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Message from Vice Chancellor

The NUJS Journal of Regulatory Studies has been conceived as a premier journal for publication of research in the field of law and public policy. In an increasingly data driven world, public policy oriented research centred on thorough theoretical concepts with the analysis of empirical data is imperative. This journal aims to provide a platform for innovative researchers whose data driven research creates knowledge that is conducive to the creation of long term strategies and goals for policymakers in India and abroad. The Centre for Regulatory Studies, Governance and Public Policy (CRSGPP) actively engages stakeholders for the formulation, analysis and oversight of public policy. This journal reflects the ethos of CRSGPP and reflects its commitment to democratic values, academic excellence and legal research of contemporary relevance. The Journal presently publishes articles on issues of national and international relevance in consonance with the aforementioned objectives. I hope that CRSGPP continues to enlighten the legal fraternity, policymakers as well as members of the public as it continues its journey of excellence and innovation.

-Prof. (Dr) N.K. Chakrabarti

Editor's Note

The NUJS Journal of Regulatory Studies started its journey in 2016 to promote legal research focusing on policy formulation. In 2019, the journal gets a new dimension with the priority inclusion of cutting edge empirical research papers from across Asia.

The new board of editors accompanied by a robust peer review team gives the journal the much needed international status. Additionally, the new shape of this open access online journal authorizes the access of the entire edition as a single file.

The journal explores through its research papers the various challenges and highlights various human rights issues. The platform of NUJS Journal of Regulatory Studies provides the young minds to find solutions beyond convention and also gives the right impetus to the centre to explore avenues to recommend such policy formulation to the concerned forum.

I am really thankful to the authors for such vivid contribution. I also take this opportunity to thank the esteemed members of the Advisory Board, Editorial Board, Peer Reviewers and my entire team who has worked relentlessly to finish the work in time.

-Dr. Shambhu Prasad Chakrabarty
Head and Research Fellow

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Message from Vice-Chancellor

Editor's Note

CONTENTS

JUDICIAL ACTIVISM ON SUSTAINABLE DEVELOPMENT: DAWN OF INDIAN ENVIRONMENTAL JURISPRUDENCE

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Abstract

Concern with the forest took shape with the Forest (Conservation) Act 1980. Until 1927 forest was a national asset and properly of the State. The Britishers in 1894 realized the tremendous commercial potentiality of the forest. They formulated a Forest Policy in 1894 where in trade in timber and forest produce was encouraged as a means of earning revenue for the state. This approach was rejected in 1955 Forest Policy. The shift from commercialization to conservation occurred in 1988 Forest Policy. The period from 1894 to 1988, almost a century, is the story of abuse and vendalization of forest. As a result by 1988 the nation was acutely conscious of forest depletion and the resultant climate change, biodiversity change, desertification, fall in ground water level, so on and so forth. Urgent and immediate intervention on war footing was required to protect forest. It was only 1995-1996 the Supreme Court systematically dealt with the issue of deforestation and from 1995 - 2004 has laid down guidelines, looked at a large number of Interlocutory Application and addressed the concerns of each constituent States of the Union of India.

KEYWORDS: Environment, Sustainable Development, Forest, Tribal, Court, Jurisprudence

Coining of Sustainable Development and Judicial Activism: The first phase

Honourable Justice Krishna Iyer sowed the seed of sustainable development in India in his famous judgement in Ratlam Municipality vs. Vardhichand[1]. The Apex Court held that the municipality cannot deny the performance of its statutory duties, under Section 123 of the M.P. Municipalities Act, 1961 to clean and dispose dirt and rubbish from the public areas, owing to budgetary constraints. In the instant case, a residential area under Ratlam Municipality was anguished by stinky filths in open drains from the nearby alcohol factories and excreta of the nearby slum dwellers. The Apex Court further stated that right to live with dignity and decency is an inseparable facet of human rights and it is the statutory obligation of the municipalities to promote public welfare and health regardless of financial insufficiency. And in this context, the Supreme Court

[1] AIR 1980 SC 1622

stroke the perfect balance between human development and preservation of the decent environment as sustainable development being an integral part of human rights.

A similar view was also taken in another landmark judgement Dr. B. L. Wadhera vs. Union of India[2], wherein the Supreme Court emphasized that the people of Delhi holds statutory rights to live in a clean and decent environment and Delhi Municipality has the statutory duty to keep the city clean by scavenging all the garbage from different sources irrespective of any budgetary constraints. It implies that right to live in decent environment is our basic human right as enshrined in Universal Declaration of Human Rights 1948 and our fundamental right too under Article 21 of the Indian Constitution. Residing in a civilized society implies right to decent food, water, air, education, environment, shelter, medical care and education.

Thereafter, there were a series of landmark cases wherein the Court upheld the concept of sustainable development in the judgements of each case. In Vanwasi Sewa Ashram vs. State of Uttar Pradesh[3], the dispute was related to a forest land inhabited by the tribal people of the Mirazapur districts who had converted a considerable part of the forest as cultivable land for their living and the State Government was of the opinion to set up thermal plant. A series of criminal proceedings and eviction cases were instituted against the tribal people and finally the Court appointed a Board of Commissioners who had to ensure the implementation of the order of the Court and keep proper records wherein Court did justice to both the parties, firstly the tribal people were not dispossessed from the forest area as they were dependent on forest products for ages but at the same time they were not allowed to deplete forest anyhow and on the other hand keeping in mind the need and significance of thermal energy, the Court allowed the construction of thermal plant with minimal disturbances to the tribal people.

In the year 1987, the Supreme Court came up with another landmark judgement which was a revolutionary step for the protection and preservation of the environment and human rights as well. M.C.Mehta threw light on the significance of 'no fault liability standards' and a new principle was introduced as' absolute liability'. The Apex Court held that industries who were handling hazardous substances within their premises in their manufacturing process which poses a potential threat to human beings and environment shall undertake the highest standard of care and precaution that no harm

[2] AIR 1996 SC 2969

[3] AIR1987 SC374

is caused them. And in case of any unfortunate accidents the industries shall undertake the absolute liability of the loss caused and compensate both the human beings and environment as a part of their social cost. In this way, the Supreme Court once again upheld the principle of sustainable development.[4]

In Narmada Bachao Andolan vs. Union of India[5], a writ petition was filed against the construction of dam over River Narmada named as Sardar Sarovar Project. Undoubtedly, the project would displace a large amount of tribal people of that area but if they are relocated with dignity then there would be no violation of their rights. Moreover, the benefits of the construction of dam could not be neglected, there is no such use of nuclear reactor which might pose threat to the ecology. The Apex Court invoked the precautionary principle and principle of sustainable development by ascertaining how far the development could be sustained by mitigating the risks to the ecologically balance naturally.

The Supreme Court in M.C. Mehta vs. Union of India[6], stated that any mining activity will not only comply Mines and Minerals (Regulation and Development) Act but also other environmental statutory enactments such Environment (Protection) Act, 1986, The Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981 and Forest (Conservation) Act, 1980 so as to prevent any anticipatory harm to the environment and irreversible consequences. Furthermore, there must be a master plan proposing restoration plans for any environmental degradation. In this case, the Court allowed the mining activities under three conditions firstly, the activities must comply with the strict conditions of sustainable development, secondly, even after the compliance if any ecological degradation or imbalance is caused at Aravalli Range, there would be a complete closure of mining activities, thirdly, no mining activities or pumping of water table should be done within 5 kilometres of Delhi and Haryana border.

The Supreme Court in Samatha vs. State of Andhra Pradesh[7], pointed out that leasing land in possession of tribal people for mining to private industries or non-tribal people is a clear violation of rights of the tribal people under Fifth Schedule of the Constitution. Furthermore, it is the duty of the Gram Sabha to conserve community resources by reiterating the right of self-governance of the tribal people. The Court directed to issue title deed immediately to the tribal people in

[4] M.C. Mehta vs. Union of India , AIR1987 SC1086
[5] AIR 2000SC 3751
[6] AIR 2004 SC 4045
[7] AIR 1997 SC 3297

possession of the land and directed that mining activities in those areas can be initiated by the Andhra Pradesh State Mineral Development Corporation in co-operation with the tribal community. The Court opined that it is the Constitutional duty of the executive to protect and preserve the social, economic and educational rights of the tribal people.

In M. C. Mehta vs. Kamal Nath[8], the Supreme Court had rested its judgement on the Doctrine of Public Trust and pointed out that there are certain natural resources like air, water and forest cover which holds immense significance to human beings or society as a whole and must be made available to all irrespective of any status, thereby, commercializing these natural resources or subjecting them to any private ownership would be unjustified and improper. In the instant case, the government had leased Motel Company the large river basin of River Beas which was also a protected forest cover and ecologically fertile land for commercial purpose which was held to be a violation of the Doctrine of Public Trust.

In V. Lakshmipathy and Others vs. State of Karnataka[9], without any official conversion of land from residential area to industrial area, the State Government had allowed to allocate industries in the said residential area with full access to water, electricity, sewage and others. The callous attitude of the Government clearly revealed non-feasance and lack of supervision of the controlling authority leading to betrayal of public interest. The Apex Court clearly outlined that once an area has been earmarked for residential purpose, it has to be used for that purpose only and no further conversion could take place and also ordered that the onus of proof would lie on the concerned authorities to prove that the environmental pollution was within permissible limits.

It is worth noting that the pro-environmental era started from 1987. The pro-environmental stand taken by the Indian judiciary lasted as long as two decades and thereafter there was paradigm shift. The Apex Court now emphasised on the concept of sustainable development to eliminate poverty and improve quality and promote wholesomeness of human life with due regard to ecological balance. Sustainable development now focused on the vivid extensive development of the ecology as a whole with minimal risk and mitigation plans.

Rising concerns for forest conservation and Judicial Activism: The second phase

[8] AIR 2000 SC 1997

[9] AIR 1992 Kant. 57

In the later phase, the growing population of the country demanded more of timber as prominent and immediate crisis. On one hand development was at stake and on other hand conservation of forest cover. Several pertinent questions on account of social, economic and constitutional aspects came up before the courts. Forest depletion was an on-going major concern for all as it not had its immediate effect on the society but also in the near future.[10] To this regard numerous rules were framed under the Indian Forest Act, 1927[11] to keep the saw mills, mines, infrastructural projects, dams and other timber encroachments within permissible limits of forest depletion. Again, environment being a subject of concurrent list, almost all the States have legislated their own laws. Too many laws and rules were creating confusion thereby either consolidating or streamlining them or harmonizing them was the need of the hour. The North-Eastern States in India being one of the major reserves of timber called for distinctive attention as they fell under the scope of Schedule VI of the Constitution.

