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FOREWORD

There are several unique features of this initiative by a committed group of youngsters which are commendable. **Firstly**, the very concept of a Foreword by an independent, unconnected person, is both innovative and refreshing. It shows a receptivity and openness, both to independent thinking and external influences, which is rare.

Secondly, this periodical owes no allegiance to a single philosophy or thought process; indeed it is even institution agnostic! Apparently, no one collectivity is dominant, and it is funded by diverse and unconnected sources who, individually or collectively, exercise zero control and influence. It is thus an unusual convergence platform for academicians, scholars, public servants, the common public and diverse other stakeholders associated with governance. Additionally, it develops a strong three way bridge between the communities of academia, law and policy.

Thirdly, the choice of themes is diverse, topical and imbued with substantive public policy perspectives. This is more important than it seems at first blush, because, since public policy spans the universe and since no one can do more than perform the role of a fan dancer—viz touch upon the subject without really covering it—it is important to choose carefully and choose wisely. The choice of themes in this edition, including many of the themes in earlier editions which I have glanced at, appositely and eminently satisfy this test.

Fourthly, empiricism is frequently seen as the crucial factor which differentiates good research from an average one. On empiricism, Immanuel Kant argued that "all our knowledge begins with the senses, proceeds then to understanding and ends with reason. There is nothing higher than reason." It is good to see that many articles in the journal are extensively empirical. For example, the second chapter of the current edition analyses the patterns of foreign judgments in cases related to international child custody issues. Similarly, the fourth chapter makes an empirical analysis of penal populism in rape-related laws. Somewhat differently, but in the same spirit of genuine inquiry, the first chapter underlines and questions the absence of a comprehensive refugee policy in India. These and other examples eschew ivory tower approaches, avoid pedantic analysis, do not indulge in doctrinaire dogmas and, above all, do not thrust pre conceived conclusions upon inconvenient

reality. To allow the latter to shape the former and not vice versa is itself no mean achievement in contemporary times!

Fifthly, I have internally faulted the best writers and thinkers for being great at criticism, average in making positive suggestions and poor in provision of pragmatic, nitty gritty solutions. This edition trumps this pattern and contains a very high volume of practical, policy prescriptions, puts its money where its mouth is and boldly risks empirical testing of the solutions presented herein. A good example is found at the end of the death penalty article. In this regard, it candidly walks the talk and thus adds to national optimism.

Sixthly, I would like future editions to increase significantly the value addition on topics like death penalty and refugee issues by conducting representative field studies, with fair sample sizes, to give a realistic ground view. For example, death penalty should be discussed in the context of field studies, updated and comprehensive, reflecting its skewed and discriminatory harshness on convicts with an impoverished background. Or analyze whether the common law on death penalty in India, even within the rarest of rare case test, should convert the death penalty imposed by the lower court into life imprisonment where **even one** judge out of a three judge bench of the High Court or the Supreme Court differs on upholding the death penalty. Or research and write about the discriminatory approach applied to refugees, arising from their religion in one case, or arising from their geographical origin in another case or arising from their racial origin in yet a third case. But this should be done with reference to actual figures or to field study findings.

I am sure the best is yet to come for this Journal. But for whatever has already been achieved, the entire team—editorial board, senior office bearers, students, editors, sub editors, contributors, subscribers, distributors et al—a high degree of congratulations and felicitations is already in order. My choicest best wishes to all.

Dr. Abhishek M. Singhvi
Senior third term MP, Senior Advocate,
Former Chairman Parliamentary Committee,
Former Addl. Solicitor General of India,
National Spokesperson, Congress Party,
Author and Commentator

CONCEPT NOTE

The Indian Journal of Law and Public Policy is a peer reviewed, biannual, law and public policy publication. Successive governments come out with their objectives and intentions in the form of various policies. These policies are a reflection of the Executive's ideologies. Laws, concomitantly, become the means through which such policy implementation takes place. However, there might be cases of conflicts between the policy and the law so in force. These contradictions have given way for a continuing debate between the relationship of law and public policy, deliberating the role of law in governing and regulating policy statement of various governments.

This journal is our solemn effort to promote erudite discernment and academic scholarship over this relationship, in a way which is not mutually dependent on each of these fields but which is mutually exclusively and independent. The focus has been to give a multi-disciplinary approach while recognizing the various effect of law and public policies on the society.

(EDITOR IN CHIEF)

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REFUGEE PROTECTION IN INDIA: THE CONUNDRUM OF HUMAN RIGHTS AND STATE SOVEREINGITY

Dr. Garima Tiwari & Mr. Ankit Dhotrekar [*]

ABSTRACT

Refugees have been permitted to take abode in India for centuries. However, there is no well-defined law on refugees in India. Ad-doc policies and judicial pronouncements have provided some relief on case by case basis. Refugees therefore, are at the mercy of the discretion of the government and its policies. Further, India has consistently declined to sign the Convention Relating to the Status of Refugees, 1951 and its protocol but has signed several other international instruments pertaining to human rights. There is no specific policy in India that shows its ideology towards the refugees and while this is suggestive of its desire to protect it sovereignty amongst other reasons, the principle of *non-refoulement* neutralises the effect. "Sovereignty" and "human rights" are placed in the same basket when one studies refugee protection laws. The paper highlights that the absence of specific law on safety and rights of the refugees in India has consequently accentuated the refusal to grant even the basic rights to the refugees. In light of this sovereignty concerns, the paper provides an overview of the India's policy (or absence thereof) on protection and advancement of the human rights of the refugees. The paper also provides a scrutiny of India's position on the Convention Relating to the Status of Refugees, 1951 and its protocol along with the recent Global Compact on Refugees, 2018.

1. INTRODUCTION

The partition of India and Pakistan in 1947 and its gruesome aftermath impelled the dislocation of millions of people on either side of the border from their respective homelands. The persons prejudiced by this large-scale unsettlement could, today, be identified as 'refugees' or as 'internally. It is this experience that, perhaps, contributes to India's having maintained an open-door policy for refugees.[1] The Indian treatment and protection of refugees, though absent any law or policy, is a de facto refugee protection that is premised on "goodwill" and "tolerance" extended by the existing administration. India has also displayed

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[1] *See* H. Raizada, *Sri Lankan Refugees in India: The Problem and the Uncertainty***,** 1(1) IJPDS 1, 5-8 (2013)

reluctance to adhere to the strictures of International law as it is not a party to the 1951 Refugee Convention[2]or its 1967 Protocol[3]. Hence, the legal discourse and remedies regarding the rights and protections that the refugees are offered in India emanate largely from the Constitution of India. India has been permissive, even historically, to the migrants of foreign states. On several occasions' refugees have been allowed entry in India. For example, Tibetan Refugees (1959); Bangladeshi refugees (1971); Tamils from Sri Lanka (1983, 1989 and 1995); Afghans (from 1980s) and the Myanmar refugees. Further back, the Jewish came in the 1st century, and the Parsi community found refuge in India in the 8th century

India's open-door policy, though laudable, suffers from the shortcoming that it is largely ad-hoc and discretionary. Therefore, there is a lack of uniformity in the rights and protections received by the different refugee groups that India has sheltered. For instance, although the position of the Tamil refugees from Sri Lanka in India in ambiguous, they have been acknowledged as "*de facto* refugees". Thus, they have been accorded certain substantive and procedural privileges. This recognition, however, has not been made available to other several other groups.[4] Thus, the policies so operational without a strict statutory framework seem prejudiced and unbalanced, even within the same communities and groups. It is noteworthy that the Tibetan refugees arriving after 1980 have been secured substantially lesser privileges as compared to other Tibetans who arrived to India prior to 1980.

As on June 2014, India was home to a staggering population of 2,03,383 people with several applications for asylum pending.[5] In addition, India has had to encounter the troubles of internally displaced persons such as the threatened Kashmiris who had fled a conflict-stricken Kashmir. This displacement, owing to India Pakistan territorial dispute, has caused Kashmiris to find places of settlement all over India.[6] In light of this sovereignty concerns, the paper provides an overview of the India's policy (or absence thereof) on the protection and advancement of the human rights of the refugees. The paper also provides a scrutiny of

[2] Convention Relating to the Status of Refugees 28th July 1951
[3] Protocol Relating to the Status of Refugees of 31 January 1967
[4] ROBERTA COHEN & FRANCIS DENG, MASSES IN FLIGHT: THE GLOBAL CRISIS OF INTERNAL DISPLACEMENT (Brookings Institution Press 1998).
[5] PTI, *India home to 2,00,000 refugees in first half of 2014: UNHCR*, THE HINDU, (Jan 09, 2015, 11:16 A.M.) https://www.thehindu.com/news/national/india-home-to-200000-refugees-in-first-half-of-2014-unhcr/article6771040.ece
[6] SARBANI SEN, *Paradoxes of the International Regime of Care: Role of the UNHCR in India* in REFUGEES AND THE STATE: PRACTICES OF ASYLUM AND CARE IN INDIA 1947-2000, 398-399 (Samaddar Ranabir (ed), Sage 2008).

India's position on the Convention Relating to the Status of Refugees, 1951 and its protocol along with the recent Global Compact on Refugees, 2018.

2. DOMESTIC LAW: INDIA'S REFUGEE POLICY (OR ABSENCE THEREOF)

There exists no national policy in India on refugees. This statutory vacuum is compounded by the absence of regional agreements and declarations like the Organization for African Unity Convention (1974) Cartagena Declaration (1984) that could bind India to frame a national policy for the same.[7] Being dualist, the Indian Constitution obliges India to enforce or implement the international instruments only through domestic enactments. Even the *Refugee and Asylum (Protection) Bill of 2009* and the *Asylum Bill, 2015*[8] are still pending and, therefore, cannot be said to have any impact on the current national policy on refugees.

However, it is asserted that despite persistent refusal to sign the Convention Relating to the Status of Refugees, 1951, India is not relieved from the prescriptions of *jus cogens.* Therefore, jus cogens makes India obligated to follow *non-refoulment*. This principle of customary international law forbids a country, "to deport, expel or forcefully return the refugee back to his home territory contrary to his will or if there exists a reasonable threat to his life, liberty and freedom."[9] Nonetheless, in the case of the Rohingya immigrants, the Indian Ministry of Home Affairs has , in an affidavit, labelled them as "illegal immigrants,". Further, it has requested for their deportation after expressing the apprehension of a "national security threat" posed by their presence. The affidavit avers that India was not mandated to observe *non-refoulement* as it has not signed the Convention Relating to the Status of Refugees, 1951. This stance coming through an official document reflects India's rather misplaced comprehension of customary international law. The Supreme Court, however, held that the situation of Rohingya refugees is that of contingency and directed the Centre to consider the Rohingya issue as a "humanitarian and human rights issue" and not a "national security issue".[10]

The municipal legislative framework of India governing the settlement of refugees is largely threefold: Passports Act, 1967, Registration of Foreigners Act, 1939 and Foreigners Act,

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[7] *Id.*

[8] *See* THE ASYLUM BILL, 2015, http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/3088LS.pdf.

[9] The Refugee Convention, 1951, Art. 33.

