.C. Jha, "The Armed Forces Tribunal Act, 2007: A Critical Analysis" (2008) 43 Economic and Political Weekly 25.
11. Army Act, 1950, S. 87; Air Force Act, 1950, S. 88.
12. Army Act, 1950, S. 27; Navy Act, 1957, S. 23; Air Force Act, 1950, S. 27.
13. *Supra* note 3, at 90.

the accused, is further harassed by the redressal process itself. As a result of this, a person aggrieved of offences in the nature of personal abuse such as sexual harassment, would rather prefer not complaining than facing additional harassment in the form of disciplinary action. Moreover, no legal aid or representation is provided to the victim. Experts argue that filing a complaint against a senior rank officer often leaves the victim and his family subject to arbitrary transfers and seclusion.[14]

2.2. Court-Martials

The Indian military justice system recognizes four kinds of Court-Martials, namely General Courts-Martial ("GCM"), District Courts-Martial ("DCM"), Summary General Courts-Martial ("SGCM"), and Summary Courts-Martial ("SCM"), with SCM being specific to Indian Army only.[15] These Courts have the power to impose punishments in the nature of capital punishment and imprisonment for life. The proceedings of GCM & DCM are formal in nature, whereas the proceedings in SCM and SGCM are informal in the sense that evidence is to be taken in a narrative form with as less as possible words used,[16] and there is no need for detailed judgement or discussion on evidence. The Court simply has to record its finding on each charge as guilty or not-guilty, without providing any reasons for the same.[17]

In GCM & DCM, though the accused is entitled to be represented by a 'defending officer' as per the Army Rules,[18] the Supreme Court in *Union of India* v. *G.S. Bajwa*[19] categorically held that such right does not extend to engage a counsel or any other legal representative at the cost of the State. The Court noted that right to free legal aid as envisaged under Articles 21 and 22 of the Indian Constitution[20] is restricted by the Army Act by virtue of Article 33. Thus, a civilian counsel for GCM and DCM trials can only be appointed at the expense of the accused.

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14. *Ibid.*
15. Army Act, 1950, S. 108; Air Force Act, 1950, S. 109.
16. Army Rules, 1954, S. 106.
17. Army Rules, 1954, S. 121.
18. Army Rules, 1954, R. 96.
19. *Union of India* v. *G. S. Bajwa*, (2003) 9 SCC 630.
20. Right to free legal aid was recognized by the Indian Courts as an indispensable facet of right to life in *Mohd. Ajmal Mohammad Amir Kasab* v. *State of Maharashtra*, (2012) 9 SCC 1 : AIR 2012 SC 3565.

In SCM & SCGM, the accused is allowed to be assisted by a 'legal advisor', however such person can only advise the accused, and does not have the authority to examine/cross-examine witnesses or address the Court.[21] Therefore, in essence an accused is not entitled to legal representation by a counsel in summary forms of Court-Martials. Considering that SGCM has powers at par with the GCM and DCM including the power to impose capital punishment, it is unjust to disentitle the accused of legal representation in SGCM trials. Such methods of summary trials are not followed in any other democratic country other than India.

Three decades after the Independence, the Supreme Court of India in *Prithi Pal Singh Bedi* v. *Union of India*[22] and *S.N. Mukherjee* v. *Union of India*,[23] highlighted two of the most prominent lacunas in the Indian Army and Air Force Acts; first, no remedy of appeal against the order of a Court-martial and second, no requirement of recording reasons by the Court in support of their decision. Though, the later problem was remedied (only for the army personnel) in the year 1992 by way of an amendment,[24] the former continued to be a hindrance in seeking justice until the enactment of the Armed Force Tribunal Act in the year 2007. This Act was passed in furtherance of the 169th Report of the Law Commission,[25] and provided for the establishment of a Tribunal having original jurisdiction over service matters, and appellate jurisdiction over the decisions of the Court-Martial. The Act also provided for a statutory right to appeal before the Supreme Court against the final order of the Tribunal so formed under it.

However, it can be argued that this Act is just a half-hearted attempt to ensure fairness in the military justice system as SCM have been kept outside the purview of the Tribunal, unless the punishment awarded by it exceeds three months of imprisonment or dismal. The Tribunal has been given the power to enhance the punishment awarded by Court-Martials,[26] which is in direct contravention with principles of natural justice and the practice prevalent in other democracies.[27] Furthermore, there is no provision for legal aid to the accused, and no time frame under which a

21. Army Rules, 1954, S. 129.
22. *Prithi Pal Singh Bedi* v. *Union of India*, (1982) 3 SCC 140.
23. *S.N. Mukherjee* v. *Union of India*, (1990) 4 SCC 594.
24. Army (Amendment) Act, 1992.
25. The Law Commission of India, 169th Report on Amendment of Army, Navy & Air Force Acts, 1999.
26. Armed Forces Tribunal Act, 2007, S. 15(6).
27. United Kingdom Court-Martial (Appeals) Act, 1968.

matter is supposed to be disposed of by the tribunal has been specified in the Act.

The military justice system prevalent in India is not followed in any other democratic country. Even though, it violates the right to life and fair trial, and directly contravenes with the principles of natural justice yet it is immune from any challenge owing to Article 33 of the Constitution.

3. THE CONSTITUTIONALLY MANDATED DIFFERENTIAL TREATMENT UNDER ARTICLE 33

While drafting the Constitution, the Constituent Assembly accepted the motion to replace the term "guaranteed" in respect to fundamental rights under Part III with the term "conferred". It can be argued that by replacing these terms, the Constituent Assembly created a fiction that Constitution is the source of fundamental rights.[28] This shift from a natural law school perception to a positivist perception of rights implies that the Constitution as a 'conferrer' of rights, also has the power to 'abrogate' them. Though, the Preamble to the Indian Constitution states that 'people of India' are the 'source' of this Constitution, this wordplay implies that the 'structures' created by the Constitution have the authority to completely abrogate the rights which were possessed by the 'source' even before the adoption of the Constitution. Article 33 is a classic example of this dichotomy, wherein firstly the Constitution assumes that fundamental rights are 'conferred' by it, and hence, delegates the authority to the Parliament to 'restrict' and 'abrogate' their application to armed force personnel. The underlying theme that army personnel have surrendered their autonomy to such an extent that constitutional bodies can not only restrict, but also abrogate the most basic human rights is extremely problematic.