During this phase, two landmark cases ushered a significant change in the environmental jurisprudence in India. The two cases Godavarman Thirumulpad vs. Union of India[12] and Environmental Awareness Forum vs. State of Jammu and Kashmir[13] together highlighted the raising concern for preservation and conservation of the forest cover. The Supreme Court accordingly extended this case to the whole of Indian and issued notice to all the secretaries of the States who were entrusted with forest and environment conservation duties to appear in the case, however, the repeated attempts of the Supreme Court failed to achieve its purpose and finally strict order was directed to the secretaries of the seven North Eastern States along with Kerela, Sikkim and Maharashtra to appear before the Apex Court.

In Environmental Awareness Forum vs. State of Jammu and Kashmir[14], Bekay Katha Pvt. Ltd. were engaged in the production of 'katha' which was a product of Khair tree. Prior the Court had exempted the feeling of trees for minor forest products and 'katha' being a minor forest product fell under this category. However, Additional Secretary of forest department pointed out that 'katha' being a minor forest product is manufactured from the woods of Khair tree which has also been categorized as timber therefore, the

[10] A "Jungle" is unplanned, uncontrolled and unregulated growth of trees, shrubs, creepers, undergrowth etc hosting a vast biodiversity. A "Forest" is a planned, organized, controlled growth of trees, plants etc.

[11] Indian Forest Act, 1927
[12] (1996) 9 S.C.R 982
[13] AIR 1999 SC 1495
[14] ibid

Court order identifying 'katha' as a minor forest product does not applies here. The Supreme Court was too was satisfied with the prima facie evidence and asked the managing director of the Bekay Katha Pvt. Ltd. to show cause why there has been a deliberate disobedience of the court's order and why no criminal proceedings should be initiated against them. In addition to this, the Apex Court ordered the Jammu and Kashmir State Government to reallocate the licensed band sawmills to the specified sawmill zones and submit a report thereby within six weeks and proceed with the demolition of the illegally set up unlicensed band sawmills. Moreover, the State Government must submit the affidavit stating the details of the movement of the quantity of timber outside the State boundaries within six weeks. The movement of timber would only be allowed outside the State boundaries for Railways, DGS and D and Defence purposes.

The Apex Court realized that there has been a misinterpretation of the term "forest" in a number of cases which needs to be interpreted immediately to avoid further misconception. The Court in Narmada Bachao Andolan vs. Union of India[15] widened scope of the term "forest" by including not only its dictionary meaning but also all statutorily recorded land as forest cover in any government records irrespective its ownership. The Court further stated that the provisions of Forest (Conservation) Act, 1980 would apply to all those recorded forest cover land and directed all the State Governments to immediately stop all such on-going activities in forest apart from those plans which have been approved by the Central Government. The order laid special emphasis to the State Government of all the North Eastern States, Tamil Nadu, Himachal Pradesh, Uttar Pradesh and Jammu and Kashmir even if such on-going projects have received the approval of the State Government or High Court or any other competent authority.[16]

In WWF-India vs. Union of India[17], the applicant pleaded for the permission for creating Asiatic Lion sanctuaries at Kuna as their second home, first being Gir National Forest, as they were at a verge of extinction. The appellant also assured fencing of the area and re-allocation of the villagers. The Court granting the permission reminded the Directive Principles of State Policy under Article 48A to protect and improve the environment and safeguard forests and wildlife, the Entry 17B of Seventh Schedule of the Constitution dedicated for protection

[15] AIR 2000 SC 3751

[16] T. N. Godavarman Thirumulpad vs. Union of India, (1996) 9 S.C.R 982

[17] WP 337 of 1995- This case concern the settlement of rights in National Parks and Sanctuaries……..

of wild animals and birds and our fundamental duty under Article 51A to improve natural environment and have compassion for living creatures. Furthermore, the Court ordered to ensure the prey ratio as the species do have equal rights to survive on earth, thus best standards must be ensured. Interpreting the sustainable development in this case the Court asked the environmentalists to identify the endangered flora and fauna and take immediate steps for their conservation by implementing recovery programmes. It was also highlighted by the Court the need of new legislation dedicated to the protection and preservation of the endangered species, both flora and fauna, before they become extinct.

In the year 1995, T.N. Godavarman, popularly known as the Green-Man of India, filed a writ petition in Supreme Court in order to bring into the notice of the Court the illegal felling of trees in the Nilgiri hilly regions and the justification of the use of timber for commercial purpose with due regard to the sustainable development. Godavarman being an environmentalist, his main concern was the conservation of forest land and maintain the ecological balance. This case had attracted a lot of critics due to the intervention of the judiciary into administrative matters. However, this case brought a revolution in the history of environmental jurisprudence and once again the Court reiterated the concepts of sustainable development, polluter's pay principles and precautionary principle. The Court made it loud and clear that the scope of judiciary would extend to all areas wherever the State would fail to perform its liabilities. This case widened the scope of Section 2, particularly the definition of forest land under Forest Conservation Act, 1980 followed by a hearing of full length National Forest Policy.[18]

The Apex Court constituted a High Power Committee (HPC) for ensuring the committed implementation of the orders. The Apex Court subsequently focused on the timber industries as well as tribal people who were dependent on forest products and thereby concluded that it is neither desirable nor feasible to stay the timber industries or interfere with the tribal rights. However, proper limits can be imposed so that there is no excess depletion. Additional requirements can be adopted such as demarcating industrial zones or reallocating the tribal people can be adopted to ensure non-depletion of the ecological balance. Furthermore, all the timber industries would require the permission of Ministry of Environment and Forest (MoEF) before

[18] T. N. Godavarman Thirumulpad vs. Union of India, (1996) 9 S.C.R 982

starting its operation. All unlicensed timber industries were directed to stop operating with an immediate effect and no State Government or Union Territory shall give permit of operation to such industries without the prior approval of the Central Empowered Committee. In addition to this, the Court directed the MoEF to draft guidelines regarding the disposal of timber and wood finished products as well within three months dated from May 2001. Another noteworthy point of the order of the Court was banning of movement and transportation of timber outside the North Easter State boundaries without prior approval of the HPC or MoEF so as to control the illegal trading of timber and its products. The HPC or MoEF shall issue printed water marked transit passes only for granting the permission. Besides these the order also included provisions for felling of tress at both forest areas as well as non-forest areas including plantations. The MoEF was entrusted with the obligation to ensure and approve within one month the guidelines and rules framed by all the State Governments regarding felling and plantation of trees which was to be submitted by them within three months from the date of order. The rules and guidelines must expressly include the manner of felling of trees, its disposal, regeneration as well as penalties. The Court order clearly stated that the felling of trees shall be done only in accordance to the Central Government approved State Government guidelines and until then no feeling of trees must occur. However, it must be assured that there are no budgetary constraints in regenerating the trees proportionate to the number of feeling of trees in the same area.[19]

Godavarman case, prevalently titled as the Forest Case in India, was not only confined to environmental issues but also extended its ambit to administrative issues. The Court realized that there is an urgent to control the illegal felling of tress especially in the North Eastern States. Thereby, the Court interpreted the expressions – "Reviewing Authority" and "Reporting Authority" to identify the competent person who could prepare the Confidential Report. The Chief Secretaries of the States were directed to identify those areas where illegal feeling of trees takes place and initiate criminal proceedings against those who were responsible for it including any officer who is found guilty having such knowledge. The forest department, defence, coast guards and the civil administration must work in coordination to prevent further illegal felling and movement of trees and instances of poaching. The Officers of forest department must be entrusted with additional powers to meet the threat of poaching under the Indian

[19] ibid

Forest Act, 1927. In addition to this, all officers of forest department and administration must undergo five days orientation training every three years to acquire knowledge on ecology with regard to its economic and social sustainability. Moreover, the forest and the administrative departments shall at the beginning of the year publish a proposed report on use of natural resources in that year and finally submit a report at the end of the year stating the actual use of the natural resources and reasons if there has been any deviation from the report proposed. The proposed report, Protected Area Management Plans and working plans must be made available to public access once they get approved.[20]

Godavarman aase and Judicial Activism: A critical appraisal

The critics pointed out that the Godavarman case had outreached its boundaries of judicial activism. In this case, the Supreme Court, being the guardian of the Constitution, had significantly violated the principle of separation of power by usurping to itself the legislative as well as executive functions of the State.[21] It had exercised the legislative function by banning the felling and transportation of timber and the executive functions by implementing its own orders and interpretations.[22] Instead of giving more stringent guidelines to the state and national bureaucracies for aligning their goals for better forest management, the Apex Court circumvented their authority and attempted to micromanage the country's entire forest management. In short, the Apex Court had restricted the responsibilities and independency of the bureaucracies.[23] Not only this, the court too had extended the assumption of its powers beyond the reasonable time frame. As per the Indian Constitution, the writ of mandamus neither has creative effects nor can be compelled against duties which have not been previously defined.[24] And in this case, the Court not only kept the case open for implementing its own powers but also practised 'continuing mandamus', which our Constitution does not warrants, to cloak itself for the continuance of the usurped law making functions and administration of the policies.[25]

[20] ibid

[21] Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 S.C.C. 441, 688; the Constitutional Obligation of the Judiciary Hon'ble Mr. J.S. Verma, Chief Justice of India, (1997) 7 S.C.C. (Jour) 1.

[22] Armin Rozencranz, Edward Boenig, and Brinda Dutta, The Godavarman Case: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests, 37 ELR 10032, http://www.eli.org Access Date: 16.6.2021

[23] Divan, as cited in Armin Rozencranz & Michael Jackson, The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power, 28 Colum. J. Envtl. L. 121 (2003).

