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Human Trafficking In Areas of Armed Conflict

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Abstract:

Human Trafficking is a threat looming over humanity. It single-handedly defeats the impetus exerted on promotion of human rights and incites its perpetrators to challenge the criminal justice mechanism of the nation. In times of conflict, the traffickers exploit the trouble-torn circumstances to latently promote their venomous activities. Out of the various kinds of trafficking, sex trafficking is the most visibly egregious part of the problem. The vulnerability of women and girl child makes them easy targets and the anomic situation does not allow the law enforcement mechanisms to come to their rescue. In this paper, an attempt has been made to understand the plight of women and girl child in armed conflict situations by building a simplified definition of trafficking and pin pointing the factors that contribute to this evil.

Key Words: *Organized Crime, Armed Conflict, Enslavement, Forced Pregnancy, Areas of Transit, Traffickers, Male-dominated Society.*

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Introduction

Human Trafficking is the coerced movement of people[1] perpetrated by the host to the destination states or countries mainly for the purposes of sexual slavery, labour exploitation, marriage, begging, services as child soldiers, organ trafficking, etc. Article 3a of the anti-trafficking protocol attached to the Convention of Transnational Organized Crime defines trafficking as

[1]DAVID A. FEINGOLD, HUMAN TRAFFICKING, Foreign Policy, 26-30, (2005).

the *recruitment, transportation, transfer, harbouring, or receipt of persons by use of threat or force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or of a vulnerable position or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.*[2] This definition is meant to provide a consensus and consistency around the world on the phenomena of human trafficking.

With the advent of globalization, transnational crimes have gained impetus as the current world conditions have credited increased demand & supply. However, it would be wrong to conclude that it is only with globalization that trafficking in persons became a fast growing organized and transnational crime. Historically, population movements have been an enduring component of the human civilization. While migration is believed to be the brighter side[3] of this population movement, trafficking is viewed as the darker side. There is a hair line of difference between the two. Thus, the tale of human trafficking can be found immortalized in historical lithographs & paintings.

Out of the various types of human trafficking, sex trafficking is the most visibly egregious part of the problem but they are at the tip of an iceberg of the massive international problem of human trafficking that encompasses many diverse forms of exploitation. A victim of sex trafficking might not only be the sex slave of the possessor[4] but might be subject to other kinds of services that obliges the whims and fancies of the possessor. Thus, the fundamental human rights of such victims are curtailed and they are alienated from the society.

The trafficking network is so huge, well organized and efficiently planned that it becomes difficult for the law enforcement agencies to take steps towards rescuing the victims of this illegal trade. The root of this crime can emerge from any part of the society, and therefore requires people to be argus-eyed in order to nip the problem from its bud. Previously, the veil of ignorance made the identification of this crime formidable. However, due to the active role of the media, news related to trafficking served as a wakeup call to many incognizant souls in deep slumber. Nationalizing and internationalizing the problem was the first step towards recognizing and combating this organized immigration crime

Research Objectives

- To understand human trafficking as a transnational and organized crime network.
- To study as to how conflicts lead to human trafficking and conflict areas serve as places of origin, transit and destination for the victims of this illicit trade.
- To analyze the situation prevailing in Assam.

Research Questions

- What is the reaction and opinion of the social audience towards the trafficking victims?
- What circumstantial impetus creates the breeding grounds for trafficking?
- What are the factors that make conflict affected people vulnerable to trafficking?
- What are the steps that can be taken at individual level to combat trafficking?

Research Methodology

The research has been conducted after analyzing the work of different authors so as to achieve the set objectives of the paper. Doctrinal method has been adhered to. The researcher has resorted to the use of books, websites, and reports of the NGOs and international organizations. Thus, secondary sources of data collection have been used. The research design is explanatory and analytical.

Limitation Of The Study

The paper aims to provide an overview of the concept of human trafficking and then proceeds to deal with the theoretical aspects of trafficking in areas of armed conflict. Though several references of foreign countries have been made, the primary focus is on India.

[2]BRIDGET ANDERSON AND JULIA O'CONNELL DAVIDSON, IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN? A MULTI-COUNTRY PILOT STUDY, IOM, 9, (2003).

[3]SANKARSEN&JAYASHREEAHUJA, TRAFFICKING IN WOMEN AND CHILDREN: MYTHS AND REALITIES, Concept Publishing House, 16 (1st ed., 2009).

[4]VEERENDRA MISHRA, HUMAN TRAFFICKING: THE STAKEHOLDER'S PERSPECTIVE, Sage Publications, 1(1ed., 2013)

Human Trafficking: An Organized and Transnational Network

Human Trafficking is recognized to be the fastest growing transnational crime aggravated by globalization. Globalization has credited increased demand and supply. Supply exists because globalization has led to increasing economic and demographic disparities between the developing and developed countries along with feminization of poverty and the marginalization of many rural communities.[5] It has also sequenced the cyclopean growth of tourism that has enabled paedophiles to travel and engage in sex tourism. The expansion of trafficking can also be credited to the transportation infrastructure and the decline in the cost of travelling. Demand has increased as producers rely more on trafficked and exploited labour to survive the competition in global economy in which the consumer seeks cheap goods and services including easily available and accessible sexual services.[6] Thus, demand and supply have spawned a thriving business for the traffickers.

Some scholars trace the genesis of human trafficking to the slave trade in the sixteenth century that witnessed the Africans being bought, owned and sold by traders across the Atlantic to work in American plantations and many other services. According to Marxist Theory of Revolution, the very fact that the Africans became the centre of commercial black labour hunting, furthered the coming up of capitalist system of production and brought along with it the resources for an Industrial Revolution.[7]But even after the abolition of the transatlantic slave trade; industrialization, urbanization and the incongruence between the economic developments of various nations has facilitated the intensification of the invisible face of modern day slavery in the form of sexual exploitation, domestic servitude and forced labour. Though globalization had promised benefits to the exploding population through employments; the stream of profit trickled down because of low wages, inhuman working conditions and instability of work.

Human Trafficking is weighed from the perspective of organized crime. Organized crime is crime based on cooperative effort and unity of purpose, like an organized business, for its successful execution. It is characterized by team work, hierarchical structure, planning, centralized authority, reserved fund, specialization, division of labour, violence, monopoly, protective measures and conduct norms[8]; all of which is necessary for trafficking of persons and successfully dodging the law enforcement agencies. This crime network makes it difficult for the executives to trace and decipher the complexities of the illicit trade. Moreover the benefit that human trafficking gives the perpetrators of organized crime is that unlike drugs, humans can be sold repeatedly. Thus, the only way to combat trafficking is utter vigilance that has to be observed by each and every member of the society as the illicit trade remains hidden within the massive and exploding population dynamics.

When viewed from the dimension of transnational crime, the growth in human trafficking can be construed by the demand for cheap labour, the whacking profitability in this trade and the supply of people ready to be trafficked. Human trafficking stems from the victims vulnerability that is exploited by the trafficker. Due to internationalization of corruption, rise of regional conflicts and globalization[9], the gap between the rich and poor has widened. As a result of which the people below the poverty line expose themselves to the trafficker's exploitative motives. In addition to this, the improved communication facilities have paved the way for buying and selling of women with the ease of a mouse click. The root of trans nationalizing human trafficking lies in the idea that dispersing victims to different international locales makes the trade difficult to trace.[10]

Factors Promoting Trafficking

There are many factors that incite the business of trafficking people and aids in spreading its tentacles. To facilitate a better and easy understanding, they are

[5]LOUISE SHELLEY, HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE, Cambridge University Press 3(1d ed., 2010).
[6]Id. at 3.
[7]VEERENDRA MISHRA, HUMAN TRAFFICKING: THE STAKEHOLDER'S PERSPECTIVE, Sage Publications, 1(1ed., 2013).
[8]RAM AHUJA, CRIMINOLOGY, Rawat Publications, 157-158(2d ed., 2012)
[9]SHIRO OKUBO & LOUISE SHELLEY; HUMAN SECURITY, TRANSNATIONAL CRIME AND HUMAN TRAFFICKING: ASIAN AND WESTERN PERSPECTIVES; Routledge, 138(2d ed. 2011).
[10]Id. at 138

divided into push and pull factors[11]. Push factors are primarily origin based factors whereas pull factors are those present at the place of destination. They both are complementary to each other, luring the victim to fall into the trafficker's trap. [12]

a. Push factors involve:

- **Class and Caste structure-**

G.S Ghurye in his polemical work had stratified the Indian society into different segments and established the functioning of different divisions by calling each division a caste. According to him, caste system is a very intrinsic part of the Indian society. This stratification of society into different caste groups led to the emergence of two antagonistic extreme classes. The people of the lower castes were always subject to exploitation by the upper castes. As the upper castes enjoyed a certain degree of influence and respectability in the society, the lower castes not being the owner of such powers and privileges, were subject to victimization on account of their vulnerability. As a result of this, the people undergo economic deprivation and status frustration. This victimization alienates them from the main stream society and in order to be de-victimized and be free from this vicious cycle, they get drawn into illegitimate opportunity structures. In the process of seeking prospects in the unexplored land, they create fertile grounds for traffickers to exploit them. In addition to this, people from lower classes are hired as domestic laborers and agriculture help. They are subject to the pleasure of the dominant class in order to make their living. Moreover the existence of structural inequalities on caste and class basis is perpetuated by less bureaucratization and more feudalism. There is less rule of law, natural justice is not respected,and political violence is resorted to in order to enforce structural fragmentation, crushing the demands of the weaker section brutally[13] and exposing them to the evil intentions of the traffickers.

Gender Based Discrimination:

Feminization of poverty has exposed women to the brutalities of a patriarchal society. Poverty among women has forced women to succumb to jobs like that of a domestic servitude, prostitution etc. Feminization of migration[14] is another emerging concept that drags home the reason as to why women and children become victims of human trafficking. Women face discrimination at their workplace where they are paid less than their male counterparts for the same or more hours of work. So in order to feed their children and take up the responsibilities of their households, single mothers often resort to prostitution and readily become a part of the trafficking network. The moral turpitude they go through is not comprehensible.[15]

- **Culture and Traditions:**

Child marriage and bride trafficking comes to play under this factor. Equating a girl child to that of a burden pushes the parents to engage in trafficking and promote prostitution. *In certain parts of India, there are many castes that practice community-based prostitution like Bedia, Bechara etc. In South India, girls are subject to sexual exploitation, violence, abuse, neglect in the name of Devadasis, Joginis, Basivis.*[16]

- **Economy:**

The increasing economic disparity between the developing and the developed countries has credited the demand for cheap labor and easily accessible sex services leading to human trafficking. The poor, who are the targets of the exploitative mechanism, find themselves victimized by this illicit trade.

- **Environmental factors:**

Natural catastrophes like floods, famines, droughts and earthquakes increase the vulnerability of women and children to the traffickers, who take undue

[11]VEERENDRA MISHRA, HUMAN TRAFFICKING: THE STAKEHOLDER'S PERSPECTIVE, Sage Publications, 6(1ed., 2013); See also: LOUISE SHELLEY, HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE, Cambridge University Press 3(1d ed., 2010).
[12]VEERENDRA MISHRA, HUMAN TRAFFICKING: THE STAKEHOLDER'S PERSPECTIVE, Sage Publications, 6(1ed., 2013)
[13]VEERENDRA MISHRA, HUMAN TRAFFICKING: THE STAKEHOLDER'S PERSPECTIVE, Sage Publications, 8(1ed., 2013)
[14]SANKARSEN&JAYASHREEAHUJA, TRAFFICKING IN WOMEN AND CHILDREN: MYTHS AND REALITIES, Concept Publishing House, 16 (1st ed., 2009).
[15]*Toolkit to combat Trafficking in Persons*, https://www.unodc.org/documents/human-trafficking/Toolkit, Retrieved on 22-10-2015 at 8.15am.
[16]VEERENDRA MISHRA, HUMAN TRAFFICKING: THE STAKEHOLDER'S PERSPECTIVE, Sage Publications, 10(1ed., 2013).

advantage of their having lost social and financial support. The women who are desperate to find a route out of this forlorn circumstance, become primary targets of the trafficking host. The relief camps become burning grounds of sexual exploitation, drug and human trafficking because of their vulnerability.[17]

b. **The Pull Factors:** Trafficking is perceived as the dark underbelly of globalization[18]. The cultural drift from traditional norms to enculturation of values of the modernized society has increased demands for unethical services by haves from have-nots. The have-nots aspire de-victimization and eventual empowerment when they move to the glossy world. The traffickers project the destination site according to these aspirations. Inadvertently, these gullible people become victims of the trafficking network and get entrapped into its organized warren.[19]

Conflicts and Human Trafficking

Armed conflict is inextricably linked to human trafficking. *War and instability cause a breakdown in law and order, a deterioration of institutional and social protection mechanisms, increased poverty, deprivation and dislocation of the civilian population, creating an environment in which trafficking thrives.*[20] Traffickers take undue advantage of this opportunity and prey on those who are forcibly displaced or compelled to migrate in search of safety and stability, both within and across borders.

The vulnerability of women exponentially increases at the time of conflicts. While other people struggle through the devastation that accompanies wars and battles, women and girls encounter violence, discrimination, oppression and become victims of sexual slavery. This brutality faced by them can be linked to their deteriorating status in the society, pre-war inequalities and inadequate opportunities, which are exacerbated during and after war. *Armed conflict also leads to specific forms of war-related trafficking such as military abduction and enslavement for sexual servitude or forced labor.*[21]Women who become refugees and internally displaced persons are exposed to a high-risk situation, as post war they have lost all economic and educational opportunities, social and financial support, protection etc. As men go off to war, they are left behind with inadequate shelter, insufficient food, are deprived of basic healthcare and their condition is reduced to a farce. They are cramped together in the makeshift abodes, in unhygienic conditions, which make them desperate to find a route out of this situation. The traffickers take advantage of this desperation and either abduct them or entice them into their trap by promising a better life at the destination site. Subsequently, these women are trafficked for sexual enslavement or enforced military prostitution. Moreover, in order to sustain war economies and prolonged war, women are forced to do domestic works, cultivate crops and demine contaminated areas.

Historically, the end of Cold war sequenced the rise of regional conflicts leading to an increased number of economic and political refugees[22], who were trafficked by many rebel groups to fund their military actions and provide for soldiers. Thus, armed conflict is very intrinsically intertwined with human trafficking since time immemorial.

Trafficking During the Time of Conflicts

The forms of trafficking vary at the time of conflicts depending on the geographic area where the conflict occurs, the economic and political conditions and the military and civil forces involved. Out of the different forms of trafficking, the most ostensible are:

- **Military abduction and enslavement in conflict territories**[23]**:**

During armed conflicts, women and children are abducted, held for a long time or exchanged for new women, for different purposes, however sexual

[17]DAVID A. FEINGOLD, HUMAN TRAFFICKING, Foreign Policy, 26-30, (2005).
[18]VEERENDRA MISHRA, HUMAN TRAFFICKING: THE STAKEHOLDER'S PERSPECTIVE, Sage Publications, 19(1ed., 2013).
[19]Id. at 17.
[20]SUSAN FORBES MARTIN & JOHN TIRMAN, WOMEN, MIGRATION AND CONFLICT: BREAKING A DEADLY CYCLE, Springer Science and Business Media, 47(1d ed. 2009)
[21]Id. at 47
[22]LOUISE SHELLEY, HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE, Cambridge University Press 3(1d ed., 2010).
[23]Sonja Wolte, Armed Conflict and Trafficking in Women: A Desk Study, Deutsche Gesellschaft fur TechnischeZusammenarbeit (GTZ) GmbH, Jan 2004, at 16

violence[24] is the most rampant among them all. The world has witnessed many burning examples of such occurrences. For instance, *the case of systematically organized military sexual slavery during wartime in which 200,000 women, mainly Korean and Philippine, were abducted by the Japanese army during World War II. Officially organized by the military leadership, these women were held in 'comfort stations' frequented by Japanese soldiers.*[25]Abduction for sexual enslavement by military forces has been repeatedly reported in current conflicts zone such as for *Angola*[26], the war in *former Yugoslavia*[27], in Sierra Leone, *Liberia*,[28] *and Democratic Republic of Congo*[29] etc.

- **Forced Pregnancy:**

In several conflicts, rape and forced pregnancy of abducted women were used as a means of ethnic cleansing. This was the case in Bosnia, Herzegovina, Rwanda, Bangladesh, Liberia and Uganda.[30]

- **Forced**

Labour: In order to sustain war economies, the trafficked people are forced to work as domestic servants, crop cultivators, fire wood collectors, demining contaminated sites[31], carrying heavy ammunitions and messages between war gangs and fighters.[32] In Columbia, women and men were forced by the guerillas and the paramilitary forces to work on drug crops.[33]

- **Cross-border trafficking of women and girls:** Though data on cross-border trafficking during armed conflicts is less, war-torn countries are breeding grounds for such activities. Lawlessness, exemption from punishment, dysfunctional state institutions and border controls and the high level of violence during war create conducive environment for trafficking. Moreover loss of social and financial support structure make women vulnerable and primary targets of these traffickers.
- **War zones as areas of transit**[34]**:** The lack of law enforcement agencies and border controls makes it way too facile for the traffickers to facilitate their self-driven interests. The term 'military prostitution[35]' explicitly explains as to how military forces are involved and have shaken hands with the perpetrators of this illicit trade. Thus, the conflict areas serve as areas of transit and even act as sources of recruitment from where the victims are abducted.
- **Poverty has a women's face:** When men go to fight in wars, women are left behind with inadequate housing facilities, lack of food supplies and unhygienic conditions. Having lost their financial support, they get exposed to the exploitative situations in male-dominated structures.

Trafficking in Post Conflict Situations

War zones have always been burning sources and transits of trafficking irrespective of whether it is the time of conflict or post war period. Post war regions can be areas of origin, transit and destination for the trafficking victims. Due to anomic situation after the war, the law enforcement institutions and political forces are in shackles. Criminal activities and violence are at the peak. These are used as pretexts for perpetuation of trafficking. *Former militia and ex-*

[24]David A. Feingold, Human Trafficking, Foreign Policy, Oct 2005 at 26; See also Sonja Wolte, Armed Conflict and Trafficking in Women: A Desk Study, Deutsche Gesellschaft fur TechnischeZusammenarbeit (GTZ) GmbH, Jan 2004, at 16; SUSAN FORBES MARTIN & JOHN TIRMAN, WOMEN, MIGRATION AND CONFLICT: BREAKING A DEADLY CYCLE, Springer Science and Business Media, 47(1d ed. 2009); SANKAR SEN &JAYA SHREE AHUJA, TRAFFICKING IN WOMEN AND CHILDREN: MYTHS AND REALITIES, Concept Publishing House, 16 (1st ed., 2009).

[25]Sonja Wolte, Armed Conflict and Trafficking in Women: A Desk Study, Deutsche Gesellschaft fur TechnischeZusammenarbeit (GTZ) GmbH, Jan 2004, at 16

[26]*Peace, Women and Security*, United Nations (2002) at p.22.

[27]Alexandra Stiglmayer, Vergewaltigung in Bosnien-Herzegowina, Massenvergewaltigung- Krieg gegen die Frauen, Freiburg i. Br., 1993 at 109-216.

[28]Sonja Wolte, Armed Conflict and Trafficking in Women: A Desk Study, Deutsche Gesellschaft fur TechnischeZusammenarbeit (GTZ) GmbH, Jan 2004, at 16

[29]United Nations (2002), pp. 17

[30]Sonja Wolte, Armed Conflict and Trafficking in Women: A Desk Study, Deutsche Gesellschaft fur TechnischeZusammenarbeit (GTZ) GmbH, Jan 2004, at 15.

[31]SUSAN FORBES MARTIN & JOHN TIRMAN, WOMEN, MIGRATION AND CONFLICT: BREAKING A DEADLY CYCLE, Springer Science and Business Media, 47(1d ed. 2009).

[32]Sonja Wolte, Armed Conflict and Trafficking in Women: A Desk Study, Deutsche Gesellschaft fur TechnischeZusammenarbeit (GTZ) GmbH, Jan 2004, at 15.

[33]Fanny M. Polania, Analysis on the relation between trafficking in humans and drugs in Columbia, Oct 3, 2003.

[34]Sonja Wolte, Armed Conflict and Trafficking in Women: A Desk Study, Deutsche Gesellschaft fur TechnischeZusa mmenarbeit (GTZ) GmbH, Jan 2004, at 19.

[35]SUSAN FORBES MARTIN & JOHN TIRMAN, WOMEN, MIGRATION AND CONFLICT: BREAKING A DEADLY CYCLE, Springer Science and Business Media, 47(1d ed. 2009).

combatants also get indulged in trafficking activities to replace revenue losses after the termination of the war. Even income losses in weapon trafficking are filled by trafficking of people.[36]

Victimization of women emanates from the belief that women have core responsibilities in rebuilding the war-torn societies. In the male dominated societal structures, women are often exempted from peace-negotiations, post-conflict decision making, policy decisions and implementation procedures. So the very fact that women are not considered to be at par with men, propagates their victimization.

Post conflict zones also serve as areas of destination as the foreign troops who come as allies or international peace support operators, bring with them the *demand for sexual slavery and domestic labor*.[37] Moreover, *better access to sexual services by prostitutes is construed to be an essential ingredient for better military performance and it also prevents the military personals from harassing the women of the host countries.*[38]

Flesh Trade Menace in Assam

According to the data for 2015 released by the National Crime Records Bureau, Assam has emerged as the trafficking hub of the country. With about 1494 reported cases of trafficking, the state accounts for 22% of the national figure[39]. The state also holds the highest number of reported cases of child trafficking which projects the doleful state of affairs within its boundaries. A NGO named NEDAN Foundation records 4 to 5 cases of missing children and adults every day in different parts of the state. Apart from these statistics, it has been presumed that a majority of cases go unreported as families of the victims fear getting caught in the legal hassles. In spite of the endeavours of the Chief Minister of the State, much is yet left to be done.

Further, in areas of armed conflict, child trafficking is rampant. According to UNODC Report 2013, Assam is ranked as one of the eight Indian states with regard to child trafficking. The Bodoland Territorial Area district has a regular feature of conflict which enhances the vulnerability of girl child trafficking[40]. By making fake promises and assurances of a good future, girls are lured into sex trade by supplying them to the forces for sexual exploitation. In Kokrajhar district of Assam, the stats of human trafficking are very high as the situation there is compounded by unstable democracy, military and separatists conflicts within and amongst the region, disparity economic growth rates that excluded large sections of diverse ethnic population and vulnerable to natural and man-made disasters[41].

In spite of the chaotic situation prevailing in the state, the constant attempts of the Nedan Foundation in combating cross border human trafficking between North-East India and South Asia, deserves acclaim. The NGO has been trying to build regional collaboration with the SAARC nations on Standard Operating Procedure on Rescue, Repatriation and Reintegration.[42] It has been conducting training programmes, seminars and workshops for building conceptual clarity on the definition of human trafficking. This NGO has also shaken hands with the State Government for success in its anti-trafficking protocol.

Conclusion

Human trafficking is the illicit trade in people for purely commercial purposes. Though, there are evidences of the existence of this crime in the pages of history, it became one of the fastest growing transnational and organized crimes due to the cushion

[36]Sonja Wolte, Armed Conflict and Trafficking in Women: A Desk Study, Deutsche Gesellschaft fur TechnischeZusammenarbeit (GTZ) GmbH, Jan 2004, at 27. See also: SUSAN FORBES MARTIN & JOHN TIRMAN, WOMEN, MIGRATION AND CONFLICT: BREAKING A DEADLY CYCLE, Springer Science and Business Media, 47(1d ed. 2009).

[37]LOUISE SHELLEY, HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE, Cambridge University Press 3(1d ed., 2010).

[38]Sonja Wolte, Armed Conflict and Trafficking in Women: A Desk Study, Deutsche Gesellschaft fur TechnischeZusammenarbeit (GTZ) GmbH, Jan 2004, at 27

[39] Rangili Brahma, *Armed Conflict and Girl child*, IOSR Journal of Humanities and Social Science, Vol. 22 Issue 1, www.iosrjournals.org. See also *'Assam emerges as India's hub of human trafficking'* available at googleweblight.com.

[40] UNODC Report on Human Trafficking exposes modern form of slavery, http://www.unodc.org, retrieved on 21-10-2015 at 10.45pm. See also Global Report on Trafficking in Persons, 2012 and 2014.

[41] *Combating Human Trafficking in Assam*, Nedan Foundation, www.nedan.in

[42] *Human Trafficking in North-Eastern Region, India*, NEDAN Foundation's initiative to End violence against Women and Children, Bodoland Territorial Council, Assam, NEDAN'S Newsletter, vol. 1

provided by globalization. This crime can be divided into three segmental areas of occurrences, which are: place of origin, transit and destination. There are several factors that aggravate this menace, however an analysis of all these factors demonstrate the fact that women and children are much more vulnerable to trafficking than men. For the purpose of this paper, it is in fact every important to understand as to how conflicts lead to trafficking. Conflicts themselves signify anomie i.e. total breakdown of law and order. In the absence of law-making, law enforcement and law-regulating agencies, criminal activities reach its peak. Thus conflict affected areas are conducive to promote trafficking. Women having lost their financial and social support expose themselves to the selfish interests of the carriers of criminal norms. Even the relief camps provide no respite to them. This victimization of women emanates from the prejudiced and biased outlook of looking down upon them.