[10] ANI, *Supreme Court adjourns Rohingya case till Jan 2019 for final disposal*, THE TIMES OF INDIA (Nov 30, 2018, 12:41 AM), https://timesofindia.indiatimes.com/india/supreme-court-adjourns-rohingya-case-till-jan-2019-for-final-disposal/articleshow/66878121.cms

1946. It is gathered from each of these that any person of a "non-Indian nationality" is a foreigner, whatever be his "specific legal status". The Registration of Foreigners Act, 1939 describes a foreigner in Article 2 as "a person who is not a citizen of India." Similar definitions have been provided in the Foreigners Act of 1946 and the Foreigners Order of 1948. These enactments essentially guide and assist foreigners regarding the necessary documentation, medical examination, employment assistance and paper work related procedure only. In addition, no reference has been made herein to 'refugees' or 'migrants. Another term relevant for this analysis is "alien". Refugees are conceived within the umbrella of term "alien" or a "foreigner" in India.[11] Since these acts are indirectly applicable to refugees (as aliens) there is a large window for the exercise of discretion by the officers as well as the courts. For example, The Foreigners Act, 1946 authorises the arrest or detention of any foreigner on the ground of mere suspicion of non-compliance. India has argued that since it already has these laws in place which match the global standards, there is no need for ratification.

Another relevant enactment is the Citizenship (Amendment) Bill, 2019 which aims to provide Indian citizenship to Hindus, Jains, Christians, Sikhs, Buddhists and Parsis from Bangladesh, Pakistan and Afghanistan post- seven years of residence in India instead of twelve years as is currently the norm in place. The law would therefore, permit these people to legally present in the country through naturalisation. This would however, not be applicable to other Muslim refugees or migrants who seek refuge in India. This is because of the concerns of conflict that could arise from the several human rights obligations that India would have to adhere. Therefore, the want of a specific legislation on refugees affirms the fact that the presently operational legal provision in India are not enough to shield the refugees from violation of their rights and underlines the need for fructification of these pending bills into laws. In addition, there is a need to study these amendments as they also apply unequally and rather unfairly.

A recent policy decision is the notification of 7th September 2015 by Central Government with regard to certain nationals from Bangladesh and Pakistan who had arrived India "on or before 31st December 2014". This notification conferred a humanitarian exemption to migrants belonging to minority communities with regard to the entry and stay in India despite the absence of necessary documentation. Thereby, Hindus, Sikhs, Jains, Buddhists, Christians

[11] *See,* Article 22 of the Constitution of India, Section 83 of the Indian Civil Procedure Code, Section 3(2)(b) of the Indian Citizenship Act, 1955.

and Parsis from Pakistan and Bangladesh who were already residing in India could continue to reside without concerns of documents that may not have been obtained (or which may have expired). Through this order of the Home Ministry, nearly 200,000 immigrants who had sought residence in India before December 31, 2014 and were considered "illegal immigrants", were given the right to reside in India for the remainder of their lifespan. They were also relieved from certain provisions of the 1946 Foreigners Act, which necessitated their exit from the country upon the expiry of their visas, and the Passports (Entry into India) Act, 1920 which required them to hold a valid passport during entry into India. Indian citizenship law permits foreign nationals residing here to apply for citizenship after seven years of continuous residence have been completed. Thus, this step also paves the way for the refugees so benefitted to secure the citizenship of India.

Assessing the open-door policy of welcoming refugees, it is evident that despite the traditionally welcoming borders of this country, the present position is largely a result of the discretion of the government authorities and of Supreme Court rulings on the subject. The Constitution of India has been interpreted by the Court to afford at least some rudimentary human rights to the refugees. The most important provision is the Right to Life and Personal Liberty as provided under Article 21 applicable equally to aliens and citizens. Thus, Constitution provides for several rights including: Articles 5 to 12; Articles 20 to 22; Articles 25 to 28 and the remedial provisions of Articles 32 and 226 and these are available to non-citizens and thereby to the refugees.[12] The fundamental rights of life, dignity and liberty to non-citizens has been re-iterated by the Supreme Court of India in the decision of *Louis De Raedt v. Union of India*.[13] Further, in the landmark case of *Visakha v. State of Rajasthan*, the court has held that,

> "*International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein.*"[14]

Likewise, in *NHRC* v. *State of Arunachal Pradesh*[15], the Supreme Court of India directed the government to protect the health and life of the Chakma population residing and that prompt

[12] NHRC, *Centre / State Acts and Rules on Refugee*s, http://nhrc.nic.in/documents/LibDoc/Refugees_A.pdf.
[13] *Louis De Raedt* v. *Union of India*, 1991 (3) SCC 554.
[14] *Visakha* v. *State of Rajasthan*, 1997 (6) SCC 241
[15] *NHRC* v. *Arunachal Pradesh*, 1996 (1) SCC 742.

action be taken on their citizenship applications by concerned authorities. On 18th September 2015 Supreme Court ordered the Central Government and the government of Arunachal Pradesh to grant citizenship to *Chakmas* and *Hajongs* refugees who immigrated to India from Bangladesh during 1964-69 and settled in Andhra Pradesh. In *Gurunathan and others v. Government of India*[16] and *A.C. Mohd. Siddique v. Government of India and others*[17] the Madras High Court held India would not compel any Sri Lankan refugees to go back to Sri Lanka. Similarly, the decision of *Syed Ata Mohammadi v. Union of India* [18]also laid down, that, "there is no question of deporting the Iranian refugee to Iran, since he has been recognised as a refugee by the UNHCR." The Court further permitted the refugee to travel and commute to any country he wished. These decisions show that the judiciary has been following the customary international law and the principle of "*non-refoulement*". The Supreme Court stayed the deportation of Andaman Island refugees of Burma in the case of *Malavika Karlekar v. Union of India*[19]noting that since their demand for refugee status was still under scrutiny, a prima facie case is presumed for acknowledging and affording them the refugee status. Thus, the current national policy on refugees in India is a mosaic of multiple laws, policies, judicial pronouncements and notifications often leading to confusion and misleading results. The courts have attempted to conform to the international human rights obligations by interpreting the Constitutional provisions with an aim to secure refugees with certain privileges and rights

3. INDIA'S CRITICAL STANCE ON THE 1951 REFUGEE CONVENTION: HUMAN RIGHT AS AN IMPEDIMENT TO STATE SOVEREIGNTY?

Initially, the law concerning the refugees and the field of law relating to human rights was considered and divergent. However, literature review points to their extensive and multi-layered interface and overlap. Over the years, it has become evident that the global migration along with a "populist wave of anti-foreigner sentiment, albeit often couched in terms of national sovereignty and national security"[20] has raised critical issues of human rights. *J. Bhabha* notes, "from the outset, the refugee protection regime was intended to be restrictive

[16] *Gurunathan and others v. Government of India*, WP No.S 6708 and 7916 of 1992.
[17] *A.C. Mohd. Siddique v. Government of India and others*, 1998(47) DRJ (DB) p.74.
[18] *Side Ata Mohammad* v *State*, Criminal writ petition no.7504/1994 at the Bombay High Court
[19] *Malavika Karlekar v. Union of India*, Writ Petition (Criminal No) 583 of 1992.
[20] A. Guterres, *Remarks at the Opening of the Judicial Year of the European Court of Human Rights*, 2 (Strasbourg, Jan 28, 2011).

and partial, a compromise between unfettered state sovereignty over the admission of aliens, and an open door for non-citizen victims of serious human rights violation. It was always clear that only a subset of forced transnational migrant persecutes were intended beneficiaries."[21] Historically, as is evident India has always received refugees and has allowed the United Nations High Commissioner for Refugees (UNHCR) to provide their support and official existence in India. However, India does not see much merit in ratification of the Convention. UNHCR had denied assistance during the Bangladesh turmoil in 1971 and this strengthens India's argument that UNHCR is more political than humanitarian. Thus, owing to the distrust emerging from colonial past and subsequent non-cooperation India prefers to keep the sovereignty intact in this area of operation.[22] *Professor B.S. Chimni* supports this and argues that India must "*always"* resist and deny from assenting to the Refugee Convention, "as it is in itself violated by nations in the Global North in both the letter as well as the spirit of the law". [23] Several western countries or the north have a no entry policy coupled with several administrative and legal restrictions and therefore, Indian scholars argue that the Convention needs to be made more "equitable" and such no-entry policies must be reversed. Such discriminatory policies include: visa restrictions, detentions, security checks, denial of social welfare schemes to the asylum seekers, and, a limited biased reading of the definition of the refugee.[24]

The report by *Mahendra P Lama* which is titled, "Managing Refugees in South Asia"[25] suggests several security concerns which are to be balanced with refugee movements and provides three models to explain such a risk. The first risk model deals with "strategic-level security" where the refugees have weapons and the State fails to regulate their actions and movement. The second risk model is "Structural-level security" where there is a tussle between the existing limited resources and the rise in demands as a result refugee population. Finally, the third model discusses the "Regime-level security" where the security gets susceptible demands raised by the refugee population who exert pressures on administration

[21] J. Bhabha, *Internationalist Gatekeepers: The Tension between Asylum Advocacy and Human Rights*, 15 HARV. HRJ 155, 167 (2002).
[22] Myron Weiner, *Rejected Peoples and Unwanted Migrants in South Asia*, 134 (38) EPW 1743, 1993 (1993).
[23]B.S. CHIMNI, The Geopolitics of Refugee Studies: A View from the South, 11(4) J REFUG STUD. 447, 448 (1998).
[24] PARKA KORUNA, BROADENING THE EDGES: REFUGEE DEFINITION AND INTERNATIONAL PROTECTION REVISITED (Hague 1997).
[25] MAHENDRA P LAMA, *Managing Refugees in South Asia*, REFUGEE AND MIGRATORY MOVEMENTS RESEARCH UNIT, pp. 19-24 (2000).

and governance. These concerns largely cater to political issues and threats to sovereignty wherein the laws become more obstructive rather than inclusive of human rights regimes.

Further, the Third World Approaches to International Law postulates against the *Eurocentric* or an imperialist interpretation of who is a refugee.[26] The definition is considered restrictive in the sense of limiting to the political and civil rights of the refugees and failing to consider the violations of socio-economic and cultural rights. Several refugees escape from their countries that are facing internal violence and domestic warfare. However, the definition does not include such situations. It is also argued that the Refugee Convention of 1951 fails to understand the realities of the developing and Third World countries, which are facing economic crises and may not be able to meet internal needs of their own citizens. Thus, non-ratification can also be attributed to poverty and lack of resources which creates anxiety amongst the local administration and governance.[27] The flexible and porous borders of South Asian counties are feared to open a flood gate situation for refugees resulting in a pressure on domestic resources, administration and change in the socio-cultural, religious and linguistic dynamics of the region. For instance, the 1971 Bangladeshi migration in North East was making the locals, minority community in their own home. Further, insufficient respite to refugees could lead to civil unrest, as had happened with the Sri Lankan Tamil refugees.

Again, there is more reliance on bilateral agreements than international ones since there is a general feeling among the governments within South Asia that freedom of action and sovereignty are the most important aspects.[28] Third World counties are very cautious of external and international humanitarian actions, whatever be their nature, neutral or otherwise. For example, South Asian Association for Regional Cooperation (SAARC) prefers bilateral relations to solve conflicts and has kept population movement concerns outside its purview. Instance of this would be the ongoing negotiation between India and Bangladesh to search for solutions involving the Chakma refugees who have been afforded asylum in Arunachal Pradesh. This leads to a clearer position and keeps the freedom of different states intact, avoiding lack of unclear compromised positions.

[26] *Id.*
[27] Myron Weiner, *supra note* 22.
[28] CHARY AMITE AND DEWITT B DAVID, *Fiscal Burden Sharing* in RE-CONCEIVING INTERNATIONAL REFUGEE LAW (Hathaway C James (ed) Martinus Njhoff Publishers 1997) 126.