Arguably, even the State or the Constitution itself, cannot deem waiver of these rights by abrogating or absolutely restricting their application.[29] Humans possess these rights by virtue of them being a member of the human community, and a collective of individuals that hold a higher political status does not possess the authority to abrogate these rights. Abrogating the application of these rights to armed force personnel takes away the status of 'humans' from such individuals. The substantiation that by merely signing a contract with the Union of India to become a member

28. VII, The Constituent Assembly Debates (9-12-1948).
29. The critique of will theory regarding waivable nature of Rights as put forth by interest theorists is relied upon to substantiate this proposition. *See*, 'Rights' *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/entries/rights/>.

of the armed forces, an individual can waive his inalienable rights such as the right to life or right to fair trial hits directly at the core of human rights regime. This also goes against the settled position in Indian law that fundamental rights cannot be waived;[30] especially rights under Article 20 & 21 that pertain to right to life and fair trial which are considered to be of such esteem significance that they cannot be suspended even during a national emergency.[31]

4. CONCLUDING REMARKS

It is proposed that Article 33 should be amended to delete the term 'abrogate' from its language. Relying on *Union of India* v. *L.D. Balam Singh*,[32] wherein it was held that,

> *"ensuring proper discharge of their duties and maintenance of discipline among them would necessarily depend upon the prevailing situation at a given point of time and it would be inadvisable to encase it in a rigid statutory formula",*

It is argued that in the current peace times, especially when dealing with domestic issues, the provisions of the Military Acts need a strict revision. International instruments such as the UDHR,[33] the ICCPR,[34] and the UNGA resolution on *Basic Principles on the Independence of the Judiciary*[35] et al. highlight that right to fair trial has utmost significance. The Council of Europe's Recommendation on *Human Rights of the Members of the Armed Forces* recognizes that exclusion of legal representation in summary trials violate basic human rights of a personnel.[36]

It is argued that Summary Court-Martials should only be allowed in exceptional circumstances, and must not become a rule. Further, the military redressal system must be restructured so as to keep the adjudicators, outside the chain of command.

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30. *Basheshar Nath* v. *CIT*, AIR 1959 SC 149.
31. Constitution of India, Art. 359.
32. *Union of India* v. *L.D. Balam Singh*, (2002) 9 SCC 73.
33. The Universal Declaration of Human Rights, Arts. 10 and 11.
34. The International Covenant on Civil and Political Rights, Arts. 14 and 4(2).
35. The UN General Assembly, Basic Principles on the Independence of the Judiciary, 1985.
36. Council of Europe, The Human Rights of Members of the Armed Forces, Recommendation CM/Rec 4 (2010), p. 40.

It is proposed that Article 33 should be interpreted in a limited sense, and emphasis should be on the two conditions specified under Article 33, namely 'proper discharge of duties' and 'the maintenance of discipline'. The Courts need to scrutinize whether the laws in place have a 'rational nexus' with these elements, instead of adopting a hand-off approach and providing immunity from judicial review to any legislation passed under Article 33. Reciprocity is an inherent human trait, and only when the army personnel are protected from abuse and oppression, can they be expected to respect the rights of other citizens.[37]

37. Chris A. Robinson, *Biological Foundation of Human Rights* (The Oxford Handbook of International Human Rights Law, 2013) 93.

MITIGATING THE VULNERABILITIES OF HONEST MICRO-ENTERPRENEURS IN TIMES OF COVID 19[1]

Ms. Anjali Yadav[*]

ABSTRACT

The WHO declaration of Covid as a pandemic in March and the subsequent lockdown by most of the nation-states as a preventive measure to contain the mushrooming of virus affected many throughout the world. India's national lockdown too impacted the lives of the informal sector, of which the street vendors form a major part. According to the study conducted by ILO in 2014, street vendor consists of 14% of the informal sector. This paper with the aid of the secondary sources aims to delve into the issues and problems faced by the urban migrant population of which the street vendors form a major chunk, the mass exodus faced by them, the lockdown of these economic activities, the abomination of equity and social justice, the infringement of their fundamental rights like "Right to live" with "dignity" and the "right to life" which encompasses the "right to livelihood". The paper in detail also highlights the special measure undertaken by the Government to mitigate the problems of the street vendors and ways in which efforts have been made to formalize to ensure their livelihood protection and reintroduce them back into the economic strata of the country.

1. INTRODUCTION

The announcement of the nationwide lockdown to contain the spread of the coronavirus saw one of the troublesome heart-wrenching views one could have ever asked for. The sudden restriction of movement, the halt of every kind of transportation not only put a full stop to the lives of the people but also to their livelihood, their means of survival. And the most affected victims of these curbing measure were the migrant population of

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1. The word Honest Entrepreneurs is used for the Street Vendors.

the cities, most of them were the informal ones, who are not regulated and neither protected by the states.

These informal activities entail a wide array of domestic workers, construction labourers, tailors, street vendors etc. This mass exodus led the workers on the streets, to walk back home, covering thousands of kilometers on the streets barefoot without any means or materials unsure of earning a living in the cities and in the fear of being left alone or not being able to survive.

Some might argue that pandemic created havoc in everyone's life, but it created a disaster in the lives of the lowly skilled urban migrant population which forms a very crucial part of the demographic dividend.

The pandemic tinted the role of informality in the lives of these workers not only in India but throughout the world. The Indian workforce, around 90% is informal in nature and the street vendors constitute a massive portion of this informal national workforce. The street vendors are not only an important economic contributor but also are a facilitator to the poor urban population who solely depends upon them for their daily food, clothing, and other household items with their mobility across the cities.[2] The street peddlers who engage in the sale of various kinds of good and provide services, were subjected to sudden interruption to their nobilities, which not only threatened their livelihood but also threatened the survival and existence of other poor population too.[3]

The current Covid 19 has not revealed any new regulatory drawback of the government to protect these frontier blue-collar workers who furnish vital goods and services. Rather, it only highlighted their omnipresent struggles for "justice, equality and dignity" and the promised human rights as laborers and being born as a soul.

The situation before the Covid was not very different and prior to Covid too, they were commonly pilloried by economic expert and officials as 'illegitimate' and 'non-fecund'. These street vendors work with sincerity and honesty and try to make a livelihood for themselves in this biased and

2. Manas Chaudhari, "'Invisible' Women Street Vendors: Lacunae in the Street Vendors Act, 2014" (2021) 3(2) Christ University Law Journal 25.
3. "Policy Push: Street Vendors' Livelihoods In Post-Covid World" - ET Government (*ETGovernment.com*, 2021) <https://government.economictimes.indiatimes.com/news/economy/policy-push-street-vendors-livelihoods-in-post-covid-world/76296116> accessed 6-3-2021.

non-accommodating environment of policies and regulations and even after the enactment of the Street Vendors Act in 2014. It is not only the policymakers who consider vendors as a nuisance,the general community also sees street vendors as invaders, using municipal space that could be used for more aesthetic purposes.[4]

However, a lot of efforts were made by the NGO's, social activists, lawyers, for the social as well as legal recognition of the street vendors so that they can earn their livelihood with dignity and respect without the constant fear of harassment or eviction by the local municipal authorities and Police Officials. Considering the plight of the vendors, the Supreme Court in "*Sodan Singh* v. *New Delhi Municipal Committee*[5] and various other judgments[6] has recognized that street vendors have the 'right to trade'. It also notes that street vending cannot be denied merely on the ground that pavements are meant exclusively for pedestrians and that street vendors are exercising their constitutional right to carry out trade or business.[7]

The Court has also in many instances, directed the Governments to enact a national legislation for their regulation and livelihood protection. As a result of which, in 2014 the Street Vendors Act was passed to legalize street vending and safeguard the constitutional rights of the vendors.