Human trafficking is a fast growing network, victimizing anyone or everyone vulnerable. As it is perceived to be one of the greatest menaces in the present society, it is indeed important for us to endeavour to combat it from its very root. Trafficking can occur anywhere at any time. To prevent victimization, one has to be argus-eyed. Discarding the thought that women are merely vessels of sexual pleasure will definitely help the situation. Apart from this, spreading awareness and imparting training to adolescents and anti-trafficking police officers is another step towards eradicating this cancer. With the noble work of the NGOs along with the state governments will only be rewarded if similar attempts are made by the people at the grass-root level.

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Interpretation of the Term "Voluntarily" Under Indian Criminal Law: An Analysis with Special Emphasis on Recent Cases

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Abstract:

Law is referred to as organic or living for the right set of reasons. The way a term is defined, interpreted and applied may change depending upon the changing social circumstances. But, when it comes to the interpretation and application of a term related with Criminal Law, the judges should exercise the highest degree of care and caution. They should strive to give effect to the legislative intent and try to make the interpretation and application of the term as uniform as possible in order to not dwindle the faith of the common masses in the justice delivery system. This research work analyses the use of the term 'voluntarily', in the Indian Criminal system. In order to achieve its objective, the author studies the seminal works of the scholars on this theme and also looks at the trajectory of recent cases which ponders upon this theme. At the end, the author tries to draw a conclusion as to the legal propriety and relevance of the manner in which the term is used in the present

Key Words: *Voluntarily, Intention, Knowledge, Reason To Believe..*

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Introduction

The Indian penal code (hereinafter referred to as the Code) is the principal substantive Criminal Law of India. Drafted in 1860, under the recommendations of the first law commission of India, the code is still applied in India and many of her neighbours who were then British colonies; without much alteration. This endurance of the code can be attributed to its cogent, robust, flexible and inclusive nature due to which the new offences such as those related to technology could fit into it very easily. The code contains substantive provisions which describe the offence and penal provisions which lay down punitive measures for committing the same.

The Code offers the definitions of all the key terminologies related to Criminal Law, which are then interpreted by the Court. Since, the way these terms are interpreted and used plays a vital role in providing directions to a criminal trial, it is imperative that the jurisprudence revolving these terms be analysed and understood. This research work aims to analyse the jurisprudence of "Voluntarily", one key terminologies of criminal law, which is explained by section 39 of the Code. Section 39 of the code says that-

"A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing, those means, he knew or had reason to believe to be likely to cause it.

Illustration

A sets fire, by night, to-an inhabited house in a large town, for the purpose of facilitating a robbery and thus causes the death of a person. Here, A may not have intended to cause death; and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily."[1]

A simple reading of the section can provide the perception that it pertains to the *mens rea, i.e.* mental element of a crime[2], and talks about three mental stages, i.e. intention, knowledge and reason to believe. The default rule under criminal Law is that a person can be convicted of commission of an offence only when he or she has committed the offence wilfully, and not under any coercion or misconception.[3] And this is what the term "Voluntarily" should ideally mean. But this is not so under the said provision. The word is given a particular meaning which is different from the widely understood ordinary meaning of it.[4] The word is thus to be understood in relation to the causation of effects and not to doing of the Acts from which those affects result.[5] Thus, the word "Voluntarily", in the context of the code has been given an artificial meaning which is different from what it is being referred to in the ordinary sense. A careful reading of the section makes it very clear that the section places 'intention', 'knowledge' and 'reason to believe' at the same pedestal. This equation faced criticism from different corners and was also defended in the same manner by providing various justifications. One of the justifications was provided by the Indian Law Commission. Its members said that as the penal consequences in the three cases are the same, blurring the difference can be accepted. They cited the Halsbury's Law of England which said that if a person does an act after having the knowledge of the probable consequences, it can be inferred that he wanted the consequences to take place, though he may not have the direct intention at the time of commission. Thus, Voluntary offenders should not only include those who directly intend to inflict a particular injury, but also all such as wilfully and knowingly incur the hazard of causing it.[6]

Concepts of Intention, Knowledge and Reason To Believe

Intention

[1] S. 39, Indian Penal Code, 1860.
[2] GRANVILLE WILLIAMS, TEXTBOOK ON CRIMINAL LAW, 71 (2nd ed., 2009).
[3] S. K. SARVARIA, RA NELSON'S INDIAN PENAL CODE, 38 (9th ed., 2003).
[4] Ibid.
[5] Ibid, at 39.
[6] Supra 3, at 40.

Intention, in the most common sense is a state of mind where a person decides to bring about a particular consequence.[7] There has been a never-ending debate in the legal sphere about the exact interpretation of the word 'intention' in the context of a crime. But, the more important point is that it is unable to prove the exact intention of a person unless he confesses it.[8] So, in most of the criminal law regimes, intention is derived from the act of the person.[9] Though, there are allegations that this way can be misleading at times, there is no better way to prove the intention of a person. Intention may be expressed or implied though this difference between implied and express intention is not the same as the interpretation of these words in term of Contract Law.[10] The distinction is far more fine and delicate in case of criminal law. Express intention is the state when a person intends the natural and probable consequences of his acts.[11] Implied intention is a creation of the law where a person has the knowledge of the likelihood of the consequence. [12]

Knowledge

According to the well-known philosopher John Locke, Knowledge is the highest degree of speculative faculties and consists in the perception of truth of affirmative or negative propositions. [13] In order to know a thing, apart from believing it to true, the belief of the person should be backed or substantiated by solid evidence, whether personal or not. [14] But, the degree of certainty to which the experience will replicate itself in the future situations is what makes the difference. Where by personal experience, it can be found out an act invariably leads to a particular consequence; it is a matter of knowledge. There are also cases where an act leads to a particular consequence generally, but not invariably.[15] This is where the question of probability comes in. Degree of probability can be classified into three types in a hierarchical manner, namely probable, likely and possible.[16] The consequence of an act can be called possible when a situation of its coming into existence can't be denied. A consequence can be called likely when it is highly possible that it may occur. And a consequence can be called probable when there is only a fraction of doubt that it may not occur. Thus, when the consequence of the act is between highly probable and certain, then it the agent is deemed to have knowledge of the same.[17] The test is that of certainty. Anything less than highly probable is reason to believe.

Reason to believe

Section 26 of the Indian Penal Code says that a person is said to have reason to believe a thing if he has sufficient cause to believe that thing but not otherwise.[18] Reading between the lines of this section makes it clear that a reason to believe a particular thing doesn't deny the existence of other possibilities. Reason to believe is somewhat weaker than knowledge. When the consequence of a particular Act is likely, then the agent has a reason to believe. Since the degree of certainty is less in this case, there is always the presence of more than one hypothesis. To have reason to believe, it is not necessary for the person to be sure about the consequence. It is enough if the person has a reasonable apprehension that it is likely that such a consequence may happen. [19]

Viewing Intention, Knowledge and Reason to Believe From the Eyes of the Indian Courts

Nankaunoo vs. State of UP[20]

In this case, a person was shot at the left thigh by another person in order to take revenge. The person died on his way to hospital. A case was registered before the person died, under 304. After the person died, the case was transferred to 302, i.e. punishment for murder. The issue before the Court was to decide the section under which the person should be punished. In the process of resolving the issue, the

[7] Supra 2, at 75.
[8] Ibid.
[9] Infra 11, at 196.
[10] Supra 3, at 41.
[11] Supra 3, 41.
[12] Supra 3, 41.
[13] SYED SHAMSUL HUDA, PRINCIPLES OF THE LAW OF CRIMES, 195 (1 ed., 2011).
[14] Ibid.
[15] Ibid.
[16] Supra 3, at 43.
[17] Supra 2, at 73.
[18] S. 26, Indian Penal Code, 1860.
[19] H. S. GOUR, COMMENTARY ON THE INDIAN PENAL CODE, 154 (12th ed., 2005).
[20] AIR 2016 SC 447.

Court delved into the issue of difference between intention and knowledge. It said that it is the intention with which the act is done that makes a difference in arriving at a conclusion whether the offence is culpable homicide or murder.[21]

Referring to the Virsa Singh case[22], the Court said that, "*the 'intention' and 'knowledge' of the accused are subjective and invisible states of mind and their existence has to be gathered from the circumstances, such as the weapon used, the ferocity of attack, multiplicity of injuries and all other surrounding circumstances. The framers of the Code designedly used the words 'intention' and 'knowledge' and it is accepted that the knowledge of the consequences which may result in doing an act is not the same thing as the intention that such consequences should ensue.*"[23]

When an act is done by a person, it is presumed that he must have been aware of the consequences that would naturally follow from his Act. But that knowledge is bare awareness and not the same thing as intention which means that the offender wants the consequences to take place. As compared to 'knowledge', 'intention' requires something more than the mere foresight of the consequences, which is the desire of the end which is to take place due to the Act.

Parvinder vs. State [24]

In this case, a young man in order to show his cavalier and money bravado, brought a gun to show to his friends. In front of them, he fired a shot in the air and the next shot to a friend. The Bullet hit the chest and the person died. However, the accused argued that he didn't have the intention to kill the victim. The Court went into a deep discussion on the different parts of section 299 and 300of IPC and contemplated as to which part would apply to the person.

The Court, in the paragraphs 31 to 37 of the judgement, goes into a long discussion on the difference between intention and knowledge. Stating a scholarly opinion, it said that according to Glanville Williams in Textbook of Criminal Law (1978 Edition), is that 'intention' cannot be satisfactorily defined and possibly it does not need a definition. However, philosophically it can be defined as: "In ordinary language a consequence is said to be intended when the actor desires that it shall follow from his conduct."

The Court also referred to two Indian cases namely Kesar Singh vs. State of Haryana[25] and Jai Prakash vs. State (Delhi Admn.). [26]The Court arrived at a conclusion that the knowledge signifies a state of mental realisation with the bare state of conscious awareness of certain facts in which human mind remains supine or inactive. On the other hand, intention is a conscious state in which mental faculties are aroused into activity and summoned into action for the purpose of achieving a conceived end. It means shaping of one's conduct so as to bring about a certain event. Therefore in the case of intention mental faculties are projected in a set direction. Knowledge can always be determined from the factual circumstances, whereas in case of intention, it is sometimes difficult to do so.

Abdul Kalam Musalman and Ors. Vs. State of Rajasthan[27]

In this case, the labourers were appointed to do a mining operation. But, unfortunately, the labourers died since the proper precautionary measures were not taken by the employers.. The question before the Court was whether the case would fall under section 304 or section 304 A of the Indian Penal Code. Section 304 of IPC dealt with punishment for culpable homicide not amounting to murder and Section 304 A dealt with causing death by rash or negligent Act. Here, the Court said that the element of knowledge is present in intention, knowledge, as well as rashness; but the ambit and nature of knowledge in all the cases are different. In al the case of intention, knowledge and rashness, there is an element of knowledge. In case of intention, the agent is aware and intends the consequences. In case of knowledge, the agent is aware of the consequences but takes the risk of doing the Act. In case of rashness, the agent is aware of the consequences but sincerely hopes that the consequences don't follow. The Court held that since

[21] Ibid.
[22] AIR 1985 SC 465.
[23] Ibid.
[24] 2015 VII AD (Delhi)169.
[25] 2008 15 SCC 753.
[26] 1991 2 SCC 32.
[27] 2011CriLJ 2507.

the motivating factor behind the act was not to kill a human and the death happened only due to the lack of precaution of the employers, thus , it can be said that the act will fall under section 304 A and not section 300of the Indian Penal Code.

Md. Isub Ali vs. State of Tripura [28]

In this case, a fight took place between two neighbouring families regarding a very trifle matter and a woman has hit by a brickbat thrown at her by a member of the other family. She became unconscious and subsequently died of the injury. The issue before the Court was that whether this case would fit into section 325 or section 304 Part II of the Indian Penal Code. The Curt was supposed to take a call that whether the accused should be punished for murder or culpable homicide not amounting to murder. The prosecution argued that the accused should be punished for murder while the defence said that the accused had no intention of killing the person and the maximum punishment that he can get was under section 325. Thus, it was imperative for the court to differentiate between intention and knowledge. The Court while differentiating between the same arrived at the conclusion that *"'Knowledge' means acquaintance with fact or truth or mental impression or belief; and 'Intention' means to do a certain thing, purpose, design; contemplating in result. The expression 'causing death' in Section 299, means putting an end to a human life, and all the three intentions mentioned in the section must be directed either deliberately to putting an end to a human life or to some act which, to the knowledge of the accused, is likely to eventuate in the putting an end to a human life. The knowledge must have reference to the particular circumstances in which an accused is placed. The intention of the accused must be judged not in the light of actual circumstances, but in light of what he supposed to be the circumstances. A man is not guilty of culpable homicide if his intention was directed to what he supposed to be a lifeless body."*

Thus, the Court held that the appellant was not aware about the cause of his act and there might not be any intention to kill the deceased but it was very much within his knowledge that throwing brickbat on the vital part of a person like head is likely to cause death of a person including the deceased which he did in the instant case. Therefore, according to this Court he committed an offence under Section 304, Part II, IPC.

Basdev v. State of PEPSU [29]

It is a landmark case where the Supreme Court of India delves deep into the question of difference between intention and knowledge. Though the Court doesn't deal directly with section 39 of the code, the analysis provided by it in this case can be used as an authentic tool to map the relationship between various elements of section 39 of the code. Here, the Court accepts that the difference between intention and knowledge is very fine, but makes an effort to distinguish between the two. Intention is something which is formed by the agent on the basis of the motive and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less. Also, intention can be presumed from knowledge in most of the cases intention is very difficult to find in a direct manner

In this case, a retired military personnel was accused of killing a boy in a marriage party in an inebriated state. The appellant asked Maghar Singh, the young boy to step aside a little so that he may occupy a convenient seat. But Maghar Singh did not move. The appellant whipped out a pistol and shot the boy in the abdomen. The boy succumbed to the injury.

The issue of contention was whether to order him punishment under section 302 or section 304 of the code. The trial Court found out that accused was intoxicated to such an extent that according to one of the one of the witnesses, he was almost in an unconscious condition.

He was framed under section 84 of the code which says that-

"In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge

[28] 2008CriLJ 100.
[29] 1956 AIR 488.

as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will"[30]

The contention which appeared before the Court is that the first part of the section mentions about intention or knowledge but the second part mentions only about knowledge. This leaves a room of confusion for the interpretation of the section.. The Court took the view that an intoxicated person, whatever may be the degree of his intoxication, can posses knowledge of the consequences of his acts. But, the ability to form an intention depends on the level of intoxication and can be deduced from the circumstantial evidences. In an example cited by the Court in this case, it was said that in a case of the accused being in the state of intoxication, circumstances such as nature of weapon used can be used as a means to deduce intention. If in a particular instance, the accused uses a simple stick to beat a person in an inebriated state, it can't be said with clarity that he could from the necessary intention to commit the crime. On the other hand, if the accused uses a weapon which in the ordinary course of nature is capable of inflicting grievous injury, then there remains no doubt that he at that moment, possess the mental capabilities to form the intention.

Inter-Connection between the Concepts of Intention, Knowledge and Reason to Believe: Two Different Perspectives

If we place the concepts of intention, knowledge and reason to believe in a hierarchy, then we find them in the following order-1. Intention, 2. Knowledge, and 3. Reason to believe. There are substantial differences in the sentencing policy, based on the hierarchy. For Crimes that are not serious in nature, the difference is not that huge, and all of them are generally placed on the same footing. But, this is not so for the crimes which are of serious nature. One of the best examples to illustrate this is Section 304 of the Code. This section lays down punishment for culpable Homicide not amounting to murder. Under this section, if the act is done with an intention, then the maximum punishment that can be given is that if life imprisonment. But, if the Act is done with mere knowledge, the highest form of punishment that can be offered is that of imprisonment of 10 years along with fine.

The inter-connection between all the three concepts can be viewed from two perspectives. The first perspective analyses and differentiates the concepts on the basis of the degree of certainty. Following the hierarchy of concepts, it can be understood that Intention has the highest degree of certainty and reason to believe has the lowest. Intention is the case where the agent is absolutely sure of the consequence and precisely intends it. Smith and Hogan in Criminal Law agrees to this proposition and says that person acts intentionally when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events.[31] In the Court of Appeals decision in Nedrick [1986] 3 All ER 1, CA; it was stated that foresight of a consequence as 'for all practical purposes inevitable' could give rise to an irresistible inference of intention, which is likely to mean in practice that foresight of inevitability, at least, will be equated with intention in the minds of a jury.[32] Williams explains that a consequence should be taken as intended, although it was not desired, if it was foreseen by the actor as the virtually certain accompaniment of what he intended.[33]In the case of knowledge, there is a fraction of doubt in the mind of the agent regarding the consequence and he may or may not want the consequences to happen. And reason to believe is of the lowest degree where the consequence is likely from the Act and in spite of that the person goes on to perform it. Here, there are always more than two possibilities of consequence.

In a particular hypothetical situation, two gangs, A and B had an altercation at a public place. One member of gang A threw a grenade towards the members of the gang B in order to kill them. Due to the explosion of the Grenade, Many common passer bys died. Here the member had the knowledge that due to the explosion, some passer bys would die, though he didn't want to kill them, i.e. had no motive behind killing them. But, he had foreseen it as virtual accompaniment of what he

[30] S.84, Indian Penal Code, 1860.
[31] Parvinder v. State 2015 VII AD (Delhi)169.
[32] Ibid.
[33] Supra 2, at 297.

intended. Here, the member of the gang will be deemed to have killed the passer bys intentionally.

Another perspective from which the inter-relationship between them can be analysed is by differentiating between mere awareness of the consequence and intending the consequences. In case of knowledge and reason to believe, the agent is aware of the consequences. [34]Though the degree of knowledge varies, the thing which is in common between them is that they do not intend the consequences.[35] On the other hand, in case of intention, there is a motive which leads the agent to be sure of the consequences as well as intending the consequences.[36] Knowledge' means acquaintance with fact or truth or mental impression or belief; and 'Intention' means to do a certain thing, purpose, design; contemplating in result.[37] Reiterating what is mentioned in the *Virsa Singh case*[38], as referred to by the Court in *Nankaunoo case*[39] is that knowledge is bare awareness and not the same thing as intention which means that the offender wants the consequences to take place. As compared to 'knowledge', 'intention' requires something more than the mere foresight of the consequences, which is the desire of the end which is to take place due to the Act.

Now, we can view the above-mentioned example of gang altercation from this perspective. The offender knew that due to his act, the passer-bys will be affected. In spite of this awareness, he takes the risk of committing the act. But, this doesn't per se mean that he wanted the passers-by to die. Thus, it can be said that he caused hurt to the passer—by voluntarily, i.e. with knowledge but not intentionally.

There is a very thin line of difference between these two perspectives and in most of the cases they overlap with each other. It can be said that the Indian Courts have used the amalgamation of these two perspectives in a manner which best suits them while deciding the cases.

Use of the Word "Voluntarily in the Indian Penal Code

The word "voluntarily" is one of the most frequently used words the Indian Penal Code. If taken a count, it is used for almost more than eighty-five times in the Code, Though, in some cases, the word is used more than once in a single provision and also used in the illustrations. The word is at least used once in the chapters of 'general exceptions', 'abetment', 'offences against the State', 'offences relating to elections', 'contempt of the lawful authority of public servants', 'false evidence and offences against public justice'; Offences Affecting The Public Health, Safety, Convenience, Decency And Morals', 'offences relating to Religion', 'offences affecting the human body', 'offences against property', 'Criminal Breach of Contract of service' and ' Criminal Intimidation, Insult and Annoyance'.

But, it is used for the maximum number of times in the chapters of offences against the human body and offences against property. So, this research work will focus on the use of the word 'voluntarily' in the context of these two chapters.

Of Offences Affecting the Human Body

Generally, offences against the human body are recognised as the most serious of all the offences and thus have the highest penalties for their commission. In this chapter, the word voluntarily is used in the case of fifteen substantive provisions. In twelve provisions out of them, the word 'voluntarily' is used in the title or marginal note of the provisions. The exceptional cases where it is not mentioned in the title are the provisions relating to 'wrongful restraint', 'unnatural offences' and 'causing miscarriage' In all these three offences, the word used is voluntarily and they have not mentioned any other word to specify *mens rea*. Thus, the meaning will include all the three ingredients, i.e. intention, knowledge and reason to believe.

Among the provisions which mention 'voluntarily' in their head notes, only three provisions, i.e.

[34] Nankaunoo v. State of UP AIR 2016 SC 447.
[35] Parvinder v. State 2015 VII AD (Delhi) 169.
[36] Basdev v. Sate of PEPSU 1956 AIR 488.
[37] Isub Ali v. State of Tripura 2008CriLJ 100.
[38] Supra 25.
[39] Supra 23.

'voluntarily causing hurt', 'voluntarily causing grievous hurt' and 'voluntarily causing grievous hurt by dangerous weapons or means', specifically mention 'intention' and 'knowledge' in their contents. All other provisions which have voluntarily in their marginal note, the meaning shall be construed in the light of the definitions given in the above-mentioned three provisions. Thus, reason to believe is specifically excluded by the framers as the degree of proof required is very loose and it is not proper to use it for serious offences

If a study is done of the more serious offences among the offences to the body such as 'murder' and 'culpable homicide not amounting to murder', then it can be easily found out that the provisions dealing with these offences do not randomly use the word 'voluntarily'. Great care has been taken by the framers of the code to mention specific *mens rea* of intention and knowledge in appropriate places. Not to mention,these provisions also don't have reason to believe as a *mens rea*.

Of Offences against Property

Under this chapter, the word 'voluntarily' is used in the provisions of four offences, namely 'theft turned robbery', 'Assisting in concealment of stolen property', 'Voluntarily causing hurt in committing robbery', and 'All persons jointly concerned in lurking house-trespass or house-breaking by night punishable where death or grievous hurt caused by one of them'. The difference in the use of the word 'voluntarily' in cases of offences against the human body and property is that in cases, the term includes the element of reason to believe. While in case of offences against body, it is specifically excluded in the definitions.

In the cases property where the term 'voluntarily' is used, the thing which is in common is that the offences are being done in furtherance of some other offences. Since, the accused are already involved in one offence, so, the law lowers the threshold of convicting them in another offence which is done in the furtherance of the previous one. Thus, in all the above-mentioned cases, any one element among intention, knowledge and reason to believe is sufficient to convict in the crime.

Conclusion

Generally, a crime consists of both the physical and mental element. Comparatively, the precise mental element of the accused is more difficult to find out than the physical element, as the latter one is more subjective and fluid than the former one. In this scenario, it is very crucial to define few comprehensive terms which can serve as thresholds for the requisite mental element for the commission of a crime. 'Voluntarily' is one such word, defined and interpreted by the framers of the Indian Penal Code keeping in mind the fluid and subjective nature of the mental element associated with a crime. Though, the meaning assigned to it by the framers of the Code is different from its ordinary meaning, it has by far served two purposes. It is generally used either in the circumstances where differentiating between intention, knowledge and reason to believe is difficult or it is not necessary. The author feels that the reason behind accommodating all the three elements was not to blur the difference between them but to avoid confusion, unnecessary repetition and to save the valuable time of the justice delivery system as a whole. The only caution which the people associated with the judicial system should keep in mind that this interpretation of the word 'voluntarily' should be used only in consonance with the intent of the framers and shouldn't be used in detriment of any innocent party.

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Feminism and Indian Constitution

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Abstract:

Feminism is a term which describes a political or cultural movement that is aimed at establishing equal legal rights and protection for women. It involves many socio-cultural theories and philosophies that involve the issues of gender discrimination. Feminism is a movement of advocacy that enforces to eliminate gender discrimination from our society. According to some imminent feminist like Rebecca Welker and Maggie Humm, history regarding feminism can be divided into three waves. The first wave was started from nineteenth and early twentieth century, and then the second was in the 1960s and 1970s. After that the last wave from the 1990s to the present. There are various provisions in Indian Constitution that talks about equal rights for women and men. There are several cases where women's rights were given much more preference over any others rights. Certain legal provisions for women have also been enacted, viz: the Factories Act, Maternity Benefit Act, Dowry Prohibition Act, Equal Remuneration Act, Child Marriage Restrain act, Medical Termination of Pregnancy Act, National Commission for Women Act, Protection of woman from domestic violence Act, Protection of women against sexual harassment at workplace etc. in order to keep right of the women in society.