Interestingly, such critical appraisal of refugee policies also raises questions on sharing of burden by states for asylum protection.[29] In September 2016, India became a signatory to the New York Declaration for Refugees and Migrants. The aim of this was to join the group showing concern for refugees and supporting the nations which provide shelter. Thus, this is largely to share the burden equitably. The Declaration provide a perfect opportunity for a novel model framework for building a rights-based framework for the refugees. Furthermore, the Global Compact on Refugees ("GCR") is a synchronised effort to fortify world-wide response to the prolonged refugee situations and addresses all phases of refugee protection in detail, from reception to subsequent lasting results. Its aims to reduce the pressure on host countries and augment refugee autonomy. [30]

Therefore, even if India takes a stance of refusal to ratify the Refugee Convention of 1951 and avoids making a strong policy on the same, it still has to adhere to its commitments internationally. India has signed and implemented several international instruments like the Universal Declaration of Human Rights ("UDHR") 1948 and the International Convention on Civil and Political Rights, 1966 ("ICCPR") and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1984. It is clear that India must follow its obligations under Article 14 of the UDHR, Article 13 of the ICCPR-1966, and Article 3 of the Torture Convention, 1984 for refugee protection.[31]

4. CONCLUSION

The apprehensions that India asserts at different forums provides a clear indication that apart from politics, the territorial sovereignty plays an important role in assessment and limits of the refugee status and protection in India. India's lack of policy while suggestive of its desire to protect it sovereignty amongst other reasons, is defused by the principle of *non-refoulement*. Therefore, while sovereignty issues influence the substance of the rules, such concerns do not diminish the "core characteristic and nature of refugee law." In conclusion, India has always welcomed refugees of its own will and has done so without any binding force or pressure from the international community. While there are internal security

[29] H K Thames, "India's Failure to Adequately Protect Refugees," Washington College of Law 2000, http://www.wcl.american.edu/hrbrief/v7i1/india.ht m.

[30] António Guterres, Towards A New Global Compact on Migration, UNITED NATIONS IN INDIA, http://in.one.un.org/blogs/towards-new-global-compact-migration/

[31] PTI, *India home to 2,00,000 refugees in first half of 2014: UNHCR*, THE HINDU, (Jan 09, 2015, 11:16 A.M.) https://www.thehindu.com/news/national/india-home-to-200000-refugees-in-first-half-of-2014-unhcr/article6771040.ece

concerns of terrorism and impelling Kashmir dispute, changing perspectives of society and the economic instabilities, India has on several occasions taken a humanitarian stand on refugees and continues to do so within its "sovereign" limits. Political, religious, economic and other ethical considerations have led to India's current stance on the Convention Relating to the Status of Refugees, 1951. The refusal stems largely stem from the colonial past and scepticism against international law as being imperialist in its agenda. While adherence to Refugee Convention does not seem a possibility in near future, it is suggested that in light of the growing refugee population instead of ad hoc notifications and policies, it would be best for the country to formulate a clear legislative framework with a specific and uniform infrastructural policy to deal with the issue.

Constitutional mandate has ample protections for refugees, however, implementation of these become a problem owing to several political and ethical concerns. Thus, there is an immediate need for a specific law to deal with refugees and asylum seekers. Further, the law must ensure uniformity and equality of treatment to balance human rights and regulate the sovereignty concerns. Another solution would be in terms of a "regional treaty" which would categorically assist in dealing with the porous borders with stable and unstable neighbours. Judicial pronouncements and the provisions of the Constitution point to suggestions and clues about how to assist and aid the refugees, but owing to political, social and sovereignty issues, India refrains from signing any conventions relating to refugee matters. The Indian nation-state is unique, so is its experience of refugees and migration. An intelligent refugee management regime would require segregated forms of protection; addressing of mixed migration and a proactive integration policy

JUDICIAL PATTERNS IN THE ENFORCEMENT OF FOREIGN JUDGMENTS: INTERNATIONAL CHILD CUSTODY ISSUES

-Lakshana R[*]

ABSTRACT

The cases concerning parental child abduction often raise questions of comity of courts principle since they are generally cross-jurisdictional. The comity of courts principle requires that courts effectuate judgments of foreign courts as a matter of justice, equity and good conscience. Indian courts have displayed significant inconsistency in enforcing foreign court orders in child custody matters. The reason behind this is that India lacks a legislation to regulate parental child removal. The Government sought to fill this legal vacuum in vain by introducing the Protection of Children (Inter-country Removal and Retention) Bill, 2016 that has lapsed. The researcher identifies patterns in the inconsistent judicial orders pronounced by Indian courts in child custody matters and analyses the same in three phases. The first phase relates to the period when the Indian judiciary placed paramount importance on child welfare in deciding custody cases and ignored other factors. The second phase saw the Indian judiciary abiding by the comity of courts principle and passing mirror orders to enforce foreign judgments. The final phase is the ongoing attempt at reconciling international comity principle with child welfare. The Supreme Court has chosen the *via media* in several recent cases by following the approach of first strike principle, intimate jurisdiction or visitation rights. The researcher concludes by highlighting the need for a new legislation.

KEYWORDS-

Foreign judgment; child custody; Code of Civil Procedure 1908; Section 13; Hague Convention; intimate jurisdiction; visitation; first strike principle.

INTRODUCTION

The Indian legal system is notorious for criminalisation of certain actions as much as it is for the legalisation of certain others. One such curious case is that of inter-parental child removal. Presently, India does not recognise parental child removal as an offence. Cases concerning parental child abduction raise questions of comity of courts principle since they are generally cross-jurisdictional. The comity of courts principle requires that Courts

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effectuate judgments of foreign courts as a matter of justice, equity and good conscience.[1]Indian courts have displayed significant inconsistency in enforcing foreign court orders and the jurisprudence is particularly incongruous in child custody matters. Orders given by foreign courts have often been ignored by Indian courts as they seek to act in what they see as the 'best interests' of the child. This problem persists despite the clear language of Sections 13 and 14 of the Code of Civil Procedure, 1908, which give effect to the comity of courts principle.

Child custody disputes often spill across borders since people are increasingly moving to different countries for education and employment related opportunities.[2] Cross-border inter-parental child abduction has become a common occurrence as the migrant and immigrant populations increase manifold. Cross-border inter-parental child removal refers to a situation where a child is wrongfully removed or retained by a parent across frontiers. As a matter of international law,- child removal connotes the violation of certain parental rights that exist by virtue of law, agreement, court order or other privileges.[3]

India does not recognise child removal as an offence and there is no clarity on the enforcement of foreign court orders in this regard. Hence, the Indian courts have produced varied judgments and they have taken diverse positions on the issues involved. Interesting patterns can be observed in the judicial orders pronounced by Indian courts in child custody matters. The researcher shall attempt to briefly analyse the same after discussing The Hague Convention 1980 and the 2016 and 2007 Bills.

THE HAGUE CONVENTION 1980

Article 3 of the Hague Convention provides that child removal or retention in breach of parental custodial rights under the laws of the place of habitual residence of the child constitutes an internationally wrongful act.[4]The person who has custodial rights as per the applicable family laws determines habitual residence of the child.[5]The Convention seeks to ensure the return of the child to the place of habitual residence, in furtherance of the belief

[1]*Satya v. Teja Singh* AIR 1975 SC 105.
[2]AR. Lakshmanan, *International Child Abduction - Parental Removal*. 48 IND. J. INT'L L. 427 (2008).
[3]Jambholkar, *India and the 1980 Hague Convention on Civil Aspects of International Child Abduction*, 51 IND. J. INT'L L. 85-96 (Jan- Feb, 2011).
[4]Art.3, Hague Convention.
[5]Art. 5 (a), Hague Convention.

that the same would be in the best interests of the child.[6]It provides for the designation of Central Authorities in each party State to discharge the duties envisioned in the Convention.[7]The Convention also covers rights of access under domestic laws[8] and seeks to protect the same and other rights until the child reaches sixteen years of age.[9]Secretariat of the Hague Conferences has published- in three parts- guides to good practice, namely Central Authority Practice, Implementing Measures and Preventing Measures which seek to aid the contracting States in fulfilling the aims of the Convention.

A major drawback of the Hague Convention is that it doesn't include any penal provisions and it only provides a framework within which countries can collaborate with each other to secure the return of abducted children. What the 1980 Convention fails to take into account is that such collaboration is an ideal goal in a world with diverse legal systems that have their own problems and unique ways of functioning.

India has not signed the said Convention and it is consequently not bound by the obligations envisaged under it. Several scholars have criticised India for failing to sign the International instrument despite having a huge migrant population around the world.[10]Legal disputes involving international parental child removal have become commonplace and the Indian judiciary is often made a helpless onlooker as children are claimed, removed and accessed like properties.

India claims that it has not signed the Hague Convention in the interests of the Indian women living abroad.[11] These women escape to India with their children in cases of domestic violence or abusive marriages. If India signs the Convention, such women could be made liable for civil offence under the strict laws of foreign countries. For instance, in the UK, the Child Abduction Act, 1984 has very stringent provisions making such wrongful removal and retention, an offence. However, it is important to balance the interests of Indian women living abroad with the interests of their wards before taking a final decision. The current position of the Indian Government has its own disadvantages.

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[6]Ishaque & Mustafa, *The best interests of the child: a prevailing consideration within Islamic principles and a governing principle in child custody cases in Pakistan,* 29 INT'L J. L. POL'Y &FAMILY78-96 (2015).
[7] Chapter II, Hague Convention.
[8]Art.1, Hague Convention.
[9] Art.4, Hague Convention.
[10] Duncan, *The Work of the Hague Conference in the Field of the International Protection of Children and its Relevance to India*,2 INT'L LAW ISSUES & CHALLENGES 149-68 (2009).
[11]J Venkatesan, *India not to sign pact on inter-country child abduction*,DECCAN CHRONICLE, Feb 12, 2017.

Firstly, the Hague Convention helps delineate the jurisdiction in cases of cross-border inter-parental child removal and it provides a mechanism for settling disputes. The Indian courts are overburdened and rather inefficient when it comes to speedy delivery of justice. India is worsening the situation by failing to sign on to a specialised mechanism that would streamline the legal landscape in this regard with that of the major developing countries where a large Non-resident Indian (NRI) population resides.

Secondly, an indirect disadvantage faced by India on account of failing to sign the 1980 Convention plays out when a foreign judge hears a petition for allowing a child to spend a vacation in India with a divorced parent. Since there is no guarantee of swift return of the child to the country of origin, the foreign judge will show greater reluctance in allowing such petitions.

INDIAN LEGAL REGIME

As mentioned earlier, India does not recognise child removal as an offence and it has recently made known that it has no intention of doing so in the near future.[12] The Protection of Children (Inter-country Removal and Retention) Bill, which was introduced in 2016- as a precursor to adopting the Hague Convention- has been allowed to lapse. The major reason cited by the Indian Government for not joining the Hague Convention is that Indian women living abroad will be disadvantaged since they might end up facing charges if they leave their abusive husbands and return to their country of origin with their children. Further, the Indian Government has pointed out that the instances of a parent leaving India with the child and escaping to a foreign country have been negligible. The Indian Government has taken the position that creating an offence of child removal would do more harm than good and there is no real need for it in the Indian legal context.