2. PROBLEMS FACED BY THE STREET VENDORS

The impact of Covid was severe and massively affected everyone's life. When the people had the option to work from home, the street vendors were worst affected as their work involves constant public interaction and mobility. Being the last link of the supply chain, they worked on the frontline to supply the fruits and vegetables to the protected households on the brink of being affected by the virus.

The constant threat of survival in the city without any income led the street vendors to migrate back to their villages as they were not covered under

4. Sumeysh Srivastava, "COVID-19 Crisis Calls for Long-Overdue Legal Protection for Street Vendors" (Vidhi Centre for Legal Policy, 2021) <https://vidhilegalpolicy.in/blog/covid-19-crisis-calls-for-long-overdue-legal-protection-for-street-vendors/> accessed 6-3-2021.
5. (1989) 4 SCC 155: (1989) 3 SCR 1038.
6. *Saghir Ahmad* v. *State of U.P.*, AIR 1954 SC 728 : (1955) 1 SCR 707; *Olga Tellis* v. *Bombay Municipal Corpn.,* (1985) 3SCC 545; *Bombay Hawkers' Union* v. *Bombay Municipal Corpn.*, (1985) 3 SCC 528; *MCD* v. *Gurnam Kaur*, (1989) 1 SCC 101.
7. *Sudhir Madan* v. *MCD,* (2009) 17 SCC 597.

any social protection schemes like the formal sector. Their lives depend on daily earnings. While fruits and vegetable vendors were considered to be the essential service providers, other vendors who sold clothes, household items or other non essential product were left with financial constraints and mental harassment and breakdown. Street vending as a profession involves heterogeneity. Often, it is not a one-person business, involves whole family members for their contribution.

The streets of Delhi are filled with vendors ranging from child vendors to the old, aged persons who are ubiquitous and honestly earning a living for themselves. Many elderly vendors were not able to return to their stalls as they were at elevated probability of being infected with the virus and were ruled out by the authorities. Street vending is an own-account work. They are self-employed workers who make their own little investment. Because of the pandemic and lockdown, they were forced to exhaust their savings and were left to be penniless for the future.

3. FAILURE OF THE LAW

The biggest concern for the street vendor is illegality.[8] The problem of illegality ensues because of the unaccommodating nature of the urban authorities as they consider them to be a dent in the city and never creates enough space to accommodate them in the planned structures of the cities.[9] To redress all the irregularities faced by the vendors the Street Vendors Act, 2014 was exclusively passed with twofold aims to safeguard the business of the hawkers and set up a legitimate framework to recognize their rights to carry on their profession.

To accomplish the abovementioned objectives, the Act provides a responsibility on the concerned State Governments to make rules and schemes for the implementation of the Act and also form the concerned statutory bodies provisioned under the Act. It also cast a duty on these statutory bodies and local municipal authorities to survey all the street vendors in the cities so that they can be given proper vending space and licenses to carry out their business. The Act also entrust the states to provide social benefits to the vendors. However, the crisis created due to

8. Rohan Alva, "The Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill, 2013: Is the Cure Worse than the Disease?" (2014) 35(2) Statute Law Review 181.
9. Begari Prasad, "Issues and Challenges of the Weekly Market Street Vendors in Telangana: A Special Reference to Hyderabad" (2018) 63(1) Economic Affairs 45.

the pandemic has highlighted the long due implementation of the Act. Some of the major provisions of the Act has been discussed below.

After the enactment of the Act, it was the responsibilities of the states to notify schemes and rules in consonance with the central law and also to form the statutory bodies under the Act. It provides that unless and until all the street vendors are surveyed by the authorities no one can be evicted from their vending place. The unannounced evictions and often seizure of goods or the abandonment of it created a briberies opportunity for the police officers and municipal authorities.

The Act also provides that in case any certified vendors are being evicted, a thirty day prior notification to be provided to the street vendors thereby promising to protect them against unannounced threats of evictions. The Act also ensure political as well as equitable representation of the street vendors. It provisions for the constitution of a Town Vending Committee also to be called as TVC, which will be responsible for carrying out the surveys of all the street vendors at the interval of every five years after the enactment and accommodated all the vendors in the notified area by the committee also called the vending zone. The TVC would also consist of a minimum of 40% of representatives of the street vendors, among which one-third should be women. The act also provides that preferences be given to the members of the marginalized section. However, the informal in organization of the street vendors poses a challenge in the implementation of this provision. The Act also provides for a Grievance Redressal Committee, to remedy the vendors for any untrue behaviour by the authorities proclaiming and protecting their rights.

There are other various important provisions too in the Act. However, what is shocking is that despite being enacted in 2014 the demanding implementation of the Act has been due overlong. According to a report presented by the Center for Civil Society in 2019, none of the sates in a full-fledged manner has yet implemented the provisions of the Act.[10] While some states like Mizoram Tamil Nadu etc. showed progress in implementation there were still 11 states who were required to implement the Act.[11]

10. Implementing the Street Vendors Act, 2014: Judicial Interpretation, Cross-State Compliance and De facto City- Level Practices (Centre for Civil Society, 2019) <https://ccs.in/sites/default/files/research/svac-report-2019.pdf> accessed 6-3-2021.
11. *Id.,* at p.16.

The study also claimed that only 33 percent of all States had notified TVCs and only 50 per cent of those TVCs had issued ID Cards.[12] Cities like Mumbai only have 2,50,000 reported vendors Delhi has identified only 1,25,000[13] 'legal' vendors, whereas the actual numbers are statistically double.[14]

Now in the wake of the pandemic, in the States like Delhi which never conducted the survey and identification, the vendors had to approach the authorities for the E-pass each time to continue their sustenance and make their living. Only if all this could have been done in a timely fashion, given time frame of the central government for the implementation of the Act, no chaos would have been created and the authorities would have identified them and contacted them for the utilization of their services for the supply of essential goods.[15]

These incidences climax how the implementation of the Act has never been done on a serious note and has been stalled after few steps with only a few vendors been issued the certificate of vending by the concerned Town Vending Committees. The pandemic made these situations more visible, as the lockdown culminated into the mass departure pf the migrant population resulting in the loss of livelihood for these street vendors.

4. MEASURES TAKEN

The pandemic highlighted the real situation of the street vendors migrant population, the no implementation of the law, the lax attitude of the official toward them. However, there are also some local as well as national policy initiative which has been taken to mitigate the plight and vulnerabilities of the street vendors. Most of the metropolitans did not permit the suppliers to function during the pandemic. Several of them were permitted only to work as fruits and vegetable vendors.