[24] Mansukhlal Vithaldas Chauhan v State of Gujarat, (1997) 7 S.C.C. 622

[25] Armin Rozencranz, Edward Boenig, and Brinda Dutta, The Godavarman Case: The Indian Supreme

Another noteworthy critic of the case noted that the contribution of the tribal people in the protection and conservation of the forest were completely overlooked in this case. Many instances have shown the active participation of the tribal people in the conservation of the forest and their dedicated vigilance to protect the forest against the illegal users. The Forest Policy of 1988 contains the worth of the relationship between the tribal people and forest directing the State authorities to involve the tribal people in the management, protection, development, regeneration and conservation of the forest thereby making sure that the tribal people living around the forest areas gets gainful employment for their living related thereto and in return they should be allowed to use the forest for their subsistence without depleting the forest cover and maintaining the ecological balance as per the principles of sustainability. It would be very unfair to expect from the tribal people to engage themselves into other trade or business apart from those based on forest products as they are particularly skilled in these activities rather having other additional training. Moreover, for ages they have been dependant on forest for their subsistence and now relocating them was an improper approach. Neither the Supreme Court nor the State Government paid any heed to this regard. Eventually after Godavarman case, by the end 2004, the nation accounted for deaths of 50 civilians which were casually linked with terrorism associated by the tribal people due to the steady deterioration of their living and lifestyle.[26]

However, the Godavarman Case had far reaching implications in the National Forest Policies of India. It had opened the Pandora's Box which attempted to regulate and reform the timber industries, forest dwellers, mining activities and illegal forest ventures across the whole nation. The Court in this case assuming the powers of a policy maker and an administrator of law besides being the interpreter of law ceased the illegal timber trade nationwide.[27] The Court even excluded the jurisdiction of the lower Courts in this matter to micromanage these proceedings. The Apex Court banned all the timber industries along with other mining operations or sawmills related to forest with an immediate effect which had not received the prior approval of the Central Government. Furthermore, all such industries were asked to reallocate themselves in the specified industrial zones for proper monitoring. The

Court's Breach of Constitutional Boundaries in Managing India's Forests, 37 ELR 10032, http://www.eli.org Access Date: 16.6.2021

[26] Armin Rozen Cranz, Edward Boenig, and Brinda Dutta, The Godavarman Case: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests, 37 ELR 10032, http://www.eli.org Access Date: 16.6.2021

[27] ibid

Apex Court since 1996 had received as many as 800 interim applications across the country related to forest protection, illegal timber transport, unfair timber pricing, forest revenues and unlicensed forest based industries. To regularize these and reform the forest related issues, the Court had to assume the character of a director to save the environment and maintain the ecological balance with due regard to the sustainable development which was at stake due to mismanagement between the State Governments and Central Government and selfish human needs. However, this was not an easy task for the Supreme Court, so eventually, the Supreme Court had to entrust the MoEF with certain significant duties.[28] One of such significant direction was to supervise that the ecological balance is maintained by ensuring compensatory afforestation so that the average percentage of the forest cover remains stable. As the State agencies failed to submit the reports within the stipulated time the MoEF was at a liberty to apply any policy related to commercial use of forest and forest products and expand the forest cover at the same time.

[28] ibid

CITIZENSHIP: ITS APPLICATION AND DENIAL IN CONTEMPORARY NEPALESE LEGAL SYSTEM

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Abstract

Citizenship is one of the major constitutional rights guaranteed by the Constitution of Nepal. Universal Declaration of Human Rights sets that everyone has the right to a nationality, and no one shall be arbitrarily deprived of his or her nationality. This article aims to identify the discriminatory clauses contained in the Constitution and the citizenship-related laws in Nepal. The Constitution of Nepal 2015 possesses some discriminatory clauses that restrict the independent identity of women to transfer citizenship to her children and spouse. Access to citizenship certificates remains a challenge for women and the marginalized communities who are affected by poverty, illiteracy, displacement, isolation and discrimination.

KEYWORDS: citizenship, Constitution, Article, gender, nationality

Introduction

The socio-political philosophy as an autonomous discipline of study examines innumerable theories and issues of concerns in the community. Amongst the numerous approaches and issues that attract much attention is the concept of citizenship. Right to identity holds a presiding role to recognize an individual's independent worth as a human being. In this contemplates, citizenship certificate bestows a person with his/her identity that enables a person to exercise any sort of economic, social, cultural or political rights. The citizenship certificate provides an individual his/her identity within a particular state and assigns rights and duties. As the citizenship certificate provides identity, safeguards one's rights and privileges being a citizen of a state is a desirable notion.

The concept of citizenship certificate seems to have a broader scope in the globalized world as nationality is one of the significant human rights concerns of the citizens. However, in the case of contemporary Nepalese society, there is an existence of narrow dimensions. This disturbing situation has back-peddled; therefore, many rights and privileges are unofficially denied to those who do not have a Nepalese citizenship certificate. Many eligible people from certain geographic areas and communities who endure poverty, illiteracy, social exclusion, landlessness and geographic isolation lack citizenship certificates and the enjoyment of rights vested to the document.

Citizenship is one of the significant constitutional rights guaranteed by the Constitution of Nepal, 2015. The "Universal Deceleration of Human Rights" poses that everyone has the right to a nationality, and no one shall be arbitrarily deprived of his/her nationality. Legal identity documents, mainly civil registration and citizenship certificates, are closely linked in Nepal. The lack of access to civil registration documents could lead to the denial of access to citizenship certificates and vice versa. The citizenship certificate is the primary legal identity document in Nepal. Without citizenship certificate, individuals cannot obtain other identity cards, such as passports, register for the electoral roll, obtain a Permanent Account Number (PAN), driving license and even a SIM card of the mobile phones. In addition to that, they are not allowed to open a bank account, cannot own property; cannot access social welfare allowances; widow allowances and face difficulties in registering births and marriages.[1] It possesses a huge challenge in every aspect of one's life and presents major challenges for living a dignified life in a country.

Nepal's system of legal identity operates under a broad framework of the Constitution and several laws and regulations. The Constitution of Nepal, 2015, is the paramount document to deal with the legal identity of people living in Nepal and it guarantees that no citizen of Nepal shall be deprived of the right to obtain citizenship. The constitutional provisions have been supplemented by several laws, major if, which is the Citizenship Act,2006. Since the proof of the very existence of a person is exhibited by the registration of his or her birth, the birth registration has been taken as the solid basis for creating the legal identity of a person. The occurrence of the personal events (birth, death, marriage, divorce and migrations) is the fundamental basis for creating or changing the legal identity or legal status of a person in Nepal.

International human rights obligations of Nepal on nationality

Nepal has ratified majority of the international human rights treaties, including the "International Covenant on Civil and Political Rights (ICCPR)" and its "Optional Protocols", the "International Covenant on Economic, Social and Cultural Rights (ICESCR)", the "Convention on the Elimination of all Forms of Racial

[1] FWLD (2014). Acquisition of Citizenship Certificate in Nepal: Understanding Trends, Barriers and Impact. Kathmandu: Forum for Women, Law and Development

Discrimination (CERD)", the "Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)", the "Convention on the Rights of the Child (CRC)", the "Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)" and the "Convention on the Rights of Persons with Disabilities (CRPD)". Nepal has not ratified the 1954 "Convention Relating to the Status of Stateless Persons" and the 1961 "Convention on the Reduction of Statelessness". However, it is notable that Nepal ratified the CEDAW and the CRC without any reservation, which contains vital protections against gender discrimination in nationality law[2] and the prevention of childhood statelessness[3]. Thus, the Government of Nepal is obligated to domesticate its international obligations protecting discrimination in nationality law into the national legislation and to create enabling environment to ensure the rights guaranteed by these international instruments.

Additionally, the "Treaty Act of Nepal" stipulates that "In case of the provisions of a treaty, to which Nepal or the Government of Nepal is a party upon its ratification, accession, acceptance or approval by the Parliament, inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws."[4] Nepal is therefore obligated to treat the provisions of those international instruments as good as domestic laws. Furthermore, the Constitution[5] requires the state to implement international treaties and agreements to which Nepal is a party[6].

Denial and application of Citizenship

In the face of substantial international obligations and assertions by the Government of Nepal, the Constitution of Nepal[7] an estimated six million individuals lack citizenship documentation. However, the majority of these would be eligible for Nepali citizenship under local law[8]. The

[2] Article 9, the Convention on the Elimination of All Forms of Discrimination against Women

[3] Article 7 & 8, the Convention on the Rights of the Child

[4] Section 9 (1), the Treaty Act, 2047 (1990) available at: http://www.lawcommission.gov.np/en/archives/9646

[5] The Constitution available at: http://www.lawcommission.gov.np/en/archives/category/documents/prevailing-law/constitution/constitution-of-nepal

[6] Article 51 (b)(3), the Constitution of Nepal

[7] The Constitution of Nepal, 2015 available at: http://www.lawcommission.gov.np/en/archives/category/documents/prevailing-law/constitution/constitution-of-nepal

[8] Acquisition of Citizenship Certificate in Nepal: Estimation and Projection (2015), Forum of Women,

Constitution still includes several articles on nationality that discriminates based on gender, and that is internally contradictory with other articles of the Constitution, which enshrine non-discrimination and the right to citizenship[9] on the one hand and the other hand contravene the rights guaranteed by the CEDAW[10] and can lead to statelessness when fathers are stateless or also unable to confer their nationality on their children.