The Indian Government's position is misconceived since the lack of recognition of child removal as an offence and the inconsistency displayed by the Indian courts in enforcing foreign custody orders has created several problems.[13] There is a need for clarity in the Indian position on the subject as voiced out in the 18th and the 20th Law Commission reports. The 2016 Bill sought to bring in much needed clarity and conformity to internationally recognised

[12] Press Trust of India,*Govt likely to junk inter-parental child abduction Bill*, INDIAN EXPRESS, Nov 6th, 2016.
[13] Anil Malhotra & Ranjit Malhotra, *Child Abduction Law in the Indian Jurisdiction*, INT'L FAM. L., 195 (November, 2003).

standards but it has met the sad fate of its 2007 predecessor, which lapsed before it could be tabled in Parliament.[14]

The 2007 Bill proposed the creation of a central authority that would decide on returning children illegally removed by parents from other countries. It was meant to give effect to the Hague Convention once India joins it. Unfortunately, the Bill was never debated in Parliament and the issue was side-lined as a low-priority subject despite the glaring number of NRI marriages and cross-border child abductions that were coming to light.[15]

A refurbished version of the 2007 Bill was tabled in Parliament in 2016.[16] The 2016 Bill borrows the definition of child removal from the Hague Convention and it seeks to create a suitable domestic atmosphere for return of abducted children.[17]

The central concept in child custody laws is that of 'habitual' or 'ordinary' residence of the child. The 2016 Bill understands 'habitual residence' as follows:

"The place where the child resided with both parents; or, if the parents are living separately and apart, with one parent under a separation agreement or with the implied consent of the other parent or under a court order; or with a person other than a parent on a permanent basis for a significant period of time, whichever last occurred."[18]

This provision should be read with the Guardians and Wards Act, 1890, which also gives primacy to the place where the minor ordinarily resides. A guardian judge can interfere by entertaining a petition for custody, only if the child ordinarily resides in his jurisdiction.[19]

The Hague Convention adopts a similar stance by emphasising the 'habitual residence' of the child over other considerations like place of birth or nationality.[20]The landmark case on 'habitual residence' is *Cooper & Casey*[21] where it was held that a child can have only one place of habitual residence which should be determined by focusing on the child's past experience and not on its or its parents' intentions. Therefore, the concept of habitual

[14]V. Kumara Swamy, *Betwixt and Between,*TELEGRAPH INDIA, April 7th, 2007.
[15]Mohammed Iqbal, *Legal experts seek uniformity of laws governing children*, THE HINDU, Oct 19th, 2014.
[16]Moushumi Das Gupta, *Inter-parental child abduction may soon become an offence in India,* HINDUSTAN TIMES, July 29th, 2016.
[17]Anil Malhotra, *Rights for Abducted Children*, THE HINDU, September 5th, 2016. Available online at http://www.thehindu.com/opinion/columns/anil-malhotra-writes-on-rights-for-abducted children/article9072611.ece (last visited on October 12th, 2016).
[18] S.2 (f), 2016 Bill.
[19] S.9, Guardians and Wards Act, 1890.
[20] Arts. 3, 4, 5, 13, 14, 15, 25, Hague Convention.
[21][1995] 18 Fam LR 433.

residence unsurprisingly forms the core of judicial decisions on the subject and it becomes a bone of contention as Indian courts grapple with foreign court orders.[22]

The following section proves an analysis of judicial trends in enforcement of child custody orders given by foreign courts.

PATTERNS IN THE ENFORCEMENT OF FOREIGN CUSTODY ORDERS

Indian Courts determine the validity of foreign court decrees and orders keeping in view the provisions of Section 13 of the Code of Civil Procedure 1908 as amended by the Amendment Acts of 1999 and 2002.Section 13 embodies the principle of *res judicata* and it provides substantive law and not a mere rule of procedure.[23]It provides for the enforcement of foreign court orders in India without adjudicating the dispute in Indian courts again.

A threefold pattern can be identified in the history of judicial decisions on the subject of child custody. The division is not clearly chronological. *Firstly,* certain court rulings chiefly focus on considerations of welfare of the infant to the exclusion of all other factors. *Secondly,* there are judicial decisions that blindly enforce foreign court orders via mirror orders, implicitly ignoring the factors that would weigh on child welfare. *Thirdly,* a number of court rulings, which are mostly recent have attempted a reconciliation of the seemingly conflicting concepts of international comity and well-being of the child.

PHASE I: PARAMOUNTCY OF CHILD WELFARE

The starting point for the child welfare jurisprudence and criminalisation of child detention is often located in *Gohar Begam v. Suggi Alias Nazma Begam*[24]where the Supreme Court provided relief under Section 491 of the Code of Criminal Procedure (as it existed then) to allow the recovery of child custody. The court cited the welfare of the minor as the major consideration. The concept of child welfare was subsequently developed in a string of cases and it has been beautifully captured by the Supreme Court's observation in the recent case of *Sumedha Nagpal v. State of Delhi*[25] as under:

"No decision by any court can restore the broken home or give a child the care and protection of both dutiful parents. But a decision there must be, and it cannot be one

[22]Anil Malhotra & Ranjit Malhotra, *Child Abduction Law in the Indian Jurisdiction*, INT'L FAM. L. 225 (Nov., 2005).
[23]*Mologi Nar Singh Rao Shitole v. Sankar Saran* AIR 1962 SC 1737.
[24]AIR 1960 SC 93.
[25]JT 2000 (7) SC 450.

repugnant to normal concepts of family and marriage. During infancy and impressionable age, the care and warmth of both the parents are required for the welfare of the child."[26]

The consideration of well-being of the infant stopped being the sole factor when India began applying the comity of courts principle in child custody cases. However, child welfare continues to remain a predominant principle and it outlasted the comity principle in several cases that were decided recently.

For instance, in 2007 the High Court of Bombay at Goa declined to issue a writ of habeas corpus thereby refusing the custody of a girl child to her mother in Ireland.[27]The concern was whether physical, mental or psychological harm might befall the child. In similar vein, it was held by the Supreme Court in *Nithya Anand Raghavan v. State of NCT of Delhi*[28] that the best interests of the child remains paramount despite relevant factors such as comity, intimate connect, citizenship, jurisdiction of foreign courts and first strike principle.

The reasoning was re-affirmed in the 2018 case of *Kanika Goel v. State of Delhi (through Station House Officer & another)*[29] wherein the Apex court ruled that it was in the best interest of the minor child to remain with the mother in India though the father had obtained a favourable order from the US court which had the rightful jurisdiction in the matter.

PHASE II: COMITY OF COURTS- AN ERA OF MIRROR ORDERS

The principle of the comity of courts is essentially a principle of self-restraint, applicable when a foreign court is *in seisin* of the issue of the custody of a child prior to the domestic court. There may be a situation where the foreign court though seized of the issue does not pass any effective or substantial order or direction. In that event, if the domestic court were to pass an effective or substantial order or direction prior in point of time then the foreign court ought to exercise self-restraint and respect the direction or order of the domestic court by the issue of a mirror order, unless there are very good reasons not to do so.

Mirror order is an order made in one country, which reflects the original order made in another country. Mirror orders are often made in circumstances where contact arrangements have been agreed and the child will then be living in another country. It signifies that the

[26]*Ibid* at 453.
[27]*Mandy Jane Collins v. James Michael Collins* (2006) 2 HLR 446.
[28](2017) 8 SCC 454.
[29] 2018 (9) SCC 578.

courts of the country where the child will later be living are aware of the original arrangements and they give protection for the other parent in the country where the child is living.[30]

In England, a mirror order is required to enforce a foreign court ruling in family law division unless the State in question is a signatory to certain Conventions. Two principles form the basis of this legal position: it is undesirable for there to be conflicting orders in different jurisdictions;[31]courts must discourage parallel rival proceedings in another jurisdiction or reconsideration of the facts of a case that has already been adjudged by a proper forum.[32]

Mirror orders are unheard of in several countries. Some countries like Indonesia allow "friendly settlement" arrangements whereby the parties can agree to lodge a consent order in the foreign state, which will be enforceable. In Islamic countries, the enforcement of foreign court orders depends on whether the order is within the bounds of what is permissible under Sharia law.

The Indian judiciary followed the mirror order jurisprudence in a small number of cases. The Supreme Court in *Surinder Kaur v. Harbax Singh Sandhu*[33]and *Elizabeth Dinshaw v. Arvind Dinshaw*[34]exercised jurisdiction in returning the minor children to the country of their parent and automatically accepted the relevant foreign court orders by issuing mirror orders for execution. The mirror order regime was soon tempered by considerations of child welfare, as the Indian judiciary began to take a more mature approach.

PHASE III: RECONCILING COMITY AND CHILD WELFARE

Welfare of child and comity of courts are not contrasting principles and they can be reconciled. The attempt at reconciliation began with *Dhanwanti Joshi v. Madhav Unde,*[35]where the Supreme Court observed that the order of the foreign court would only be one of the facts, which must be taken into consideration while dealing with child custody matters. It was further opined that India being a country which is not a signatory to the Hague

[30] Anil Malhotra, *International Parental Child Abduction Law in the Indian Jurisdiction: Case law Analysis and Procedural Safeguards*, 2 INT'L L. ISSUES & CHALLENGES 168-86 (2009); see also *Re G (Contact)* [2006] EWCA Civ 1507.
[31]*E v E* 2007 1 FLR 1977.
[32]*In Re A* 2007 1 FCR 391.
[33]1984 SCR (3) 422.
[34]1987 SCR (1) 175.
[35](1998) 1 SCC 112.

Convention, was not bound to take execute foreign child custody orders. The comity principle was thus backgrounded.

The reasoning in *Dhanwanti Joshi* was re-affirmed by the Supreme Court in the case of *Sarita Sharma v. Sushil Sharma* [36] where it was held that in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children.

In the case of *Kumar V. Jahgirdar v. Chethana Ramatheertha,* [37] the conflicting considerations were balanced by concluding that a female child of growing age needs company more of her mother compared to the father regardless of foreign court custody orders.

Further, in a recent case of *Paul Mohinder Gahun v. State of NCT of Delhi*[38] the Delhi High Court refused to grant custody of the child to the father and observed that the question of conflict of laws and jurisdictions should take a back seat in preference to what lies in the interest of the minor.

While attempting to reconcile the comity principle with the best interests of the child, the Indian courts have broadly employed three methods- first strike principle, the concept of visitation rights and the principle of intimate jurisdiction.

First strike principle

The case of *Surya Vadanan v. State of Tamil Nadu*[39] is the watershed verdict on this subject. It was held that the Rule of comity of courts should not be jettisoned except for compelling special reasons to be recorded in writing. The Supreme Court discussed the first strike principle and held that whichever court in whichever jurisdiction is seized of the matter first, will have the prerogative to decide the case. Accordingly, the children were ordered to be returned to UK since the English court was first *in seisin* of the matter. The theory applies whenever the foreign court's jurisdiction is not in doubt. Madan Lokur J, further opined that interim orders of foreign courts of competent jurisdiction should be respected and that enquiry by domestic courts must be based on reasons when there is a pre-existing order of a foreign court.

[36] 2000(3) SCC 14.
[37] 2004 (1) HLR 468.
[38] 2005 (1) HLR 428.
[39] Cri. App. No. 395 of 2015 (Arising out of S.L.P. (Crl.) No.3634 of 2014).

The first strike principle was recently applied in the case of *Anand Raghavan v. State of Delhi,*[40] wherein the court reiterated that without any special reason to diverge from the principle of comity of courts, the judges would be uninclined to do so. The child was a habitual resident of the UK and the balance was tilted in favour of British courts. The mother was ordered to return the female child to the petitioner in the UK.

Visitation rights

Visitation rights is the court ordered privilege conferred on a non-custodial parent or any other relative for spending time with a child who is living with another person, usually the custodial parent.[41] In a number of cases,[42] the Supreme Court has employed visitation rights as a balancing mechanism to partly circumvent a clearly worded custody order issued by a foreign court. Visitation rights have been conferred upon the non-custodial parent, grandparents, adoptive parents, maternal uncles and aunt's et al. The prime consideration for visitation rights is the welfare of the child and the proximity of the child to the relation concerned.