Key Words: *Feminism, Women Movements, Rights of Women, Impact, Indian society*

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Introduction

From the very historic era to the present, in most of the societies, the women everywhere suffered subordination and were assigned a purely functional role. According to Confucius, the subordination of women to man was one of the supreme principles of government. Aristotle deemed the dominion of the male over the female in the organisation of the family to be natural and necessary. The Hindu Sage, Manu, condemned women to eternal bondage. The Greeks, in their period of highest culture, imprisoned their women within their houses and denied them all rights.[1] Even under Mohammedan text of theology and Shariat, the women are considered half of the male in status. Saint Tulsi Das in his famous epic Ram Charit Manasa says that if women are liberated they shall become corrupt, it makes people still believes that female have no right to personal liberty.

This concept is contrary to the prevailing concepts of justice which consisted in some sort of equality. Actually the people have wrong perception to the word feminism and also have interpreted it in wrong way. Feminism never means for superiority of women over men, this is what generally the people think. The term feminism actually means for bringing gender equality which means equal legal protection of women as men have. Pre-colonial women's role and social structures reveal that feminism was theorized differently in India in comparison to that of west.

It has been recognised in modern times that the constitutions has a major role in ensuring gender justice in any country. The Indian Constitution is a durable device and a living document which makes the government system work along with gender equality.[2] It lays down the framework defining the procedures, structure, powers and duties of government institutions and sets out fundamental rights, directive principles of state policy and the duties of citizens. It is most important that the supreme law of the land should meaningfully address for upbringing the status woman and respond to the challenges by stimulating the whole legal system towards a greater concern for, and protection of women.

The main aim of this paper is to historically trace the legal discourses of India and its subsequent amendments, which have lent a helping hand to improve the conditions of women in society. It also draws on some historic judicial pronouncements of the Supreme Court and various other courts in India, which have upheld some landmark judgments in favour of women's increased visibility and accessibility. This in turn also lays stress on the various amendments in some of the laws of the Constitution of India.

Defining Feminism in the Indian context

"Feminism is a movement to end sexism, sexist exploitation, and oppression". This is how Feminism has been defined in *Feminism Is for Everybody: Passionate Politics, bell hooks (2000).*

Feminism, a complex notion, has its different meaning from generation to generation. One of the most used definitions is *"An awareness of women's oppression and exploitation in society, at work and within the family, and conscious action by women and men to change this situation".*[3] Women's role in pre-colonial structure revels that feminism has its different meaning in India in then it has in west. Colonial essentialization of "Indian culture" and reconstruction of Indian womanhood as the epitome of that culture through social reform movements resulted in political theorization in the form of nationalism rather than as feminism alone[10].

Historical circumstances and values in India make women's issues different from the western feminist rhetoric. The idea of women as "powerful" is accommodated into patriarchal culture through religion. This has retained visibility in all sections of society; by providing women with traditional "cultural spaces". Another consideration is that whereas in the West the notion of "self" rests in competitive individualism where people are described as "born free yet everywhere in chains", by contrast in India the individual is usually considered to be just one part of the larger social collective, dependent for its survival upon cooperation and self-denial for the greater good.[4]

[1] DR. S.P. DWIVEDI, JURISPRUDENCE AND LEGAL THEORY, 433-34 (5th ed. 2012)

[2] Ishwara Bhat, Constitutionalism feminism: an overview, (2001) 2 SCC (Jour) 1

[3] Dwijendra Nath Thakur, Feminism and Women Movement in India, Research Journal of Humanities and Social Sciences (2008)

[4] Ibid.

Indian activist and feminist scholars have to do a lot of struggle in order to carve a separate identity for feminism in India. They define feminism in space and time to in order to avoid Western ideas. Indian women has to negotiate their survival through an array of oppressive patriarchal family structures: ordinal status, age and relationship to men through family of marriage and procreation as well as patriarchal attributes - dowry etc. - caste, community, market and the state.[5] It should however be noted that several communities in India, such as the Nair's of Kerala, certain Maratha clans, and Bengali families exhibit matriarchal tendencies, with the head of the family being the oldest women rather than the oldest man. Sikh culture is also regarded as relatively gender-neutral.

Constitutional and Legal Rights for Women in India

Status of women prior Independence

Old Ages: During the Vedic period, women in India enjoyed a very fair amount of freedom and equality. This period can be best termed as the period of feminine glory. They studied in Gurukuls and enjoyed equality in learning the Vedas. In the Rigveda the wife has been to live as a queen in the house of her husband. The word 'Dampati', signifies high status of women, was used in Vedas, characterises both wife and husband.[6] The status of women, thus, in ancient India was based on liberty, equality and cooperation.

But in the Post-Vedic period women's status suffered a setback when many restrictions were imposed on their rights and privileges by Manu. The birth of a daughter which was not a source of anxiety during the Vedic period now becomes the source of disaster for the father. Education, which has been an accepted norm for women, was neglected and later on girls were completely denied access to education.

With invasion of India by Alexander and Huns, the position of women was further degraded. Their education and training came to a stop. Women's movement was restricted and thus was denied opportunities to take part in community affair. Social evils like sati, child marriage, and female infanticide were on rise.

British Period: The attitude and behaviours of men in relation to women, however, changed during the British period. Voice against ill-treatments and discrimination with women was raised. During the British rule, there were two major movements which largely affected the status of women. Of these the first was the Social Reform Movement of the 19th Century and the second was the Nationalist Movement of the 20th Century. British period may be seen with enacting number of laws eradicating social evils and removing all disparities, dissimilarities and discriminations against women.[7] These included an Act legalizing widow's remarriage, Child Marriage Restraint Act, an Act recognising Hindu Women's Right to Property etc. Thus, during the British rule awareness was created for the removal of social malaises. Many laws rectifying women's unequal position were passed.

Constitutional and Legal Rights for Women in Contemporary India

The framers of the Constitution of India were aware of the problems faced by the female sex. In spite of their contribution in all spheres, they suffer in silence and belong to a class which is disadvantaged position on account of various barriers and impediments. Keeping this in view, the framers, therefore, realised that in order to eliminate inequality and to provide opportunities for the exercise of human rights, it was necessary to promote education and economic interests of women. It became the objective of the state to protect women from exploitation and provide social justice. All these ideals were incorporated in the Preamble of the Constitution which resolved to secure to all its citizens justice-social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and opportunity; and to promote among them fraternity, assuring the dignity of an individual and the unity of the nation.[8] To attain these objectives, the Constitution guarantees certain fundamental rights and freedoms, such as freedom of speech and expression, protection of life and personal

[5] Soumik Saha, Women Empowerment in India: Discussing Liberal Feminism and Legal Interventions, https://www.lawarticles.com/women_empowerement_in_india_Soumik_Saha.htm

[6] Supra note 1

[7] Ankita Chakraborty, Gender Justice Under Indian Constitution, International Journal of Legal Developments and Allied Issues (2012)

[8] Tauffique Ahmad and Anil Kumar Mishra, Legal status and rights of women in Indian Constitution, International Journal of Advanced Education and Research 6.1 (2010)

liberty. Indian women are beneficiaries of these rights in the same way as men.

Articles *14, 15, 16* and *21* of the Constitution attempts to give equal treatment of life and livelihood to both men and women. Embodying the guiding principle of Equality before Law, Article 14 states that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Prohibiting discrimination on the ground of sex, *Article 15* states that[9] *(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—(a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public. (3) Nothing in this article shall prevent the State from making any special provision for women and children. (4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.*

Concerning private actions like sexual harassment at workplaces and institutions which arise in the absence of law or due to lack of effective supervision by the employer, a set of stern guidelines has been framed by the Supreme Court in *Vishaka v. State of Rajasthan*[10] case (subsequently, Parliament enacted the Prevention of Sexual Harassment at Workplace Act in 2013). The court gathered feminist vision as an input for its reasoning from convention on elimination of all forms of discrimination against women, directive principles of state policy, affirmative action policy under *Article 15(3)* and the idea of human dignity. Constitutional feminism requires an unconventional approach towards the law relating to rape, prostitution, pornography and dowry-related crimes.

Providing equal opportunities irrespective of sex, and prohibiting discrimination against women, *Article 16* clearly states[11], *Equality of opportunity in matters of public employment—(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be eligible for, or discriminated against in respect of, any employment or office under the State.*

Enumerating the right to protection of life and personal liberty, *Article 21* provides that *No person shall be deprived of his life or personal liberty except according to the procedure established by law.* This Article keeps very closely to one of the most celebrated clauses of the Magna Carta, which states "No man shall be taken or imprisoned, disseized or outlawed, or exiled, or in any way destroyed save…by the law of the land."[12]

The provisions in *Directive Principles* about equal entitlement to livelihood, equal pay for equal work, protection against moral and material abandonment, maternity leave, nutrition, equitable distribution of material resources of production and respect for international conventions have significant value in building the corpus of constitutional feminism. Reservations for women in Panchayati raj institutions are aimed at enhancing women's participation in democratic process.

In view of the constitutional provision of *Article 39* which specifically directs the states to secure equal pay for equal work for both men and women, the Parliament has enacted *The Equal Remuneration Act 1976*, which provides for payment of equal remuneration to men and women workers for the same work or a work of a similar nature and for the prevention of determination on grounds of sex. The notion of "*equal work*" depends on a number of various factors such as responsibility, skill, effort and condition of work. In pursuance of the objectives of the state in order to secure just and human conditions of work and for maternity benefits as enshrined in the Constitution of India, the Parliament has enacted *The Maternity Benefits Act of 1961.*[13] This Act

[9] MAHENDRA PAL SINGH (ED.), V.N. SHUKLA'S CONSTITUTION OF INDIA, 87-88 (12 ED. 2016)
[10] (1997) 6 CSS 241
[11] Supra note 9
[12] Meenakashi Lekhi, Feminism the Indian Constitution, http://www.theweek.in/columns/Meenakashi-Lekhi/feminise-the-indian-constitution.html (April 20, 2017)
[13] Supra note 7

regulated the employment of women in certain establishments for certain periods before and after child birth as well as provides for maternity and other benefits. The constitution of India imposes a fundamental duty on every citizen through *Article 51(A)(e)* to renounce practices derogatory to the dignity of women.

Apart from, various protectional law, too, have been enacted and enforced, for instance, the *Commission of Sati Prevention Act, 1987, Dowry Prohibition Act 1961, Muslim Women's (Protection of Rights on Divorce) Act, 1986, Suppression of Immoral Traffic in Women and girls Act, 1956* etc. The demand for reservation of 33% seats for women in Parliament and State Legislatures has been gaining ground to be brought as an important Act safeguarding the rights of women.[14] Although a uniform civil code is still a dream in spite of various directions of the Court, the enactment of certain legislations like the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 has been brought by the Parliament to prevent the female Foeticide and Infanticide.

Judicial Trends and Practical Reality

Fundamental Rights and women:

The Constitution of India guarantees equal rights to all its citizens irrespective of their gender. Women thus enjoy the Right to Equality, the Right to freedom, the Right against exploitation, the Right to freedom of religion, Cultural and Educational Rights and the Right to Constitutional remedies. Let us have a deeper look at the take of judiciary on the aforementioned provisions of the constitution and whether the learned judges have been successful in turning the status of de jure equality to de facto equality.

Nargesh Meerza vs Air India Case:

In the landmark case of *Nargesh Meerza vs Air India*[15] it was finely pronounced that a woman shall not be denied employment merely on the ground of her being of the feminine gender. This leads to violation of Article-14 of the Constitution. In the present case, an air hostess of Air India challenged the service rules of Air India wherein an air hostess would barred from getting married within a period of 4 years from the date of their joining. The rule further stated that the airhostesses shall lose their jobs if they become pregnant and also that they will retire at the age of 35 years (exception can be made only if managing director extends the term by 10 years at his own discretion). The Apex Court ruled that that even though the first provision is reasonable, the second and third provisions are cruel, arbitrary and unconstitutional.

In the case of *C.Rajakumari vs Commisioner*[16] of Police, Hyderabad the critical question was raised before the Andhra Pradesh High Court pertaining to the fact whether the beauty contests which indecently represents a women's body, figure and form is in violation of Article -15 of the Constitution. The court held that if in any beauty contest the body is represented in such a way that it is indecent and is injurious to public morality then such beauty contest would be violation of the provisions of Indecent Representation of Women(Prohibition) Act,1986 and also unconstitutional as it violates Articles 14,21 and 51A.

Directive Principles and Women

The Directive Principles of State Policy enshrined in part- IV of the Indian Constitution contains certain provisions which deal with the welfare and development of woman.

The framers of the Constitution prohibited forced labour in any form including beggar and trafficking of human beings under Article-23. In *Neeraja Chowdary vs State of Madhya Pradesh*[17], Justice Bhagwati held that women and children cannot be compelled to work under unhygienic conditions because it is a kind of bonded labour which is prohibited under Art-21 and Art-23 of the Constitution.

In the case of *Randhir Singh vs Union of India*[18], the Apex Court talked about the doctrine of equal pay for equal work. It was held that the doctrine is applicable in case of both the genders. Art-39(d) of the Indian Constitution provides that there shall be equal pay for equal work for both men and women. But Article-37 on the contrary says that directive principles are not enforceable in nature. But when fixation of pay scales

[14] Supra note 8
[15] 1981 AIR 1829, 1982 SCR (1) 438
[16] 1998 (1) ALD Cri 298.
[17] AIR 1984 SC 1099
[18] 1982 AIR 879, 1982 SCR (3) 298

of government employees is based on unreasonable classification which violates Art-14 and Art-16 of the Constitution, the courts are allowed to enforce the doctrine of equal pay for equal work. Thus the court held that the principle of equality is enshrined in the provisions of the Equal Remuneration Act, 1976.

Women and politics

As already mentioned an attempt was made for adequate representation of women in politics and for that Art-243D as well as Art-243T was brought which carried a kind of weapon of feminism with it. But it did not affect much to the women situation in country as many States did not implement the provision. Mostly the elected women were so influenced my their male relatives that they only used to represent their views and advice in the council, it enforces us to think that even though the provisions make look futile but the woman representations are merely acting as rubber stamp figures. There is lack of actual participation by them in the political sphere.

Issue and Challenges for Women's Empowerment in India

There has been many cases of advancements of woman but still there remains many pertinent problems which shows that though these rights have been implemented on paper the rights and the opportunities are not fully given to the women and they still cannot exercise their rights fully. They are still considered as the weaker section of the population and therefore need assistance to function at par with the male section.

There are religious laws, personal laws and custom laws which conflict with the rights of a woman given in the Indian constitution and these traditions and customs are accepted and obeyed by people for the past hundred years or more. Despite the conflict of rights and acclamation of the position, the Indian government does not interfere with these personal or religious laws. Religion like Hinduism, they expect the women to be total devotees towards their God and husbands. As they are termed, *Pativrata*, it means that the wife has accepted to serve her husband and family as her ultimate religion and duty. There is great decree of influence of the hierarchical systems within Indian families and communities and these hierarchies can be broken down into age, sex, kinship relationships, caste, lineage, wealth, occupations and relationship to ruling power within the community.[19] Girls, mostly in financially challenged families suffer the impact of the vulnerability and stability of the emergence of hierarchies of social convention and economic need within the family. It has been seen from ages that from the birth of the girls, they are only entitled to get less than the boys in anything and everything starting from playtime to food to education. They are not provided equal facilities to their brothers. They are considered to be the liability to the family and this liability is gets rid of by marrying them off at an early age. They have less access to the family's income and assets which only aggravated the poor and the Indian families. After the birth of the girl itself, it is presumed that they are a burden over their families and so they will be burdened with arduous work and exhausting responsibilities of their families for the rest of her lives till she dies with no compensation and recognition of her dedication or hard work towards her family.

Patriarchy society

The word Patriarchy is associated with the meaning, rule of the father or the patriarch and it is used to describe a male dominated family or whose hierarchy are traced through the males of the family. Usually, the patriarch of the family was the senior most male member of the family whose domain included the rule over the women of the families, junior male member, children, slaves and other domestic servants. Presently the term patriarch is more used to refer the supremacy of the male member over the others where the men dominate the women to characterize a system where women will always be their subordinate and in different ways.

India also follows the Patriarchal system of hierarchy where the males of the family who are either the father or husband are assumed to be the official head of the house. The kinship and the lineage and the inheritance are traced through the male line which is known as the patrilineal system and they are only responsible for the distribution of the family resources.

As these traditions are followed since ages, it has been a way of Indian life and this type of lifestyle is expected by woman as they are accustomed to this. As the education is mostly neglected for the women, they

[19] Supra note 7

are not properly aware of their rights and powers provided by the constitution of India and as a result they do not properly use their rights. They are also not made aware of their voting rights because of their low knowledge and awareness of the political system for which they lack the sense of political efficacy. [20] Neither women are informed about the contemporary issues not they are encouraged to be aware of those as the men always have a fear of losing their dominance over them. As a result of this the political parties does not invest much time in the women candidates they are unable to see the potential or the zeal or the promise within them and thus they see them as a wasted investment.

Material and Methods:

Doctrinal legal research method has been used for this topic. The sources of this topic have been depicted from books, journals, articles etc. The research is presented after the thorough readings of the primary and secondary sources. Multiple websites from the internet also played a major role to conduct research in this project.

Conclusion

In post-independence era, although much has been done for liberation and betterment of women, yet it cannot be said that they are fully free from the clutches of male domination. In practice, there is no equality between man and woman. It is true that constitution provides equal opportunities for women implicitly as they are applicable to all persons irrespective of sex, but the court realise that these article reflect only de jure equality to women. They have not been able to accelerate de facto equality to the extent the Constitution intended. Reflecting this in *Dimple Singla v. Union of India*[21], the Delhi High Court expressed its apprehension that unless attitudes change, elimination of discrimination against women cannot be achieved. There is still a considerable gap between Constitutional rights and their application in day to day lives of most women. At the same time it is true that women are working in jobs which are hitherto exclusively masculine domains. But there are still instances which exhibit lack of confidence in their capability and efficiency. There remains a long and lingering suspicion regarding their capacities to meet the challenges of the job assigned. Such doubts affect the dignity of working women.

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[20] Supra note 8

[21] (2002) 2 AISLJ 161

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Position of Child Witness under Indian Evidence Act, 1872 – An Analytical Study

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Abstract:

A witness is a person who gives evidence before any court. Section 118 of Indian Evidence Act, 1872 explains competency of witness. So according this section a child of tender age can be allowed to testify if he had intellectual capacity to understand questions and given rational answers thereto. No absolute age is fixed by law within which they are exempted from giving evidence on the ground that they have not sufficient understanding. The evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to swayed by what others tell them and thus a child witness is an easy prey to tutoring. This article describes meaning and competency of witness under the Indian evidence Act. Competency of child witness and value of such child witness are analytically discussed in this article with decided case laws. Lastly some effective suggestions are put forward to make this provision more effective.

Key Words: *Child witnesses, Competency of witness, evidence, Voir dire, Corroboration*

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Introduction

Child witnesses are generally prone to tutoring and when something is repeated to them by their elders, they begin to imagining them and really feel them to be the truth. Their innocent brains are like blank papers and can retain anything written over them by repeated communication. But that does not mean that they cannot remember anything. The memories of children are also better and what they see specially when under strain, they seldom forget for a long time unless it is over written by some effort. It is not that what they state is always result of imagination but is that same may sometimes be on effect of imagination created by others and for that one needs another to cast that imagination and then lastly the duty of court would be to work out portions improved and deal with them according to law. Under section 118 of Indian Evidence Act, 1872 a child is competent to testify, if it can understand the question put to it and give rational answers thereto.

Meaning and competency of witness

Witnesses and documents are the main sources of evidence. A witness is a person who gives evidence before any court. As per Bentham, witnesses are the eyes and ears of justice. Witnesses can be the person who gives valuable input for the case. It is through witnesses and documents that evidence is placed before the court. So, the law has to be very clear with regards to certain issues like who are a competent witness and how can the credibility of the witness be tested.

Section 118 of Indian Evidence Act, 1872 explains who may testify i.e. competency of witness. A witness is said to be competent when there is nothing in law to prevent him from appearing in court and giving evidence. Under this section all persons are competent to testify they are incapable of giving evidence or understanding the questions put to them because of tender years, extreme old age, disease or any other cause of the same kind.

Indian Evidence Act, 1872 does not prescribe by particular age as determinative factor to treat a witness to treat a witness to be a competent one. So according to section 118 of the Evidence Act a child of tender age can be allowed to testify if he had intellectual capacity to understand questions and given rational answers thereto.

Competency of a witness must be distinguished from his compellability and from privilege. A witness is said to be competent when there is nothing in law to prevent him from being sworn and examined if he wishes to give evidence. Though the general rule is that a witness who is competent is also compellable, yet there are cases where a witness is competent but not compellable to give evidence, as for example, sovereigns and ambassadors of foreign states. Even under section 5 of the Banker's Books Evidence Act, 1891 no officer of the bank shall in any proceeding to which the bank is not a party be compellable to produce any banker's book or to appear as a witness, unless by order of the court for a special cause. In divorce and other matrimonial proceedings the parties are competent witnesses but not compellable (e.g. section 51 and 52 of Divorce Act).

Again, compellability to be sworn and examined must be distinguished from privilege i.e. from compellability, when sworn, to answer certain specific questions. Sections 118 to 121 and section 133 deal with competency, the subject of general compellability is not specially dealt with by the Evidence Act; and section 121 to 132 deals with privilege. The admissibility of evidence is not solely dependent on the competency of the witness. A witness may be competent, yet his evidence may be inadmissible, as for instance, where it relates to hearsay or to confession made to a police officer.[1]

Competency of child witness

With respect to children, a child may be allowed to testify, if the court is satisfied that the child is capable of understanding the question put to him and give rational answers to the court. No absolute age is fixed by law within which they are exempted from giving evidence on the ground that they have not sufficient understanding. Actually it is not possible to lay down any specific rule regarding the degree of intelligence and knowledge which will render a child a competent or credible witness. So it is the discretion of the court to judge whether the child is capable of understanding

[1]2 M. MONIR & DEOKI NANDAN, PRINCIPLES AND DIGEST OF THE LAW OF EVIDENCE 2037-2038 (2001)

the question put to him and give rational answers to the court.

Before examining a child as a witness the court should test his intellectual capacity by putting a few simple and ordinary questions to him and should also record a brief proceeding of the inquiry so that the appellate court may feel satisfied as to the capacity of the child to give evidence. If the court is not satisfied as to the child's capacity to depose it should decline to examine him, but if it is satisfied as to this matter, it should administer oath to the witness and examine him in the ordinary way unless he is under twelve years of age and does not understand the nature of an oath or affirmation. It is desirable that judges or magistrates should always record their opinion that the witness understands the duty of speaking the truth and state why they think that; otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether.[2]

In *NivruttiPandurangKokate v. State of Maharashtra*,[3] the Supreme Court dealing with the child witness has observed that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

In *HimmatSukhadeoWahurwagh v. State of Maharashtra*,[4] the Supreme Court held that the evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him.

In *RatansinhDalsukhbhaiNayak v State of Gujarat*[5] the Supreme Court observed that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaked and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

In case of *Baby Kandayanathil v. State of Kerala*,[6] the learned trial judge has put preliminary questions to each of the witnesses and satisfying himself that they were answering questions intelligently without any fear whatsoever, proceeded to record the evidence.

Voir dire test

Voir dire means to speak the truth. It is a preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury.[7] According to the Law

[2] *Id*.
[3] A.I.R 2008 S.W.C 1460 : (2008) 12 S.C.C 565 : (2009).1 S.C.C (Cri) 454
[4] A.I.R 2009 S.C 2292 : (2009) 6 S.C.C 712 : (2009) 3 S.C.C(Cri) 1
[5] A.I.R 2004 S.C 23 : (2004) 1 S.C.C 64; *See also* GollaYeluguGivindu v. State of A.P, A.I.R 2008 S.C 1842
[6] A.I.R 1993 S.C 2275 : 1993 Cri.L.J 2605(SC) : 1993 Supp.(3) S.C.C 667
[7] Black's Law Dictionary 2041 (8th ed. 2008)

Lexicon it is a special form of oath administered to a witness whose competency to give evidence in the particular matter before the court is in question, or who is to be examined as to some other collateral matter.[8]Voir dire means to tell the truth. A sort of preliminary examination by the judge, in which the witness is required to speak the truth with respect to the questions put to him, when, if incompetency appear from his answers, he is rejected and even if they are satisfactory, the judge may receive evidence to contradict them or establish other facts showing the witness to be in competent.[9] According to Encyclopaedic Law Dictionary, voir dire means an examination of a witness upon the voir dire in a series of questions by the court and usually in the nature of an examination as to his competency to give evidence on some other collateral matter. And this takes place generally prior to his examination-in-chief.[10]

Credibility and admissibility of child witness

Dr. Henry Gross, who has been described by many as the father of criminal research, has set out in his book, "Criminal Investigation" (1934 Edition, pp. 61-62), the nature and character of evidence given by children. He has said that in one sense the best witnesses are children of seven to ten years of age, as at that time love and hatred, ambition and hypocrisy, considerations of religion rank etc. are yet unknown to them. He has, however, pointed out the great drawbacks which have made more distrustful of the capacity of children. They are apt to say much more from imagination than they actually know.[11]

In *Panchhi v. State of U.P*[12] the Supreme Court held that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to swayed by what others tell them and thus a child witness is an easy prey to tutoring.