Article 10(1) of the Constitution[11] states that "no citizen of Nepal shall be deprived of the right to obtain citizenship". However, in the absence of provision of the right to remedy in the violation of this provision, it is remained merely as discretional. Further, the Article 11(2) (b) of the Constitution [12] states that "any person whose father or mother was a citizen of Nepal at the time of birth is a citizen by descent". Articles 11(3), 11(5) and Article 11(7) were getting contradicted with Article 11(2). The Article 11(3) requires "both the 'father and mother' to be citizens of Nepal for a child to acquire citizenship by descent in cases where one of the parents acquired citizenship by birth, preventing Nepali women from transferring her citizenship to their children independently". Similarly, the Article 11(5) states that a "Nepali woman only retains the right to pass nationality by descent if her child is born and resided in Nepal and "whose father is not traced," with the condition that the citizenship of the child to be converted into naturalized if the father is known to be a foreigner". Further, the Article 11(7) states that the "child of a Nepali woman married to a foreign man may only acquire naturalized citizenship if the child has permanently resided in Nepal and has not acquired citizenship of father's country". In contradicting Article 11(2)(b), these provisions further violate Nepali citizens' right to equality before the law and equal protection of the law as well as equal lineage right of women without gender-based discrimination, as enshrined in the Article 18 and 38 of the Constitution.[13]

The Constitution[14] further "discriminates against women with regard to the conferral of nationality on foreign spouses, a right

Law and Development (FWLD) also reported in "2019 Country Reports on Human Rights Practices: Nepal" (2019), U.S Department of State available at : https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/nepal/

[9] Nepal Citizenship Act, 2006, available at: http://www.lawcommission.gov.np/en/archives/category/documents/prevailing-law/statutes-acts/nepal-citizenship-act-2063-2006

[10] Article 9 (2), the Convention on the Elimination of All Forms of Discrimination against Women

[11] The Constitution of Nepal

[12] The Constitution of Nepal

[13] The Constitution of Nepal

[14] The Constitution of Nepal

reserved for Nepali men and denied to Nepali women." The Constitution[15] where "a foreign woman married to a Nepali man may apply for citizenship, if she wishes, with a marriage certificate and proof that she has initiated the renunciation of any other citizenship[16] whereas, the Constitution is silent with respect to the ability of the foreign spouses of Nepali women to acquire citizenship through marriage." The provision[17] meanwhile allows Nepali men to confer citizenship to their foreign wives if they wish and initiate proceedings renounce their previous nationality there is no provision of the conferral of Nepali citizenship by Nepali woman to a foreign spouse through marriage and their children. This has limited women's autonomy regarding nationality and the ability to transmit citizenship through marriage and to their children.

The provision of Article 11(5) of the Constitution states that "a child is born to a Nepali mother whose father is not identified, such children may be given citizenship by descent in cases where the child is born and residing in Nepal. However, citizenship would be changed automatically to naturalized citizenship in cases where the father of such a child is identified as a foreigner. This discriminatory provision not only fails to recognize the independent identity of the mother but also may result in stigmatizing both mother and child in genuine cases of unknown paternity involving incidents of rape, sex-work, trafficking, migrant women workers, extra-marital relationship and similar cases."

The Citizenship Act denies Nepali women equal rights to acquire and retain their own nationality. According to the proviso of Section 8(1)(a) of the Act[18], Nepali women married to foreign men before obtaining citizenship certificate do not have a right to obtain it subsequently. This is not only internally contradicted with the constitutional provision but also contradicts with CEDAW Article 9(1). This continues despite the decision made by the Supreme Court of Nepal in 2008, stating that citizenship to be issued without any discrimination on the basis of gender and marital status[19].

"Putting a special condition for women creates discrimination against them and puts their children at the risk of exclusion of legal

[15] The Constitution of Nepal
[16] Articles 11(6), the Constitution of Nepal
[17] Articles 11(6), the Constitution of Nepal
[18] Nepal Citizenship Act, 2006
[19] Nakkali Maharjan v, Office of Prime Minister and the Cabinet of Ministers et. al., Supreme Court of Nepal, 2007

identity. Lack of clarification expands the authorities' discretionary power on the issuance of citizenship, thereby making it challenging to implement this provision, especially in a non-discriminatory way[20]." Complementing the Article 11 (7) of the Constitution [21], the Section 5(2) of the Citizenship Act[22] and Section 7 of the Citizenship Rules[23] deny "Nepali women the right to confer their citizenship to their children by decent. Instead, such children have only the option to seek naturalization. However, the discretion wielded by state authorities in relation to naturalization is extensive, and the overwhelming majority of naturalization applications do not result in the conferral of nationality even after the decision made by the Supreme Court of Nepal."

The application process for acquiring "citizenship by children born to Nepali women, outlined in the Citizenship Act[24] and the Citizenship Rules[25] is a challenging, bureaucratic process." According to the Section 5(2) and 5(3), "this process requires the applicant to provide a copy of the mother's citizenship certificate; a recommendation by the local authorities certifying the child's birth and permanent residency in Nepal, and evidence that the child has not acquired the father's foreign citizenship." It is likely to be particularly onerous for Nepali women's children – especially in women-headed households – to provide evidence that foreign citizenship has not been acquired. "The denial of equal nationality rights leads to both the denial of proof of legal identity and the denial of the right to a nationality." Furthermore, "discrimination in Nepal's nationality laws inhibits women's ability, in practice, to freely choose a spouse, in violation of CEDAW Article 16, further entrenching traditional stereotypes regarding the primacy of male legal identity, and contributing to women's inequality within the family and society at large. Further entrenchment of such stereotypes is in breach of Nepal's obligations under the CEDAW Article 5(a)."

[20] Forum for Women, Law and Development (FWLD), "Legal Analysis of Citizenship Law of Nepal", 2016, pg. 15, available at http://fwld.org/publications/legal-analysis-citizenship-law-nepal/

[21] The Constitution of Nepal

[22] Nepal Citizenship Act, 2006 available at: http://www.lawcommission.gov.np/en/archives/13035

[23] Nepal Citizenship Act, 2006 available at: http://www.lawcommission.gov.np/en/archives/13035

[24] Nepal Citizenship Act, 2006

[25] Nepal Citizenship Act, 2006

Despite the Constitution[26] proclaims that no citizen of Nepal may be deprived of the right to obtain citizenship[27] the Nepal Citizenship Regulation, 2006 requires to submit documentation of recommendation from the orphan home (approved by the government)[28] or from the organization under which protection the child was grown up[29] or from the individual who has legally obtained guardianship of the child.[30]This restricts the street children or the orphan children who have grown up on their own from obtaining citizenship as well as stops them from enjoying their fundamental rights guaranteed by the Constitution.

Further, even almost five years after the promulgation of the Constitution, necessary amendments in the prevailing Nepal Citizenship Act, 2007 in line with the Constitution has not been possible. In the absence of legal amendments, many people are constitutionally eligible to acquire citizenship by being deprived of citizenship. In this context, after two years since the Nepal Citizenship Act, Amendment Bill submitted to the House of Representatives (HOR) the State Affairs and Good Governance Committee of House of Representatives (HOR) had recently passed the Bill and had submitted to the HOR plenary for consideration. Unfortunately, the Bill's passage has been delayed due to the government's sudden decision to end the parliament session. Because of this, along with hundreds and thousands of people who are eligible to obtain Nepali citizenship, hundreds of children of the citizens by birth who are entitled to obtain citizenship by descent are being denied as the amendment of existing law is lingering for a longer time. This way, many citizens of Nepal are being deprived of their citizenship for none of their faults. Hence, there must be a provision of compensation for these categories of people.

The Nepal Citizenship Act Amendment Bill, passed by the State Affairs and Good Governance Committee of the House of Representative, Federal Parliament by a majority has yet to address shortcomings from the perspective of sexual and gender identity, Nepali citizen married to a foreign citizen has to submit of proof of not acquiring citizenship of foreign country or renounced, no provision for complaint mechanism, issues of landless people for the purpose of permanent residence to apply for citizenship,

[26] The Constitution of Nepal
[27] Article 10 (1), the Constitution of Nepal
[28] Rule 3 (3) (a), the Nepal Citizenship Regulation, 2006
[29] Rule 3 (3) (a and c), the Nepal Citizenship Regulation, 2006
[30] Rule 3 (3) (b), the Nepal Citizenship Regulation, 2006

there is no provision whereby Nepali woman can confer citizenship to her foreign husband. Likewise, the provision whereby an individual wish to be mentioned 'other' in the citizenship certificate on the basis of his or her sexual and gender identity shall submit a recommendation of a recognized Medical Doctor. This will create an unnecessary burden of proof for persons from sexual and gender minority as well as such procedures may not be dignified and might hurt the dignity of such persons.

While the Article 39 (1) of the Constitution first ever in any constitution of Nepal explicitly proclaims that "every child shall have the right to name and birth registration along with his or her identity". The recent National Identity Card and Civil Registration Act, 2020 which came into the force repealing the previous Birth, Death and Other Personal Events (Registration) Act, 1976 prerequisites document of citizenship certificate for the national identity card. This also requires birth registration. As a result, the children who do not have access to citizenship might be systematically excluded from national identity card and birth registration. It further restricts landless people from acquiring national identity card as they have difficulties in accessing citizenship certificate as well.

Gender discrimination in Nepal's citizenship law often results in the exclusion of birth certificate and citizenship of children whose mothers have faced discrimination, despite Nepal's obligations under various international human rights treaties. Further, the Constitution guarantees right to birth registration[31] however recently enacted law[32] requires national identity card for birth registration and citizenship is made mandatory to obtain a national identity card resulting in the systematic exclusion of children born in Nepal.

Amidst the lockdown imposed by the Government of Nepal due to the given situation of COVID 19, the government announced the relief package targeting the workers of the unorganized sector and helpless people. The Standard[33]prepared to distribute the relief package made citizenship certificate or any identity document a mandatory document to receive the relief due to which the considerable number of people

[31] Article 39 (1), "Every child shall have the right to name and birth registration along with his or her identity", the Constitution of Nepal also available at http://www.lawcommission.gov.np/en/archives/981

[32] National Identity and Civil Registration Act, 2019

[33] The Standards relating to the Relief Distribution to the Workers of an Unorganized Sector and Helpless People, 2020

without citizenship certificate were excluded from the benefit of the government's relief package[34]. The Supreme Court of Nepal issued an interim order to the government telling to provide relief materials immediately to the economically marginalized and helpless people without requiring them to provide citizenship certificate keeping in mind the people's right to food and on the grounds of humanity. However, there are still cases reported where the people without citizenship certificate were denied the relief package.