While countries like South Africa after a lot of pressure declared the street peddlers to be important service providers. The public health professionals issued guidelines for the street vendors and asked them to

12. *Id.,* at p.17.
13. National Policy on Urban Street Vendors: Reports and Recommendation (May 2006) <http://dcmsme.gov.in/Street%20Vendors%20policy.pdf> accessed 4-3-2021.
14. *Supra* note 3.
15. Annie Banerji, "Indian Street Vendors 'Shattered' as Coronavirus Wrecks Trade" (MSN, 2021) <https://www.msn.com/en-us/news/world/feature-indian-street-vendors-shattered-as-coronavirus-wrecks-trade/ar-BB19fO14> accessed 6-3-2021.

follow them so that they can trade safely as supermarkets. Such a practice was not observed in India, barring a few instances.

For instance, in India, after the announcement of the lockdown by the Prime Minister, the Ahmedabad Municipal Corporation (AMC) recognized the importance of continuing the supply of the food chain from breaking after the lockdown, announced an innovative schemes called "Vegetables on Wheels" to distribute fresh vegetables from the marketplaces to individually all the area of the town with the help of the e- rickshaws. They also issued the curfew pass to the eligible vendors to go to the general flea market in the morning to buy vegetables and fruits with the help of the e-rickshaw drivers who helped the vendors to pick and drop to their home from the markets. The AMC also with the aid and partnership of Self Employed Women's Association (SEWA), a trade union of women welfare workers, helped many fruit and vegetable vendors.[16]

With the appropriate guidelines of safe distancing, wearing a mask and sanitizing etc. many women vendors in Gujrat catered to the needs of the customers, trying to keep safe their families, drivers, and their customers. From this example, we can certainly say that few states did recognize the contributions of the street vendors to food security and the local economy.

4.1. Prime Minister's Svanidhi Yojana

Apart from all the local initiatives taken by the states, one prominent step was taken by the Indian Government to mitigate and lessen the vulnerabilities of the street vendors during the pandemic were the PM SVANIDHI. The "Prime Minister Street Vendors *Aatmnirbhar Nidhi Yojana*" is a policy proposed by the Ministry of Housing and Urban Affairs, launched on 1st June 2020.[17] The scheme provides an economic stimulus package to the street vendors under "*Prime Minister Aatmanirbhar Abhiyan.*" It purports to deliver reasonable loans to street vendors who has an exceedingly small capital base to invest again after exhausting all the savings in the lockdown.

16. "Covid 19 Crisis and the Informal Economy: Informal Workers in Ahmedabad" (Women in Informal Employment- Globalising and Organizing (WEIGO), December 2020) <https://www.wiego.org/sites/default/files/publications/file/WIEGO_FactSheet_Ahmedabad%20for%20web.pdf> accessed 4-3-2021.
17. National Portal of India <https://www.india.gov.in/spotlight/pm-street-vendors-atmanirbhar-nidhi-pm-svanidhi> accessed 4-3-2021; also *see* PM Svanidhi Portal <https://pmsvanidhi.mohua.gov.in/> accessed 4-3-2021.

This measure would also help them to free themselves from the unwarranted loans they had to advance from the loan sharks at extremely high interest. The scheme provides a working capital loan of up to 10,000 rupees, the frequent digital payment transactions will be rewarded.[18]

One of the key issues which were raised during the spread of the Covid was, there was no database of the street vendors, with whom the administration can develop an understanding to supply the essential services as it was done by the Ahmedabad Municipal Corporation. This policy however up to a certain extent helps in creating a digital database of the street vendors to avail them.

However, unless and until the implementation of the Street Vendors Act is not strengthened the credit linage under the PM Svanidhi and other benefits lie social security etc. provisioned under the Act may not reach its eligible vendors. The policy can only be implemented when the local authorities would have the right database of the beneficiaries because it would lead to the formalization of the street vendors without any impediments. The scheme also emphasizes the need for a digital database as it provides as IT-based generated provisional certificate of vending to avail the loan facility to those vendors who were not covered under the surveys. It also promises to issue a permanent certificate of vending within one month after the issuance of the provisional one.

A classified street provider's database will also be created in the Ministry portal by ULB/state, resulting in a digital demonstration in the future. This system would not only help the hawkers to formalise but also promotes digital transactions through cashback facilities for them. The scheme also ensures an integrated IT application for management, along with the development of a roadmap for the street vendors to build capacity for e-commerce and to obtain quality certifications.

These innovative solutions are successful, although ensuring this ease in a post-pandemic society with an economic crisis and an already expanded workforce will be a challenge. Street vendors are the key source of interaction for consumers in the supply series and, at a time when public scrutiny of cleanliness is expected to be alarming, it is imperative that proper guidance be provided to suppliers on protection and sanitization. To ensure the same and to take the vendors up in the economic ladder, MoHUA has synchronized with key players, including

18. *Ibid*.

Municipal Corporations, FSSAI, Swiggy and GST officials, to ensure that the necessary prerequisites and the adoption of innovation in vendor certification in accordance with FSSAI standards increase public confidence in street vending. To facilitate the same, a pilot program would be initiated in 5 major cities of the country Ahmadabad, Chennai, Delhi, Indore, and Varanasi onboarding 250 vendors.

The exceptional COVID circumstance has lined the approach to new methodologies and advancements in issue addressing. The government also should embrace new components to support the economy and uphold *Antyodaya* to control the harm of the pandemic.

5. BEYOND POST COVID RECOVERY

The pandemic presented itself with significant risks but also has a defining moment that created an opportunity to tackle inequality and injustices. Recognizing these undocumented workers as providers of future services and acknowledging and integrating new perspectives on daily work (respecting the value of their contributions) must lead to a new economic and urban vision. Street vending is a very important economic and concrete activity, and we do not hope the government to revert to the 'terrible old deal', which depends entirely upon the exploited and degraded workers Nor do we want the world to enter to an even worse stimulus package, a terribly real menace as government agencies and organisations around the globe continue to promote their own aspirations in order to profit from the primary consideration for public health and the economic recovery.

The migrant workers just want to be accepted and appreciated as working people who contribute to society. They want proper social protection, both social security insurance and their livelihood activities that are integrated and supported in the local economic development and urban plans. There is however a real threat to the reversal of the gains made by informal workers during months of conflict. In cities worldwide, informal workers are faced with increased violence and police harassment, dislocation from sources or sales, and increased prejudice and social exclusion as integers of the virus.

India had already seen indications of what is 'worse' for the labour force in the country. Over 15 state governments in India have called for the suspension of labour welfare laws in the name of the virus recovery. Corporations in India have required 12 hours of working days in the

name of public health measures. Larger companies have been pushing for investment and turnover in quality as medium-sized businesses to build upon stimulus plans for micro and SMBs.

Various possible scenarios could take place for these poor and disadvantaged street vendors - First, to return to the old bad scenarios and second, the setback of pre-Covid improvements made by these labours, if any and lastly, post Covid restructurings to guard their earnings and rights which largely depends upon the national, state and local governments as they are vested with the choice to defend the justices of these underprivileged urban population, only the inequality and poverty could be reduced.