In *State of Assam v. Mafzuddin Ahmed*,[13] it was held by the Supreme Court that it is hazardous to rely on the sole testimony of the child witness as it is not available immediately after the occurrence of the incidental before there were any possibility of coaching and tutoring him.

In *Mangoo v. State of M.P.*[14] the Supreme Court while dealing with the evidence of a child observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

Competency of a person to be a witness is quite different from reliability of the witness unless a child is found competent to be a witness his statement is not admissible as evidence. Thus a child has to be a competent witness first then only his statement is admissible. Thereafter, the admissibility of the child witness has to be considered for reliability on scrutiny of his evidence. If the child is found to be reliable then only the child may be taken as a reliable witness. Otherwise rule of prudence which has been christened as a rule of law is that generally it is unsafe to rely upon statement of a child witness as children are easily tutored or threatened or persuaded to speak in the way as told by others. Hence the statement of the child witness has to be examined carefully to see that he was not been tutored.[15] Admissibility of evidence is not solely dependent on competency of witnesses. A witness may be competent within section 118, yet his evidence may be inadmissible if he states his opinions or beliefs instead of facts within his knowledge or gives hearsay evidence.[16]

Evidence of child witness without oath

Under section 4 of the Oaths Act, 1969 all witnesses are to take oaths or affirmation. The proviso says that sections 4 and 5 of the said Act shall not apply to a child witness under twelve years of age. The proviso to section 4 of the Oaths Act, 1969 must be read along with section 118 of the Indian Evidence Act and section 7 of Oaths Act. An omission to administer an

[8] P. RAMANATHA AIYAR, THE LAW LEXICON 1965 (2nd ed. 2000)

[9] Wharton's Law Lexicon 1049-1050 (1999)

[10] DR. A.R. BISWAS, ENCYCLOPAEDIC LAW DICTIONARY 1512 (2008)

[11] S. SARKAR, LAW OF EVIDENCE 2127 (16th Edition, 2007)

[12] A.I.R 1998 S.C 2726 : (1998).7 S.C.C 177 : 1998 S.C.C. (Cri) 1561

[13] A.I.R 1983 S.C 274 : (1983) 2 S.C.C 14

[14] A.I.R 1959 S.C 959 : 1995 Cri.L.J 1461(S.C)

[15] SARKAR, *Supra* note 11

[16] *Id*, at 2123

oath, even to an adult, goes only to the credibility of the witness and not his competency. The question of competency is dealt with, in section 118 of the Evidence Act. Every witness is competent unless the court considers he is prevented from understanding the questions put to him, or from giving rational answers, by reason of tender years, extreme old age, disease whether of body or mind or any other cause of the same kind. Therefore, unless the Oaths Act adds additional grounds of incompetency, it is evident that section 118 of the Evidence Act must prevail.[17] The Oaths Act does not deal with competency. In *Bhagwania v. State of Rajasthan*,[18] it was held that an omission to administer oath under the Oaths Act, 1969 does not affect the admissibility of evidence unless the judge considers the witness to be otherwise incompetent. Further, in *Ghewar Ram v. State of Rajasthan*,[19] it was held that once the child witness is found competent, his inability to take or understand oath or omission in administering it, neither invalidates the proceedings nor renders his evidence inadmissible.

In *Rameshwar v. State of Rajasthan*,[20] the Supreme Court held that an omission to administer an oath, even to an adult, goes only to the credibility of the witness and not his competency. The question of competency is dealt with is section 118 of the Evidence Act. Every witness is competent unless the court considers he is prevented from understanding the questions put to him, or from giving rational answers by reason of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. It is further held that judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. The Supreme Court in *DattuRamraoSakhare v. State of Maharashtra*,[21] further held that even in the absence of oath the evidence of a child witness can be considered under section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness is that the witness must be a reliable any other competent witness and there is no likelihood of being tutored.

Need for corroboration

Children are most dangerous witnesses, for due to tender age they often mistake, dreams for reality. They are capable of cramming things easily and reproducing them. They repeat as to their own knowledge that they have heard from others and are greatly influenced by fear of punishment, by hope of reward and by desire of notoriety. Hence it is unsafe to rely on uncorroborated testimony of a child. In *Mohamed Sunal v. King*,[22] it was held that in England where provision has been made for the reception of unsworned evidence, from a child it has always been provided that the evidence must be corroborated in some material particulars implicating the accused. But in Indian Acts there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence court can act upon it. It is sound rule in practice not to act on the uncorroborated evidence of a child, whether sworned or unsworned but this is a rule of prudence and not of law. In *GaganKanojia v. State of Punjab*,[23] the Supreme Court held that part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the un tutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of hostile witness.

In *Arbind Singh v. State of Bihar*,[24] the Supreme Court observed that it is well settled that a child witness is prone to tutoring and hence the court should look for corroboration particularly when the evidence betrays traces of tutoring. Further in *Bhagwan Singh v. State of M.P*,[25] the Supreme Court observed that the law recognizes the child as a competent witness but a child who is unable to form a proper opinion about the nature of the incident because of immaturity of

[17] *Rameshwar v. State of Rajasthan*, A.I.R 1952 S.C 54 : 1952 Cri.L.J 547(S.C)
[18] 2001 Cri.L.J 3719(Raj.)
[19] 2001 Cri.L.J 4460(Raj.)
[20] A.I.R 1952 S.C 54 : 1952 Cri.L.J 547(S.C)
[21] (1997) 5 S.C.C 341; See also *State of Karnataka v. ShantappaMadivalappaGalapuji and others*, A.I.R 2009 S.C 2144
[22] A.I.R 1946 P.C 3
[23] (2006) 13 S.C.C 516 : (2008) 1 S.C.C (Cri.) 109
[24] A.I.R 1994 S.C 1068 : 1995 Supp (4) S.C.C 416
[25] A.I.R 2003 S.C 1088 : 2003 (3) S.C.C 21

understanding, is not considered by the court to be a witness whose sole testimony can be relied without other corroborative evidence. The evidence of child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony. But in *Suryanarayan v. State of Karnataka*,[26] the Supreme Court held that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not.

Suggestions and conclusion

In case of child witness, the question on which his competency depends is whether he can understand and answer the question put him. The evidence of the child is required to be evaluated carefully as he is an easy prey to tutoring. So it will be unsafe to rely the testimony of the child witness without corroboration, though it is not the rule but a measure of caution and prudence. Some suggestions are put forward to make the provisions relating to child witness more effective –

(i) When any witness who is under examination is a child, the court should comply section 118 of the Evidence Act properly i.e. court should apply its discretion to judge whether the child is capable of understanding the question put to him and give rational answers.

(ii) The examination in chief and cross examination of the child witness should properly be controlled by the judicial officers. The court should monitor the leading questions which are faced by the child witness.

(iii) Whenever possible the child should be permitted to testify via closed circuit television or through video conferencing. Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. The advancement of science and technology is such that now it is possible to set up video conferencing equipments in the court itself. In that case evidence would be recorded by the magistrate or under his dictation in the open court as observed by the Supreme Court in *Sakshi v. Union of India*.[27] The suggestions made by the Law Commission of India in its 198th Report regarding witness protection may be considered.[28]

(iv) In criminal justice system in India, speedy trial is regarded as one of the fundamental rights. In order to ensure this right, the court should take appropriate action to ensure a speedy trial in order to minimize the length of time a child must endure the stress of his or her involvement in the proceeding. Also the court should take the appropriate steps to avoid repeated appearance of a child witness before the court.

(v) Prosecutors, Police, Judicial Officers should be well equipped with child psychology and child behavior. They should receive proper training in this regard to deal with the cases where children are alleged victims and witnesses of abuse..

[26] (2001) 9 S.C.C 129
[27] A.I.R 2004 S.C 3566
[28] *198th Report on Witness Identity Protection and Witness Protection Programmes*, LAW COMMISSION OF INDIA (June 01, 2017, 08.07 PM) http://lawcommissionofindia.nic.in/reports/rep198.pdf

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Sexual Harassment at Workplace: An Overview of the Legal Framework in India

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Abstract:

The right to be protected from sexual harassment and sexual assault is one of the pillars on which the very construct of gender justice stands. In several countries, sexual harassment at workplace is not identified as a distinct category of a prohibited activity. In India, until the Vishaka case, like these several countries, there has been, for a long time, no specific provision but a plethora of legal provisions to identify, recognize and define this problem, may be under various distinct categories and without identical terminologies. The Indian Penal Code, 1860; The Code of Civil Procedure, 1908; The Code of Criminal Procedure, 1973; The Indian Evidence Act, 1872, along with many other special acts and welfare legislations deal with this issue in one way or the other and provide for protection of women from such aberration. The paper shall also discuss the international conventions to which India is a party and have thus become a source of law. The paper further draws an analysis of the 'Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013' drawn after 14 years of the Vishaka judgement and many bills drawn on the issue.

Finally, the paper concludes by enlightening the need for focussing on the need for preventive mechanisms which accompany the legislative measures.

Key Words: *sexual harassment, sexual assault, work place*

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Introduction

'*The man who has in his power to hire and fire women from an interesting and lucrative position may profit by that factor to extort sexual favours that would not spontaneously be offered to him. A man who is famous or charismatic might exploit those advantages to humiliate women in ways that they would otherwise angrily resist What the men do not realize is that they are exploiting the oppressed and servile status of women."*[1]

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

The intensity of its bite is being felt gravely these days because of its new *'avataar'* with bloody tentacles. Sexual Harassment at work place may be termed as coercive, exploitative, abusive or unprofessional behaviour but it remains a serious affront to human dignity. The issue has become ubiquitous across the world transgressing all limits and borders. It has registered its presence at every workplace across the world. The rise in such incidences may be attributed to increased participation and splendid achievements of women in almost every profession, till hitherto conventionally monopolized by men. The increased influx of women in jobs has also given rise to preoccupation with conflicting ideologies and troubled social conditions. All this has also brought a sea change, both qualitative and quantitative, in workplace equations, generating and spreading virus of Sexual Harassment at workplace.

Sexual Harassment- What it really means?

Sexual Harassment is a behaviour with a sexual connation that is abusive, injurious and unwelcome. It places the victim in an atmosphere of intimidation, humiliation or hostility. It may be constituted by many or a single act and the intention of the harasser has no relevance. There is a whole range of behaviour and activity, which may not fall squarely within the definition above but still it may constitute or may amount to Sexual Harassment.

Following can be a few of the illustrations of such behaviour and any of these may be perceived as Sexual Harassment:

1) A sexual comment or sexually determined behaviour such as.
2) Leering at another's body and\or sexually suggestive gesturing.
3) Displaying sexually visual material such as pin ups, cartoons, graffiti, computer programs, and catalogues of a sexual nature.
4) Telling a woman employee about the ways she dresses up.
5) Calling her up late at night with a request to have dinner with her repeatedly with which she is not comfortable.
6) Making sweeping statements while delivering lecture on advertising, for example, women are the best models to sell a product; that body of the car should be sleek and sexy like a woman; soap has to be soft to touch and so on.
7) Any other verbal or non-verbal conduct sexual in nature

A popular misconception about Sexual Harassment is that it inevitably includes physical sexual contact at any time, place and in any context. Also, it may not be true as always that every kind of sexual violation should involve visible proof. The conduct constituting Sexual Harassment encompasses both physical as well as psychological behaviour.

Extent and Types of Sexual Harassment

To evaluate the problems, it is essential to identify its vivid forms and understand the extent to which these exists in the society; though, the statistics and the available data may not reveal the true picture.

The Vulnerables

Women, across the age groups and class, face this menace. Younger and new entrants into the profession

[1] Germaine Greer," Seduction is a four-letter word". In L.G. Shultz(ed.), Rape Victimology, Illinois, CC Thomas, 1975, p.385

especially in private sector are equally vulnerable as women on the age of their retirement. Even widows who get jobs on compassionate grounds or divorced women are not spread. The crux of the matter is that a major chunk of the population has to endure such sexual gestures and comments without any fault of theirs.

Admitting and assuming that not all men are potential rapists, batterers, molesters and tortures of women, all women are potential victims of Sexual Harassment crosses all professions, social strata and levels of income.

Power Games

Sexual Harassment speaks more to power relationships and victimization than it does to sex itself.[2] It is the improper use of power to extort sexual gratification and consists of misperception or misunderstanding of a person's intentions. It reflects a power relationship, male over female that is exploitative.[3]

"It results from a misuse of power-not from sexual attraction"[4] as it reflects a disparity in power between the perpetrator and the victim, which more often than no, mirrors the power differentials between men and women in society.[5]

A claim of Sexual Harassment at workplace may be predicated on either of the following two types:

"*Harassment that involves the conditioning of concrete employment benefits on sexual favours, and harassment that, while not affecting economic benefits, creates a hostile or offensive environment."*[6]

For the first time, the terms appeared in academic literature and subsequently found their way into decisions of the United States Courts of Appeals and in due course of time acquired their own significance. Highlighting the importance of distinction, the US Supreme Court said,

"*The principal significance of the distinction (was) to instruct that Title V11 is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be serve or pervasive.*[7]

A. Quid Pro Quo

When it is literally translated, it means "this for that". It refers to situations where an employer or superior at work makes tangible job-related consequences such as promises of promotion, higher pay, academic advancement etc. conditional upon obtaining sexual favours from an employee.[8]

This form of Sexual Harassment involves making conditions of employment (hiring, firing, promotion, retention etc.) contingent on the victim providing sexual favours.
This type of Sexual Harassment holds the woman to ransom as her refusal to comply with a request can be met with retaliatory action such an action must prove that

- The employee was subjected to unwelcome sexual advances or request for sexual favours; and
- The reaction to the harassment-rejection or submission as the case maybe -affected tangible aspects of the employees' compensation, terms, conditions, and promotion, access to training opportunities and/or any other privileges of employment. (ibid)

Adverse work consequences maybe of 2 types:

1. *Tangible*- this type of consequences are quite visible such as hiring, firing, failing to promote, re-assignment with significantly different responsibilities, a decision to cause a significant change in benefit, a demotion evidenced by a decrease

[2] *Sexual Harassment in the work place: Opportunities and Challenges for legal redress in Asia and the Pacific;* International Women's Right Action Watch (IWRAW) Asia Pacific, 2005.p.2
[3] Rehana Sikri, *Women and Sexual Exploitation: Harassment at Work*, Kanishka Publishers, 1999 pp.130, 131
[4] William Petrocelli and Barbara Kate Repa, *Sexual Harassment on the Job*, Nolo Press. 1992, p. 1-9
[5] *ILO. Technical Report for Discussion.*ILO-Japan Regional; International Women's Right Action Watch (IWRAW) Asia Pacific 2005.p.2
[6] *Meritor Savings Bank v. Vinson*, 477 US 57 (1986); *Henson v. Dundee*, 682 F.2d 897 (11th Cir.1982)
[7] *Burlington v. Ellerth*, 524 US 742 (1998)
[8] International Women's Rights Action Watch Asia Pacific (IWRAW) Occasional Papers Series No.7, Sexual Harassment in the Workplace: *Opportunities and the Challenges for the Legal Redress in Asia and the Pacific*, p.8

in wage or salary, a material loss of benefits and significantly diminished responsibilities.[9]

2. *Intangible*- In this type of adverse employment action, a complainant need not demonstrate any so called tangible adverse employment action over and above a hostile or demeaning environment.[10]
Simply speaking, if boss docks her pay or fires her or otherwise punishes her for rebuffing and advance, he is flat-out guilty of this type of harassment.

B. Hostile Work Environment

The U.S. Supreme Court held that when the Work Place is permeated with 'discriminatory intimidation, ridicule and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'[11]

Whether an environment is 'hostile' or 'abusive' can only be determined by looking into the totality of the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether its physically threatening or a mere offensive utterance; and whether it unreasonably interferes with an employee's work and performance."

The House of Lords in an English case[12] held that it was not necessary for the victim to demonstrate physical or economic consequences and that compensation for injury to feeling can be awarded where an employment is taken that results in a complaint's role and position being substantially undermined, or on her being increasingly marginalized at work.

In this case, the US Supreme court undertook a detailed analysis of what constitutes "hostile environment" Sexual Harassment[13] and quoted with approval, the Federal Equal Employment Opportunity Commission (EEOC) Guidelines on Sexual Harassment.[14] The court stated that employees have "the right to work in an environment free from discriminatory intimidation, ridicule and insult" and that "a requirement that a man or a woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Quid pro quo and hostile work environment, though two specific forms of Sexual Harassment, do not occur in isolation and one may lead to other. Moreover, it is not possible to devise a straightjacket formula to distinguish between both the types as the features and ingredient overlap very often.

The unified approach has been preferred by some instead of the dichotomy that has been very often downplayed by the courts. Chief Justice of Canada Supreme Court observed:

"While the distinction may have been important to illustrate forcefully the range of behaviour that constitutes harassment at a time before Sexual Harassment was widely viewed as actionable, in my view there is no longer any need to characterize harassment as one of these forms. The main point in allegations of Sexual Harassment is that unwelcome sexual conduct has involved the workplace, irrespective of whether the consequences of the harassment included a denial of concrete employment rewards for refusing to participate in sexual activity."[15]

What led to Vishaka v. UOI

In 1992, Bhanwari Devi, a rural level change agent was engaged by the State of Rajasthan to work towards prevention of the practice of child marriage. During her time, she prevented the marriage of a one-year old girl. This act of hers was resented and met with harassment from men.

When she reported the same, no action was taken. This omission by the authorities came at a great cost. Bhanwari was subsequently gang raped by those men.

[9] Burlington v Ellerth, (524) US 742 (1998)
[10] *Read v. Mitchell*, (2000) 1 NZ LR 470
[11] *Harris v. Forklift Systems Sys.*, 510 US 17 (1993)
[12] *Shamoon v. Chief Constable of the Royal Ulster Constabulary, [*2003] UKHL 11.
[13] Meritor saving Bank v. Winson, 477 US .57 (1986)
[14] The Guidelines stated that sex related misconduct which "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment," whether or not it was directly linked to an economic quid pro quo, constituted Sexual Harassment
[15] *Janzen v. Platy Enterprises Ltd.*,[1989] ISCR 1252.

Based on this, a PIL was filed by Vishaka and other women groups against the State of Rajasthan and the Union of India before the Supreme Court. It proposed that sexual harassment be recognised as a violation of women's fundamental right to equality and that all workplace/establishments be made accountable and responsible to uphold these rights.

After 16 years of this landmark judgement, the country finally has a law to ensure a safe working environment for women, which laid down the preventive measures and a mechanism for redressal.

Vishaka Guidelines: The Beginning of an Era

In India, there was no statutory definition of Sexual Harassment till 1997 though there had been quite a few notable judgements.[16]

The following preventive steps were prescribed for the employers "without prejudice to the generality of the obligations.":

a. Express prohibition of Sexual Harassment at workplace should be circulated in proper ways.
b. Public sector bodies relating to discipline should include rules and penalties should be given to the offender.
c. As regards private employers, steps should be taken to prohibit aforesaid under the Industrial Employment (Standing Orders) Act,1946.
d. Proper work conditions should be provided to women as there is no hostile environment towards them.
e. *Criminal Proceedings:* Under any law, the employer shall initiate action according to the law by making complaint with the appropriate authority. The victims of Sexual Harassment should have the option to seek transfer of their own transfer.

Other guidelines relate to:

- Disciplinary Action
- Complain committee
- Complaint mechanism
- Workers initiative
- Awareness
- Third party harassment

Principle of Fairness in Procedure

Vishaka was a quantum leap in expanding the 'Principal of Fairness in Procedure' by the Court after *Maneka Gandhi*'s case[17] where the Court, for the first time, had observed that the right to equality would also include the right not to be treated in an arbitrary manner. After 1978 probably it was for the first time in 1997, in *Vishaka*, the 'Principal of Fair and Just Procedure' was expanded further to include a 'gender just' procedure in furtherance of the constitutional goals for equlity.

Even 'an attempt to molest' is included

Keeping pace with the changed work culture and in its quest to provide safe and protective work environment to the women of society, the Supreme Court held that even an attempt to molest would amount to Sexual Harassment and that outrageous behaviour of the employee is sufficient enough to constitute Sexual Harassment and actual assault or touch is not necessary to prove it.[18]

Safe Work Place: Responsibility of the Employer

In *Vishaka*, the Supreme Court delineated the duty of the employers to take all possible steps to combat this menace at work place. Verma J (CJI later) mandated as follows:

"*It shall be the duty of the employer or other responsible persons in workplaces or other institutions to prevent or deter the commission of acts of Sexual Harassment and to provide the procedure for the resolution, settlements or prosecution of acts of Sexual Harassment by taking all steps require."*

The Supreme Court apprehended that the legislature would take considerable time to bring legislation on this issue. Since Supreme Court has the power to lay down binding norm like any other law of the land[19], it thought it necessary and expedient to formulate certain guidelines as a stop-gap arrangement till enactment of such legislation.

[16] *Radha Bai v. Union Territory of Pondicherry*, AIR 1995 SC 1476; [1995] 4 SCC 141; *Rupan Deol Bajaj v*. KPS Gill (1995) 6 SCC194; AIR 1996 SC 309.
[17] *Maneka Gandhi v. Union of India*, AIR 1978 SC 597
[18] *Apparel Export Promotion Council v. A.K Chopra*, AIR 1999 SC 625;1999 [1] SCC 759
[19] Article 141 of the Constitution

The court did not leave any scope for non-compliance when it declared:

"[T] his would be treated as the law declared by this court under Art.141 of the Constitution."

Legal Framework: In Support- The Constitution and Other Laws

- **The Constitution of India**

"The meaning and content of the fundamental rights guaranteed in the Constitution of India are sufficient amplitudes to encompass all facets of gender equality…"[20]

Part III and Part IV, though constitute two entirely separate units of our constitution, carry the common theme of human rights[21] and rights included therein are equally fundamental. It is beyond any cavil of doubt that they are complementary to each other because together they constitute the human rights regime including respectively he civil and political rights and the social and economic rights. Thus, it can be made out that the tone for reformation of the society had already been set out in our country through its Constitution.

This constitutional mandate is followed by 'the legislative intent being expressed in the form of various enactments from time to time. The 'Equality Code' of the Constitution comprises of Article 14, Articles 15-18 of Part III and Articles 38, 39, 39A, 41 and 46 of Part IV.

As far as ***Article 19*** is concerned, gender discrimination in employment adversely affects a woman's freedom to carry out her occupation. The Supreme Court has struck down gender discrimination employment on several occasions. In *CB Muthamma, I.F.S v. Union of India*[22], service rules that placed unfair burden on women were labelled as discriminatory. In *Mackinnon Mackenzie and Co. v. Audry D' Costa*[23], the Court held that gender-based discrimination in employment arises when men and women are paid differently for the same work.

For the first time, the SC in *Vishaka* held that one of the logical consequences of incidents of sexual harassment at work place is the violation of the woman's fundamental right under Article 19(1)(g) "to business".

Further, the SC in its interpretation of the "right to life" under ***Article 21***[24] has on many occasions stressed that the right to life could not be equated to living out an animal existence.[25] Gender discrimination has been recognised as an obstacle to the full realization of the right to life under Article 21. In yet another case[26], the court held that equality, dignity of person and the right to development are inherent rights of every human being.

In *Vishaka*, the Apex Court held that each incident of sexual harassment of women at the workplace is a violation of the right to life under Article 21, which implies the right to dignity. According to the court, the principle of gender equality incudes protection from sexual harassment and the right to work with dignity, which had been reflected in international conventions and norms. The court went on to hold that it is the primary responsibility for ensuring such safety and dignity of women through suitable legislation, and executive.