People without citizenship certificate often already live on society's sidelines, and the absence of identity documents exacerbates their lack of access to social services. The Government of Nepal (GON) should encourage to extend support to all individuals residing within its territory that meet the criteria of vulnerability, regardless of legal status. All persons are treated equally without discrimination irrespective of gender, caste, class, marital status, sexual orientation, profession, political or ideological beliefs, religion and physical condition. The ultra-nationalist or radical nests should not be the barrier and cause an obstacle to work for the welfare of the people. The Government of Nepal (GON) both at the central and local levels should specify and simplify the provisions of the Act to prevent ambiguity. With the introduction of the explicit provisions and the non-discriminatory mindset of the administrative officers, most of the issues related to citizenship certificate can be addressed. As citizenship certificate acknowledges the existence of an individual and it is the document that recognizes one's legal identity issues faced by the individuals who lack citizenship certificate or who are denied to acquire citizenship certificate will be addressed. It is observed that when a person lacks citizenship certificate, s/he is deprived of various facilities endowed by the government.

The predominant cause of denial of citizenship is found mainly relating to the State, laws, institutions, and officials' behaviour rather than the personal reasons of the denied persons. This, in the long run, could result in an exponential growth of the persons suffered due to the stateless condition in Nepal. The availability of State administrative services to the public at the district level seems insufficient to encourage their access to citizenship. Women's rights to get citizenship for themselves are not

[34] Ibid, Number 8 (a), (b) and (c) of the Annex 1

recognized, and they are made dependent on their male counterparts; thus, there is an immense loss of women's independent identity as a sovereign citizen.

Conclusion

The Constitution that was passed on September 20 2015, includes some progressive changes wherein citizenship is recognized as a right of every citizen (Article 10), and women are allowed to confer citizenship if the father of the child is unidentified (Article 11(5)). However, the provision is still discriminatory to women (Article 11(5), (6) and (7)). It also needs to be carefully monitored how the existing Act, Regulation and Directives are amended to accommodate the constitutional changes.

The Citizenship Act (Amendment) Bill, which was tabled in the Federal Parliament in 2018 has stalled there though significant discussions and agreements were made in the parliament. The session of the parliament was ended in 2019 without adopting the Citizenship Act Amendment Bill. After two years of being under consideration of the State Affairs and Good Governance Committee of the House of Representatives, the report relating to the Bill to Amend the Nepal Citizenship Act was passed by the Committee on the day of June 21, 2020. The report than had been submitted to the House of Representatives on June 23, 2020, for a consideration. However, due to the sudden decision of the Government of Nepal the parliament session was ended without any conclusion made on the Citizenship Act (Amendment) Bill resulting in hundreds of thousand people who are eligible to obtain Nepali citizenship under the provision of the Constitution of Nepal, are being deprived of citizenship without their fault. The Constitution requires amendments in the laws as per the Constitution within a year, counting from the federal parliament's first session.[35] However, it has been more than two years since the first session of the federal parliament, but the amendments in the Citizenship laws have not been possible yet.

Access to citizenship certificates remains a challenge for women and the marginalized communities affected by poverty, illiteracy, displacement, isolation and discrimination. Impoverished and landless persons, for instance, may have difficulties in obtaining and preparing the necessary documents

[35] Article 304 of the Constitution of Nepal states that any law inconsistence with the Constitution shall ipso facto be invalid to the extent of such inconsistency after one year of the date on which the first session of the Federal Parliament set forth in this Constitution is held.

required to apply for a citizenship certificate. Persons from rural communities are also presumed to lack adequate access to citizenship certificates and supporting documents from Rural Municipality or Municipality, which certify eligibility for the issuance of citizenship certificates.[36]

Citizenship certificate is not only vested with one's identity and legal rights it is now the matter of one's existence and self-respect. To be undocumented means to be denied opportunities and possibilities to exercise civil and social rights. In practical terms, there is no distinction between an undocumented person whose birth was never registered and one whose birth was registered, but who never obtained his or her national identity document. The exclusion of the people without citizenship certificate from access to opportunities and activities is a non-material aspect that must be recognized and addressed. Exclusion takes many forms, but one of its common and determining factors is the lack of an identity document. Having a document that verifies one's identity is fundamental for any citizen to be able to access rights, benefits, and services. Today, having a legal identity is increasingly important for any person who interacts with the public sector and society in general. Legal identity is understood to be the combination of factors that enable a person to access rights, benefits, and responsibilities.

[36] Forum for Women, Law and Development (FWLD), Acquisition of Citizenship Certificate in Nepal, Understanding Trends, Barriers and Impacts, Kathmandu, 2014.

DIGITAL DIVIDE VS DIGITAL INDIA ASPECTS OF PRIVACY AND DATA PROTECTION IN INDIA

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Abstract

Privacy and data protection issues in the modern era are forced to be re-examined due to the recent advancement of technology and the dynamism of the legal world. Although privacy has since become a privileged issue for everyone, today's emphasis is on data protection within the 'Digital India Programme'. Personal data is under threat when an individual shares information with strangers. As a result of the exceptional rise of Information Technology (IT), the dramatic growth of its devices' capacity to store, process, and link data, the discussion around personal data protection has intensified significantly. Because of the way it offers its products, the debate has been exacerbated. This use of products in human life style became vulnerable in terms of sharing information with a stranger on this technologically advanced epoch without knowing facts. The pervasive role of technology in day-to-day affairs of the individual has been causing vulnerability. Personal information disclosed, intentionally or unintentionally, has been exploited for commercial interest and susceptible to misuse. The right to protect one's information is a derivative of the right to privacy. The scope and ambit of the right needs to be constructed to build a right-based framework for personal information/data protection. With this introduction of the policy of the government of India there is a need for a specific re-examination of the protection of the individual privacy and data protection. In addition, research will be needed to understand its impacts/importance.

Keywords: Privacy, Data Protection, Digital India, Information Technology.

Introduction

A moral human being is one who at his capacity can think, reason, choose, and value things. However, in this scenario of divergent views, freedom and rationality are two milestones in achieving an individual's liberty. Further, an individual's right to express his thought and protect his personal privatism from encroachment is essential to enjoy his liberty. Liberty, which covers a variety of rights, raised to the status of distinct fundamental rights and other related rights of right to privacy. Charles Fried, "Privacy" Fried argues that privacy is necessary for the maintaining of intimate and interpersonal relationships, because it allows for discretion as to whom one shares information with.[1] Judith Jarvis Thomson, "The Right to Privacy" Thomson is skeptical of privacy and argues that there is nothing coherent or distinctive about privacy as a legal or conceptual notion: there is not one central characteristic of

[1] Charles Fried, *The Nature and Importance of Liberty*, HARVARD JOURNAL OF LAW & PUBLIC POLICY, Vol 29, pp.3-8, (2005).

privacy (coherence) nor is it distinctive from other rights: property as one example. Privacy, then, is derivative of other rights.

Privacy has to be recognised as a right if liberty is to be supported.[2] Photography, computers, and personal data are just some of the more modern issues that today's discussion began with. With respect to bodily privacy, territorial privacy, communication privacy, and information privacy, the scope of the right to privacy has widened over time.[3] Communication privacy and informational privacy are two types of personal information-related privacy that is crucial in today's society. Personal information is shared at the discretion of men. Sharing of data, which includes such activities as giving your medical records to another doctor or uploading your photos to the internet, has no apparent negative impact on human rights. The State's duty to take steps to protect certain human rights, such as the right to life, may sometimes require the collection of personal data, and in some cases, it is theoretically justified based on public interest considerations. For the argument for the welfare state, government must present data-sharing proposals that are both justifiable and proportionate, and evidence is provided to show that safeguards are in place to prevent personal data from being arbitrarily disclosed unless necessary.

India's Constitution is a cornerstone of freedom and liberty, providing the guaranteed rights of liberty and freedom according to articles 19(1) and 21 respectively. The rights mentioned in Article 21 of the UN International Covenant on Civil and Political Rights have been interpreted as meaning something more than simply surviving and simply existing. Life is better because it includes all those facets that enhance the value, meaning, and purpose of a person's life. To have the right to privacy is one of those facets. Right to privacy is 'a right to be let alone'.[4] The Supreme Court has held that the right to privacy is essential to the preservation of freedom.[5] Even though, privacy and data protection have not been explicitly mentioned in any provision, 'privacy' as a right has evolved through various judicial pronouncements.[6]

Considering the above-mentioned aspects, the recently announced initiative of the

[2] A M BHATTACHERJEE, EQUALITY, LIBERTY AND PROPERTY UNDER THE CONSTITUTION OF INDIA, EASTERN LAW HOUSE, NEW DELHI, p.55, (1997).

[3] Available at, http://gilc.org/privacy/survey/intro.html (last Updated April 15, 2017).

[4] Messrs. Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy,* HARVARD LAW REVIEW (1890).

[5] Ram Jethmalani and Ors. v. Union of India (2011) 8 SCC 1

[6] Jayanta G & Uday S, 'Privacy and Data Protection Laws in India: A Right-Based Analysis' Bharti Law Review, Vol. V, Issue.2, (Oct-Dec 2016), pp. 54-72.

Government of India, 'Digital India Programme'[7] needs to be examined against the touchstone of legal regime on privacy and data protection. This programme has been initiated as a policy of the government promising better governance, inclusive growth, job opportunities and quality of life to citizen of this country through intervention of Information Communication Technology (ICT).[8] The absence of clarity on right to privacy and data protection on the landscape of human rights raises serious apprehension about the exercise of power by the government in relation to the collection and usage of data. Therefore, it is pertinent to examine the position of privacy and data protection in the gamut of right to personal liberty and right to freedom guaranteed under the Constitution of India. In this regard, the study will be undertaken with the reference of Digital India programme of the Government of India as it is based on collection of personal information and the concern of the informant about the security and safety of the collected information.

Goals – Looking for

India has witnessed rapid expansion of use of internet amongst the inhabitants. At the same time, the digital divide which refers to the gap between demographics and regions that have access to information and communications technology, and those that do not (don´t = colloquial= or have restricted access, is also a reality in India. Information communication technology has been viewed as a solution of many ills, particularly, 'governance', as indicated in the broad vision of Digital India. The role of technology in improving governance, such as to bring transparency, easier access to services etc., has been in place since late 80s in India. For the purpose of distribution of different services/amenities by the government arrangement, through technology. This technology connects the citizen and government virtually.

Dempsey points out that "privacy" cannot be an afterthought in the design of information systems" and for that matter needs e-government implementation.[9] Fairweather and Rogerson advises, "e-government should also offer a good level of data protection and security".[10] Therefore, the 'Digital India Programme' must also give preference to the

[7] Digital India Programme, Available at: http://www.digitalindia.gov.in/content/about-programme (Last updated April 10, 2017).