Intimate jurisdiction

In *Ravi Chandran v. UOI*[43] it was held that the Court in the native country that has the closest concern and the most intimate contact with the issues arising in the case, would be in the best position to investigate the aspects relating to the welfare of the child. The concept of intimate jurisdiction was discussed as early as 1950 in England in the case of *Mark T. Mc. Kee v. Eyelyn McKee.*[44] It was found that it may be proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interest of the child. The concept was re-affirmed in ***Re:*** *L (minors)*[45] and approved by the Supreme Court in *Dhanwanti Joshi v. Madhav Unde*[46].

[40] W.P.(Cr). No. 247 of 2016.
[41] *Roxann Sharma v. Arun Sharma* Civ. App. No. 1966 of 2015 (Arising out of SLP No. 31615 of 2014).
[42] *Prabhat Kumar v. Himalini Kashyap* CM (M) 373/2009 & CM(M) 821/2009; *Sahiba Ali v. State of Maharashtra*2004 (1) HLR 212; *Aishley Kapoorc case*Case No: CO/5143/2014; *Ms. Neeta Misra v. Philip David Dexter*W.P. (Crl.) 1562/2012 & FAO 29/2013.
[43] 2010 (1) SCC 174.
[44] (1951) A.C. 352 : (1951) All ER 942.
[45] (1974) 1 All ER 913.
[46] *Supra* note 37.

In *Shilpa Agarwal v. Aviral Mittal*[47]the High Court ordered that the child be returned to the foreign country by invoking Section 6 of the Hindu Minority and Guardianship Act, 1956, whereunder the mother is entitled to retain custody of the minor child under the age of 5 years. The foreign court was also found to be more proximate to the child's place of habitual residence.

In *Ruchi Majoo v. Sanjeev Majoo*[48]the concept of intimate jurisdiction was applied and the Court in *Surinder Kaur*[49] has specifically approved the modern theory of Conflict of Laws, which prefers the jurisdiction of the State, which has the most intimate contact with the issues arising in the case. The Court also holds that Jurisdiction is not attracted by the operation or creation of fortuitous circumstances. The "most intimate contact" doctrine and the "closest concern" doctrine of *Surinder Kaur* cannot be ignored only because their application might be uncomfortable in certain situations. It is not appropriate that a domestic court having much less intimate contact with a child and having much less close concern with a child and his or her parents (as against a foreign court in a given case) should take upon itself the onerous task of determining the best interests and welfare of the child. A foreign court having the most intimate contact and the closest concern with the child would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court. The Court adds a caution that to allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum shopping.

TOWARDS A CONCLUSION

The judicial practice can be thus classified based on the relative importance given to the comity of courts principle and the consideration of the welfare of the child. However, these heads are not comprehensive. They merely seek to provide a framework to appreciate the rich jurisprudence of the Indian courts in child custody and removal matters, especially, when there is a lack of legislative clarity.[50]

The Indian Government took a step in the right direction by preparing the Protection of Children (Inter-country Removal and Retention) Bill, 2016.The Bill would have brought in

[47]2010 (1) SCC 591.
[48](2011) 6 SCC 479.
[49]1984 SCR (3) 422.
[50]These issues have been dealt with in the report of the 20th Law Commission of India. *See* Ajit Prakash Shah, *Reforms in Guardianship and Custody Laws in India*, Report No. 257.

much needed legal clarity if India had also subsequently signed and ratified the Hague Convention to ease the process of inter-country child returning. This would have made it easier to monitor child removal or wrongful retention. Being part of a private international law regime might have helped reach finality on the interpretive application of Section 13 of the Code of Civil Procedure. Apart from also being in consonance with the 18th Law Commission's Recommendations,[51] such an act of ratification would have, most importantly, truly ratified India's commitment towards the welfare of children.

However, the Indian Government has allowed the 2016 Bill to lapse and it is claiming that recognition of child removal as an offence would disadvantage Indian women living abroad. It is a legitimate consideration that Indian women might face an unfair disadvantage but it cannot be the sole factor for consideration. The Indian Government ought to balance it with the welfare of Indian and foreign children are or have been victims of parental abduction. However, it has failed to do so. One can only hope that the Indian Government would soon evolve an alternative mechanism to solve the problem of child removal and clarify the legal position.

[51]Dr. Justice AR. Lakshmanan, *Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980),* Report No. 218 (March, 2009).

THE PATENTING OF LIFE FORMS

-*Siddharth Jain & V. Saketh Roy Vydyula* [*]

ABSTRACT

Biological exploration has been broadening its horizons to infinite spaces. It was not long ago that living organisms which are naturally occurring entities in the world were free from the intrusion of the laws that made them a property to someone else or a body corporate. The present scenario stands as such where scientists and inventors are able to channel their ability to invent and discover new formulations and reap benefits off of them through ownership and *exclusivity*. This paper intends to explain how *Living organisms have become a subject matter of patent rights* by tracing the history of subject matter of patents i.e. the non-inclusion of living organisms in the list of patentable items and comparing it with the shift in paradigm that took place due to the landmark case of *Diamond v. Chakravarthy* where for the first time in the world a living organism was allowed to be patented. The advantages and disadvantages of granting patents to micro-organisms and their genepool will be discussed. Furthermore, the author would concentrate on what constitutes as subject matter of a patent and how regions over the world classify such constituents mainly, United States of America, European Union and India.

INTRODUCTION

Late Congressman Mike Synar, a Democrat from Oklahoma, remarked that few lawyers knew anything about patent law.

"Everyone knows it is part of the bar exam, so to hell with it."[1]

Man, being a finest creation of god is considered a supreme being as he placed himself on top of the food chain over all other creatures. From the primitive ages where one would be startled at the process of natural birth to the modern age where man has attained the ability to not only challenge the course of nature but also create and alter life forms, humanity has come a long way. It's as if man has started playing god. Nevertheless, the question remained, do the powers of a man allow him to claim ownership over another living organism?

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[1] *Patents and the Constitution: Transgenic Animals: Before the Subcomm. On Courts, Civil Liberties & the Admin. Of Justice of the H.Comm. on the judiciary,* 100th Cong. 1 (1987) (statement of late congressman Mike Synar, a Democrat from Oklahoma).

Intellectual property rights have been reiterating the fact that 'might is right' as they give right to the powerful to possess claim over another inferior living organism. Patenting of life forms, be it food varieties, gene pools, DNA or micro-organisms has always put forward certain legal, moral and ethical apprehensions in the minds of the general public. Patent laws are said to be fuelling the vessel of commodification of life through which the scientists are granted exclusive rights over their genetic research. This procedure was opposed by a basic question that shouldn't something be patented because it is a "newly created invention" which would then be a means of protecting the very intellectual property rights of the inventor/scientist?

The United States of America marked the beginning of its journey in the intellectual property rights arena when the Patents Act of 1793 was introduced to replace the old Patents Act of 1790. It pioneered the cause of promoting "Useful Arts", however the patent act of 1793 is known for the laying emphasis on the definition of the subjects of patents such as "*any new and useful art, machine, manufacture or composition of matter and any new and useful improvement on any art, machine, manufacture or composition of matter*"[2]. These subjects remained unchanged and unaltered until now. It was unheard of and never imagined that a life form could be patented or its patent could be a topic of debate between the lawmakers. Such a thought, when arisen was quashed by the precedent of the landmark case of *Ex -Parte Laminer*[3]where the commissioner rejected the application of a patent for the pointy needles found in the fibres of the pine tree. The commissioner concluded by mentioning that it would be *"unreasonable and impossible"* to allow the granting of patents to the trees of the forest and plants of the earth.

The arguments against the patenting of life forms are generally based on idea of tampering with life forms and then applying patent procedures to such developments. Such a thought was considered as interference with the natural world and its functioning. Patents were rejected because the authorities believed that it would serve as an incentive for scientists to venture into the nature and alter/modify it's working to attain exclusive rights over them. Jonas Salk, the inventor of the Polio vaccine which prevented millions from falling prey to polio was asked a question regarding the ownership of patent of the vaccine, Jonas Salk replied saying "The people own the product. Can one patent the sun?". The whole idea of patenting something that was the need of the hour came out to Mr. Jonas Salk as absurd. The

[2]Patent Act, ch. 11, 1 Stat. 318-23 (1973).
[3]*Ex parte* Latimer, 1889 Dec. Comm'r Pat. 123-27.

same was the case to a lot of institutions, NGO's and activists in regard with the patenting of life forms. They thought this process would lead to the concentration of power in the hands of a very few who can dictate the course of life of a patented life form. The loss of diversity in the genetic sphere has been one of the common arguments as patenting of life forms is so diluted and unregulated that it poses a threat to the environment

Patenting thus appears as the final step toward objectifying living things; now they will be "inventions," just like VCRs and computers.[4]

In the landmark case of Funk Brothers Seed Co. v. Kalo Inoculant Co.[5]the Supreme Court of America rejected the grant of patent of a bacterium establishing that if one has only found an organism and had not invented it, he/she cannot patent it. The struggle one takes in order to discover or find the organism does not form a ground for the granting of a patent. If it is an organism occurring naturally, it cannot be patented. *"The qualities of these bacteria, like the heat of the sun, electricity, or the qualities of metals, are part of the storehouse of knowledge of all men. They are manifestations of laws of nature, free to all men and reserved exclusively to none. He who discovers a hitherto unknown phenomenon of nature has no claim to a monopoly of it which the law recognizes. If there is to be invention from such a discovery, it must come from the application of the law of nature to a new and useful end."* These were the days where the rationale of the courts was simple, they established that the *laws of nature* exclusion shall be taken into consideration when the question of patenting a living organism or a life form came up. Little did they know that through the course of time the United States of America will pronounce a ruling in Diamond v. Chakravarthy which holds otherwise.

CHANGE IN PERSPECTIVE

Every patent, to be a valid patent, has to be within the appropriate subject matter. With regards to the category of natural phenomenons and in particular living organisms, a more liberal interpretation has been incorporated with the change in time. Anything under the sun made by man was meant to be patentable. However, there was much clarity in the patenting of living organisms or natural phenomenons in the initial phases due to which, huge number of limitations were there on the patenting of the same. The patentability of living organisms is a judicially created set of exceptions and is a creature of courts over decades of refinement.

[4]Wallis C., *Should Animals Be Patented?*, National Centre for Biotechnology Information (Jan. 8, 2019, 8:56 PM),https://www.ncbi.nlm.nih.gov/pubmed/11645595].
[5]333 U.S. 127, 129 (1948).

Therefore, it is safe to say that subject matter limitations are a key "policy lever" developed by the courts.

1. Chakrabarty Case

When we talk about the natural phenomenon restriction on subject matter, the key case that can be attributed to the liberal approach of courts towards patentability of living organisms is Diamond v. Chakrabarty, 1980. Mr. Chakrabarty developed a man-made bacterial organism in a lab. The key application for the bacterial organism was that it would effectively eat petroleum and oil. Because of this reason, it was extremely useful. For oil spills, you could release it and it would help breakdown the oils. Dr. Chakrabarty had three primary claims in this case in three categories.

- The first category was the *process of producing the bacterial organism*. Since this was a brand new organism made in the lab, he could patent the organism made in the lab and could patent the process of making it.
- The second was the *method of using the bacterial organism*. The organism had important and potentially very commericially valuable applications for use.
- The third was the patenting of*bacterial organism itself*.

The patent examiner allowed claims 1 and 2, the process of producing it and the method of using it were found to be patentable at the outset. But rejected the third claim (of patenting the living organism itself) as it was directed to a living organism. The patent office had the view that there was no patentability for living things.

Now, Mr. Chakrabarthy was able to easily granted the claims 1 and 2, the process of producing it and the method of using it, which eshtablished that he was already going to get a fair amount of protection for the underlying invention. But these grants didn't protect him from people who would come up with a different way of producing the organism. Neither do these grants protect him from people who want to use the organism for some other purpose. Eventhough, those two set of claims would give him significant protection, what he wanted was more, because in his view he had invented somethin new and the patent system should acknowledge that and allow him to get the patent for claim 3 and this would allow him to get protection over the baterial organism no matter how it was made or how it was used.