6. CONCLUSION

While this situation requires urgent action in respect of human rights to contain the pandemic, it highlights fundamental structural problems in our society, resulting in exclusion, violence and injustice. Violations of human rights and therefore pandemics generation go hand in hand. Consequently, the pandemic also involves government policies that change the organization and operation of our societies fundamentally.

The unprecedented situation of COVID has paved the way for innovation and problem-solving solutions. The digital initiative of PMSVANidhi and MoU with Swiggy are the positive steps for the ignored street vendors of the country. Though Covid has created a havoc for the vendors but looking at the other side of the coin, their miseries became noticeable and they became the talk of the town.

These initiatives would not only make a financial inclusion for them during this digital economy but would also help in their recognition, formalization and better implementation of exclusively passed legislation the Street Vendors, Act 2014 so they might not remain invisible and illegal anymore.[19] The implementing of all provisions of the Act has long lasting advantages transcending access by communities to products and allowing towns and native entities to increase their own income by collecting taxes and costs through official channels.

19. *Supra* note 15.

COVID-19, NOT A BLANK CHEQUE TO DO AWAY WITH LABOUR LAWS: A CASE COMMENT ON *GUJARAT MAZDOOR SABHA* V. *STATE OF GUJARAT*

Mr. Pruthvirajsinh Zala & Ms. Aashvi Shah

1. INTRODUCTION

As a response to Covid-19 crisis, the States have been using 'financial exigencies' as a foreground to be apathetic towards the value of an Indian labour's life by compromising their basic rights[1]. At the altar of public health, welfare and livelihood of a significant labour workforce continue to be sacrificed. Relaxation of labour laws during the pandemic times has only worsened the already vulnerable section of the International Labour Organisation's ('ILO') tripartite dynamics,[2] to which India is a state party. The current legal framework puts an obligation on all the three organs of the Indian Democracy to ensure social and economic security[3] to the labour force. These laws are the direct result of India's ILO obligations, constitutional promises under Article 23,[4] Article 24[5] as well as broad social values.[6] Decades of jurisprudential dialogues[7] and legal battle[8] to

1. "Hard Labour: Supreme Court Quashes Gujarat Fiat on Extra Work Hours" (Financial Express, 2-10-2020) <https://www.financialexpress.com/industry/hard-labour-supreme-court-quashes-gujarat-fiat-on-extra-work-hours/2096294/> accessed 22-1-2021.
2. "Tripartite Constituents" <https://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.html> accessed 23-1-2021.
3. Employment & Labour Law 2020 <https://www.globallegalinsights.com/practice-areas/employment-and-labour-laws-and-regulations/india> accessed 26-1-2021.
4. Constitution of India, Art. 23.
5. Constitution of India, Art. 24.
6. Dr. Minal H. Upadhyay, "Industrial Labour Laws with Reference to Directive Principles of State Policy" (2014) 2 International Journal of Research in Humanities and Social Sciences 29.
7. 'Karachi Resolution 1931' (Constitutionofindia.net) <https://www.constitutionofindia.net/historical_constitutions/karachi_resolution__1931__1st%20January%201931> accessed 26-1-2021.
8. S.I.A. Muhammed Yasir, "Labour Legislation in India – A Historical Study" (2016) 6 Indian Journal of Applied Research 34.

ease the struggles of this working-class is compromised yet again in the name of unprecedented times.

Dr. Ambedkar quite aptly questions, 'how many have to relinquish their constitutional rights in order to gain their living? How many have to subject themselves to be governed by private employers?'[9] This case further makes us ponder that in light of the double jeopardizing exploitation during the pandemic, isn't state's notification an epitome of Hobson's choice?[10] The alarming need for rethinking the role labour law framework in a constitutional democracy has been one of the key takeaways from the judgment penned by the three-judge bench of the Indian Supreme Court in *Gujarat Mazdoor Sabha* v. *State of Gujarat*[11]. Judicial efficiency and pro-worker statutory changes positively reinforce the degree of social protection.[12] The usage[13] of Article 142(1) by Justice Chandrachud to grant retrospective double wages to the workers is an embodiment of this judicial efficiency.

2. BACKGROUND

2.1. Facts

Gujarat government soon after the national lockdown on 17th April 2020 issued a notification[14] under Section 5[15] the Factories Act, 1948. The notification suspended the obligations of the factory employers towards the workers in lieu of the economic turmoil as a result of the COVID-19 pandemic. The object of the notification as substantiated by the government[16] was to address the financial hardships suffered by the industrial employers. The notification in effect enabled employers to increase the working hours of the workers, curtail rest period, and slash overtime pay by a significant amount. The notification directed as follows:-

9. B. Shiva Rao, *The Framing of India's Constitution*, Vol. 2 (Universal Law Publishing 2015) 100.
10. *People's Union Democratic Rights* v. *Union of India*, (1982) 3 SCC 235.
11. *Gujarat Mazdoor Sabha* v. *State of Gujarat,* (2020) 10 SCC 459.
12. Sonja Fagernäs, "Labour Law, Judicial Efficiency, and Informal Employment in India" (2010) 7 Journal of Empirical Legal Studies 282.
13. *Supra* note 11, para 50.
14. *Id.*, para 2.
15. Factories Act, 1948, S. 5.
16. *Supra* note 11, para 1.

> *" ...(1) No adult worker shall be allowed or required to work in a factory for more than twelve hours in any day and Seventy Two hours in any week.*
>
> *(2) The Periods of work of adult workers in a factory each day shall be so fixed that no period shall exceed six hours and that no worker shall work for more than six hours before he has had an interval of rest of at least half an hour.*
>
> *(3) No Female workers shall be allowed or required to work in a factory between 7:00 PM to 6:00 AM.*
>
> *(4) Wages shall be in a proportion of the existing wages (e.g. If wages for eight hours are 80 Rupees, then proportionate wages for twelve hours will be 120 Rupees)."*[17]

Initially, the notification was supposed to run until 19 July but was eventually extended to 19 October. The state's notification was challenged by two trade unions representing thousands of workmen in factories spread across the state of Gujarat as well as the country. A petition was filed before the Hon'ble Supreme Court of India under Article 32 of the Indian Constitution, challenging the validity of notification and its extension.

2.2. Issues

The court did not explicitly narrow down its scope by underlining specific issues, however, the following issues are extracted from the judgment by the authors:

1. Whether the state's notifications fulfils the condition precedent of Section 5 of the Factories Act?
    a. Whether the COVID-19 pandemic and the nationwide lockdown qualify as a 'public emergency' as defined in Section 5
    b. Whether financial exigencies qualify as 'Internal Disturbance' in the state?
    c. Whether the security of India was under threat?

17. *Supra* note 11, para 2.