The Supreme Court in *A.K Chopra's case* re-iterated that the Indian State had an obligation under CEDAW and the Beijing Declaration to prevent sexual harassment and held it to be beyond the scope of debate that sexual harassment of a female at the place of work is incompatible with the dignity and honour of female.[27]

An act of Sexual Harassment is a violation of the right to privacy of a woman, and therefore of the right to personal liberty and life under Article 21. In another case,[28] which dealt with the issue of reduction in the

[20] Late Chief Justice J.S. Verma, Supreme Court of India, Vishaka v. State of Rajasthan

[21] V.N. Shukla, Constitution of India, Revised by M.P. Singh, 10th edn., Eastern Book Co., 2004

[22] CB Muthamma, I.F.S v. Union of India (1985) 3 SCC 545, pp. 572-573, para 33

[23] Mackinnon Mackenzie and Co. v. Audry D' Costa, (1987) 2SCC 469

[24] No person shall be deprived of his life or personal liberty except according to procedure established by law

[25] Francis Coralie Mullin v. Administrator, Union Territory of Delhi, 1981, 1 SCC 608; Olga Tellis v Bombay Municipal Corporation, (1985) 3 SCC 545

[26] Madhu Kishwar v. State of Bihar, (1996) 5 SCC 125; C. Mudaliar v. Idol of Sri Swaminathaswami Thirukoil (1996) 8 SCC 525

[27] *Apparel Export Promotion Council v. A.K Chopra,* AIR 1999 SC 625;1999 [1] SCC 759

[28] *State of Karnataka v. Krishnappa* [2000] 4 SCC 75, p.83 para 14

sentence awarded in the case of rape of a girl of tender years, the Court observed that sexual violence, apart from being an act of physical violence is an unlawful intrusion of the right to privacy and personal integrity. The Apex Court held that "[e]ven a woman of easy virtues is entitled to privacy and no one can invade her privacy as and when he wishes. She is entitled to protect her person if there is any attempt to violate it against her wish. She is equally entitled to the protection of law."[29]

The right to privacy includes the "right to be let alone".[30]

Even so, the Supreme Court has attempted to define the right to privacy to include personal intimacies of the home, family, marriage, procreation, motherhood and child rearing.[31] Elaborating on the right, any questions to a female candidate regarding personal problems such as pregnancy, mensuration etc., which modesty and self-respect may preclude the disclosure of, should be deleted from enquiry by the employer.

Article 32: The Right to Move the Supreme Court through Appropriate Writ Petitions

The power of the Supreme Court in clause (2) is not confined only to the issuance of writs. It extends to issuing of any directions or orders that may be appropriate for the enforcement of any of the fundamental rights. The power of the court is not only injunctive in ambit, that is, preventing the infringement of a fundamental right but is also remedial in scope and provides relief against breach of a fundamental right already committed.

Article 226: Power of High Courts to Issue Certain Wits

Article 226 provides for the right to move the appropriate High Courts for the enforcement of fundamental rights and other legal rights.[32] The judiciary has also been liberal while interpreting the contents of fundamental rights.[33] The High Courts are also enabled to mould the relieves to meet peculiar and complicated requirements of this country.[34]

In granting the appropriate relief, the Court is not bound by the adversary procedure envisaged in the Civil Procedure code and the Evidence Act and can devise inquisitorial or other suitable procedure to achieve the object and purpose of Article 226[35] Such an approach to Article 226 is more in consonance to our social reality where a vast majority of people cannot properly fight out their claims due to poverty, ignorance and other similar factors.

- **Directive Principles of State Policy**

Part IV the Constitution contains Directive Principles which may not be enforced by the Courts as such but they must interpret laws as to further and not hinder the goals set out therein.[36] Few of these can be made applicable to the cases of sexual Harassment at workplace.

Article 39 provides for certain principles of policy to be followed by the state. ("The state shall, in particular, direct its policy towards securing-

a) That the citizens, men and women equally, have the right to an adequate means of livelihood;

b) That there is equal pay for equal work for both men and women.

c) That the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by the economic necessity to enter avocations unsuited to their age or strength;)

The more important provision is ***Article 39-A*** which enjoins the state to secure that the operation of the legal system promotes justice, on a basis of equal opportunity and to provide free legal aid, in particular, by suitable legislation or schemes or in any other way, to ensure that the opportunities for securing justice are not denied to any citizen, by reason of economic or other disabilities. It implies that justice should be so administered that it is available to all equally, irrespective of ignorance, poverty or any other cause despite plethora of legal and constitutional guarantees,

[29] *State of Maharashtra v. Madhukar* [1991] 1 SCC 57
[30] *R. Rajgopal v. State of Tamil Nadu* 1994 6 SCC 632
[31] *Govind v. State of MP* [1975] 2 SCC 148, p.156, para 24. See also *R. Rajgopal v. State of T.N.* [1994], 6 SCC 632
[32] *Bodhisattwa Gautam v. Subhra Chakraborty*, [1996] 1 SCC 490
[33] *Vineet Narain v. Union of India*, [1998] 4 SCC 226, AIR 1988 SC 2211
[34] *Bandhua Mukti Morcha v. Union of India*, [1984] 3 SCC 161, 188-189, AIR 1984 SC 802, 815
[35] *Ibid*
[36] *UPSC Board v. Hari Shankar*, AIR 1979 SC 65; *Municipal Corporation of Delhi v. Female Workers [Muster Role]*, AIR 2000 SC 1274

the equality of sexes would remain a pious wish unless the principles contained in Article 39-A are implemented not only in letter but also in spirit.[37]

Article 42 provides for securing just and humane conditions of work and maternity relief. The Maternity Relief Act and other similar rules and regulations and certain labour laws are in consonance with this article. This article exhibits the concern of the framers of the constitution for the welfare of workers.

The state shall endeavour to secure, by suitable legislation or economic organization or in any other way…, [c]onditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities…

…as prescribed under Article 43.

It has been provided in the constitution vide Article 51-A that it shall be the duty of every citizen of India:

a) To abide by the Constitution and respect its ideals and institutions.

*b) To promote harmony and the spirit of common brotherhood amongst al the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women. (*The Indecent Representation of Women 'Prevention' Act, 1986 is one such act passed in pursuance of this Article.)

c) to develop the scientific temper, humanism and the spirit of enquiry and reform.

d) To safeguard public property and to abjure violence.

The State shall work towards fostering respect for its obligations under international law and treaties in the dealings of organized people with one another as provided in Article 51

Article 253: Legislation for Giving Effect to International Agreements

Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body." Entry 14 of the Union List confers on the Parliament exclusive power to make laws with respect to entering and implementing of treaties and conventions etc.[38]

- **The Indian Penal Code, 1860[39]**

In Indian criminal law, there is no chapter specifically dealing with 'violence against women' and available provisions to tackle such problems lie scattered under various chapters. Moreover, as far as Sexual Harassment is concerned neither there is any offence identified, described or listed as such nor it has ever been enunciated as juridical category of crime.[40] From these propositions, this can and should not be inferred that the Indian Penal Code, 1860 does not recognize sexual Harassment even informally, or that there are no existing laws as such that can be invoked in case such issue arises.

It has been clearly mentioned in *Vishaka* that the definition given therein is not exhaustive one and that it does not preclude the possibility of other serious manifestations of sexual Harassment being covered under offences that are already defined in the penal code.[41]

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

S. No.	Sections Indian Penal Code	Details
1	292 to 294	Obscenity
2	339 to 348	Wrongful Restraint and Wrongful Confinement

[37] Equal justice and free legal aid Inserted by the constitution 'forty second Amendment' Act, 1976, Sec.8 [w.e.f 3-1-1997], V.N Shukla's *Constitution of India*, Eastern Book Co., p. 304

[38] Seventh Schedule: List 1- [Union List], Entry 14- Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries

[39] As amended by the Criminal Law Amendment, 2013 w.e.f 03.02.2013

[40] Pratiksha Baxi, *Sexual Harassment*, available at http://www.india-seminar.com/2001/505/505%20pratiksha%20baxi.htm

[41] Section 294-obscene acts and songs- "whoever, to the annoyance of others
a) Does any obscene act in public place, or
b) Sings, recites or utters any obscene songs, ballad or words, in or near any Public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both

3	354, 354A to 354D	Outraging the modesty of a woman
4	375 to 376, 376A to 376E	Rape
5	499 to 500	Defamation
6	503	Criminal Intimidation
7	509	Word, gesture or act intended to insult the modesty of a woman
8	511	Attempt to commit offences

Section 503: Criminal Intimidation

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

According to the section, there are three situations in which the section may be brought into operation:

a) *Threat with intent to cause alarm*
b) *Causing a person to do anything which he is not legally bound to do.*
c) *Prevent a person from doing anything which he is legally entitled to do.*

- **The Indian Evidence Act** [42]

There are various provisions of Evidence Act which may be helpful in establishing the offence of sexual harassment at workplace, for that matter just like the cases of sexual assault or rape.

Section 114-A: Evidence of Prosecutrix

In the Indian setting, refusal to act only on the testimony of a victim of a sexual assault, in the absence of corroboration, as a rule, is nothing less than adding spice of insult to the injury. Like the evidence of any other injured witness, the evidence of a girl or woman raped or molested should bear enough weight since a female bound by traditional conservative and non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect her chastity had ever occurred.[43]

Criminal Procedure Code[44]

In all cases of offences committed against women it is left to the discretion of the women injured or her relations to take her first to the Police or Hospital. The doctors should not insist on police report as a perquisite for giving first aid or medical examination. Police officials are attached with majority of the Government hospitals to attend Medico-legal cases (MLC).

Relevant CrPC sections in this regard are sections 39, 47(2), 51(2), 53(2), 54, 53A, 54A, 98, 100 (3), 154, 160, 164, 197.

- **Women Specific Economic Legislations**

- The Factories Act, 1948
- The Industrial Disputes Act, 1947

- **Social Legislations**

- The Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989
- The Immoral Traffic (Prevention) Act, 1956
- The Indecent Representation of Women (Prohibition) Act, 1986

- **Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Act, 2013**

After 14 years of the *Vishaka* judgement and man draft bills on the issue, finally 'Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Act, 2013' received the President's assent on 22nd April, 2013. It was notified in the Gazette of India on 23rd April, 2013.

[42] As amended by the Criminal Law Amendment Act, 2013 w.e.f 03.02.2013
[43] *Bhoginbhai Hizinbhai v. State of Gujrat*, AIR 1938 SC 753; *Krishan Lal v. State of Haryana* AIR 1980, SC 1252
[44] As amended by the Criminal Law Amendment Act, 2013 w.e.f 03.02.2013

The Act not only symbolizes India's commitments under CEDAW but also reflects culmination of the Apex Court's initiative, towards a meaningful legislation and safer work place environments for women.

Salient features of the act are as follows:

- The Act proposes a definition of Sexual Harassment, which is as laid down by the SC in *Vishaka v. State of Rajasthan*. Additionally, it recognises the promise or threat to a women's employment, prospects or creation of a hostile work environment as a 'Sexual Harassment' at Work pace and expressly seeks to prohibit such acts.
- The Act is applicable both in Government and Private Sector, and brings in its ambit even domestic workers and agriculture labour, both organised and unorganised sectors. Students, research scholars in colleges/ university and patients in hospitals have also been covered.

- The Act provides protection not only to women who are employed but also to any women who enters the workplace as a client, customer, apprentice and daily wager or in ad-hoc capacity.

- Under the Act, every employer requires to constitute an **Internal Complaints Committee** (ICC). Since a large number of the establishments (41.2 million out of 41.83 million as per economic census, 2005) in our country have less than 10 workers for whom it may not be feasible to set up an ICC, the Act provides for setting up of Local Complaints Committee (LCC) to be constituted by the designated District Officer at the District or the Sub-District levels, depending upon the need. This twin-mechanism would ensure that women in any workplace irrespective of its size pr nature, have access to a redressal mechanism. The LCCs will enquire into the complaints of sexual harassment and recommend action to the employer or the District Officer.

- Employers who fail to comply with the provisions of the Act will be punishable with a fine which may extend to Rs. 50,000.

- The Complaint Committees are required to complete the enquiry within 90 days and a period of 60 days has been given to the employer/ DO for implementation of the recommendations of the committee.

- The Act provides for safeguards in case of false or malicious complaints of sexual harassment. However, mere inability to substantiate the complaint or to provide for adequate proof would not make the complainant liable for punishment (Section 14 (1))

- The Act covers members of the armed forces.

- An "aggrieved woman" includes only 2 categories- a woman in relation to either the workplace or a 'dwelling place or a house'. "Students" are covered under educational institutions.

Conclusion and Suggestions – What needs to be done

"Legislation may not be the best means to control a problem which is one of society: [w]hat is important is to bring about a change in mentality, as many women trade unionists have often pointed out… efforts should be made to identify measures that would help to change behaviour and attitude, and thus prevent Sexual Harassment."[45]

It has become increasingly apparent over recent decades that legislative measures for combating Sexual Harassment needs to be accompanied by preventive mechanisms introduced at the work place level.[46] Throughout the world, Governments, employers'/workers' organizations and NGOs' are increasingly advocating that Sexual Harassment be addressed though work place policies and complaints procedures. This trend reflects the recognition that workplace policies can be the most effective tool for

[45] Federation of Austrian Industry; Conditions of Work Digest, Vol. 11, 1\1992, *"Combating Sexual Harassment at Work,"* ILO, Geneva, p.238

[46] Technical Report for Discussion at the ILO/Japan Regional Tripartite Seminar on Action against Sexual Harassment at Work in Asia and the Pacific, Malaysia, 2001, p. 65

preventing the Sexual Harassment, their main role is to ensure that it does not take place.[47]

Formulating a Multi-Pronged Strategy

Just like any other professional, occupational or workplace hazard, the employees should strive strategically to protect their employers against the hazards entailed by this multifaceted workplace syndrome. The European Trade Union Confederation (ETUC) in its resolution has stated as under:

"A strategy aimed at improving health and safety at work means that all improvement in this field should be based in first instance, on preventive policies. The aim of prevention is to create optional conditions that will reduce the occurrence of Sexual Harassment to a minimum. Sexual Harassment can be prevented by giving special attention to the organization of work, the working conditions and the working environment including the design of the workplace. It should be anticipated to what risks people are potentially exposed, just like this is done with other safety and health risks. Harassing women can be a part of a (matter-of-course) culture in the workplace. This culture may manifest itself in sex-related remarks, pornographic pictures on the wall, etc. Preventive policies should include these aspects of the working environment."

The SC, also, underlined the need for employers to take all necessary steps to combat this program when it held that It shall be the duty of the employer or other responsible persons in workplaces or other responsible persons in workplaces or other institutions to prevent or deter the commission of acts of Sexual Harassment by taking all steps required."[48] The SC directed further,

"*Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at workplaces and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment."*

Restoring Confidence of the Victim

The victim may lose self- confidence, feel undervalued, suffer stress, and become demotivated/negligent at work. In extreme cases, she may lose her job which is not simply a loss to the company or to her person rather it's a loss to the whole society and ultimately to humanity. Having a clear policy to deal with the problem can be an effective preventive measure as it enables women to complain. The most effective way to encourage reporting of incidents of Sexual Harassment is to introduce a range of different measures, since this approach has been shown to result in aggrieved individuals being more confident that their employer will respond to their plight.[49]

Delineation of Responsibilities

Under the guidance and supervision of the senior most administrator, any senior manager, who is a specialized and trained officer should be assigned overall responsibility. He may act as a champion and catalyst or change agent who himself is not easily deflected by problems or by the need to compromise the approach in view of other competing priorities. It should be his responsibility to 'own' the policy, to take it seriously, to oversee its implementation and to push it through the whole organization.

Consultation Sessions

Involving the staff or its representatives\trade unions throughout the development of the policy not only provides a strong foundation and a better basis on which rather stronger edifice can be raised, but it also ensures their participation and co-operation so that they become aware of the rubric of the policy and have an intimate feel of various provisions prior to its implementation. Once it is implemented, such sessions should continue whenever review or amendment of such a policy is to be carried out.

Policy Statements

Policy statements by themselves appear to be the most useful in preventing forms of Sexual Harassment

[47] Michael Rubinstein, *Dealing with Sexual Harassment at Work: The experience of industrialized countries in ILO, Conditions of Work Digest:* Combating Sexual Harassment at Work, Geneva

[48] *Vishaka v. UOI,* AIR 1997 SC 3011

[49] Rowe, in M.S Stockdale, *Sexual Harassment in the Work Place, Thousand Oaks,* Sage Publications, California, Ed.1996 and DuBois Cathy Lz, etal, Perceptions of Organisational Responses to formal Sexual Harassment complaints, in Journal of Managerial Issues 11, Pittsburgh, USA

which involve behaviour that is not aimed at specific individuals such as offensive comments about women in general, or the display of sexually suggestive or explicit material. All policies should contain a policy statement representing the organization position on Sexual Harassment.

- A policy statement is a statement of intent and gives the clear message that in the organization this is not appropriate workplace behaviour.
- The organization\institution should formulate policy statements expressly declaring that particular workplace as "Zero Tolerance Zone" meaning thereby that Sexual Harassment shall not be tolerated or condoned under any circumstance by the employer.
- The policy should also require victims of Sexual Harassment to report such incident/behaviour to their immediate supervisor or boss.
- The Equal Employment opportunity commission, EEOC, emphasizes that prevention is the best tool for elimination of Sexual Harassment, has stipulated clearly in its guideline., etc.

Areas to be covered in A Sexual Harassment Policy

A policy should start by giving the policy statement. With such a policy, it is always useful to draw up a code for managers and another for employees, outlining the procedure each would need to follow in cases of Sexual Harassment and should cover the advice for both, who are being harassed and alleged harassers.

Dissemination of the Policy

The policy only on paper neither serves the purpose nor proves to be instrumental in preventing the problem unless circulated and disseminated amongst the employees. The employees or the potential victims would not even know of its existence until it is communicated effectively. Victims might not even know whom they should approach for help, how to complain and have their grievances redressed.

Therefore, the courts, jurists, academics, legal commentators and various bodies worldwide have laid great stress on the requirement of effective dissemination of the Sexual Harassment is not sufficient.

However, the issuance of a policy statement does not deter more personalized forms of Sexual Harassment, directed at individuals. "…Combating Sexual Harassment involves tackling sensitive issues associated with well-worn patterns of human relationships. It involves changing attitudes with respect to the role of women at work, and how they are treated and valued as workers. To effectively prevent all forms of harassment… organizations must make visible efforts by taking steps to ensure that workers are aware of policies and procedures in place."[50] The Supreme Court of India also underscored this requirement when it is said in *Vishaka* case, "Express prohibition of Sexual Harassment… at the workplace should be notified, published and circulated in appropriate ways, "The court also said, "Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.[51]

A written acknowledgement from each employee confirming receipt of copy of the policy would help the employee in reviewing the effectiveness of *modus operandi* of communication used.

Role of Administrators

Primarily, it is duty of the key administrators (employees, managers and supervisor) in any organization to maintain a workplace free from all kinds of harassment taking due care of the respect and dignity of its employees. All requisite steps should be taken implement promote the policy.

Training Programs

Training is among the most important of the proactive measures contours of a Sexual Harassment policy be effectively implemented in practice.[52] Awareness generation is, indeed, one of the most important tools for countering the menace of Sexual Harassment at work place and imparting practical training to them can do wonders to spread the same. It

[50] ILO, *Action against Sexual Harassment at Work in Asia and the Pacific,"*2001,p.138.
[51] Guideline 9 as laid down by the SC in *Vishaka v. State of Rajasthan* AIR 1997 SC 3011
[52] Deirdre McCann, Sexual Harassment at Work: National and International Responses, ILO, 2005, p. 59

not only renders great help to those who actually seek assistance but also sparks a chain reaction to spread the knowledge so generated to million others who silently tolerate this type of violence only due to lack of information.

Disciplinary Proceedings

The goal of a Sexual Harassment policy is to achieve a healthy workplace. Therefore, the sooner action is taken to eliminate harassing conduct, the less likely it is that any such conduct will become detrimental to the work environment.[53]

The employer should take appropriate disciplinary action against the harasser if held guilty of Sexual Harassment in the investigation. The punishment however, should commensurate with the gravity of the misconduct.

Protection from Retaliation

Every organization should view complaint in a positive light and nothing should be on record to reflect a wrong message that it was the victim who caused the problem or that the management has adjudged the complainant to be at fault every if the complaint could not be upheld due to inconclusive evidence.

The victims of the Sexual Harassment should have the option to seek transfer of the perpetrator or their own transfer.[54]

A ***Social Audit*** should be conducted regularly which may start with the report from complaints committee on the issue of Sexual Harassment. The management may scan through and distribute the audit report to keep everyone aware of what is happening in this area. Keeping up to date may also act as a precautionary step.

[53] *Canada Human Rights Commission v. Canada Armed Forces [1993]* 3 FC 653, dated 28-4-1999, Docket: T-1200-98

[54] *Vishaka v. State of Rajasthan,* AIR 1997 SC 311

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Aadhaar- The Basis of an Indian

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Abstract:

Since its inception in 2009, the Aadhaar project has been shrouded in controversy due to various questions raised about privacy, technological issues, welfare exclusion, and security concerns. The project is ladled with serious lacunae and it lacks security of the personal identity information, openness in the working of the UIDAI, proper supervision, redress mechanisms and accountability. Legal framework is sketchy and not adequate. But on the other hand, succeeded in removing the bottlenecks from the government subsidy delivery chain, making of the passport, opening bank accounts, disbursing pensions, provident fund and thereby it saved a lot of money of the government. The World Bank is so impressed with the aadhaar that it recommended other countries to in the world to adopt it Countries like Tanzania, Afghanistan, Bangladesh, Russia, Morocco, Algeria, and Tunisia, have expressed interest in the system . Government asserted Supreme Court, by linking Aadhar to PAN card will weed out fake PAN cards which are used for terror financing, drug financing, and circulation of black money that is almost all the major problems country is facing today. Now it becomes so ambitious that it is now not considered less than messiah. The aadhaar project has been depicted not only as a new face of development that technology could bring about but also as an identity technology that will open us all up to discrimination, prejudice, the risk of identity theft any subject the entire population of the country under continuous surveillance. There are reports claiming that the aadhar is saving over 1 billion dollar of the government. There are also reports that nearly 135 aadhaar numbers and some personal information has been disclosed. Therefore this project has both positive as well as negative aspect. This paper is intended to examine both these aspects and to reach at the conclusion with a suggestion how these problems can be solved.

Key Words: *Aadhaar- The Basis of an Indian*

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Introduction

With the aim of weeding out corruption and personification from government service and welfare supply chain, the aadhaar project was launched in 2009. Under this project, a random and unique number, which can singularly identify people, is generated using some biometric (photograph, fingerprint, iris scan etc.) and personal information (name, date of birth, address etc) of the people. National Identification Authority of India Bill, 2010 (hereinafter as the NIAI Bill) was introduced in the Loksabha to give statutory back-up to the project. Standing Committee on Finance of the 15th Loksabha, however, rejected it and observed that "the scheme is ladled with serious lacunae and enactment of legislation of a data protection and privacy is was a pre-requisite for the Aadhaar scheme." But the project was continued to be executed without any legislation. A new bill, Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 (hereinafter Aadhaar Act, 2016) finally get enacted. But this bill got criticized for not accepting five recommendation of Rajya Sabha, for absence of any opt-out option, for no effective and comprehensive provisions pertaining to cybersecurity of Aadhaar, for no safeguards for the privacy of the personal identity information, for no limitation over-collection of information for the registration under the scheme, for disclosure of the personal information by the requesting agency under section 8, for disclosure of the aadhaar information, for undefined national security under section 33, for no prescription of data-breach notification, for striping legitimate citizens of their right to report criminal activities and breaches concerning Aadhaar, for involvement of private entity in the maintenance and establishment of the CIDR under Section 10, for the composition of oversight committee to check misuse of disclosure of aadhaar information prescribed under section 33 and for over delegation of power to Unique Identification Authority of India (hereinafter as the UIDAI). Parliament in contrast to the aadhaar act and the Supreme Court's interim order dated August 11 and October 15, 2015, made an amendment and inserted Section 139AA in the Income Tax Act, which made aadhaar mandatory for the filing of income tax returns and PAN number with effect from 1 July 2017. This amendment too shrouded aadhaar in controversies because it allegedly violates right of informational self-determination[1].

However, this project succeeded in removing the bottlenecks from the government subsidy delivery chain. Making of the passport, opening bank accounts, disbursing pensions and the provident fund now become easier and faster. The World Bank is so impressed with the aadhaar that it recommended other countries to in the world to adopt it.[2] This project also received global acclaim from entities like Bill Gates, *The Economist*, the World Bank, Raoul Pal, and others. Countries like Tanzania, Afghanistan, Bangladesh, Russia, Morocco, Algeria, and Tunisia, have expressed interest in the system[3].Government, reportedly, per year saves approximately USD 1 billion (Rs 650 crores) transfer cost under Mahatma Gandhi National Rural Employment Guarantee Act, supplying of LPG subsidy, disbursement of pension, provident fund and ration under PDS scheme. The government asserted Supreme Court, by linking Aadhaar to PAN card will weed out fake PAN cards which are used for terror financing, drug financing, and circulation of black money that is almost all the major problems country is facing today.[4] Now it becomes so ambitious that it is now not considered less than Messiah. Therefore this project has positive as well as negative aspects. It will not be right to abandon this project merely for these lacunae but this also equally not right to not do anything to improve the current on-going project. This paper is intended to evaluate and examine both the negative and positive

[1] A proposition developed by the Federal Constitutional Court of Germany in a ruling relating to personal information collected during that country's 1983 census.