The examiner had rejected the claim on the grounds that the natural phenomenon exception that had been in the law for several decades prevented patenting of anything that was living. However, the Supreme Court of the US found the third claim to be valid. The reasoning here was that this bacteria was in fact not naturally occurring and thus wasn't subject to the natural

phenomena limitation. Fundamentally, what the Supreme Court does in the Chakrabarty case is that it creates a distinction between naturally occurring organisms on one hand, and non-naturally occurring organisms or essentially man-made organisms on the other. Therefore, the Chakrabarty case draws clear lines between discovery of something versus invention of something. The court affirms that discovery is not subject to patentability but invention is. The reason why discovery is not patentable whereas inventions are is that this would help *encourage people to create new knowledge and not merely exploit or compile pre-existing knowledge*. In simpler words, what is wanted is something 'new' rather than the exploitation of the old. This in turn would be a better result for society.

2. Parke-Davis case

One of the most important aspects of the natural phenomenon subject matter limitation is the Parke-Davis case. In that claim, the technology in issue was what we now know as insulin, which was a substance found in adrenal glands. The claim in that case was what was decscribed as an *isolated and purified version of that naturally occuring product*. Yet again, the claims made were for a naturally occurring substance that was found in the adrenal glands. However, it wasn't to the precise version of that naturally occurring product that was found in the gland. It was, instead, to an isolated and purified version.

The Court, in Parke-Davis, finds this particular patent claim to be patentable. The reasoning here was that it was not a natural phenomena, and, therefore, not subject to the restriction that one cannot patent it because it was isolated and purified. Furthermore, it is a formal matter, it did not occur in the nature in the way that it was claimed. Because one would not find isolated and purified versions of insulin in the wild, the only way one would do that would be by extracting it, isolating it, and then purifying it through some sort of process. And therefore, that process, which includes extraction, isolation and purification, was enough to convert a natural product and a natural phenomenon, into something that was new and functionally man-made.

The importance of Parke-Davis, I think would be difficult to overstate. Because if you combine the Chakrabarty ruling, which is that non-natural organisms are patentable, that living versus non-living doesn't matter and that, really, the line that matters is strictly one regarding whether something is man-made or non-man-made. With Parke-Davis holding, which is that isolated and purified versions of things, even things that are natural, are, in fact, as far as the law is concerned, non-natural, man-made, and therefore, patentable.

When Chakrabarty and Parke-Davis cases are read together, it really means that almost anything in the biological area becomes patentable. Because as long as the claim is made for as an isolated and purified version, a version that has been extracted, or that has been chemically treated, or that some minor or trivial changes have been made, then it can be established as something that is, under the umbrella of the judgments of Parke-Davis and Chakrabarty cases, a new thing, a man-made thing, and, therefore, patentable. This is really the foundation of patenting in much of the biological industry and much of the biotech industry. The result of this is that *almost* anything becomes patentable which occurs from mid-80s to the early 2010s. This was one of the golden phases of biotech industry as billions of dollars were pouring in to further research and development.

At the same time, there is and has been a lot of backlash, a lot of criticism that what the authorities are doing by allowing all of these patents is, in fact, patenting nature. And not only patenting nature, but "over-patenting" nature. These products come from human beings, or from plants, or from well known chemicals or processes. All of these components of nature are being patented, propertized, which, ultimately, can lead to less innovation if its too hard for people later on to determine who owns the rights, or to get a licensee, or to get permission, or to pay the fees, or whatever it is. Therefore, there is a huge possibility that over-patenting of nature would stifle innovation.

3. The Association of Molecular Pathologies v. Myriad (Myriad case)

By the early 2010s there have been tens of thousands of patents, in particular, on the segment of human DNA which in simpler terms can be known as gene patents. Genetic patenting boom could be attributed to the combination of Chakrabarty and Parke-Davis case which affirmed that, natural products, living products, parts of organisms when isolated and purified are patentable under the patent law.

What happens in this case is that, Myriad, a for-profit company, obtains a patent on two particular genes, known as the BRCA1 and BRCA2 genes. These genes have been found, through extensive research, to have connections and linkages associated with the likelihood of cancer, especially breast cancer in women. Myriad, obviously, wanted these patents for this very reason. Because Myriad's business model is, and was, to sell testing. What they would do was sell to people who desired it, a way to sceen for the BRCA1 and BRCA2, and sometimes both genes, using samples of your blood. And then they would be able to tell whether you had the genes, that meant that you had a higher than average, a propensity for

potentially getting cancer. You could then take the steps that you wanted in terms of more frequent cancer screening, maybe changes in diet, a variety of other things you might want to do once you learn you have these genes.

Now, what the patent does is that it gives Myriad marker power over these particular genes. And since, at this time, these genes were the ones that were, particularly, found by scientific research to be associated with cancer, by having the patent, Myriad was able to be the sole provider of testing for screening for these genes. And because they were the sole provider, the cost that they are able to charge was much higher than the actual cost of doing it.

Now, Myriad responded by saying, if people had a demonstrated need, they would lower the price, and so forth, but it was definitely the case that the cost was much higher and the testing was much less available than would have been the case if the patent had not been granted at all. Association of Molecular Pathologies along with a number of other academic public interests and individual physicians, got together and they sued Myriad for a declaratory judgement that the patent claims that Myriad was asserting, that they had in this patent, was in valid and that these claims to the BRCA1 and BRCA2 genes were unpatentable because they were natural phenomena, as that term has been understood in the patent law, and, therefore, invalid entirely and unavailable to Myriad for patenting.

So one thing to understand at the outset is that Myriad argues in this case, that it has clearly patentable, because it is simply doing exactly what the law requires and what the law requires is that you claim an isolated and purified version of whatever it is the naturally occuring product is. The fact that these DNA, these genes, the BRCA1 and BRCA2 genes, in fact, occur in nature is immaterial to the subject matter limitations enquiry. That, in fact, what matters is that what Myriad has claimed in an isolated and purified version.

In fact, what Myriad has done is to claim two slightly different versions of the genes. The first was an isolated DNA coding for the BRCA1 and the other claim was for cDNA genetic sequence for BRCA2. The isolated DNA sequences, in fact, exist in nature. They are literally, if one pulls them out of the human genomre, they would be there. However, they don't really exist in nature in the sense that what Myriad was claiming was the small sequence, the BRCA1 gene is just a small component of the overall genetic sequence. What Myriad says is that these isolated DNA components, because in the labs one essentially break the chemical bonds at the end of the genetic sequence and pull the sequence of interest itself out of the broader genome.

cDNA is a slightly different thing and is a synthetic version of DNA, atleast according to the US Supreme Court. Its created entirely in the lab and its functionally extremely similar to making a copy of the natural DNA, except that you leave out certain unnecessary components. However, these cDNA sequences, these reduced sequences, in fact, occur in nature atleast fairly often. They may not be typical, but, in fact, you do find in nature these reduced for versions of DNA.

The US Supreme Court made a distinction between the isolated, which was natural, but isolated, and the cDNA which was synthetic, not isolated, entirely man-made in the lab. So the Court here says that Myriad's invention here for the isolated DNA sequence are really different, very different than Chakrabarty's. In Chakrabarty, the bacterial was not natural. And the Court says that Myriad's inventions, the DNA sequences of the BRCA1 and BRCA2 genes, they don't do anything other than simply code for what it does in the body and have exactly the same characteristics as what occurs in the body. That's why they're valuable to Myriad. That's why the Court held that these patent claims are not allowed under the law as they are no different than what are found in nature. However, the Court upheld the claim for the cDNA version, although the function itself and the structure to some extent is dictated by natue, on the grounds of it being created in the lab and that is enough reason to accept the claim. The court, even left a footnote while deciding the case, which is going to be critically important in the next couple of decades, saying that if the cDNA claims that you make in your patent application happen to be the same as what are found in nature, then the claim is to be invalid for exactly the same reasons that the Court found, the isolated DNA of Myriad's invalid as well. It was because there was no evidence that the cDNA that Myriad claimed was never naturally occurring.

So what's patentable in the area? As per the US Supreme Court, after the Myriad case, the basic rule here is that man-made materials are patentable, and naturally occurring materials are not. If there's anything that the Myriad case actually did, it was that it cast serious doubt on the Parke-Davis distinction. So even if one takes different kinds of DNA and mix them together in sort of a hybrid, that appears under the Myriad case to also not be patentable because then, the question would be whether this mixture creates what is described as distinct characteristics, something different, such as what the Chakrabarty innovation was, where onecreated an organism that was very different that what had come before.

INTERNATIONAL ANALYSIS

1. USA

It is safe to say that USA has the most liberal approach when it comes to granting monopolies for new inventions. This ideal of the United Stated dates back to its Constitution. As per Article 1, Section 8, Clause 8 of the U.S. Constitution:-

"The Congress shall have power… to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

While the U.S. Constitution authorises patent law, United States patent law is codified in title 35 of the United States Code.

§ 101 of Title 35 of U.S.C deals with subject matter of patents. It is a relatively straightforward Section of patent law and simply establishes that:-

> *"Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."*

This is the very first provision that is meaningful in terms of what can be patented and what cannot. Essentially, all the things enumerated in the § 101 are patentable subject to other requirements of the patent statute. What that means is that § 101 is effectively a gateway or a hurdle, the first hurdle that one needs to overcome in order to have a patentable invention.

Over a period of time, the US Supreme Court in particular has developed a set of categories of subject matter limitations based on the language used in § 101 and its precursor sections over the years.

The U.S. approach with regards to living organisms cannot be considered to be consistent but more of a roller coaster in this never ending debate of to what extent or under what parameters can living organisms be patented. The Chakrabarty case can be considered to be the first step forward to a more liberal approach for making living organisms patentable. What the case did was that it opened the doors for patenting living organisms and created a distinction between invention and discovery, deeming the former to be patentable, making man-made organisms patentable. This approach of US Supreme Court was made even more

liberal after the Parke-Davis case which made even non-living organisms patentable and that living versus non-living doesn't matter and that, really, the line that matters is strictly one regarding whether something is man-made or non-man-made. So post Parker-Davis case, there was a noticeable boom in the biotech industry and billions were being poured in just research for creating something new since during that time, almost anything and everything was patentable. However, this liberal approach of the Court later was restricted with the Myriad case. Now, the current approach that is being followed after the Myriad case, which maybe for the better or worse is still debatable, is that man-made materials are patentable, and naturally occurring materials are not.

The present approach of the US Supreme Court can be given credit to foster invention and disallow people from merely making changes to the existing inventions. However, due to the clay like approach of the US Supreme Court with regards to patentability of living organisms, it can be deduced that the current approach cannot be deemed to be a permanent approach. There will always be a major question mark as to what the Court may permit or not permit in the future. What is uncertain is the 'when'. When will the current approach change and when it does change, will it be for the better or for worse, will it be more liberal or will it be more restricted. All these questions can only be answered by the future.