2. Whether the notifications aligned with the larger objectives of the factories act and constitutional provisions?

3. ANALYSIS

'Emergency powers' or 'public emergency' denotes a 'suspension of or departure from legal normality in response to a political, economic or social crisis'.[18] According to Miller, an emergency is not only a result of urgent compelling condition(s) but also a result of the so-called perception of the political wing (often the executive alone) that exceptional actions are necessary for the well-being of the state at large.[19] Many philosophers have emphasised the importance of preservation of the state. For instance, Spinoza termed it as the 'chief good',[20] while Rousseau observed that the 'primary intention' of the people ought to be that the 'state should not perish'.[21] Whereas, according to Hobbes the Commonwealth as an institution itself will be in vain if its members do not have the 'purpose or the courage to preserve'[22] it. Locke also asserted that the end goal of power is 'preservation of all'.[23] Machiavelli termed *republic* as 'good' based on its longevity,[24] while Aristotle cautioned that 'far greater difficulty is the preservation'[25] of democracy. Carl Schmitt famously said that in the declaration of the 'state of exception' it is the sovereign 'who decides on the exception'.[26] In different constitutional jurisdictions, the existence of

18. D. O'Donnell, "States of Siege or Emergency and their Effects on Human Rights: Observations and Recommendations of the ICJ" (U.N. Doc E/CN 4/Sub 2/NGO 93) (August 1981).
19. Arthur S. Miller, *Democratic Dictatorship: The Emergent Constitution of Control* (Greenwood Press 1981) xiii.
20. B.D. Spinoza, *Tractatus Theologico-Politicus: A Critical Inquiry Into the History, Purpose, and Authenticity of the Hebrew Scriptures; with the Right to Free Thought and Free Discussion Asserted, and Shown to be Not Only Consistent But Necessarily Bound Up with True Piety and Good Government* (R.H.M. Elwes trans., 1862) 204.
21. Jean Jacques Rousseau, *Social Contract* (Ernest Rhys ed., G.D.H. Cole trans., 1923) 109.
22. Thomas Hobbes, *Leviathan* (Micahel Oakeshott ed., 1946).
23. John Locke, *Second Treatise on Civil Government* (J.W. Gough ed., 1948) 80.
24. Niccolò Machiavelli, *Discourses on The First Decade of Titus Livius* (Ninian Thomson trans., 1883) 19-22
25. Aristotle, *Politics* (Benjamin Jowett trans., OUP 1885) 196.
26. Carl. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, Vol. 5 (G. Schwab trans., MIT Press, 1985).

such powers have not been contingent on the express constitutional text[27] and desirability of such express emergency powers is still debated.[28]

While the jurisprudential understanding of emergency powers and its underlying cause is elucidated above, now we shall discuss the extent of such powers in the context of this judgment.

While sovereign may decide what amounts to 'exception' according to Schmitt,[29] the Factories Act unambiguously lays down the exceptional conditions of what amount to 'public emergency'. Explanation to Section 5 reads as follows:

> *"For the purposes of this section "public emergency" means a grave emergency whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance."*[30]

The explanation draws precise boundaries by adopting a cause and effect structure. The court's observation of the lack of expression 'subjective satisfaction' in Section 5 is correct and vital.[31] In effect, the State ought to show objectively on what basis it concluded that COVID-19 amounts to 'public emergency'. Explanation to section 5 lays down the following condition precedent for a situation to amount as 'public emergency': (i) existence of a "grave emergency"; (ii) the said emergency threatens the security of India or of any part of its territory; and (iii) the cause of such threat must be war, external aggression or internal disturbance.

The court correctly dismissed the state's argument that COVID-19 amounts to a grave public emergency caused by 'internal disturbance'. Even though the State relied[32] on Sarkaria Commission report[33] to support

27. K.L. Scheppele, "North American Emergencies: The Use of Emergency Powers in Canada and United States" (2006) 4 International Journal of Constitutional Law 213; Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing 2018) 19-21.
28. Stephen I. Vladeck, "Emergency Power and the Militia Acts" (2004) 114 Yale Law Journal 149, 190-92.
29. *Supra* note 26.
30. *Supra* note 15.
31. *Supra* note 11, para 9.
32. *Supra* note 11, para 28.
33. Report of the Sarkaria Commission <http://interstatecouncil.nic.in/report-of-the-sarkaria-commission/> accessed 26-1-2021.

its proposition that an 'epidemic' can be termed as 'internal disturbance', the court strictly scrutinised the construction of the explanation clause and held that pandemic induced socio-economic effects do not amount to 'internal disturbance threatening the security of the state'.[34] It is also pertinent to note that the explanation clause to section 5 was included through an amendment,[35] in effect, restricting the usually unbridled and uncontrolled executive powers.

Court's narrow approach was not merely in the backdrop of the statutory language but was also coupled with the examination of all phrases of explanation clause through Constitution's emergency provisions,[36] other legislations,[37] precedents,[38] and the principle of *noscitur a sociis*. The court contextually interpreted the concept of 'internal disturbance', keeping in mind the historical and constitutional lessons of the emergency.[39] By applying the principle of *noscitur a sociis*, the court held that the term 'internal disturbance' cannot be understood in isolation and must be contextually analysed in light of the two expressions which precede it and its gravity thereof.[40] Therefore, due to the lack of public order disruption and security threat the court rightly held that the state cannot take recourse to emergency powers under section 5.

The strict and narrow interpretation of the usually broadly construed terms like 'public emergency', 'internal disturbance' and 'security of the state' by the court is an effective check and balance on the unrestrained executive powers. Separation of powers principle envisions that the judiciary ought to be a check on arbitrariness and aggrandizement by the other branches of government.[41] The fundamental constitutional limitation on executive action and primary protection against excessive executive action emanates from the principle that all executive actions "comport with the terms set in legislative directives."[42] The increased

34. *Supra* note 11, para 30.
35. Factories (Amendment) Act of 1976.
36. *Supra* note 11, para 13 and 15.
37. *Supra* note 11, para 20.
38. *Supra* note 11, para 16-17, 22 and 23.
39. *Supra* note 11, para 13.
40. *Supra* note 11, para 20 and 21.
41. Richard H. Fallon Jr "Of Legislative Courts, Administrative Agencies, and Article III" (1988) 101 Harvard Law Review 915, 978.
42. Harold J. Krent, 'Separating the Strands in Separation of Powers Controversies' (1988) 74 Virginia Law Review 1253, 125.

threshold of judicial review by the court compared to the usual deferential review standard[43] is appreciable and constitutionally required.

The guarantees of the Factories Act are an acknowledgement of the unequal bargaining power of the employers and is envisioned to serve as a palisade against exploitative and harsh working conditions and wages.[44] The respondent State's argument that the impugned notification shall be understood w.r.t. the 'extreme financial exigencies arising due to the spread of COVID-19 pandemic'[45] is antithetical to the constitutional vision. To say that the State has adopted 'a holistic approach to maintain the production and adequately compensate workers'[46] will be a highly problematic proposition. The ever-widening executive powers cannot undo the long-fought labour guarantees at the altar of financial exigencies and COVID-19.