[2] Jeanette Rodrigues, Aadhaar wins, World Bank praise amid 'big brother' fears, Live Mint (Mar 16, 2017, 08:30 IST), http://www.livemint.com/Politics/Y0WwNHySlbDKDFMMvw57nM/Aadhaar-wins-World-Bank-praise-amid-big-brother-fears.html.

[3] World Bank thinks Aadhaar System in India is very effective and should be adopted by all nations (Mar. 17, 2017), https://yourstory.com/2017/03/aadhaar-system-world-bank/.

[4] Other than stopping people from wearing a helmet in their hands, Aahaar can fix every other problem: Govt to SC (May 07, 2017), http://www.fakingnews.firstpost.com/india/stopping-people-wearing-helmet-hands-aadhaar-govt-sc-20776.

points of the project and reaching the conclusion with the mid-way solution.

Achievements of Aadhaar

Aadhaar (English translation "the basis") as the names suggest, is an essential and single most important document for identification purposes and KYC verification. Aadhaar succeeded in removing the bottlenecks from the government subsidy delivery chain, making of the passport, opening bank accounts, disbursing pensions, provident fund and thereby it saved a lot of money of the government. The World Bank is so impressed with the aadhaar that it recommended other countries to in the world to adopt it.[5] Countries like Tanzania, Afghanistan, Bangladesh, Russia, Morocco, Algeria, and Tunisia, have expressed interest in the system[6]. Taking inspiration from 3 schemes benefits from the aadhaar has been widened. Now it becomes so ambitious that it is now not considered less than the messiah. Recently Government asserted Supreme Court, by linking Aadhar to PAN card will weed out fake PAN cards which are used for terror financing, drug financing, and circulation of black money that is almost all the major problems country is facing today.[7] Biometric identification has so much influenced the government that it has proposed in the Supreme Court the similar unique identification system for the cows too to keep track cows and prevent their smuggling. This section tries to enlist some of those achievements.

Direct Bank Transfer

The decision to use the 12 digits individual identification number on Aadhar card for Direct Benefit Transfer (DBT) for individual beneficiaries under social welfare schemes was made to stop duplicate applicants, frauds, and middleman and end corruption within government. It is now being used to get LPG subsidy, availing of other subsidies without the need to register and enrol for these separately, monthly pension, provident fund and scholarships for the students directly in the bank account. This negates the possibility of the funds being misappropriated or of individuals making fraudulent claims in order to claim benefits. A cumulative amount of Rs 17869475 has been transferred using DBT for 138 schemes under 27 ministries since 2013. 29 various financial frameworks like Aadhaar Payments Bridge (hereinafter referred as APB) and Aadhaar Enabled Payment Systems (hereinafter referred as AePS) have been built by National Payment Corporation of India to support DBT and also to allow individuals use Aadhaar for payments. In the PDS scheme alone almost Rs 14,000 crore has been saved.[8]

Universal Identification-

The Aadhaar card is a universal card that does not really have a specific purpose behind it. Unlike a voter ID card, whose sole purpose is to permit the holder to take part in the electoral process, the Aadhaar card the with any specific use in mind. Instead, it can be used for a number of purposes, making it a universally acceptable government-issued card, without needing to register or apply for a separate card for each of these services. For example, an Aadhaar card can be used as proof of identity, proof of address as well as proof of age when applying for any government service.

Ease of Availability:

The Aadhaar card is the only government-issued document that is available anywhere, everywhere. An Aadhaar card can be applied for online. Known as e-Aadhar, this is the downloadable version of your Aadhaar card and can be accessed wherever and whenever required. This makes it convenient for individuals to always have a copy of a valid government-issued identity document that is also easily accessible. This also reduces the risk of a document being stolen/misplaced, since the Aadhaar can be downloaded onto any device and displayed when required.

[5] Jeanette Rodrigues, Aadhaar wins, World Bank praise amid 'big brother' fears, Live Mint (Mar 16, 2017, 08:30 IST), http://www.livemint.com/Politics/Y0WwNHySlbDKDFMMvw57nM/Aadhaar-wins-World-Bank-praise-amid-big-brother-fears.html.

[6] World Bank thinks Aadhaar System in India is very effective and should be adopted by all nations (Mar. 17, 2017), https://yourstory.com/2017/03/aadhaar-system-world-bank/.

[7] Other than stopping people from wearing a helmet in their hands, Aahaar can fix every other problem: Govt to SC (May 07, 2017), http://www.fakingnews.firstpost.com/india/stopping-people-wearing-helmet-hands-aadhaar-govt-sc-20776.

[8] Linking Aadhaar to ration cards saved Rs 14000 crore: Ram Vilas Paswan, The Economic Times (May 04, 2017, 10:12 PM IST), retrieved from http://www.business-standard.com/article/economy-policy/linking-aadhaar-to-ration-cards-saved-rs-14-000-cr-ram-vilas-paswan-117050401349_1.html

Digital Life Certificate

The 'Jeevan Praman for Pensioners' or the Digital Life Certificate as it is also called, was initiated by Department of Electronics and IT with the aim of abolishing the need for the pensioner to be physically present in order to receive the pension for the continuation of their scheme. Pensioners can now avail pension without having to leave their homes as their details can be digitally accessed by the agency through their Aadhaar Card numbers.

Digital Locker:

The government of India has launched digital locker (DigiLocker) system for everyone for storing all personal documents on the government's server. The sign-up process for DigiLocker requires a person to link his/her 12 digit Aadhaar card number.

Voter Card Linking:

Starting 9th March 2015, Aadhaar card UIDAI number would be linked to the voter ids. This action is taken to eliminate bogus voters. Once an Aadhaar number is linked, it would become impossible for a multiple voter ID card holder to make its illegal use, as registration requires voter card holder to be physically present and produce Aadhaar card to the polling booth officer for linking.

Removed bottlenecks from the bureaucracy

By using Aadhaar Card, passports can now be availed by applicants within 10 days. Individuals who wish to obtain a passport can apply for the same online by simply attaching their Aadhaar Card as the only residence and identity proof along with their application. Financial institutions and banks consider Aadhaar Cards as a valid address and photo ID proofs during the time of opening a bank account. It is used for KYC, identification and verification purposes. Banks are issuing basic banking or "no-frills account" under Jan Dhan Yojna using Aadhaar as the primary authentication for individuals to receive benefits from government schemes.[9] For the migrant population in cities, who live in slums or unauthorised clusters and keep shifting homes, any work that required them to provide proof of identity and residence – opening a bank account, applying for a ration card or even a gas connection – was always a problem. Aadhaar gave them an identity document that would remain valid wherever they moved.

Controversies surrounding the Aadhaar and their analysis

Since its inception in 2009, the Aadhaar project has been shrouded in controversy due to various questions raised about privacy, technological issues, welfare exclusion, and security concerns.[10] In this section, those controversies will be thoroughly analysed.

Right to privacy under the Aadhaar project

The Aadhaar project is revolutionary and groundbreaking. It plunged leakages in the government benefits and subsidy supply chain. But it is not only these positive points that made it so famous. The suspected threat to the right to privacy pose by it is a contributory element in its popularity. And this threat to the right to privacy was one of the reasons that made a parliamentary standing committee, led by Yashwant Sinha to reject National Identification Authority of India Bill, (hereinafter referred as the NIAI Bill) in 2011. Following the rejection of the bill, the aadhaar project continued to be executed without any statutory back up until Aadhaar (Targeted Delivery of Financial and other Subsidies, benefits and services) Act (hereinafter as the aadhaar Act) was enacted in 2016. This act has following sections and provisions that allegedly pose threat over the right to privacy.

Section 8 made the identity information openly accessible

According to Section 8 of the aadhaar act, the "requesting entity" (any "agency or person" who is willing to pay the fees) can ask for any aspect of that person's identity information including photograph, except for the core biometric information to be shared during authentication provided the requesting entity must inform the Aadhaar card holder about the use it proposes to make of identity information and it cannot publish or display the Aadhaar number.

This section lacks any tangible safeguards to prevent any misuse of the data by the requesting agency and important identity information is rendered to be openly

[9] NPCI. Frequently Asked Questions By Banks for Aadhaar Enabled Payment System, National Payments Corporation of India, http://www.npci.org.in/documents/AEPSFAQBank.pdf.

[10] Information security practices of aadhaar or lack thereof a documentation of the public availability of aadhaar numbers with sensitive personal financial information (May 01. 2017), http://cis-india.org/internet-governance/information-security-practices-of-aadhaar-or-lack-thereof-a-documentation-of-public-availability-of-aadhaar-numbers-with-sensitive-personal-financial-information-1

accessible. For instance, before buying sim card using aadhaar, it would be unpractical to expect from any person to read the fine print of the terms and conditions, or before clicking "I agree" when installing new software. And after taking nominal consent by this way there is nothing that can prevent a requesting entity from sharing the identity information (name, address, date of birth, photograph – whatever the government decides).[11]

Involvement of the private players in the registration for and generation of the Aadhar numbers

Enrollment of individuals for Aadhaar, as per the aadhaar act, is to be done by registrars which are mainly government and public sector agencies. But they can hire enrolment agencies which can be private players, to collect demographic and biometric information and these enrolment agencies can hire enrollment operators and supervisors through third parties. The aadhaar act lacks any provision for a foolproof system in place to guard against the breach of data from any of these points or to ensure that enrolment agencies and operators do not keep a copy of the database when they hand it over to the government. There are some instances reported when enrolment agencies and operators handle the information, available to them, in a casual manner.[12]

Disclosure of the aadhaar numbers

Various agencies in the country collect different information for statistical purpose empowered by the Collection of Statistics Act, 2008.[13] This information is collected by publishing a notification in the official Gazette and Section 9(4) prohibits the publication of identifying information unless permitted by the concerned person. Similarly, the publication of Aadhaar numbers is also prohibited under Section 29 (4) of the Aadhaar Act, 2016 unless the permission to publish them is sought from the Aadhaar number holder. But recent events have proven that Aadhaar numbers can be easily disclosed, posted online and used for malicious purposes. On May 1, researchers at the Centre for Internet and Society in Bangalore reported that an estimated 135 million Aadhaar numbers had been leaked online from four separate government databases.[14] The first two belong to the rural development ministry—the National Social Assistance Programme (NSAP)'s dashboard and the National Rural Employment Guarantee Act's (NREGA) portal. The other two databases deal with Andhra Pradesh—the state's own NREGA portal and the online dashboard of a government scheme called "Chandranna Bima". The type of data disclosed included names, names of parents, PAN numbers, mobile numbers, religions, marks, the status of Aadhaar applications, beneficiaries of welfare schemes, bank account numbers, IFSC codes and other sensitive information. The most famous was the leak of Mahendra Singh Dhoni's aadhaar application form. The report claims these government dashboards and databases revealed personally identifiable information (PII) due to a lack of proper controls exercised by the departments.[15] Most of these reports refer to publications of personally identifiable information of beneficiaries or subjects of the databases containing Aadhaar numbers of individuals along with other personal identifiers. All of these disclosures are symptomatic of a significant and potentially irreversible privacy harm.[16] The privacy risk is huge in this cases because the simple combination of a person's name, phone number and bank account number is sufficient for numerous cyber-attacks such as phishing.[17] However, Ministry of

[11] Jean Dreze, Hello aadhaar goodbye privacy (Mar. 24, 2017), https://thewire.in/118655/hello-aadhaar-goodbye-privacy/

[12] Usha Ramanathan, Who Owns the UID Database? Medianama (May 6, 2013), http://www.medianama.com/2013/05/223-who-owns-the-uid-database-usha-ramanathan/.

[13] PRS India. (n.d.). The Collection of Statistics Act, 2008, PRS India (Jan. 09, 2009), http://www.prsindia.org/uploads/media/vikas_doc/docs/1241607771~~The%20Collection%20Of%20Statistics%20Act,%202008.pdf.

[14] Rohith Jyothish, Aadhaar vs security: is the biometric system a tool for surveillance? (May 6, 2017, 12:27 PM), http://www.business-standard.com/article/economy-policy/aadhaar-vs-security-is-the-biometric-system-a-tool-for-surveillance-117050600183_1.html

[15] Govt may have made 135 million Aadhaar numbers public: CIS report (May 02, 2017, 04:43 AM IST), http://www.livemint.com/Politics/oj7ky556p6vdljXpRw8gPP/135-million-Aadhaar-numbers-made-public-by-government-author.html?li_source=LI&li_medium=news_rec

[16] Information security practices of aadhaar or lack thereof a documentation of the public availability of aadhaar numbers with sensitive personal financial information (May 01. 2017), http://cis-india.org/internet-governance/information-security-practices-of-aadhaar-or-lack-thereof-a-documentation-of-public-availability-of-aadhaar-numbers-with-sensitive-personal-financial-information-1

[17] Asheeta Regidi, GOI directs removal of Aadhaar info published online, what the law says and what to do if your find your data online first post (Mar. 30 2017, 07:21 PM IST), http://www.firstpost.com/india/goi-directs-removal-of-aadhaar-info-published-online-what-the-law-says-and-what-to-do-if-you-find-your-data-online-3360372.html.

Electronics and Information Technology dated 25 March 2017 direct state and central department to not to publish this aadhaar and other identity information online and to remove the information that is already published online.[18]

Implications of Disclosure

The initiatives by the government open data portals NREGA, NSAP, Andhra Pradesh NREGA portal and the online dashboard of a government scheme called "Chandranna Bima" may be laudable for providing easy access to government data condensed for easy digestion, however in the absence of proper controls exercised by the government departments populating the databases which inform the data on the dashboards, the results can be disastrous by divulging sensitive and adversely actionable information about the individuals who are responding units of such databases.[19] Through aadhaar number and some basic identity information, other granular details about individuals including sensitive PII such as caste, religion, address, photographs and details of bank account details, credit card numbers and passwords can easily be accessed through social engineering to steal money from individual's accounts.[20] One of the prime examples is individuals receiving phone calls from someone claiming to be from the bank.[21] Another method is changing the phone number linked to aadhaar number maliciously. There are also some brokers which buy tonnes of copies of Aadhaar documents from shops selling SIM cards and other institutions, for the purposes of identity fraud.[22] In the recent past, there have been reported cases of employees of services provider caught stealing the biometric data collected for Aadhaar authentication.[23] It has been stated by the government that so far 34000 operators have been blacklisted for enabling the creation of fake Aadhaar numbers.[24] Even biometric data can be collected, for example lifting people's fingerprints remotely and without consent from a variety of objects that they may touch, and their iris data may be picked up by a high resolution, directional camera from a distance.[25] In light of these factors, the public presence of Aadhaar numbers, details about DBT transfers, registered mobile phone numbers and seeded bank account numbers presents a huge opportunity for financial fraud. In the US, the ease of getting Social Security Numbers from public databases has resulted in numerous cases of identity theft.[26] These risks increase multifold in India due to the mapping of the aadhaar number with bank accounts under Aadhaar Payments Bridge (APB) and Aadhaar enabled Payment Systems (AePS).[27]

In case a financial fraud takes place through AePS, the consumer may not be able to assert his claims for compensation due to the terms and conditions around liabilities, these terms force the consumer to take liabilities onto oneself than the payment provider. The terms and conditions have been vague in the recent AePS applications like BHIM Aadhaar App.[28] Regulations and standards around Aadhaar are at a very early and nascent stage causing an increase in

[18] Ibid.

[19] Gordon, P. Data Leakage - Threats and Mitigation, 2007, October 15, https://www.sans.org/reading-room/whitepapers/awareness/data-leakage-threats-mitigation-1931.

[20] Social engineering fraud, from Interpol: https://www.interpol.int/Crime-areas/Financial-crime/Social-engineering-fraud/Types-of-social-engineering-fraud.

[21] Information security practices of aadhaar or lack thereof a documentation of the public availability of aadhaar numbers with sensitive personal financial information (May 01. 2017), http://cis-india.org/internet-governance/information-security-practices-of-aadhaar-or-lack-thereof-a-documentation-of-public-availability-of-aadhaar-numbers-with-sensitive-personal-financial-information-1.

[22] Reddy, L. V. Hyderabad: Note cheats use Aadhaar card copies, Deccan Chronicle (Nov. 17, 2016), http://www.deccanchronicle.com/nation/current-affairs/171116/hyderabad-note-cheats-use-aadhaar-card-copies.html.

[23] Singh, S. R. RJio SIM cards being sold on the black market in Delhi, Business Line (Sep. 22, 2016), http://www.thehindubusinessline.com/info-tech/rjio-sim-cards-being-sold-in-the-black-market-in-delhi/article9136775.ece.

[24] PTI. Govt asserts no poor will be deprived by making Aadhaar mandatory, Hindustan Times (April 10, 2017), http://www.hindustantimes.com/india-news/govt-asserts-no-poor-will-be-deprived-by-making-aadhaar-mandatory/story-G2OBbLDaGFuYISwUqHJ8pL.html.

[25] Agrawal, S., Banerjee, S., & Sharma, S. (n.d.). Privacy and Security of Aadhaar: A Computer Science Perspective, from IIT Madras, http://www.cse.iitm.ac.in/~shwetaag/papers/aadhaar.pdf.

[26] The Identity Project, London School of Economics, http://www.lse.ac.uk/management/research/identityproject/identityreport.pdf.

[27] Joe C Mathew, Aadhaar must up security measures to ward off financial frauds, says the report, Business Today (May 11, 2017, 04:01 PM IST), http://www.businesstoday.in/current/economy-politics/aadhaar-must-up-security-measures-to-ward-off-financial-frauds-says-report/story/251403.html.

[28] Menon, S. Are the terms and conditions of BHIM-Aadhaar anti-consumer or simply anti-interpretation?, Newslaundry (April 20, 2017), https://www.newslaundry.com/2017/04/20/are-the-terms-and-conditions-of-bhim-aadhaar-anti-consumer-or-simply-anti-interpretation.

financial risk for both consumers and banks to venture into AePS.[29]

Over delegation of powers to the UIDAI

The matters on which the UIDAI may frame rules include:

The process of collecting information, Verification of information, Individual access to information, Sharing and disclosure of information, Alteration of information, Request and response for authentication, Defining use of Aadhaar numbers, Defining privacy and security processes, Specifying processes relating to data management, security protocols and other technology safeguards under this Act and Establishing grievance redressal mechanisms.

This Act allows the executive a very high degree of discretionary power. As mentioned above, a number of important powers which should ideally be within the purview of the legislature are delegated to the UIDAI. The UIDAI has been administrating the project since its inception, and a number of problems have already been documented in the process such as collection, verification, sharing of information, privacy and security processes. Rather than addressing these problems, the Act allows the UIDAI to continue to have similar powers. Even the power to set up such a mechanism is delegated to the UIDAI under Section 23 (2) (s) of the Act despite the fact that making the entity administering a project, also responsible for providing for the frameworks to address the grievances arising from the project, severely compromises the independence of the grievance redressal body.

No Effective Provisions for Cybersecurity

The biometric and demographic information of persons collected under the Act is stored in a centralised database called 'Central Identities Data Repository' (CIDR), which is under the control of Unique Identification Authority of India (UIDAI).

The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (hereinafter referred to as the Aadhaar Act, 2016) was passed to grant legality to Aadhaar. However, the Aadhaar Act, 2016 did not address all relevant and imperative issues concerning Aadhaar in a comprehensive manner.

We need to appreciate that security is critical for the further success of the Aadhaar ecosystem. When one looks at the provisions of the Aadhaar Act 2016, one finds that no effective and comprehensive provisions pertaining to cybersecurity of Aadhaar ecosystem are incorporated under the Aadhaar Act, 2016.

The Aadhaar Act, 2016 has itself been drafted keeping in mind just the security of identity information and authentication records of individuals stored in the Central Identities Data Repository.

The very fact that the Aadhaar Act, 2016 has not done enough for cyber security has ensured that the breaches will continue.

Given the resolve of the government to make Aadhaar mandatory, it needs to look at a broader vision of trying to make the Aadhaar ecosystem more cyber secure, rather than just the narrow vision of protecting the security of the Central Identities Data Repository.

Voluntary v Mandatory

Using biometrics of a person for identification to get rid of fraud and duplication is a very effective idea. But there is also another aspect of this. Biometrics of any person are core to his/her identity and every individual has a right of "informational self-determination". Therefore biometrics of any person can't be taken apart from him forcefully from him for whatsoever reason.[30]. An individual must be allowed to determine what information of his can be allowed to be put out and this is closely tied to a person's right to dignity.[31] The state has no eminent domain in making a law that forces a citizen to part with biometrics.[32]

[29]Information security practices of aadhaar or lack thereof a documentation of the public availability of aadhaar numbers with sensitive personal financial information (May 01. 2017), http://cis-india.org/internet-governance/information-security-practices-of-aadhaar-or-lack-thereof-a-documentation-of-public-availability-of-aadhaar-numbers-with-sensitive-personal-financial-information-1

[30] A proposition developed by the Federal Constitutional Court of Germany in a ruling relating to personal information collected during that country's 1983 census.

[31] Advocate Shyam Divan makes a case against govt rulemaking Aadhaar must file tax returns, Live Mint (Apr. 29, 2017, 12:29 AM), http://www.livemint.com/Politics/snjp639veqmeanRxdjE22J/Advocate-Shyam-Divan-makes-case-against-govt-rule-making-Aad.html.

[32] Shyam Divan concludes arguments in Aadhaar case in Supreme Court, Live Mint (Apr. 28, 2017, 04:15 PM IST), http://www.livemint.com/Politics/sN0S5mYYx641tgrctGf03H/Shyam-Divan-concludes-arguments-in-Aadhaar-case-in-Supreme-C.html.

Taking cognizance of bodily interest and personal interest of individuals Supreme Court held on August 11 and October 15, 2015, in unambiguous terms, that Aadhaar could not be made mandatory, and that it could be used only for the six purposes specified by the government before it. "The Aadhar Act itself envisages free consent.[33] But the Aadhaar slowly became compulsory for a wide variety of services through various administrative orders despite the Supreme Court ruling that this should not be done. Seeking consent for linking the Aadhaar number with the bank account means nothing when banks insist on customers providing Aadhaar numbers. Income tax assessees are being asked to provide their aadhaar numvers from assessment year. The Election Commission is putting out advertisements asking people to link their Aadhaar numbers with their election identity cards. In Delhi, even witnesses to property-related transactions registered in courts have to provide their Aadhaar numbers. To avail benefits of the scholarships, student has to have their Aadhaar identification number.[34] Now parliament also made an amendment and inserted Section 139AA of the Income Tax Act which provides for mandatory quoting of Aadhar or enrolment ID of Aadhar application form for filing of income tax returns and making application for allotment of PAN number with effect from 1 July this year. The parliament did so, surprisingly, without amending the aadhaar act.

By no means, the author wanted to challenge the authority and prudence of the parliament. The SC's 2015 order was mandamus only to the government, which was executed and it cannot be a mandamus against Parliament".[35] And if parliament wanted to make aadhaar mandatory then they could do it. Judgment or order of the Supreme Court is not cast in stone and as many as 30 judgments of the Supreme Court have been reversed by parliament, but in all previous cases, parliament took care to change the basis of a judgment before overruling it. In this case also if the government wants to make aadhaar mandatory then it should amend the Aadhaar Act to make it mandatory for all purposes. But it is surprising that Parliament, which had passed the Aadhar Act last year as voluntary, has enacted section 139AA which makes it mandatory[36]. Section 139AA of the Income Tax Act making Aadhaar mandatory for filing income tax returns is contrary to the Aadhaar Act. [37]

The difference between the aadhaar act and various government decisions which made aadhaar mandatory necessary for availing government benefits created a lot of confusion over whether it is voluntary or mandatory and whether the lack of it can be used to deny someone a service. Related to this is the fact that it will become a single point of access to information about everything concerning an individual, which is why the privacy issue is paramount.

Surveillance

Under the aadhaar Act, the most controversial subject of security and privacy of individuals' electronic data is dealt with in Chapter VI of Protection of Information. In Clause 30, biometric and demographic information is regarded as *"electronic record,"* and *"sensitive personal data or information"* as mentioned in the Information Technology Act, 2000. If any individual or company impersonates, intentionally discloses, transmits, copies or disseminates, damages, steals, conceals, destroys, deletes or alters, or tampers with etc. such vital information, it is to be regarded as an offence which is elaborated in Chapter VII titled 'Offences and Penalties' (Clause 34-47). The aadhaar act gives an *"opportunity to a hearing"* to the Unique Identification Authority of India prior to the court's order relating to any matter of protection of information. Most importantly, an attempt has been made to bring in a procedural framework to curb

[33] PTI, ***Alive to early orders that aadhaar should be voluntary,*** The New Indian Express (Apr. 28, 2017, 02:23 AM IST), http://www.newindianexpress.com/nation/2017/apr/28/alive-to-earlier-orders-that-aadhaar-should-be-voluntary-sc-1598687.html.