2. EUROPE:

The patent office of Europe called upon the European Patent Convention in the year 1973. This convention dealt with the constituents of substantive patent laws. However, the concept of Biotechnology which started to emerge was cornered in the laws. Biotechnology was making unforeseen discoveries around the world and required the immediate attention of the law makers to debate upon their protection. This need for attention resulted in the *EU Directive 98/44/EC*, July 1998 which concentrated upon the legal protection of biotechnological inventions. This directive came to be known as the "Biotech Patent Directive" whose aim was to draw a distinction between patentable and non patentable subject matter. The relevant laws governing patents in field of biotechnology in the european continent are

- European Patent Convention: Articles 52-57, 83, 84 followed by the Rule 23 (b-e) and Rule 28.
- Biotech Patent Directive: Directive 98/44/EC

Patent laws vary from country to country. However, there are some essential grounds for the granting of a patent that stay constant throughout the world. These essential grounds establish a basic structure for the entitlement of a patent. They are[6] :

1. Novelty
2. Inventiveness
3. Utility of the product.

Novelty[7]: The basic requirement for granting a patent is the newness of a product or an invention. One cannot patent something that already exists in the world and is publicly known. In Europe and throughout the world Prior Existence and knowledge are the greatest barriers for the march of patent applications and rights. This test of originality or novelty is assessed as on the date of application of a patent. The fundamentals of novelty vary from country to country, what is new in one country may not be new in another.

"The following in particular shall not be regarded as inventions within the meaning of paragraph 1: ***(a) discoveries, scientific theories and mathematical methods..***"[8]The EPC resorted to a conservative approach on the concept of discoveries. When the article 52 (2) is given a plain reading, it is understood that there exist certain limitations in for the patenting of certain inventions, specially living organisms. Such impositing of limitations is based on the principle of "product of nature" which highlights the distinction between *discovery* and *invention*. When something new such as a characteristic, a use or a chemical composition etc. is found *in* a product of nature (assumed to be freely existing already) it is known as discovery and not invention as the product was already in a state of being in the course of nature. These "discoveries" are not patentable.[9] For a patent to be granted for such discoveries, the applicant needs to prove to the office that the substance so discovered can be put to a new use. If such proof satisfies the office, patent is granted for the living organism and its new use. Furthermore, substances occurring naturally are patentable if they innovation involves isolation by technical means. It should be established that such substances would not have come into existence if there was no technical intervention.[10]

[6] These grounds are not exhaustive, grounds can vary from country to country.
[7]Convention on the Grant of European Patents, art. 54, 13 ILM 268(1973). [hereinafter, *EPC*].
[8]*id. art.* 52.
[9] *Guidelines for Examination*, EUROPEAN PATENT OFFICE (Jan. 26, 2019),https://www.epo.org/law-practice/legal-texts/html/guidelines/e/b_iv_2.htm.
[10]Bundespatentgericht [BpatG] [Federal Patent Court]July 28, 1977, Beschluss vom 16 W (pat) 64/75(Ger.).

"an element isolated from the human body or otherwise produced is not excluded from patentability since it is, for example, the result of technical processes.."[11] Let's take an example of the leading sphere in biotechnology and intellectual property rights, gene sequencing or genetic organisms. A general notion that exists is that a gene is not invented but is discovered because a gene is a product of the nature and is an entity that exists in a host such as a living organism. This notion is falsified as, in current practice, altered, modified and isolated genes used by biologists are considered to be new under the European Patent Laws as such a sequence of genes will have never existed until such time of discovery. "*partial sequences should be subject to the same criteria of patentability as in all other areas of technology:* ***novelty, inventive step and industrial application****;.."*[12]

This paves way for the granting of a patent for the granting of a patent to "*second and non-medicinal uses*"[13] i.e. patent can be granted to those uses of a newly discovered product already existing in the nature which were unidentified at the first instance. For example: Mr. Roger discovered product X with uses QW, ER and TR and had it patented. Mr. Salmon, had discovered a new use such as YU and IO. Initially, Mr. Salmon would not have any right to patent these uses as they, ultimately, originate from the discovered product X by Mr. Roger. However, the shift in European laws now allow Mr. Salmon to obtain patent for his "*second*" uses that he had discovered.

Inventive Step: In life, if someone states something obvious, he is not given credit for it. The same way, the test of obviousness states that when something is invented, it should not be obvious for a skilled person in that line of work to make it. If it so, it cannot be patentable. In the USA it is referred to as "Non-obviousness" and in the Europe, it is known as "inventiveness". Factors such as "reasonable expectation of success"[14] and "unexpected properties" furthered the inventive step method and became grounds for patent. Something ceases to be inventive when a person has fed off of an already existing invention in a particular art. Nevertheless, a patent is granted when the applicant is able to prove an "unexpected use" of that product which no one has come across until then. In the field of Biotechnology, the production of something new is called out be as a discovery than as an invention as it already exists as a product of nature. "*An invention shall be considered as*

[11]Directive 98/44/EC of the European Parliament and of the Council on the legal protection of biotechnological inventions, art 21, 1998 O.J. (L 213/13).[hereinafter *Directive 98/44/EC*]
[12]*id. art.* 22.
[13]Case T-0059/87, Mobil Oil Corp. v. Chevron, 1990 E.C.L.I. 288.
[14] Laurie Hill, *The Race to Patent the Genome: Free Riders, Hold Ups, And the Future of Medical Breakthroughs*, 11 tex. Intell. Prop. L.J. 221 (2003).

involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art."[15]The inventiveness of an invention/discovery is based on a 3 step test developed by the European Patent Office also known as the "problem–solution approach" which aims at considering the inventions as a whole and not in part. This approach consists of three steps which are considered by the EPO:

I. *Closest prior art*: the closest relative of the product in the same genus which was already existing before.

II. *Objective technical problem*: the problem that particular invention is aiming to solve.

III. *Obviousness:* the applicant of the patent/ the inventor should not have invented something just by changing the old inevntion. He should have thought about such a function/ mechanism of a product irrespective of the prior product's existence.

Utility of the product[16]: "*Whereas, in order to comply with the industrial application criterion it is necessary…**to specify which protein or part of a protein is produced or what function it performs***"[17]. In these cases the word industry is given the widest interpretation possible. An invention is said to have a purpose or is deemed to be useful for industrial application when "*it can be made or used in any kind of industry, including agriculture*."

Exceptions to Patentability : European patents shall not be granted in respect of:

*(a) inventions the commercial exploitation of which would be contrary to "**ordre public**" or morality[18];* Ordre Public means the order of the things in the society as a whole. An invention against the society and its beliefs cannot be granted a patent as it is a highly volatile and dynamic matter. Inclusion of this clause which deals with the order and moral beliefs of the society is criticised on many occasions as the concepts of morality are subjective and keep changing from one person to another. How can laws base themselves on dynamic beliefs was the question that was left unanswered.

*(b) plant or animal varieties or essentially **biological processes** for the production of plants or animals; this provision shall not apply to microbiological processes or the products thereof;* Plant varieties are excluded from patentability in the clause (b) of article 53 in this convention in order to avoid double protection as the UPOV convention 1961 already

[15]*EPC, supra* note 7, art. 56.
[16]*EPC, supra* note 7, art. 57.
[17]*Directive 98/44/EC, supra* note 11, art. 24.
[18]*EPC, supra* note 7, art. 52.

protects the plant varieties that are new and distinct through the breeders rights. The word biological processes was explained as "*processes that consist entirely of natural phenomena such as crossing and selection*"[19]. Furthermore, Processes for cloning human beings, germ line modification and uses of human embryos for industrial uses are also excluded from patentability.[20]

Disclosure[21]: Non-prejudicial disclosures lays down that for the application of Article 54, a disclosure of the invention is not taken into official consideration in cases where it was disclosed because of

1. an abuse of relationship between the applicant and his legal representative or
2. a showcase of the invention in a recognised exhibition or an expo.

However when the invention is disclosed by the applicant to the office it should be done in "*a manner sufficiently clear and complete*"[22]

3. INDIA:

It is a known fact that biotechnology patenting in India is still in its infancy. The paradigm shifts away from India's earlier narrow and rigid anti-patent product regime coupled with a rapidly expanding biotechnology industry which is backed by colossal investments from both private and even public sectors has resulted in a massive and rather sudden surge in biotechnology patenting activity in India.

The Patent Act does not enumerate what is patentable but rather by way of omissions of subject matter from the non-patentable sections clarify what subject matter can be patented. It was only after becoming a member of TRIPS agreement that India had to make its intellectual property rights in line with TRIPS. This resulted in the amendment of the Indian Patent Act, 1970 in June, 2002. The new Act has explicitly excluded certain items and processed from the definition of invention, thus making them unpatentable.[23] The mere discovery of "any living thing or non-living substance occurring in nature" is not an invention and therefore, not patentable under the Act.[24] Section 3(k) of the Act expressly excludes from

[19]*EPC, supra* note 7, rule 23.
[20]*EPC, supra* note 7, rule 28.
[21]*EPC, supra* note 7, art. 55.
[22]*EPC, supra* note 7, art. 83.
[23]The Patents Act, 1970, No. 39, Acts of Parliament, 1970, § 3. [hereinafter *Patents Act*]
[24]The Patents (Amendment) Act, No. 38, Acts of Parliament, 2002, § 4(b). [hereinafter *Patents (Amendment) Act*]

patent protection "plant and animals in whole or any part thereof other than microorganisms but including seeds, varieties and species and essentially biological process for production or propagation of plants and animals".

Although patents for a method of horticulture are not allowed under the Act,[25] the Act does explicitly specify that any method relating to the treatment of plants is patentable.[26] This is where the growing western approach which can be considered equivalent to the growing liberal approach be seen. In simpler words, the Act basically allows an invention to be patented that is merely a method of making plants free of disease.[27] Furthermore, even the process for improving the plant's value or increasing the value of plant's product is patentable.[28]

The most notable case in India with regards to patentability of living organisms in India which can be considered to open the way for numerous inventions related to microorganisms, resulting in a massive boom of biotech industries is the case of Dimminaco AG v. Controller of Patent Design[29]. The case primarily dealt with the issue that whether a process involving microorganisms that are living as an end product can be patented or not. On examination of such process patent, the examiner refuted the contention of applicant on the ground that the vaccine in question involves certain micro organic substances and concluded that the said process is not an invention and hence not patentable. The dispute was put to an end by the Calcutta High Court. The Court highlighted that Indian law on patent does not put any chains on patentability of microorganisms developed in a controlled environment in laboratories. In the end, the Court concluded to accept the process of manufacturing buristus vaccine as patentable subject matter, even though the end product contained is a living organism.

One can notice that India has somewhat similar but restricted approach as the US Supreme Court in the Parke-Davis Case. In Parke-Davis Case, the US Supreme Court was of the view that isolated and purified versions of things, even things that are natural, are, in fact, as far as the law is concerned, non-natural, man-made, and therefore, patentable. Whereas, in India the requirement is that the end product in question to be made in a controlled environment in laboratories, even though the end product contained is a living organism. However, the major difference between India and US is that in India, plants and animals cannot be patented and it

[25] *Patents Act*, *supra* note 23, § 3(h).
[26] *Patents (Amendment) Act*, *supra* note 24, § 4(d)(ii).
[27] *Patents (Amendment) Act*, *supra* note 24, § 4(e).
[28] *Patents (Amendment) Act*, *supra* note 24, § 4(e).
[29] Dimminaco AG v. Controller of Patent Design, 2002 AIR 1 (Cal.).

is only microorganisms that can be patented. One may consider the Indian approach to be narrow or rather restricted. However, this can also be seen as a baby step towards a future which may be more liberal with regards to what all living organisms can be patented.