By locating the guarantees of just wages and working conditions in the historical context of a 'long struggle of worker unions',[47] the court recognized the very backdrop of the enactment and the struggle in achieving the labour rights. The court's use of Directive principle as interpretive tools coupled with the application of the fundamental right of dignity and right against forced labour leads to strengthening the constitutional foundation underlying the judgment.

The perceived stage of exception and public health emergency is not to jettison all methods of constitutional scrutiny. It is incumbent upon a court at the very least to decipher and test the rational basis of the state action on the anvil of its least intrusiveness of rights & guarantees. The court's application of the proportionality principle[48] to test the restrictions on worker protections is both logical and laudable. By applying the conditions

43. Gautam Bhatia, "Coronavirus and the Constitution – XXXVII: The Pandemic, Labour Rights, and the Supreme Court's Judgment in Gujarat Mazdoor Sabha" (1-10-2020) <https://indconlawphil.wordpress.com/2020/10/01/coronavirus-and-the-constitution-xxxvii-the-pandemic-labour-rights-and-the-supreme-courts-judgment-in-gujarat-mazdoor-sabha/> accessed 20-1-2021.
44. *Supra* note 11, para 32.
45. *Supra* note 11para 37.
46. *Ibid.*
47. *Supra* note 11, para 31.
48. *Modern Dental College and Research Centre* v. *State of M.P.*, (2016) 7 SCC 353, para 157; *Anuradha Bhasin* v. *Union of India*, (2020) 3 SCC 637, para 74; *Internet and Mobile Assn. of India* v. *Reserve Bank of India*, (2020) 10 SCC 274; *K.S. Puttaswamy* v. *Union of India*, (2019) 1 SCC 1; *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1.

of legitimate goal, rational connection, necessity and disproportionate impact, the Court holds that the impugned notification falls foul of the proportionality test:

> *"The impugned notifications do not serve any purpose, apart from reducing the overhead costs of all factories in the State, without regard to the nature of their manufactured products. It would be fathomable, and within the realm of reasonable possibility during a pandemic, if the factories producing medical equipment such as life-saving drugs, personal protective equipment or sanitisers, would be exempted by way of Section 65(2), while justly compensating the workers for supplying their valuable labour in a time of urgent need. However, a blanket notification of exemption to all factories, irrespective of the manufactured product, while denying overtime to the workers, is indicative of the intention to capitalize on the pandemic to force an already worn-down class of society, into the chains of servitude."*[49]

The importance of guaranteed overtime pay is traced through its socio-economic value and the underlying transformative constitutional vision.[50] In a welfare state, the employment guarantees are not merely a private affair of the employee and employer. The very philosophy underlying the directive principles[51] propounds that the state also ought to be responsible for the prevention of exploitation and guaranteeing conditions conducive to safe and healthy work.[52] Recognizing the extra energy and the resultant strain on the health of the workers due to overtime, it has been held in *Y.A. Mamarde* v. *Authority under the Minimum Wages Act*[53] that overtime wages cannot merely be confined to 'confined to double the minimum wages fixed but may justly be fixed at double the wages ordinarily received by the workmen as a fact'.[54]

Double rates of wages for overtime work were not always guaranteed and are based on the rationale of social welfare.[55] The enactment of

49. *Supra* note 11, para 38.
50. *Supra* note 11, para 39.
51. Constitution of India, Arts. 38-39 and 43.
52. *Bhikusa Yamasa Kshatriya (P) Ltd.* v. *Union of India*, AIR 1963 SC 1591, para 9.
53. *Y.A. Mamarde* v. *Authority under the Minimum Wages Act*, 1972 2 SCC 108.
54. *Id. :* , para 13; *Supra* note 12, para 41.
55. *Supra* note 11, para 43.

anti-exploitation legislation is a result of the prolonged struggle of the working class.[56] The double wages for overtime is recognition of the practically undeniable, inherent and severe inequalities between the working class and the management. The management or in this case the state (in effect) cannot by using its exploitative bargaining powers force the workers to contract out of the double wages guarantee. It is obvious that if such vital guarantees can be done away with through a contract or notification at the behest of the employer or the state, then the 'whole object with which these provisions have been enacted will be frustrated.'[57]

Addressing a pandemic or the resultant economic turmoil vis-a-vis labour welfare guarantees is indeed a difficult balancing task. However, such balancing cannot be sans constitutional vision and rule of law.[58] COVID-19 pandemic ought not to be a 'blank check'[59] for the executive enabling them the lee-way to disregard constitutional guarantees of dignity and equity. Any such restrictions and exemptions shall be strictly scrutinized when judicially reviewed on the anvil of proportionality and permissible statutory limits.

Indian Constitutional vision is not restricted to transfer of political power and the political freedoms, but is also a wheel furthering and envisioning socio-economic justice - a "labour's constitution of (economic)[60] freedom."[61] Justice Chandrachud eloquently refers[62] to Granville Austin[63] and Prof. Upendra Baxi,[64] as he notes the vitality of directive principles of state policy in guiding state action.

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56. *ITC Ltd.* v. *Regional Provident Fund Commr.,* 1986 SCC OnLine P&H : ILR (1988) 1 P&H 73, para 27.
57. *Hindustan Machine Tools Ltd.* v. *Labour Court*, 1993 SCC OnLine Raj 17 : (1994) 1 LLN 256, para 6.
58. *Supra* note 11, para 40.
59. *Calvary Chapel Dayton Valley* v. *Sisolak,* 2020 SCC OnLine US SC 10 : 591 US_(2020).
60. Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Harper Collins, 2019).
61. James Gray Pope, "Labor's Constitution of Freedom" (1997) 106 Yale Law Journal 941.
62. *Supra* note 11, para 44.
63. Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP 1966) 63.
64. Upendra Baxi, '"The Little Done, The Vast Undone"- Some Reflections on Reading Granville Austin's "The Indian Constitution"' (1967) 9 Journal of Indian Law Institute 366-67.

The Supreme Court in *People's Union Democratic Rights* v. *Union of India*[65] ("PUDR") held:

> *"...And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly "forced labour". (...) It is not rare that in a capitalist society economic circumstances exert much greater pressure on an individual in driving him to a particular course of action than physical compulsion or force of legislative provision. The word "force" must therefore be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leaves no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage."*

Applying the seminal transformative interpretation of 'free' and 'force' in terms of Article 23 as laid down by Justice Bhagwati in PUDR,[66] the state enabled exploitation in the name of economy and pandemic amounts to forced labour. The promises of freedom and dignity will be mere lip service if allowed to be done away with 'by the immensity of economic coercion'.[67]

It is vital to note that during the time of the issuance of the impugned notification, the lockdown had resulted in a grave migrant labour crisis[68] leading to the abandonment of work, shelter and income and causing a mass exodus of workers across the country.[69] State, by giving the factories a free hand of exploitation and extracting toilsome work without just remuneration, derecognises the very dignity of workers in the times where the already less bargaining power is at a worse pedestal.