[34] Live Law, Why Is Aadhaar card mandatory for availing of Minority Student's Scholarships: Delhi HC asks Centre, Live Law (Sept. 7, 2016, 05: 41), http://www.livelaw.in/aadhar-card-mandatory-availing-minority-students-scholarships-delhi-hc-asks-centre/.

[35] PTI, Govt can not belittle Supreme Court order holding Aadhaar voluntary, Business Standard (May 05, 2017, 12:30 AM IST), http://www.business-standard.com/article/economy-policy/govt-cannot-belittle-supreme-court-order-holding-aadhaar-voluntary-117050401110_1.html.

[36] The Wire Analysis, As arguments on Aadhaar- Income Tax link end, the court may read down the mandatory provision, The Wire (May 05, 2017), https://thewire.in/132141/aadhaar-pan-supreme-court-income-tax/.

[37] Agencies, Linking Aadhaar to PAN contravenes Income Tax Act: Advocate Divan (Apr. 28, 2017), http://www.mid-day.com/articles/national-news-linking-aadhaar-to-pan-contravenes-income-tax-act-advocate-divan/18205169.

unlawful surveillance by adding an Oversight Committee. It is alleged that this framework is diluted under Clause 33.

Under this Clause, there are two significant aspects. Firstly, it is regarded as an act to address the problem of identification in order to provide social security schemes to every individual. However, Clause 33 (2) says, *"disclosure of information, including identity information or authentication records, made in the interest of national security,"* which suggests that the aadhaar project is not limited to facilitate delivery government subsidies and benefits, but it can be used for security and surveillance.

In order to protect blatant misuse, this clause lays out *"an Oversight Committee consisting of the Cabinet Secretary and the Secretaries to the Government of India in the Department of Legal Affairs and the Department of Electronics and Information Technology."* This committee would act as a channel to review any unlawful surveillance by the government.

Oversight Committee

Indian Telegraph Act 1885[38] and Indian Telegraph Rule 2007[39] and both of them had a 'Review Committee'. But, all of them had substantially failed to restrain its misuse which is evident from several cases from the last two decades. In the 2009 news came out of Gujarat government's surveillance on a woman architect; the 2010 Radia tapes controversy revealed the nexus between corporate, politics and interception; in 2013 we heard of illegal phone tapping by state agencies in Himachal Pradesh; in 2015 a clash emerged between two recently bifurcated states (Telangana and Andhra Pradesh) and phone-tapping scandal surfaced apart from the many more allegations of phone tapping by the politicians. It indicates the blatant misuse of surveillance by the state, which raises questions about the functioning of this proposed oversight committee.

Secondly, unlike the United States' Foreign Intelligence Surveillance Court (1978) to regulate surveillance and United Kingdom's Investigatory Powers Tribunal (2008) and Intelligence and Security Committee of Parliament to oversee and examine unlawful surveillance, India does not have any such institutional apparatus. The Supreme Court of India in 1996 PUCL judgement clearly backed off from providing any prior judicial scrutiny in matters of data privacy and unlawful surveillance. Instead, it stated that it is the central government's role to frame laws and lay down the procedural framework to curb unlawful surveillance. Hence, the creation of any institutional apparatus lies in hands of Parliament. But Clause 33(1) says *"disclosure of information, including identity information or authentication records, [can be] made pursuant to an order of a court" this suggests that the parliament just set aside itself from taking the responsibility*.

A Goa court asked UIDAI to give the Central Bureau of Investigation the biometrics of everyone enrolled under Aadhar in the state to help it solve a gang rape case.[40] In 2014, the Bombay High Court quashed and called erroneously the judgement passed by the Goa High Court. This case reflects how in coming times the judiciary can order the disclosure of biometric information for criminal investigation or for reasons of national security.

With this power, the government will become like "big brother", watching our every activity plays on our worst fears.[41] The worst thing is that if any aadhaar card holder wants to unregister oneself, it can't be done because there is no provision for this in the Aadhar Act.[42]

Overall, this entire proposed act reflects the interlocking of surveillance mechanisms and expansion of state powers to put its citizens under surveillance in the name of governance. Post 26/11 Mumbai attack, India's intelligence gathering and action networks were retreaded by launching NATGRID (National Intelligence Grid). It is a technical interface or central facilitation centre, with an integrated facility, which aims to link databases of 21 categories (e.g. travel, income tax, driving licenses, bank account details, immigration records, telephone etc). In addition to that, it would be shared with 11 central agencies (eg. CBI, IB, R&AW, NIA etc.). It is,

[38] Indian Telegraph Act, 1885, Section 5.
[39] Indian Telegraph Rule, 2007,Section 419A.
[40] The Indian Express, Stop Aadhaar data use to probe crime: UIDAI to SC, The Indian Express (Mar. 19, 2014, 12:50 IST), http://indianexpress.com/article/india/india-others/stop-aadhaar-data-use-to-probe-crime-uidai-to-sc/.
[41] Anil Padmanabhan, Aadhaar: in the eye of the privacy storm, Live Mint (Apr. 10, 2017, 03: 50 AM IST), http://www.livemint.com/Opinion/AF15Svbru1pCvHwV8AYDPP/Aadhaar-In-the-eye-of-the-privacy-storm.html?li_source=LI&li_medium=news_rec.
[42] Jean Dreze, Hello aadhaar goodbye privacy (Mar. 24, 2017), https://thewire.in/118655/hello-aadhaar-goodbye-privacy/

essentially, 'dataveillance' as it uses personal data systems in the investigation and monitoring of the actions or communications of an individual.

Interlocking the biometric card with the Intelligence Grid has empowered the Indian state with technologically-enabled surveillance. The colossal database can be shared with various other intelligence agencies and government departments. It also serves a range of desires, including those of control, governance and security. This raises the biggest danger of Aadhaar: its power as a tool of mass surveillance. By such an all-purpose identification tool, the life of citizen will become transparent to the state as a contact lens. Courts can order UIDAI to provide law enforcement agencies with the biometrics for an entire state (as the Bombay high court did) to check if they match against the fingerprints recovered from a crime scene. Details of railway bookings, phone call records, and financial transactions and so on will be accessible to the government at the click of a mouse without invoking any special powers.

Lacunae in the aadhaar act

The aadhaar act before enactment was also debated in the **Rajya Sabha. It proposed five changes in the Act, these changes were as follows-**

CHANGE 1: Clause 3

An individual who does not wish to continue as a holder of Aadhaar number should be permitted to have his number deleted from the Central Identities Data Repository. A certificate shall be issued within fifteen days of the request.

CHANGE 2: Clause 7

If an Aadhaar number is not assigned to or if an individual chooses not to opt for enrollment, the person shall be offered alternate and viable means of identification for delivery of the subsidy, benefits, or service.

CHANGE 3: Clause 33

For the words "national security", the words "public emergency or in the interest of public safety" be substituted.

CHANGE 4: Clause 33

The Oversight Committee (which will take a decision on whether to agree to a request to share biometric data of an individual for national security) should also include the central vigilance commissioner or the 'comptroller and auditor general'.

CHANGE 5: Clause 57

Clause 57, which all prevent the state or anybody, company or person can use the Aadhaar number for establishing the identity of an individual for any purpose, should be deleted.[43]

These changes seem to be very fair and reasonable however the bill was not amended again as it was introduced as a money bill. But it can be said that the aadhaar act, before enactment has to be amended because following lacunae still existed in it.

No opt out option

The Aadhar Act does not provide an opt-out clause, wherein Aadhar number holders can choose permanently removed from the Central Identities Data Repository.The aadhaar act indeed provides an opt-in option to the applicant.

No standard to take opt-in consent

According to section 8(2)(a) and (c) of the Aadhar Act require requesting entity to take the consent of the individual before collecting his/her identity information for the purposes of authentication and also has to inform the individual of the alternatives to submission of the identity information. Section 3(2) of the Act require the enrolling agencies to inform the individual about the manner in which their information shall be used and shared and ensure that their identity information is only used for submission to the Central Identities Data Repository.

However, the Act provides no requirement or standard for the form of consent that must be taken during enrollment. This is significant as it is the point at which individuals are providing raw biometric material and during previous enrollment, has been a point of weakness as the consent was taken is an enabler to function creep as it allows the UIDAI to share information with engaged in the delivery of welfare services.

[43] 5 changes Rajya Sabha wanted in Aadhaar Bill, Rediff Business (Mar. 17, 2016, 02:06 PM IST), http://www.rediff.com/business/report/changes-rajya-sabha-wanted-in-aadhaar-bill/20160317.htm.

No limitation over collection of identity information

Section 3(1) of the Aadhar Act entitles every "resident"[44] to obtain an Aadhar number by submitting his/her biometric (photograph, fingerprint, Iris scan) and demographic information (name, date of birth, address).

It must be noted that the Act leaves scope for further information to be included in the collection process if so specified by regulations. It must be noted that although the Act specifically provides what information can be collected, it does not specifically prohibit the collection of further information. This becomes relevant because it makes it possible for enrolling agencies to collect extra information relating to individuals without any legal implications of such actions.

The Act prohibits collection of the details about religion, caste, race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history for the purpose of Aadhaar authentication but as evidenced by findings of an research organization Centre For Research in Internet and Society that this information is collected by various agencies. While this information should only be used for the purpose collected, not only were the internal access controls within and across different government agencies unavailable on the portals, instances of caste information linked to Aadhaar being stored and found as reported for specific sites is also shared both publicly on these portals.[45]

No clarity whether the authorised personnel will Parliament for collecting the information which they are not authorised to collect

Section 36 of the Aadhaar Act stipulates that any person who in not authorised to collect information under the Act, and pretends that he is authorised to do so, shall be punishable with imprisonment for a term which may extend to three years or with a fine which may extend to Rs. 10,000/- or both. In the case of companies, the maximum fine amount would be increased to Rs. 1000000/-.

It must be noted that the section, as it is currently worded seems to criminalise the act of impersonation of authorised individuals and the actual collection of information is not required to complete this offence. It is not clear if this section will apply if a person who is authorised to collect information under the Act in general, collects some information that he/she is not authorised to collect.

Access and correction

It is not clear why access to the core biometric information is not provided to an individual. Further, since Section 6 seems to place the responsibility for updating and accuracy of biometric information on the individual, it is not clear how a person is supposed to know that the biometric information contained in the database has changed if he/she does not have access to the same. The problem gets more severe if we consider that they can be wrongly entered in the system, as has been documented in Rajasthan[46] (where the biometric information of potential food ration beneficiaries did not match the data stored on the Aadhaar servers). It may also be noted that the Aadhaar Act provides only for a request (not demand) to the UIDAI for access to the information and does not make access to the information a right of the individual, this would mean that it would be entirely at the discretion of the UIDAI to refuse to grant access to the information once a request has been made.

Aadhaar numbers and biometric information to be made public

It is unclear for what purposes it would be necessary for Aadhaar numbers and core biometric information to be made public and it is concerning that such circumstances are left to be defined by regulation. This is different from the Telegraph Act and the IT Act

[44] Section 6 of the Income Tax Act says defines A resident is defined as any person who has resided in India for a period of at least 182 days in the previous 12 months.

[45] Information security practices of aadhaar or lack thereof a documentation of the public availability of aadhaar numbers with sensitive personal financial information (May 01. 2017), http://cis-india.org/internet-governance/information-security-practices-of-aadhaar-or-lack-thereof-a-documentation-of-public-availability-of-aadhaar-numbers-with-sensitive-personal-financial-information-1

[46] Anumeha Yadav, Rajasthan presses on with Aadhaar after fingerprints readers fail: We'll buy iris scanners (Apr. 10, 2016, 09:00 AM IST), https://scroll.in/article/806243/rajasthan-presses-on-with-aadhaar-after-fingerprint-readers-fail-well-buy-iris-scanners.

which define the circumstances for an interception in the Act and define the procedure for carrying out interception orders in associated Rules. Defining circumstances for such information to be made public is against the disclosure standards in the 43A Rules - which would be applicable to the UIDAI and the disclosure of core biometric information.

Low standards for disclosure order

Though a court order from a District Judge is required to authorise disclosure of information, the Act fails to define important standards that such an order must meet including that the order is necessary and proportionate. Disclosures that are made 'in the interest of national security' do not require authorization by a judge and instead can be authorised by the Joint Secretary of the Government of India - a standard lower than that established in the Telegraph Act and IT Act for the interception of communications.

Minimum rights for the citizen

Citizens Can't Report Crimes Related to Aadhaar. A major concern is that the Aadhaar Act, 2016 strips legitimate citizens of their right to report criminal activities and breaches concerning Aadhaar.

Section 47 of the Aadhaar Act, 2016 effectively locks out any effective remedy for the affected person whose privacy has been impacted by the breach of Aadhaar numbers and other details. This Section provides that only on a complaint made by the UIDAI or any person authorised by it, any Court can take cognizance of any offence punishable under the Aadhaar Act, 2016. This effectively means that legitimate people, who are victims of breaches of their Aadhaar numbers or details, have no effective remedy.

Aggrieved users only have the option of approaching the consumer courts or proceeding under Section 43A of the IT Act (for negligent security practices causing wrongful loss or gain to a third party) before an Adjudicating Officer, who can only hear disputes less than Rs. 5 crores. Rule 5(9) of the 2011 IT Rules also envisages the appointment of a Grievance Officer by body corporates. However, in reality, such an officer is an 'invisible man', considering that the Rules are silent about his minimum qualifications, duration, tenure, powers, and manner of reaching a decision, and no right of appeal is prescribed.[47]

Accountability

Effective supervision and redress mechanisms require individuals to be informed when there is a breach of confidentiality or disclosure of their personal information. Section 47 of the Act prescribes that only the UIDAI or its authorised officer can file a criminal complaint under the Act. Thus, all the criminal penalties prescribed under the Act (e.g. for disclosing identity information under Section 37 or for unauthorised access to the Central Identities Data Repository under Section 38) can only be initiated by the UIDAI, and not the aggrieved Aadhaar number holder.

There is no grievance redressal mechanism created under the Act. The power to set up such a mechanism is delegated to the UIDAI under Section 23 (2) (s) of the Act. However, making the entity administering a project[48], also responsible for providing for the frameworks to address the grievances arising from the project, severely compromises the independence of the grievance redressal body. An independent national grievance redressal body with state and district level bodies under it should be set up. Further, the NIAI Bill, 2010, provided for establishing an Identity Review Committee to monitor the usage pattern of Aadhar numbers. This has been removed in the Aadhar Act 2016 and must be restored.[49]

Openness

There does not seem to be any provision in the Aadhaar Act which requires the UIDAI to make its privacy policies and procedure available to the public in general even though the UIDAI has the

[47] Vrinda Bhandari and Renuka Sane, Analysing the Information Technology Act (2000) from the viewpoint of protection of privacy (Mar. 18, 2016), https://ajayshahblog.blogspot.nl/2016/03/analysing-information-technology-act.html.

[48] Section 23(2) (s) of the Aadhaar Act.

[49] Amber Sinha, Sandro Chattapadhayay, Sunil Abraham and Vanya Rakesh, List of Recommendation on the Aadhaar Bill, 2016- Letter Submitted to the Members of Parliament (Mar. 16, 2016), http://cis-india.org/internet-governance/blog/list-of-recommendations-on-the-aadhaar-bill-2016.

responsibility to maintain the security and confidentiality of the information.

Undefined security measures

The act specifies that appropriate technical and organisational security measures shall be put in place without elaborating upon what those measures should be or define any standards that they will adhere to. The Act gives the Authority the power to define broad regulations pertaining to security protocol.

Unclear application of Section 43 A Rules:

The act characterises biometric information collected as 'sensitive personal data or information' under the Information Technology Act, 2000 and Section 43A Rules and states that the Act and Rules would be applicable to biometric information. If this is the case, than any corporate body (including the UIDAI) collecting, processing, or storing biometric information would need to follow the standards established in the Rules - including standards for collection, consent, disclosure, sharing, retention, and security. Yet, the Act allows the UIDAI to make regulations for collection, disclosure, security etc.

Inefficient data protection safeguards and unenforceable civil remedies

Section 30 of the Act treats biometric information as "sensitive personal data or information", as understood in Section 43A of the Information Technology Act. But the IT act itself is not efficient enough as far as the protection of the private data is concerned. The adjudicatory system for disclosure of sensitive personal data under the IT Act has structural flaws and is not functional[50]. For instance, Section 48[51] provides for the establishment of multiple Cyber Appellate Tribunals, for appeals against the order of an Adjudicating Officer. Currently, only one Cyber Appellate Tribunal has been set up in Delhi and even that has been defunct since 2011[52]. In fact, the last decided case seems to be of 30th June 2011[53], bringing to light the stark inefficiencies of the functioning of the IT Act. There is neither court infrastructure nor permanent seat for such cases and the adjudicating officer who is usually the IT Secretary of the state government may not be trained in law. Hence, the civil remedies offered in the Aadhaar Act appeared to be illusionary and unenforceable.[54]

No Criminal remedies for aggrieved person

Since under Section 47 of the Act *only* the UIDAI or its authorised officer can file a criminal complaint under the Act, therefore, all the criminal penalties prescribed under the Act (e.g. for disclosing identity information under Section 37 or for unauthorised access to the Central Identities Data Repository under Section 38) can only be initiated by the UIDAI, and not the aggrieved Aadhaar number holder.

Allows body corporate to use the aadhaar number for their own purpose

The Aadhaar Act justifies the collection, storage, and use of personal data on the premise that it is a "condition for receipt of a subsidy, benefit or service", as stipulated under Section 7 of the Act. Thus, the Act is portrayed as covering (or regulating) only the interactions between the State and its residents.

However, a closer look reveals that under Section 57, the Act also facilitates interactions between private parties and residents of India by allowing "body corporate" to use the Aadhar number for their own purpose. This raises concerns about violations of privacy when UIDAI shares data with private entities.

For instance, TrustID is an app that allows the user to verify any individual using their Aadhar number and offers a range of services including pre-employment, credit background, tenants, business partners, employers, and property owners' verification. It is not clear that the information access by TrustID is taking place in ways that protect the privacy of individuals.

[50] Anumeha Yadav, The government has introduced a bill on Aadhaar and it is not good news (Mar. 05, 2016, 10:30 AM IST), https://scroll.in/article/804577/the-government-has-introduced-a-bill-on-aadhaar-and-it-is-not-good-news.

[51] Available at https://indiankanoon.org/doc/1414109/.

[52] Soibam Rocky Singh, India's only cyber appellate tribunal defunct since 2011, Hindustan Times (Jun 29, 2017, 11:37 IST), http://www.hindusta%3Ctimes.com/india/india-s-only-cyber-appellate-tribunal-defunct-since-2011/story-208HGrEN7hXrABg7lAb69N.html.

[53] http://catindia.gov.in/judgement.aspx

[54] Anumeha Yadav, Seven reasons why Parliament should debate the Aadhaar bill (and not pass in a rush (Mar. 11, 2016, 09:15 AM), https://scroll.in/article/804922/seven-reasons-why-parliament-should-debate-the-aadhaar-bill-and-not-pass-it-in-a-rush.

These applications suggest that the Aadhar system will not be narrowly limited to the applications described in Section 7. The Act potentially covers everyone. It can include all the transactions conducted by an individual and the State in relation to benefits and subsidies; and the transactions between an individual and a corporate entity, where the private entity uses the Aadhar number for identification and authentication. The expanded scope of coverage, along with the absence of protecting privacy, implies that this Act has reduced the overall privacy protections enjoyed by residents in India – whether in their interactions with the State to access subsidies/benefits or in their interactions with corporate entities.

Notice

Manner of giving notice left to the realm of regulations

Section 3(2) of the Aadhar Act requires that the agencies enrolling people for distribution of Aadhar numbers should give people notice regarding:

(a) the manner in which the information shall be used;
(b) the nature of recipients with whom the information is intended to be shared during authentication; and

(c) the existence of a right to access information, the procedure for making requests for such access, and details of the person or department in charge to whom such requests can be made.

Section 8(3) of the Aadhaar Act requires that authenticating agencies shall give information to the individuals whose information is to be authenticated regarding

(a) the nature of information that may be shared upon authentication;
(b) the uses to which the information received during authentication may be put by the requesting entity; and
(c) alternatives to submission of identity information to the requesting entity.

It must be noted that the Act leaves the manner of giving such notice in the realm of regulations and does not specify how this notice is to be provided, which leaves important specifics to the realm of the executive. This left an unclear picture as to how comprehensive, accessible, and frequent this notice must be.

No prescription of data breach notification

The Aadhar Act fails to prescribe 'data breach notification' requirements, mandating the UIDAI to inform an individual, the Aadhaar number holder, that their identity (biometric and demographic) information has been shared or used without their knowledge or consent.

Lack of an effective enforcement mechanism

Section 3(2) of the Act require the enrolling agencies to inform the individual about the manner in which their information shall be used and shared and ensure that their identity information is only used for submission to the Central Identities Data Repository.

Section 8(2) (b) and section (3) of the Aadhaar Act. The authenticating entities are allowed to use the identity information only for the purpose of submission to the CIDR for authentication. Further, Section 29(3) (a) of the Act specifies that identity information available to a requesting entity shall not be used for any purpose other than that specified to the individual at the time of submitting the information for authentication.

Section 41 imposes a penalty on the requesting entity for non-compliance.

Section 57 enables the state and the body corporates to use the aadhaar number holder's identity information. Section 37 of the Aadhaar Act provides that any authentication entity which uses the information for any purpose not already specified will be liable to a punishment of imprisonment of up to 3 years or a fine of Rs. 10,000/- or both. In a case of companies, the maximum fine amount would be increased to Rs. 1000000/.

The lack of an effective enforcement mechanism undermines these provisions. The Act does not detail how an Aadhaar number holder can escalate the issue (since only the UIDAI can file a complaint) or what standard will be used to determine whether the requesting entity has provided the information in a

clear and suitable manner. There is no regulation governing the use of aadhaar number holder's information by third parties.

Section 33

Section 33 of the aadhaar act stipulates that the UIDAI may reveal identity information, authentication records or any information in the CIDR following a court order by a District Judge or higher. Any such order may only be made after UIDAI is allowed to appear in a hearing. According to section 33 of the Act, the confidentiality provisions in Sections 28 and 29 will not apply with respect to disclosure made in the interest of national security following directions by a Joint Secretary to the Government of India, or an officer of a higher rank, authorised for this purpose.

Disclosure provision in the act differs from the Indian Telegraph Act, 1885

The provisions regulating disclosure of private information under the act differ from guidelines specified under the. The Act differs from guidelines for phone tapping in two ways. First, the act permits sharing in the interest of 'national security' rather than for public emergency or public safety. Second, the order can be issued by an officer of the rank of Joint Secretary, instead of a home secretary.[55]

Sweeping exception of National Securit

Section 33(2) carves out an express exception to Section 29(1)(b)'s stipulation of "using" core biometric information for any purpose other than generation of Aadhaar numbers and authentication under this Act if it is in the interest of `national security'. The phrase "national security" is undefined in the Act, as well as the General Clauses Act, and thus the circumstances in which an individual's information may be disclosed remains open to interpretation, therefore, section 33 is very vague.

No independent review of the order of disclosure of identity information under section 33(2)

Section 33(2) makes an exception to the security, confidentiality and disclosure provisions on the direction of the Joint Secretary in the interest of national security. Such a direction has to be reviewed by a three-member 'Oversight Committee', consisting of the Cabinet Secretary, the Secretary of the Department of Legal Affairs and the Secretary of the Department of Electronics and Information Technology. The second proviso further provides that such a direction shall be valid for three months, after which it can be reviewed and extended every three months. This is problematic for various reasons.

Since the entire process of review of the disclosing order is being handled within the executive and there is no independent oversight. There are no substantive provisions laid down that shall act as the guiding principles for such oversight mechanisms[56].

Lack of defined functions and responsibilities of oversight mechanisms

Section 33 currently specifies a procedure for oversight by a committee, however, there are no substantive provisions laid down as the guiding principles establishing the responsibilities and powers of the oversight mechanism.

Lack of opportunity to data subject

The proviso in section 33(1) only requires a hearing to be given to the UIDAI, and not to the Aadhaar card holder, whose information is being disclosed and in case of a court order identification information and authentication records of an individual can be revealed without any notice or opportunity of hearing to the individual affected. The act does not provide any means by which an individual can contest such an order or challenge it after it has been passed.

Involvement of private entity in the maintenance and establishment of the CIDR

Section 10 of the Act stipulates that the Authority may engage one or more entities to establish and maintain the Central Identities Data Repository and to perform any other functions as may be specified by regulations.

[55] PRS Legislative Research, Nine issues to debate on aadhaar Bill (Mar. 11, 2016, 01:39 PM IST), http://www.thehindu.com/news/national/nine-issues-to-debate-on-aadhaar-bill/article8341611.ece.