[8] Ibid.

[9] Anderson, P. and Dempsey, J. *Privacy and e-government: privacy impact assessments and privacy commissioners–two mechanisms for protecting privacy to promote citizen trust online.* GLOBAL INTERNET POLICY INITIATIVE, p. 11, (2003).

[10] Fairweather, N.B. And Rogerson, S. *Towards morally defensible e-government interactions with citizens*. JOURNAL OF INFORMATION, COMMUNICATION AND ETHICS IN SOCIETY, 4 (4), pp. 173-180, (2006).

privacy of an individual. Anderson points out that "countries seeking to promote e-government must protect the privacy of the information they collect".[11] This imposes the responsibility upon the state to protect the collected information of the individuals. And the efforts of the government to protect the individual privacy and data is in question.

The privacy right has come up with another dimension i.e. data protection. Data protection as a right like the right of access to data banks, the right to check their exactness, the right to bring them up to date and to correct them, the right to the secrecy of sensitive data, the right to authorize their dissemination: all these rights together today constitute the new right to privacy. In relation to privacy and data protection, the Information Technology (Amendment) Act 2008, have discussed some provisions.[12] The preamble of the Act facilitates e-commerce 'which involve the use of alternatives to paper based methods of communication and storage of information, to facilitate electronic filings of documents with the Government agencies…'[13] The Act has limited applicability and fails to provide any legal mechanism regarding the sharing of information by an individual with the government for obtaining services or benefits under different schemes of the 'Digital India Programme' which is based on horizontal relationship between the subject of the right holder and the duty-holder.

Considering the technological development, privacy and data protection are having greater impact on this digital age. The present day's scenario demands privacy and data protection to be read as a human right perspective. In this information technological era, the right to life and dignity of an individual has acquired a new dimension of least-intrusive role of the state. By the commencement of the Digital India programme, the government plans to make India a truly digital nation by offering a plethora of e-governance services schemes across sectors by using cloud, mobility, Internet of Things etc. With the implementation of the Digital India programme, the privacy and data protection of an individual becomes a prominent concern of the informant. In relation to privacy and data protection of an individual, the Digital India Programme has no legal mechanism to protect the shared information.

[11] Anderson, P. and Dempsey, J. *Privacy and e-government: privacy impact assessments and privacy commissioners–two mechanisms for protecting privacy to promote citizen trust online.* GLOBAL INTERNET POLICY INITIATIVE, p. 11, (2003).

[12] INFORMATION TECHNOLOGY (AMENDMENT) ACT 2008, available at: http://deity.gov.in/sites/upload_files/dit/files/downloads/itact2000/it_amendment_act2008.pdf (Last updated April 20, 2017).

[13] Ibid.

Research Focus

There are certain research analysis has to be done to accomplish the Digital India Programme with this technological advancement era, Firstly, to analyze the importance/Impact of privacy and data protection in accomplishment of Digital India Programme. And Secondly, to frame some suitable policy suggestion for protection of privacy and personal data in Digital India Programme. To fulfill these two research objectives some questions are to be sorted out which are very much relevant for this study and can be helpful to trace the concrete solution for the objectives. Firstly, what are the constitutional and legal provisions relating to privacy and data protection and whether they enjoy the status of right in the realm of human rights landscape? And whether the vision of Digital India addresses the concern of privacy and data protection for intended beneficiaries and what is its legal implications?

Methodology Stepwise:

Step 1*:* For the purpose of this doctrinal study an inquiry into the legal rules, principles and doctrines governing the privacy-liberty issues to ascertain consistency, coherence, efficacy and stability in the area of privacy and data protection law.

Step 2: Historical method will be employed to trace the evolutionary process that led to the origin of data protection laws. This will help the researcher to explore and appreciate the circumstances that require suitable legal framework to deal with the issue. The researcher anticipates that this may also be helpful to trace crucial clues as to why the protection of personal information of individual need to address as a paramount legal concerns of this technological advancement age and also to understand need of the right-based exposition in Digital India Programme.

Step 3: The Analytical method will be employed to critically assess the statutory provisions, judicial pronouncements, policies and doctrines relating to privacy and data protection laws. This would help the researcher to structure a new legal paradigm for India. An analytical study will conduct for analysis of the judicial pronouncement. The researcher will anticipate by this analysis the judicial take on the privacy and data protection laws.

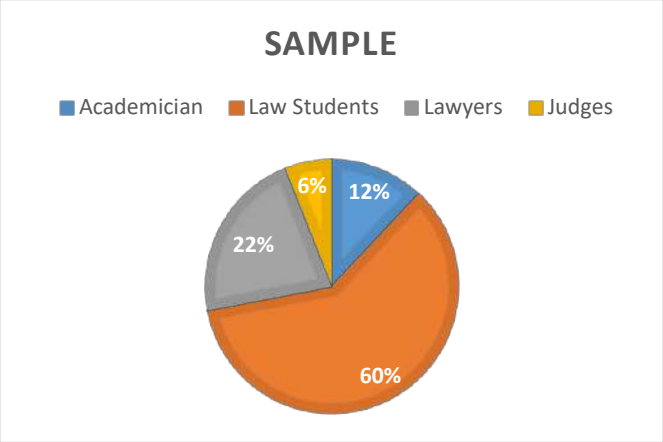
Step 4: The researcher will adopt an empirical study, which will anticipate the validity and the authenticity of the emerging issues of privacy and data protection laws in the concern of 'Digital India Programme'. A structured questionnaire will be frame

according to research objectives and questions. This qualitative analysis will be adopting on the questionnaire-based survey. This survey will be done with different stakeholders like, Academician, Law Students, Lawyers and Judges. Interview and focus group discussion methods will be used for collection of data. These methods will be chosen because of the direct access, one-to-one interaction with the stakeholders.

Sample

Stakeholders	Sample
Academician	**60**
Law Students	**300**
Lawyers	**110**
Judges	**30**

These stakeholders are choose from different area of across India. [14]



Legal Journey Privacy to Data Protection in India

As a result of Article 21[15] of the Constitution and other constitutional provisions protecting fundamental rights, an individual's right to privacy has evolved. The Supreme Court of India has previously ruled in numerous cases[16] that the right to privacy is included in the fundamental rights of Indian citizens, such as the right to life and personal liberty. The only entity that may be held liable for constitutional violations is the state or state-owned entities, not private citizens or organizations.

The Constitution of India provides that *'No person shall be deprived of his life or personal liberty except according to the procedure*

[14] The sample includes graduate law students, professors from top Indian law universities, lawyers from different bar associations and Judges from different courts all over the country.

[15] Article 21 of the Constitution provides that 'No person shall be deprived of life or personal liberty except according to the procedure established by law'.

[16] *Kharak Singh Vs. State of U.P (AIR 1963 SC 1295; Gobind Vs. State of M.P. (AIR 1975 SC 1375; R. Rajagopal Vs. State of Tamil Nadu ([1994] 6 SCC 632); People's Union of Civil Liberties (PUCL) Vs. Union of India (AIR 1997 SC 568); Distt. Registrar and Collector, Hyderabad Vs. Canara Bank (AIR 2005 SC 186)*

established by law' (Article 21). The Supreme Court has interpreted this provision to include the protection of privacy since *Kharak Singh v. The State of U.P.*, where it stated: *'It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty.'*[17] Personal privacy was also guaranteed by Articles 19(1)(a) and 19(1)(d), both of which mentioned freedom of speech and expression (right of freedom of movement).

Article 14 states *"equality before the law or the equal protection of the laws";* both of these articles are important in relation to one another because of their mutual interaction. Article 19(1) (a) of the Constitution guarantees freedom of speech and expression to all citizens. In the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency, morality, contempt of court, defamation, and incitement of offence, the State may enact laws that restrict the exercise of the rights granted by Article 19(1). the Supreme Court has concluded that the right to know encompasses access to information contained in Article 19(1) (a).[18] All persons, whether or not they are citizens of India, have the right to equal protection under the law, as guaranteed under Article 21. Authorities using the "procedure established by law" exception to Article 21 are instructed to strictly and meticulously adhere to all the legal requirements.[19] Since *Menka Gandhi v Union of India*[20] the phrase 'procedure established by law' has been held to have a meaning similar to 'due process of law' in the US Constitution. Case law has repeatedly taken a 'persons and not places' emphasis in interpreting the right of privacy, rejecting views that privacy is tied to property interests.[21] The ruling by the Indian Supreme Court is in line with the trend that started with the development of Article 21 in that it reflects a movement toward principles of data protection. However, this is only now happening: almost all Article 21 cases are about search and seizure or telecommunications surveillance. Outside search and surveillance issues, the most significant development has been the decision of the Delhi High Court in Naz Foundation v. the Government of NCT of Delhi.[22] The lawsuit was filed by the Naz Foundation, a non-profit organization, to challenge the constitutionality of Section 377 of the Indian

[17] AIR1963 SC 1295

[18] State of U.P. v Raj Narayan (1975) AIR 1975 SC 865

[19] Ram Narain v State of Bombay (1952) SCR 652.

[20] (1978) AIR 1978 SC 597

[21] District Registrar and Collector, Hyderabad & Anr. v Canara Bank & Ors. (2005) 1 SCC 496

[22] High Court of Delhi, Case number WP(c) No.7455/2001 (2 July 2009), available at ,http://lobis.nic.in/dhc/APS/judgement/02-07-2009/APS02072009CW74552001.pdf

Penal Code, which criminalizes "unnatural offences", such as homosexuality, and others listed in the section's title. In 2004, the Supreme Court re-examined the matter, which the Delhi High Court had originally dismissed as an academic challenge.

The Court concluded that Section 377 (which bans gay sex) breaches the right to privacy, and it also denied the argument that there is an exception to Article 21 for laws that protect personal privacy. It was discovered that the state does not have the authority to invade citizens' privacy due solely to 'public morals'. Article 14 (equality before the law) and its more specific articulation in Article 15 were also found to violate (prohibiting discrimination on the grounds of sex).