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65. *People's Union Democratic Rights* v. *Union of India,* (1982) 3 SCC 235.
66. *Ibid*, para 14.
67. *Supra* note 11, para 45.
68. *Supra* note 11, para 46.
69. "4 Crore Migrant Workers in India; 75 Lakh Return Home so far: MHA", (*The Tribune*, 23-5-2020) <https://www.tribuneindia.com/news/nation/4-crore-migrant-workers-in-india-75-lakh-return-home-so-far-mha-88940> accessed 24-1-2021.

The judgment highlights[70] the discretion incorporated by the constitutional framers in terms of allowing different paths to reach economic democracy.[71] However, it aptly notes that any such path cannot be sans the vision of socio-economic welfare. Emphasising the importance of the word 'strive' in Article 38 Dr. Ambedkar had said, "..that is why we have used the word 'strive'". Otherwise, it would be open for any Government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go."[72]

The judgment emphatically notes that while 'judicial review is justifiably held off in matters of (...) economic policy (...) but the Directive Principles of State Policy cannot be reduced to oblivion by a sleigh interpretation.'[73] The judgment is not only constitutionally sound in terms of its effective reading of the Constitution, but it is also logically apt due to its considerations of ground realities. There can be no doubt that without recognizing the worker's practical hardships, there can be no 'sentinel on the qui vive'.[74] This case aptly showcases that the non-apparent connection between liberty and economic structure is indeed real and apparent.[75]

4. CONCLUSION

Labour-power is never disembodied and when an employer buys 'labour-power', he enables his command, and in effect buys the worker and his labour.[76] This proposition of limitless subordination and servitude can never be termed involuntary and free[77] and is antithetical to the constitutional guarantees and vision! The impugned notification of the state, to a certain extent, enables the imposition of this dangerous and unconstitutional proposition. Unprecedented disruption of worker rights guarantees in the garb of economic turmoil serves as a harrowing reminder of state excess,

70. *Supra* note 11, para 47.
71. *"Constituent Assembly Debates*" (Dr B.R. Ambedkar speech on November 19, 1948, Volume 7 Parliament of India) <http://164.100.47.194/Loksabha/Debates/Result_Nw_15.aspx?dbsl=169> accessed 26 January 2021.
72. *Ibid.*
73. *Supra* note 11, para 48.
74. *State of Madras* v. *V.G. Row,* AIR 1952 SC 196.
75. *Supra* note 10, para 84.
76. Carole Pateman, *The Sexual Contract* (Cambridge University Press 1988) 151.
77. Robert Steinfeld, *Coercion, Contract and Free Labor in the Nineteenth Century* (Cambridge University Press 2001) 271; also *see* also *Supra* note 65.

where long fought guarantees of dignity, just overtime wages, and humane working conditions etc. become the collateral damage.

The framers of the constitution were aware of the deep rootedness of societal inequalities and envisioned that the constitution will act as the transformative tool of change. The executive or majoritarian government cannot ignore the same and undo the inalienable human rights with the *Farman* of notification. The strict scrutiny and higher standard of judicial review of executive action by the court recognise that 'amidst the clash of arms the laws are not silent'.[78] The judgment reinforced that the directive principles are not mere 'parchment barriers'[79] but are significant interpretive guides.[80] Directive Principles envision *economic democracy* and lay the structural foundation for understanding fundamental rights.[81]

The judgment shall play a critical role in the evolution of constitutional doctrine and averting the snowball destruction of democratic institutions and fundamental freedoms, which is often birthed from a state of emergency. By adopting a contextual, narrow, purposive and transformative approach, the judgment elevated the worker rights protections to the status of constitutional and human rights. Such vigilant judicial review from an effective judicial wing is significantly needed if the fundamental rights and freedoms, especially of the weaker sections, are to be effectuated both in letter and spirit. In the times where the Supreme Court often chooses to evade[82] or

78. *Liversidge* v. *Anderson*, 1942 AC 206, 244.
79. James Madison, "The Federalist Papers: No. 48" (1788) <https://avalon.law.yale.edu/18th_century/fed48.asp> accessed 26-1-2021.
80. *Regional Provident Fund Commr.* v. *Hooghly Mills Co. Ltd.,* (2012) 2 SCC 489; *S. Subramaniam Balaji* v. *State of T.N.,* (2013) 9 SCC 659.
81. Gautam Bhatia, "Directive Principles of State Policy: Theory and Practice" in Sujit Choudhry et al., (eds), *Oxford Handbook for the Indian Constitution* (Oxford University Press 2015).
82. Gautam Bhatia, "Payment of Wages and Judicial Evasion in a Pandemic" (12-6-2020) <https://indconlawphil.wordpress.com/2020/06/12/coronavirus-and-the-constitution-xxxii-judicial-evasion-in-a-pandemic/> accessed 26-1-2021; Gautam Bhatia, "Judicial Evasion and the Electoral Bonds Case' (13-4-2019) <https://indconlawphil.wordpress.com/2019/04/13/judicial-evasion-and-the-electoral-bonds-case/> accessed 26-01-2021; Gautam Bhatia, "Judicial Evasion, Book Bans and the unreasoned order" (21-9-2017) <https://indconlawphil.wordpress.com/2017/09/21/judicial-evasion-book-bans-and-the-unreasoned-order/> accessed 26-01-2021; Gautam Bhatia, "The (Continuing) Doctrine of Judicial Evasion in the Aadhar Case" (*indconlawphil*, 9-5-2017) <https://indconlawphil.wordpress.com/2017/05/09/the-continuing-doctrine-of-judicial-evasion-in-the-aadhaar-case/> accessed 26-1-2021.

abdicate[83] its duty of judicial review, the present judgment is a ray of hope. The judgment will form an important precedent as it will guide the future benches on how to review executive actions during such mishap or pandemic while according a significant place to the constitutional vision. It reinstates faith in the judiciary and demonstrates how the checks and balances can be implemented with a citizen-centric approach. Amidst a scenario of threat and survival, assuring the basic human rights and dignity to the labour class and not letting them be at the mercy of state is a reiteration and affirmation of the constitutional promise.

83. *Foundation for Media Professionals* v. *UT of J&K,* (2020) 5 SCC 746; Nishin Shrikhande and Sohini Banerjee, "The Supreme Court's order in the Jammu & Kashmir 4G Case: Judicial Abdication?" (*Bar and Bench*, 3-6-2020) <https://www.barandbench.com/columns/jk-4g-order-supreme-court> accessed 26-01-2021; Gautam Bhatia, "The Supreme Court's 4G Order: Evasion by Abnegation" (11-5-2020) <https://indconlawphil.wordpress.com/2020/05/11/the-supreme-courts-4g-internet-order-evasion-by-abnegation/> accessed 26-1-2021; Arvind Datar, "The Dangers of Outsourcing Justice" (*Bar and Bench*, 7-6-2020) <https://www.barandbench.com/columns/the-dangers-of-outsourcing-justice> accessed 25-1-2021.

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