[56] Amber Sinha, Sumandro Chattapadhayay, Sunil Abraham and Vanya Rakesh, List of Recommendation on the Aadhaar Bill, 2016- Letter Submitted to the Members of Parliament (Mar. 16, 2016), http://cis-india.org/internet-governance/blog/list-of-recommendations-on-the-aadhaar-bill-2016.

If a private entity is involved in the maintenance and establishment of the CIDR it can be presumed that there is the possibility that they would, to some degree, have access to the information stored in the CIDR, yet there are no clear standards in the Act regarding this potential access and the process for appointing such entities. The fact that the UIDAI has been given the freedom to appoint an outside entity to maintain a sensitive asset such as the CIDR raises security concerns.

Conflict of Interest

Courts cannot take cognizance of any offence punishable under the Act unless a complaint is made by the UID authority or a person authorised by it. It is unlike UID will complain against itself in the case of a breach.

Failure of the aadhaar

As per the official data put up on the Telangana government's website, the authentication failure rate for Aadhar-based transactions was at 36% for the period between January to till date; this was higher than the failure rate of 34% recorded in the October-December period last year. In fact, the failure rates in the two districts of Adilabad and Wanarapathy were as high as 46% and 38% respectively in the period between 1 January and 6 April. The Aadhar biometric authentication failure rate in the ambitious rural job guarantee scheme is as high as 36% in Telangana, data collated by the state government shows. The main reason for the payment failure in the operation of the Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS) was the biometric mismatch, the data showed. Due to wear and tear of their fingers, rural labourers have failed the biometric authentication. And since iris scanners, largely because they are expensive, have not been deployed widely, workers have been denied wage payments due to them. This failure rate is really very worrisome because it is hurting the livelihood of the people. In the case of ATMs, the failure rate is only 0.5%. But for Aadhar authentication for MGNREGA wages and social security pensions, the failure rate is as high as 30%. 22% of PDS cardholders in Andhra Pradesh could not collect their rations because of fingerprint authentication failure in 290 of the 790 cardholders, and in 93 instances there was an ID mismatch. A recent paper in the Economic and Political Weekly by Hans Mathews, a mathematician with the CIS, shows the programme would fail to uniquely identify individuals in a country of 1.2 billion. This essentially shows that problem is with the Aadhar technology especially when it comes to biometric mismatches.[57]

Conclusion

In today's world smartphones, CCTV camera, drones, social media and many such technologies are producing sensitive and personal data which definitely have the capability of threatening the privacy of the people and thereby risking their financial and personal security. Aadhaar, a go-to document to access various public services, is another tool to harness biometric and demographic data in large volumes. There is a legitimate fear that this identity technology will open us all up to discrimination, prejudice, the risk of identity theft and subject the entire population of the country under continuous surveillance. However even if existing legal frameworks on Aadhaar are sketchy and not adequate, aadhaar can't be abandoned merely for these suspected risk. Aadhaar Identity information under aadhaar is very well protected in the CIDR. Not a single instance of data-breach from CIDR has been noticed. There are some instances of disclosure of aadhaar number and personal information by some government departments but the absence of any legal provision to deter these disclosures is to be blame for this, not aadhaar and its technology. [58] It is only sporadic and episodic, it only verifies the identity of the person during authentication which is not surveillance. It will mean to be surveillance when UIDAI the purpose for which the aadhaar is being used and when the UIDAI is black-boxing information.

The aadhaar act lacks Security of the personal identity information, openness in the working of the UIDAI, proper supervision, redress mechanisms and accountability of the oversight committee. It only requires specific amendments to insert some

[57] Prerna Kapoor, Remya Nair and Elizabeth Roche, Aadhaar fails MGNREGS test in Telangana (Apr. 07, 2017, 12:36 AM IST), http://www.livemint.com/Politics/Uf5B33ZB2sYKpmLqwMke8O/Aadhaar-fails-MGNREGS-test-in-Telangana.html.

[58] Anil Padmanbham, Aadhaar in the eye of the privacy storm (Apr. 10, 2017, 03:50 AM IST), http://www.livemint.com/Opinion/AF15Svbru1pCvHwV8AYDPP/Aadhaar-In-the-eye-of-the-privacy-storm.html?li_source=LI&li_medium=news_rec.

procedural safeguard measures for the security of the data and the privacy of the citizens to remove all these lacunae.[59] Other than these the technology also needed to be improved to protect data from cyber terrorism which can't be done instantly. Technology isn't foolproof and there is no way to make it completely safe. In this complex and evolving technology errors are inevitable. For instance, across its products, Google has to manage around 2 billion lines of source code. The average program has 14 separate vulnerabilities, each of them a potential of illicit entry. Such weaknesses are compounded by the history of the Internet, in which security was an afterthought. But this is not to suggest not to do anything for data protection for technology is so complex. Instead, there is an urgent need to generate a larger conversation involving all the private stakeholders to remove all the misconception about right to privacy.[60]

The right to Privacy is not an absolute right but a right having layers of importance depending upon the substance that is deemed to be kept private and opposite interest, for example, national security or investigation of a crime, for which privacy can or can't be compromised. Research. If the substance is biometric or personal information but the opposite interest is very compelling like national security then the importance of the right to privacy would not be more than national security. If the nation gets rid of terror financing, corruption, duplicated passport, sim, driving licence and evasion of tax etc. by making aadhaar mandatory then it has to be done. However, an existing delicate balance between these opposite interests should be maintained by an accountable and transparent oversight committee to ensure that Aadhaar should not become a tool for misuse of people's information.[61] Numerous checks and balances need to be put in place for ensuring the security and stability of the Aadhaar ecosystem. This is not just important from the point of view of individuals, even companies and countries are vulnerable (hackers mostly go after institutions, which curate all kinds of information).[62]

Aadhaar technology if used wisely can transform the nation. If not, it can cause us untold harm. We need to be prepared for the impending flood of data—we need to build dams, sluice gates and canals in its path so that we can guide its flow to our benefit. It is high time that the biggest democracy of the world takes cognisance of the intrinsic legal, policy and regulatory deficiencies in the Aadhaar ecosystem.

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[59]Vrinda Bhandari and Renuka Sane, Analysing the Information Technology Act (2000) from the viewpoint of protecting privacy (Mar. 18, 2016, 12:19 PM IST), https://ajayshahblog.blogspot.nl/2016/03/analysing-information-technology-act.html.

[60]Anil Padmanabhan, Aadhaar: in the eye of the privacy storm, Live Mint (Apr. 10, 2017, 03: 50 AM IST), http://www.livemint.com/Opinion/AF15Svbru1pCvHwV8AYDPP/Aadhaar-In-the-eye-of-the-privacy-storm.html?li_source=LI&li_medium=news_rec.

[61] Apurva Vishwanath, Govt defends to link PAN with Aadhaar in Supreme Court, Live Mint (May 02, 2017, 01:49 PM IST), http://www.livemint.com/Politics/k5RPTacEjeUEyLPidgIvtO/Govt-defends-decision-to-link-PAN-with-Aadhaar-in-Supreme-Co.html.

[62] Anil Padmanabhan, Aadhaar: in the eye of the privacy storm, Live Mint (Apr. 10, 2017, 03: 50 AM IST), http://www.livemint.com/Opinion/AF15Svbru1pCvHwV8AYDPP/Aadhaar-In-the-eye-of-the-privacy-storm.html?li_source=LI&li_medium=news_rec.

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Goods and Service Tax- One nation One Tax

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Abstract:

This research paper is based upon the recently passed law by the parliament termed as Goods and Service tax Act. It deals with the origin, meaning, working and impact of the Goods and Service Tax upon the Indian Economy.

Introduction of this Research paper emphasis on the meaning of the Goods and Service Tax and the nations who opted for the same. There after it shows that how the Goods and Service Tax replaced the existing Indirect system of our country. Timeline of the Goods and Service Tax is also an essence of this paper, which is followed by the constitutionality of this Act. Later it shows the main features of the 122ndAmendment Bill 2014.

After the introduction, comes the working of this Goods and Service Tax bill which is explained with the help of 2 Examples. Impact of this Goods and Service Tax act has been focused upon 2 areas I.e. impact upon the economy and the impact upon the second-hand goods industry.

Lastly the Benefits of the Act for the Consumer, Businessmen, and government had been highlighted. Few questions were asked to the general public through the questionnaire as a part of this research paper with respect to the Goods and Service Tax, and the result of the same has been mentioned in the paper.

Key Words: *Goods and Service Tax. Second Hand Industry, Slab rates, Impact, Public View, 101 Amendment.*

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Introduction

Goods and Service Tax

Goods and service Tax refers to the one Indirect tax system for the whole of India. This tax will cover the supply of goods and services from the manufacturer to the consume. Purpose of introducing this new tax was to make India a unified market. This tax system will not only clear the complication of earlier tax system, but will also help the government to curb corruption and to prevent leakage of tax revenue.[1]

Origin of Goods and service tax.

Goods and service tax was first introduced in the country of France in the year 1954. After that many other countries (140) have opted for the same scheme of Indirect taxes in their economy. Many developed countries are included in this list like Australia, Canada, United Kingdom etc. Some countries have opted for the dual Goods and Service Tax Model. India is also one of them, including Canada, Brazil and others. USA did not opt for the Goods and Service Tax system because it wanted to preserve the autonomy of its states. Same question arises for the states of India. Since the Central Government had fixed the revenue percentage of states, it will result in the loss of revenue for majority of states. Centre had promised for compensating the states for their losses, but the quantum of compensation, depends upon of the Central government only. Centre Government in a way had affected the autonomy of the states.

Goods and Service Tax and India

Goods and Service Tax in India was passed in the historic session of parliament on 30thJune midnight. The proposal for Goods and Service Tax was made back in year 2000 and it took exactly 17 years to become an act. This shows the complication of procedure of law making in our country. This Goods and Service Tax replaced the existing taxes like central excise duty, services tax, additional customs duty, surcharges, state-level value added tax and Octroi. However taxes like Custom Duty, Stamp Duty, Vehicle Tax etc. are outside the preview of GST.

Timeline of GST

YEAR 2000

The Vajpayee Government started discussion about the Goods and Service tax by setting up a committee. Asim Dasgupta was the head of the committee.

YEAR 2002-2004

The Kelkar Task Force on the implementation of Fiscal Responsibility and Budget Management Act 2003 and suggested a comprehensive Goods and Service Tax.

YEAR 2006

In year 2006-07, a proposal was first mooted in the Budget Speech to introduce a national level Goods and Service Tax by April 1, 2010.

YEAR 2007

On May 2007 Empowered Committee of State Finance Ministers, started work on Goods and Service Tax road map. On 19 November 2007 The Joint Working Group, submitted its report to the Empowered Committee.

YEAR 2008

A report titled ‘A model and roadmap for Goods and Services Tax in India’ was finalized by the Empowered Committee.

YEAR 2009

First Discussion Paper was released by the committee in Nov 2009.

YEAR 2010

Finance Minister in the speech (Feb 2010) mentioned about the Goods and Service Tax to be introduced in April 2011.

YEAR 2011

[1] CBEC. (2017), *FAQs ON GOODS AND SERVICE TAX*, Central Board of Excise and Customs, (July. 06, 2017, 06:21PM), http://www.cbec.gov.in/htdocs-cbec/gst.

In March 2011 The 115th Constitutional Amendment Bill was introduced in the Loksabha for levy of Goods and Service Tax on all goods or services except for the specified goods.

YEAR 2013

August- Standing committee submitted its report on Goods and Service Tax. November- EC rejected Government's proposal to include petroleum products.

YEAR 2014

On 17th December 2014, the 122th Constitutional Amendment Bill was passed in Loksabha for levy of this new Tax which enables the introduction of Goods and Service Tax expected by April 2016.

YEAR 2016

On 3rd August 2016 'The Constitution (122nd Amendment) Bill passed by the Rajyasabha.

YEAR 2017

On 16th March 2017 GST council cleared State and Union Territory Goods and Service Tax laws.

On 30th June 2017 in the midnight session of the Parliament, Goods and Service Tax was passed and made enforceable by 1st July 2017.

Goods and Service Tax and Constitution of India

Every law is passed by the Primary law-making body of our Country, i.e. Parliament.

Every bill, before becoming any act should be passed either by simple majority, special majority or special majority requiring 50% state ratification. To amend the constitution of India (Article 368) special majority with 50% state ratification is required. This Goods and Service tax Act was introduced as 122nd Amendment and was passed as 101st Constitutional Amendment Act. First state to ratify the Goods and Service Tax bill was Assam. Consent of the President of India was received on September 8th 2016.

The important changes made in Constitution (new articles / amended articles) via this law are as follows:[2]

Article 246 (A)

Article 269A

Article 279-A

Changes in the 7th Schedule. Union list and State list.[3]

It was introduced as122nd Constitutional amendment bill. But as we know every bill have to be pass through the parliamentary procedure and if it affects the federal structure of Constitution (effect the right of the states) than it must need to pass through at least 50% of the states, known as state ratification

Every bill is not able to get pass because they may not come to common ideology. So either they lapse or removed by government with the introduction of new bill. Many of such bill could not make through this process.[4]

Therefore Goods and Service Tax came as 122nd ConstitutionalAmendment bill but when it was passed, it make to 101st Constitutional Amendment act.

Working of goods and service tax

Taxation scheme

Goods and Service Tax is divided into three parts. I.e. Central GST, State GST, and Integrated GST. CGST will be levied and collected by Centre, SGST will be levied by State, IGST will be levied by the Central Government on inter state supply of goods and services. GST will be levied on all transaction such as sale, transfer, purchase, barter, lease or import of goods and services. It is must be noted that Goods and Service Tax will be levied in the state in which the goods/services are consumed, and not where they are produced because of the nature of this tax i.e Consumption Base Tax.[5]

[2]GK Today, *Constitution 101st Amendment Act, 2016*. GKTODAY, (JULY. 06, 2017 03:32PM), https://www.gktoday.in/blog/constitution-101st-amendment-act-2016.

[3] CBEC. (2017), *101ST Constitution Amendment Act 2016*. Central Board of Excise and Customs. (July. 07, 11:53AM). http://www.cbec.gov.in/resources//htdocs-cbec/gst/consti-amend-act.pdf.

[4]Yuvrajsingh Solanki, *Is GST Bill 101st or 122nd constitutional amendment,* QUORA (June. 30, 2017, 10:43AM). https://www.quora.com/Is-GST-bill-101-or-122-constitutional-amendment.

[5] GST-SEVA, (2017). *GST HISTORY INDIA | GST-Seva | GST-in-India | CGST | SGST | IGST| Goods and Services tax free tax site*, GST SEVA. (July. 04, 2017, 11:53PM), https://www.gstseva.com/gst/history/.

Under the previous system, a state would have to only deal with a single government in order to collect tax revenue

Slab rates for the items are as follows – 0% (Half of the Consumer price Basket, including food grains), 5% (Most Consumption item like spices and oil), 12% (processed item), 18% (Daily use item like toothpaste, smart phone, soaps), 28% (cars), 28% plus cess (Luxury items).

Working and example

EXAMPLE 1

A dealer in Delhi sold goods to a consumer in Delhi worth Rs. 1,00,000. The Goods and Services Tax rate is 18% comprising CGST rate of 9% and SGST rate of 9%. In such cases the dealer collects Rs. 18000 and of this amount, Rs. 9000 will go to the central government and Rs. 9000 will go to the Delhi government.

Now, let us assume the dealer in Delhi had sold goods to a dealer in Madhya Pradesh worth Rs. 1,00,000. The GST rate is 18% comprising of CGST rate of 9% and SGST rate of 9%. In such case the dealer has to charge Rs. 18000 as IGST. This IGST will go to the Centre. There will no longer be any need to pay CGST and SGST.[6]

EXAMPLE 2 (Input - Output Tax Credit, Cascading Effect and Cenvat Credit)

XYZ Ltd. was engaged in the business of producing refills for the pens in Delhi. The total cost of producing a refill was Rs. 100. The same refill was sold to the manufacturer of pen i.e. ABC Ltd in Delhi for 100 + 18 = 118 (18% GST on 100) . The tax collected by the XYZ company will be paid to the Government. 9% to the State Govt. as SGST and 9% to the Central Govt. as CGST.

The amount paid by the ABC ltd as tax will be available to them as input credit.

ABC Ltd made the complete pen and cost of the same was Rs. 150. They sold the same pen to a retailer PQR in Delhi at Rs. 177 (150+27). Rs. 27 collected is the GST. Now ABC Ltd is liable to pay only Rs. 9 to the Government because they will avail the benefit of their input credit. i.e Rs. 18.

The amount paid by the PQR as tax will be available to them as input credit.

PQR Ltd sold the pen to the Consumer in Delhi for Rs. 236 (200 + 18% GST). Now PQR Ltd is liable to only Rs. 9 to the Government because they will avail the benefit of their input credit i.e Rs. 27.

At the end of this example, we came to a conclusion that Total GST on the Pen was Rs. 36. (18% of 200). The burden of the whole tax was borne by the Consumer only. Businessmen were provided with the benefit of input credit.

In the case of Goods and Services Tax, there is a way to claim credit for tax paid in acquiring input. What happens in this case is, the individual who has paid a tax already can claim credit for this tax when he submits his taxes.

Impact of goods and service tax

Impact upon the economy

The step to introduce Goods and Service Tax was taken to bring reform in the existing indirect tax system of India. There were many drawbacks of the earlier indirect tax system like leakage of taxes, tax evasion, cascading effect, unable to receive input credit, double taxation and lot more. Goods and Service Tax will merge the large No. of indirect taxes of the State and Centre government. This new tax system will unify the Indian market. Collection and distribution of tax will be an easy task. this is a new hassle free tax system. Goods and Service Tax is supposed to bring the transparency in the Indian economy. The expected increase in the revenue is estimated at 43% of the existing collection of taxes.

This new system will also enhance the relation between the State and Centre government. Both the Governments will coordinate with each other for the collection of taxes.

Goods and Service Tax holds a great promise in terms of Sustainable growth for the Indian Economy.

[6] Cleartax.in, *What is GST Law in India? Goods & Services Tax Law Explained*, CLEAR TAX (July. 03, 2017, 12:41PM), https://cleartax.in/s/gst-law-goods-and-services-tax.

Goods and Service Tax is expected to have a favorable outcome on the economy

Economies of scale in production and efficiency in the supply chain can be achieved with the removal of tax barriers with seamless credit. Reduction in the cost because of the removal of cascading effect.

Single Tax will help in the ease of doing business. Transparency will be increased. Cost of transaction and tax compliance will be significantly reduced

Increase in foreign investment because of stable and predictable tax regime. Creation of job opportunities for new aspirants.

To Safeguard States interests, few items which contributes for the major portion of tax collection had been kept out of the purview of Goods and Service Tax like, Liquor, Petroleum and Electricity

Impact upon Second Hand Goods

ABC Ltd a dealer in the second-hand goods procured goods from a registered dealer PQR under Goods and Service Tax, for such transaction, there would be no impact as laws are same which apply to new goods dealer.

ABC Ltd. a second-hand dealer procures goods from unregistered dealers PQR, would fall under the provisions of reverse charge mechanism and have to pay taxes on behalf of unregistered dealers and later, claim such tax as input tax credit. So, more procedures need to be followed by such dealers.

If a dealer procures goods directly from the end users, then it would carry low tax burden i.e. no tax on purchases. It would increase their profitability because the tax will be charged on the margins.

There is no distinction between the second hand goods and the new goods under the new Goods and Service Tax law passed, hence the Goods and Service Tax rates will be applied to used goods would be in the same manner if they were like the new goods.[7]

Benefit of Goods and Service Tax

For business and industry

Transparency: All the services related to Goods and Service Tax will be available online like registration, returns, payment etc. This will make the compliance easy and transparent. Therefore a strong and Comprehensive Information Technology is foundation of this new Tax

Uniform tax rates: Dividing goods and services under the slab rates and providing fix percentage for the same will increase the uniformity of the taxes and ease of doing business. People will be attracted to the business sector.

Removing cascading effect of Taxes: A system of seamless tax-credits throughout the value-chain, and across boundaries of States, would ensure that there is minimal cascading of taxes. This would reduce hidden costs of doing business.

Improved competition: Reduction in transaction costs and compliance cost of doing business would eventually lead to an improved competitiveness for the trade and industry. It will attract foreign investors as well.

Benefit to manufacturers and exporters: The merger of major Central and State taxes in Goods and Service Tax, complete and comprehensive set-off of input goods and services and phasing out of Central Sales Tax (CST) would reduce the cost of locally manufactured goods and services. This will increase the value of Indian goods and services in the international market and give boost to Indian exports. The uniformity in tax rates and procedures across the country will also go a long way in reducing the compliance cost.[8]

For Central and State Governments

For the Government, Goods and Service Tax will serve as a new mechanism to make sure that tax is being properly collected and there is no Tax evasion on the part of the tax payer. Not only this, the single tax system between the State and Center Government will increase the cordial relationship between both of them.

[7] Dhruve, *GST: Impact on Second Hand Goods Industry (an un discussed theory)*. TAX GURU. (July. 04, 2017, 04:55PM), http://taxguru.in/goods-and-service-tax/gst-impact-hand-goods-industry-undiscussed-theory.html.

[8] Gstindia.com. (2017), *About – GST India-Goods and Services Tax in India*. GST INDIA, (July. 08, 2017, 06:21PM), http://www.gstindia.com/about/.

Revenue collected from the taxpayers will be equally divided among State and Center Government except IGST which will go only to the Centre Government.

Introducing this system was important on the part of government was because, they were unable to motivate people to invest in the business sector. Now this easy to comply GST will motivate the people open more businesses, which will ultimately boost the 'Make In India' Campaign.

This system will also increase the credibility of people towards the Government.

For the consumer

Single value of goods and services: Due to multiple indirect taxes being levied by the Centre and State, with incomplete or no input tax credits available at progressive stages of value addition, the cost of most goods and services in the country today were laden with many hidden taxes. Under GST, there would be only one tax from the manufacturer to the consumer, leading to transparency of taxes paid to the final consumer.

Overall relief from tax burden: Due to efficiency gains and prevention of leakages, the overall tax burden on most commodities will come down, which will benefit consumers.[9]

Drawbacks of Goods and Service Tax

In the infant stage of Goods and Service Tax it is very difficult to understand the concept completely. All the compliance and procedures seems to be a bit tricky.

Moreover at the present time we do not have the proper platform to implement Goods and Service Tax. Mere website and online processes cannot fulfill all the required purposes.

In India more than 30% people do not have the internet access and many of the people do not know how to use computer, in such circumstances, the success of this Goods and Service Tax bill is in doubt.

Under previous tax system, State government had the liberty to decide the tax rates according to their will, but now since the tax rates are fixed by the Central Government, many states might be on the losing side in terms of revenue.

Every company will be forced to change their business software[10], which lead to the heavy installation cost.

Most importantly Goods and Service Tax is passed in the middle of year, making it complex to file returns and payment of taxes.

One the one side Government is promoting digital payment and on the other side, making the banking services more expensive.

Analysis of goods and service tax

Public view towards goods and service tax

After the launch of Goods and Service Tax during the midnight session of the parliament on 30th June 2017, a questionnaire as a part of research work was sent to many scholars, businessmen, local shopkeepers, households, and government officials.

Following observations were made during the research work

QUESTION-1 How do you rate the Goods and Service Tax Bill passed by the Government?

PERCENTAGE	OPTIONS
70%	Excellent
15%	Very good
5%	Good
10%	Bad

QUESTION-2 Will Goods and Service Tax overcome the defects of earlier indirect tax system?

PERCENTAGE	OPTIONS
65%	Definitely
10%	May be
12%	Not sure
13%	Not at all

QUESTION–3 Will Goods and Service Tax simplify the Indirect Tax System of India?

[9]Company, *GST India - GST Benefits and Impact on Indian Economy*, DESKARA INDIA, (July. 05, 2017, 02:12PM), http://www.deskera.in/gst-benefits-and-impact-on-indian-economy.

[10]Cleartax.in, *Drawback and Demerits of GST*, CLEAR TAX, (July. 03, 2017 12:41PM), https://cleartax.in/s/disadvantages-gst.

PERCENTAGE	OPTIONS
87%	Yes
13%	No

Conclusion/observation

The 101st Amendment made by the Government in the name of Goods and Service Tax Act, is a step towards a new India. This new indirect tax system will not only simplify the taxation system in India, but also help in curbing corruption and other mal practices like tax evasion. This new law has been widely accepted by the general people.

This is the first time that we are moving towards goods and services regime and the whole purpose is to create an all India Market. How this is going to really work in practice we will have to wait and see. It is an unknown terrain and nobody is clear of the consequences, implications and the outcome. Although Goods and Service Tax is in its infant stage and people are finding it difficult to understand the concept, but they are willing to learn about it.

During the research work, it was observed that people are excited towards the new change in the tax system of India and they whole heartedly accepted the same.

With the view that 'Goods and Service Tax will help us achieve ***one nation one tax***' I wish for the success of this Goods and Service Tax Act.

May India become one of the Leading Economy in the coming time.

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