The Naz Foundation Case seeks to go beyond issues of search and surveillance by advocating for the protection of personal privacy under the Indian Constitution. After conducting a thorough review of Indian case law on the issue of privacy, the Delhi High Court states that "A man's right to privacy can be found in the place where he can become and remain himself." Individual autonomy enables each person to exercise the ability to do so. Whether this sweeping strategy could evolve in the direction of a "right to informational self-determination" developed by the German federal Constitutional Court remains to be seen.[23] This is evident from the Supreme Court's work to define a right of access to public information prior to its national enactment in the Right to Information Act of 2005. The Supreme Court can make binding rules until the laws made by the legislature are found to be sufficient by the Court. It is necessary to bear in mind the possibility of future developments in the Indian judicial system when discussing the limits of Indian data protection law.

In the pronouncement of the Supreme Court expressed that *"Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner."* [24]

In *K.S. Puttaswamy v. Union of India*[25] the learned Attorney General asserted that *"the respondents do not share any personal information of an Aadhaar card holder through biometrics or otherwise with any other person or authority. This statement allays the apprehension for now, that there is a widespread breach of privacy of those to whom an Aadhaar card has been issued."* This batch of matters involves important questions

[23] Judgment of 15 December 1983 (Census Act case), 65 BVerfGE 1

[24] Ram Jethmalani & Ors v. Union of India, Manu/SC/0711/2011, para 73.

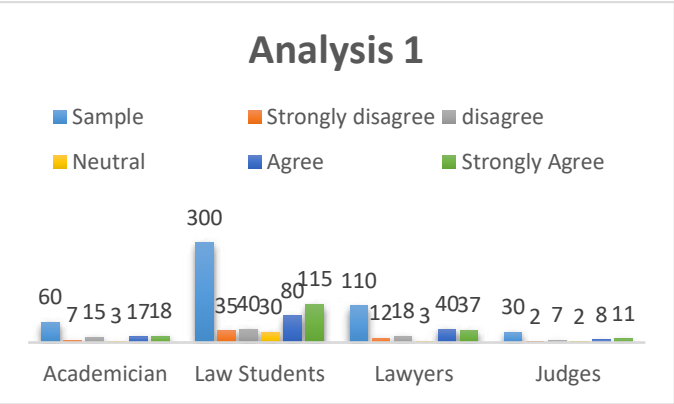
[25] AIR2015SC3081

about whether a "right to privacy" is protected under our Constitution. Additionally, it must be recognised that if such a right exists, what are the sources and contours of the right to privacy, since there is no specific provision in the Constitution discussing the issue. As a result, these issues require a larger bench of at with at least five judges to hear and decide the matters based on the mandate in Article 145(3) of the Indian Constitution.[26]

Results and Discussions

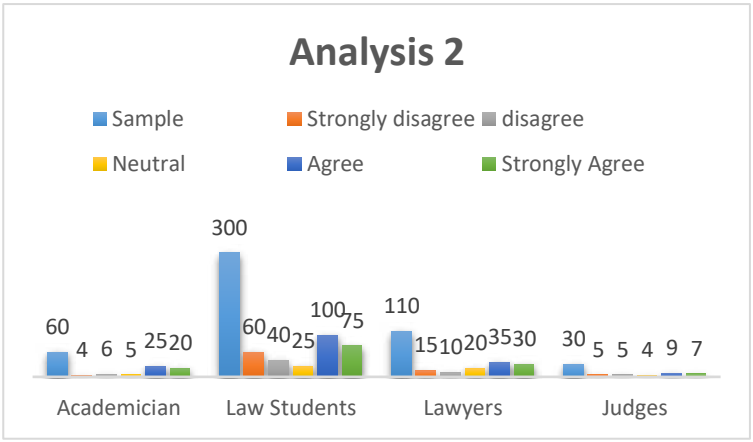
Analysis of the responses

There are only four responses are taken for the completion of the empirical study. Total number of stakeholder sample 500 under four category namely, – academician, law students, lawyers, judges. The sample responses analysis is shown in the flow chart below.



Response 1: Privacy and Data Protection are required separate status to deal with the Digital India Program.

This response no 1, are taken in the context to get exact status of the privacy and data protection on digital India program recently launched by the government of India. Responses of the different category are more agreed on the position of privacy and data protection should be taken care separately. Strongly agree parameter given clear picture of the viability of the privacy and data protection. And also, the agree parameter is side by side supporting the position of the strongly agree.

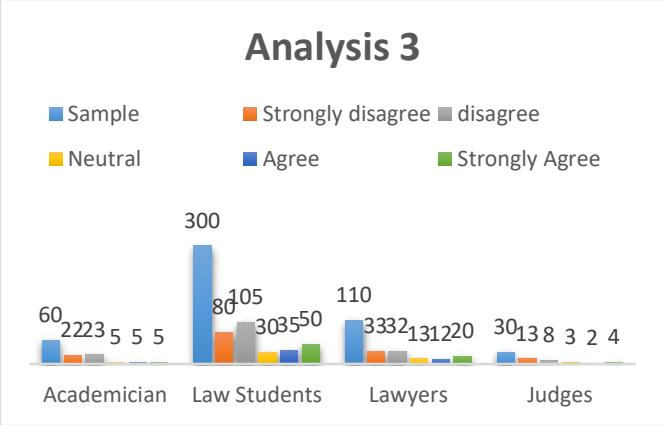


Response 2: There is a need for separate regulatory body to maintaining the confidentiality of individual 'Privacy'& 'Data Protection'.

In response no 2, for implementation of the separate regulatory body to maintain confidentiality of the individual privacy and data protection position is in agreeable position. This statements though not getting the up to mark for strongly agree parameter. In that, several situations come out like, who is

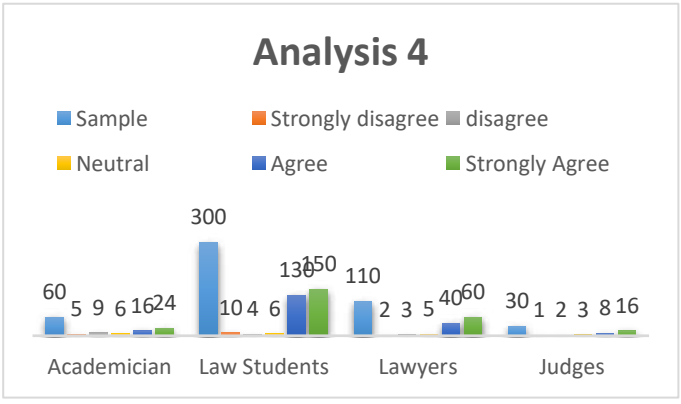
[26] Ibid.

the main regulatory body to process and stored the personal information, by whom this regulatory body would be selected, etc. So in terms of addressing this issue the result came out that the agree position is satisfactory.



Response 3: Existing laws are sufficient enough to deal with this Digital India Programme legal issues.

The response no 3, existing laws like Information Technology (amended) Act 2008, are sufficient enough to deal with this digital India programme, by this statement the ratio of responses are really astonishing that the stakeholders believe that it's not going to help for the individual privacy protection. Hence the statement strongly rejected by the stakeholders.



Response 4: 'Data Protection Laws' in India is required.

In the response no 4, for the legislation of the data protection laws the statistical parameter is more lenient on the side of the strongly agreeable portion. Hence the implementation of the data protection laws for the sake of the individual interest is given greater emphasis by the responses.

Conclusion & Strategic Solution

In this particular case study of privacy and data protection in digital India, the human right to data protection was definitely weighting more. Because someone's private information has the same value as someone's right to express his/her owns beliefs, when that person uses a third party's private information with no consent. The attempt is made in this monograph to answer the societies growing issue of digitalization of India and human tendencies to adaption of this. The basic idea is demonstrated with the analysis of these four responses of the different stakeholders of the Indian society for the viability and need of privacy and data protection laws. As well as this monograph argues that self-management of the sharing of personal data to avail the scheme benefit should be viewed as complementary tools to facilitate effective control as a human right. Individual can have

their subjective control on the personal information, yet the control must be buttress by an architectural design of technology which should be regulated by laws and these laws should made by following the golden principles of data protection.

Data protection is a fundamental right, and these separate fundamental rights should be recognized and granted for this reason. Many people are unaware that their personal information is protected, which allows authorities, internet service providers, and online businesses to commit numerous abuses against them. One thing we can hope for is that in time, people will understand the importance of fundamental data protection rights. Personal information security awareness should be at every level of society, and ethics should be kept in place so that organizations cannot abuse the personal information they have on others.

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[19] Maneka Gandhi v. Union of India, AIR 1978 SC 597

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MEN ~~DON'T CRY~~ CAN BE RAPED

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Abstract

It is the general rule of interpretation that Penal provisions are to be given a strict interpretation, but this paper throws light on what happens when an archaic provision, present for almost 160 years, is scrapped, leaving a void in the law, not ready to be addressed by the legislatures or the society. We still live in a patriarchal society that teaches their daughters to sit with their legs folded and their sons to man up and not whine. We still are not ready to discuss the abuse of a man by the fairer sex, which is why, we are still okay with our rape laws as it currently exists to be, read as

"A man is said to commit "rape" …… has sexual intercourse with a woman"[1]

Therefore, that the authors have decided to ask, what if the man is at the receiving end or what if the woman is at the inflicting end, how will the aspects of consent, free will, intention etc. apply. The authors question the validity of rape laws in the light of decriminalisation of Section 377 of Macaulay's Penal Code, which has its roots on UK's 1533 Buggery Act. This factor plays a pivotal role in raising such questions because 1967 witnessed progress by our while our colonial masters, however the hangover ensnared in our penal laws lingered on.

There will never be a right time, hence the authors wish to demand gender neutral rape laws, in respect of both the victim and the accused, and suggest the society move beyond the whole concept of 'penetration' and peno-vaginal sex, where the men dominate the woman.

KEYWORDS: Section 377, Buggery Act, Macaulay's Penal Code, Rape, Laws.

Introduction

The concept of men being a patriarchal crime, directly emanating from the abuse of male power and privilege is as archaic as our penal code. Even the latest Criminal Law (Amendment) Act, 2013 which centrally covered a paradigm shift in rape laws, failed to defeat or contradict this theory, with not even a hint of gender neutrality when it comes to rape laws.

It has been argued on many fronts that biologically it is absurd to claim that a man has been a victim of rape by a woman, and when both the victim and the perpetrator are of the 'stronger' sex, the law conveniently convicted them of sodomy. An article from India Today, August 19th, 2014 read "Teacher among 4 booked for sodomy in Muzaffarnagar"[2] does not even hint that such uncalled-for act can even be termed rape,

[1] The Indian Penal Code, 1860, Section 375.

[2] Teacher among 4 booked for sodomy in Muzaffarnagar. (2014, August), *India Today* https://www.indiatoday.in/india/north/story/sodomy-in-muzaffarnagar-government-run-protection-home-

because in no way could it be consensual in nature. Even though, the Protection Of Children from Sexual Offences Act, 2012 ("POCSO Act") protects children of both the genders, the adult male of the society has no place to raise his voice against a crime which would be a perfect crime if the tables were flipped. And now that Section 377 of the Indian Penal Code ("IPC") has been decriminalised[3], they do not even have the ground to sodomy.

It was held by a two-judge bench of the Delhi High Court, that Section 377 was violative of the ideals of autonomy, privacy and liberty that "were grafted into the ecosystem of fundamental rights guaranteed by Part-III of the Indian Constitution."[4] It was further stated that principle of inclusiveness which forms the core of the Constitution, was denigrated by the sustained suppression of the LGBT+ community. The judgment puts forward a progressive and bold claim aimed at reversing a century and a half era of oppression, thus being hailed as an impressive judgment. The aim being admirable, the quality of the judgment deserves mentioning as it blended principles of international law, along with both Indian and Foreign judgments in addition to citing literature on sexuality as a form of identity.

However, very soon this was overturned when an astrologer, Suresh Kumar Kaushal challenged this verdict of the Hon'ble Delhi High Court stating that the implications of decriminalising the section included "national security concerns" that would result in military defeats with soldiers getting distracted as would be free to enter into consensual relationships with each other.[5] Confounding, the Supreme Court's verdict lent judicial legitimacy to *Koushal's* thought process, as they overturned the *Naz Foundation* judgment and affirmed the constitutional validity of Section 377 on some bizarre grounds.[6]

However, on 6th September, 2018 the Supreme Court once again applied their minds and a colonial era law, that was decriminalised by our colonial masters in their country as back as 1967, criminalising "carnal intercourse against the order of nature", was discontinued at the hands of five judges of the Supreme Court of India. It was considered as a great leap towards a modern society and empowering the true ideals of the

teacher-booked-204666-2014-08-19#targetText=The%20incident%20took%20place%20on,station%20in%20Shamli%20district%20here.

[3] *Navtej Singh Johar –v- Union of India,* WP (Crl.) No. 76/2016, order dated 12-07-2018

[4] (2009) 160 DLT 277; W.P. (C) No.7455/2001 of 2009 (Delhi HC).

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Constitution, it however created a huge vacuum when it comes to rape laws against men in India.

Let us take into consideration the two main case laws which help us create an ambit whereby applying the mischievous rule and harmonious construction, we can lead up to the conclusion that even adult men can be raped. The two main cases are *Sakshi-v-Union of India*[7] which expanded the ambit of acts that can be covered under the definition of rape, and *Navtej Singh Johar –v- Union of India*[8] which decriminalises consensual sexual behaviour between same sex adults, which can constructively read to be decriminalising sodomy.

The words 'consensual', in the latter judgment, is of material importance and can be read to establish that there can be non-consensual intercourse between adults of the same sex, however, the same shall not be covered under the law. This means that we can constructively read that if there is sex, beyond consensus between the parties, it will still be violative of the law, and since the parties here discussed are homosexual in nature, we can further read into the fact that the inflicting party can be a woman, and further so, the victim can also be a man. When reading into these intricacies of the judgment, we can also say that on the one hand, where the so called 'carnal intercourse' is consensual in nature, the judgment validates it, but when the act in question is consensual in nature, it inherently refers to offences covered under Section 375 of the IPC, thus rendering Section 377 redundant in its entirety.

Further, the former case is of further importance, because it broadens the horizon of acts which can be termed as rape. After this landmark judgment dated as back as 2004 and the recent 2013 Criminal Amendment rape is committed

"when a man

1. *penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*
2. *inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*
3. *manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any ~ of body of such woman or makes her to do so with him or any other person; or*

[7] AIR 2004 SC 3566

[8] WP (Crl.) No. 76/2016, order dated 12-07-2018

4. *applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person*

the same is followed by the 7 circumstances and the following Explanation:

Explanation I.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2. —Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity." [9]

Now, if we read both the both the judgments in harmony and considering the mischief rule, we can infer the following:

1. The main intention of the court was to prevent non-consensual sex
2. The acts did not just include penetration, it included cunnilingus as well
3. Covered use of any other tool or body part either directly or by way of manipulation
4. Covered, vagina, urethra, anus

This means, we can read that if a non-consensual act occurs, where the penetration either penal or any other is into the anus, it will still amount to rape. Then the correct question to ask here is why this cannot apply to men, because even they have an anus, and why can the perpetrator not be a woman, because having a penis is not mandatory to rape anymore.

The former case bears further importance because fundamentally the case had failed when the Court had adjudged that they are bound by the principles of stare decisis and strict interpretation of the law. Furthermore, it was observed that the intention of the Legislature is to be understood from the language used in the statute i.e., what has been said as well as what has not been said, must be focused on equally. Therefore, a construction that renders words meaningless after certain addition or substitution of words must be rejected and avoided altogether. It was on this interpretation that the definition of the term "Rape" was denied being amended to widen its scope as per the contentions of the petitioner.

[9] S. 375, Indian Penal Code.

But, post the 2013 Criminal Law Amendment we stand at a different footing altogether, because the limitations faced by the Court in the *Sakshi case* were broken by this amendment and the definition of rape was subsequently widened. Ergo, presently, the Courts are not bound by stare decisis, the settled law has been unsettled by the legislators themselves, giving the Court a clean slate. Because, even they believe that these archaic laws have become obsolete, and such is the ground for the jurists to move beyond stare decisis and create an exception.

If, for the sake of argument, we argue that part one of Section 377 which indirectly talks about non-consensual sex between homosexuals, has not been revoked and is still criminalised, in the form of forced Sodomy, we are differentiating two acts that are fundamentally the same on the basis of gender of the culprit or the victim, which inevitably will be violative of Article 14 of the Constitution. This is why, it boils down to the mere fact that we need to apply harmonious construction to the two sections and should identify the latter as Rape also.

Many PILs have seen the doors of the Courts for making 375 gender neutral[10], where the Court rejected the PILs on the same ground that they rejected Sakshi's case, stating that it is the legislators who can bring about such a change and the Courts have no say. But these cases preceded the judgment decriminalising Section 377. Another important fact to consider is the 172nd Law Commission Report and Justice Verma Committee Report, which advocated making gender-natural rape laws. However, the legislators did not see the recommendations as important enough to include it in the recent amendment.

Further, a recent case of September 2019, a man being forced to have sex but not 'rape' with five other men in Vashi, Mumbai attracted a lot of attention on social media. Big news houses like India Times categorized it as sexual assault and not rape just because the victim was a man. The articles read [11]

"A 36-year-old man was brutalised in a sexual assault by five unidentified persons at Vashi in Navi Mumbai, necessitating an emergency surgery to save his life police said on Wednesday"

The case was still registered under section 377 of IPC, which technically is redundant

[10] Writ Petition (Civil) No. 8745 OF 2017.

[11] 36-year-old man gang-raped by five in Vashi; Undergoes emergency surgery. (2019, September), *Mumbai Mirror*. https://mumbaimirror.indiatimes.com/mumbai/crime/36-year-old-man-gang-raped-by-five-in-vashi-undergoes-emergency-surgery/articleshow/71310362.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

and invariably does not exist post the judgment. So much so, that the victim ended up retracting his statement stating that the same were self-inflicted injuries. This, we believe, is the biggest fault in our society, not only are people hesitant to speak up, the patriarchy imposes on such men, who have been violated, to live in denial. On similar tracks, we see male survivors being additionally burdened due to the perception that they are effeminate or even possess homosexual attributes, all of which are taboo topics even for men, that would not be equally felt by female survivors.[12]

However, we also agree, that making rape gender-neutral can open floodgates of difficulties in its implementation, because it will be difficult to establish the perpetrators in the crime, it can also lead to counterclaims, when a girl claims that she was raped, the man can in turn claim that in reality, he was the victim of the situation. However, we believe that a few circumstances of abuse cannot lead to the denial of the whole right, because, inherently speaking every law in some way or the other has been abused. Further, since circumstantial evidences form a huge part of the law even currently, such issues can be dealt with, on a case to case basis.

Nevertheless, it is crucial to mention here, that we do not say that both the sexes suffer from cases of rape equally, or that the grief of one is greater than the other, we are not taking a feminist or a misogynist stand, all we are trying to establish here is that every individual of the society needs a voice against such a heinous crime, violating their body and soul, and such voice should be free from gender-stigmatization, since it is already laden with social stigma of shame and non-acceptance.

Conclusion

In conclusion, we would like to point out that rape law of the land has evolved from a strict act of penal-vaginal in nature, to include penal-orifice to further expand up to penetrative-orifice, all including non-consensual in their essence. Then why not evolve it completely, why leave out the possibility of it being abused by a whole fraction of the society, why leaving a half of the society voiceless? It is high time, we agree that if Penal statutes continue to be strictly interpreted, the archaic law is going to see the detriment of society. When the lawmakers have identified the need to bring a reform, even the judges can strike an exception to general rule of strict interpretation here. Ideally, the whole idea

[12] India's laws should recognise men can be raped too. *Centre for Civil Society*. https://ccs.in/indias-law-should-recognise-men-can-be-raped-too

behind these principles of statutory interpretation is to render justice and to ensure that every single voice is heard, and if a whole part of the society, eventually has to suffer, because these very interpretations that were supposed to render justice, bind the courts from providing the same, then isn't the whole institution a faux at the end. This is why we believe that the laws relating to rape, should be interpreted beyond literal and strict interpretation and be the tool that these interpretation theories are supposed to be and render justice.

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