Patents for plant varieties and farmer's rights in India:

70 percent of India's rural households still depend primarily on agriculture for their livelihood, with 82 percent of farmers being small and marginal[30]. In a country where dependence on agriculture and farming is so high, there needs to exist a system which protects the rights of the farmers and breeders of plants in the course of agriculture. In the early 1980's and 1990's distributing agencies were formed in order to distribute the government produced seeds at cheap prices to the farmers for their benefit. To further the cause of striking a balance between growing intellectual property rights and advent of international corporations in the agricultural industry , India resorted to adopting a *sui generis* form of protection for the plant varieties by formulating and adopting the Protection of Plan Varieties and Farmers Rights Act 2001 whose object was stated as follows*: "An Act to provide for the establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants..."*.[31] The preamble of the act also establishes that the said act operates to give effect to the Article 27 (3) (b) of the TRIPS agreement which states that "*(b) ...However, Members shall provide for the protection of plant varieties either by patents or by an effective* ***sui generis system*** *or by any combination thereof.."*[32] which India has ratified.

The act establishes a criteria for registration of varieties which include novelty at the time of application, distinctiveness at least through one characteristic from an already existing variety, uniformity and stability the in essential characteristics of the variety.[33]In order to level the playing field for the interests of the breeders as well as the farmers the PPV&FR act introduced the "Extant Variety" clause which defines extant variety as that about which there is common knowledge or is in public domain[34]. This is in contrast to the "Farmers Variety" clause which defines farmers variety as that which has been traditionally cultivated and

[30] FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS,http://www.fao.org/india/fao-in-india/india-at-a-glance/en/ (last visited Jan. 13, 2019).
[31]The Protection of Plant Varieties and Farmers' Rights Act, 2001, No. 53, Acts of Parliament, 2001, Preamble. [hereinafter *PPV&FR*]
[32]Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).
[33]*PPV&FR*, *supra* note 31, § 15.
[34]*PPV&FR*, *supra* note 31, § 2.

evolved by the farmers in their fields, or is a wild relative or landrace of a variety about which the farmers possess the common knowledge [35]. Therefore, a variety does not necessarily need to be novel. However, it has to conform itself to the other three criteria's for registration. The Act grants the right to a farmer, breeder, a community of farmers, an university or a public sector undertaking to register any of the above mentioned varieties[36]. This move aimed at preserving the traditional knowledge and indigenous rights and to ensure that such knowledge is not misappropriated.[37]

CONCLUSION

We have a come a long way from inventing something as common as the wheel or for that matter even fire to playing God and creating an entirely new living organism. Whether giving exclusive rights over a man-made living organisms is the right thing to do has been a never ending debate. However, it can be deduced that the answer to this never ending debate, whether giving exclusive rights for living organisms is the right thing or not, depends primarily on the approach of the society towards this. It can be noted that a conservative country like India is still skeptical about this and hence, does not allow patenting living organisms. Whereas, countries like the USA or Europe, which can be deemed to be more liberal and forward looking have accepted patenting of living organisms subject to certain restriction, that being, the thing invented should be man-made and not naturally occurring. These countries have shifted their focus to the debate of invention versus discovery and under the umbrella of this, have allowed patenting of living organisms if they are man-made and not naturally occurring.

There is a flip side to the above mentioned approach as well. Whenever man creates something, it never thought it could, it is deemed or rather believed to be playing God. There may have been a possibility that man would have been compared to God whenever any scientific achievement was reached. So if we can give a patent for most inventions, is it reasonable to restrict patentability merely because the subject is a living organism? I believe this approach will change in the due course of time and eventually we may live in a future where invention of living organisms is as common as the invention of the wheel. When that

[35] *PPV&FR*, *supra* note 31, § 2(1)(i) & (ii) Sec 2 (l) (i) & (ii) of PPV&FR Act.
[36] *PPV&FR*, *supra* note 31, § 16.
[37] Rohit Mooka&Silky Mukherjee, *TRIPS Flexibilities and India's Plant Variety Projection Regime: The Way Forward*, 5 BRICS L.J. 117 (2018).

times come, the current restrictions may go out of the window and we may observe a shift towards a more liberal approach. However, all of this is a mere possibility.

Therefore, it is safe to say that we are at a very crucial time right now with regards to growth of our patenting laws. It is how we, the people, the society, perceive things and how we accept these new inventions that holds a major significance with regards to patentability of living organisms.

UNDERSTANDING PENAL POPULISM IN THE BACKDROP OF UNFOUNDED DEVELOPMENTS IN RAPE LAWS

*Anmol Jain**

ABSTRACT

This paper concerns the recent developments in rape laws through multiple legislative amendments introducing death penalty as a punishment for rape of women below 12 years of age. The author has attempted to contend that such amendments are mere tools of penal populism to divert the public discourse in favour of the incumbents before the upcoming elections. The scope of this paper is restricted to only those cases where the rape did not lead to death of the victim. It is emphasised that the author supports the application of Section 376-A of IPC that allows granting death penalty to convicts of rape when the victim dies due to the crime. The blockades to the amendments come from multiple realms as the impugned laws subverts the constitutional mandates of equality, defies the criminological principles as presented under various theories of crime and punishment, undermines certain reports of the authorities, disregards the principles of international law and proves to be unscientific when tested against facts and statistics. The Criminal Laws (Amendment) Act, 2018 has created multiple classes of victims based on which punishments are conferred upon the accused. This leads to over-classification of a class violating Article 14 of the Constitution. Another constitutional challenge comes in through the Extradition Act. It disallows conferment of death penalty to any fugitive criminal extradited to India if the extraditing country does not provide for death penalty for rape, which hints to unequal treatment. The amendments have also disregarded the ratio of *Bachan Singh v. Union of India,* which has mandated that death penalty can be imposed only in rarest of the rare cases. It is argued through the analysis of multiple case laws that rape, where the victim survives, does not qualify as rarest of the rare case. Through such multi-facet discussion, the author has settled with a view that curative and harsh punishments are mere acts of penal populism, true success lies with preventive measures and transforming the intellect.

I. INTRODUCTION

The two cold-blooded gang-rapes and murders of minor girls, one in Unnao, Uttar Pradesh[1] and the other in Kathua, Jammu & Kashmir[2] had steered a widespread outcry in the country

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demanding stringent rape laws. This was followed by multiple acts of penal populism by the State Legislatures, the Hon'ble President of India and the Lok Sabha, manifested as amendments to the Criminal Laws. The first in this order of events was the Madhya Pradesh State Legislative Assembly that unanimously passed a law provisioning death penalty for those found guilty of raping woman up to twelve years of age.[3] The states of Rajasthan,[4] Arunachal Pradesh,[5] Haryana[6] and Punjab[7] followed similar steps, not only in implementing the law but also in penalising the accused.[8] The latest proposal in this league has come from the state of Uttarakhand,[9] wherein the Chief Minister has promised to bring a legislation in the next session of the state assembly for the same. Withal to these events, the Hon'ble President of India had also issued an Ordinance providing for death penalty of rape of girls below the age of 12.[10] This Ordinance has been cloaked in the form of The Criminal Laws (Amendment) Bill, 2018. This Bill has received the assent of the President on August 11th, 2018 with a retrospective effect from April 21st, 2018, the date of the Ordinance.[11]

The context in which this paper is written has been articulated above. The intent for presenting my opinions through this paper is to put forth certain constitutional, criminological

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[1] *Unnao rape case: Here's everything you need to know,* THE INDIAN EXPRESS (Apr. 14, 2018),https://indianexpress.com/article/india/unnao-rape-case-bjp-mla-kuldeep-singh-sengar-arrested-5137445/.

[2] *Crime in Kathua*, THE HINDU (April 13, 2018), https://www.thehindu.com/opinion/editorial/crime-in-kathua/article23516777.ece.

[3] The Criminal Laws (Madhya Pradesh Amendment) Act, 2017;*Death Penalty for rape of girls aged 12 and below: MP Assembly passes Bill*, THE HINDU (Dec. 4, 2017), https://www.thehindu.com/news/national/other-states/death-penalty-for-rape-of-girls-aged-12-and-below-mp-assembly-passes-bill/article21260343.ece.

[4] The Criminal Laws (Rajasthan Amendment) Act, 2018;*Rajasthan passes Bill for death penalty for rape of girls aged 12 & below*, THE INDIAN EXPRESS (Mar. 9, 2018), https://indianexpress.com/article/india/in-rajasthan-those-found-found-guilty-of-raping-girls-below-12-to-get-death-penalty/.

[5] The Criminal Laws (Arunachal Pradesh Amendment) Act, 2018;*Arunachal Pradesh approves death penalty for rape of girls under 12*, HINDUSTAN TIMES (Mar. 16, 2018), https://www.hindustantimes.com/india-news/arunachal-pradesh-approves-death-penalty-for-rape-of-girls-under-12/story-xTKSNUcgCfQPWabOcPUUrN.html.

[6] The Criminal Laws (Haryana Amendment) Act, 2018; *Haryana Assembly okays death penalty for child rape*, THE HINDU (Mar. 16, 2018), https://www.thehindu.com/news/national/other-states/haryana-assembly-okays-death-penalty-for-child-rape/article23268202.ece.

[7] The Criminal Laws (Punjab Amendment) Ordinance, 2018;*Punjab adopts death penalty for rape of below-12 girls*, HINDUSTAN TIMES (Jun. 27, 2018), https://www.hindustantimes.com/punjab/state-adopts-death-penalty-for-rape-of-below-12-girls/story-6QW2HbQgwBJcOqPnmzOVNK.html.

[8] *Rapists gets death in MP, first after new law*, THE TIMES OF INDIA (Jul. 8, 2018),https://timesofindia.indiatimes.com/india/rapist-gets-death-in-mp-first-after-new-law/articleshow/64901928.cms; *19-year-old gets death penalty for raping infant in Rajasthan*, HINDUSTAN TIMES (Jul. 21, 2018), https://www.hindustantimes.com/india-news/19-year-old-gets-death-penalty-for-raping-infant-in-rajasthan/story-0qddEwTeIPAqtkctgcsz1O.html.

[9] *Uttarakhand to introduce law to give death penalty to rapists of minor girls*, THE WIRE (Jul. 13, 2018), https://www.thewire.in/law/uttarakhand-to-introduce-law-to-give-death-penalty-to-rapists-of-minor-girls.

[10] The Criminal Law (Amendment) Ordinance, 2018;*President approves ordinance on death penalty to child rapists*, THE ECONOMIC TIMES, (Apr. 22, 2018), https://economictimes.indiatimes.com/news/politics-and-nation/president-approves-ordinance-on-death-penalty-to-child-rapists/articleshow/63866296.cms.

[11] The Criminal Laws (Amendment) Act, 2018, https://mha.gov.in/sites/default/files/CSdivTheCriminalLawAct_14082018_0.pdf.

and factual blockades that prevail in the voyage to deem death penalty for rape of girls below 12 years a just punishment.

Before I move on to specify such blockades, I feel a need to present a couple of clarifications:

- That wherever the paper mentions 'death penalty,' it be read as 'death penalty for rape of girls below 12 years of age, provided the victim survives';
- The author does not intend to challenge the existence of death penalty as such in the law books; the only concern is to challenge the death penalty in cases where victim survives. Consequently, it must be emphasised that the author is in support of providing death penalty to those found guilty of raping a woman and thereby causing her death or causing the woman to be in a persistent vegetative state.[12]

II. DECODING THE CRIMINAL LAWS (AMENDMENT) ACT, 2018

The Criminal Laws (Amendment) Act, 2018 has classified the punishment of rape according to the age of the victim. The difference between the said Act and other state amendments lies in provisions providing three-layer classification[13] for punishment under the Act, whereas the state amendments only provide for two-layer classification.[14]The three-layer classification can be depicted as follow:

Crime/Age Class	Below 12 Years	12-16 Years	Above 16 Years
Rape	Rigorous imprisonment for a term not less than 20 years, but extendable to imprisonment for life + fine; or death.[15]	Rigorous imprisonment for a term not less than 20 years, but extendable to imprisonment for life + fine.[16]	Rigorous imprisonment for a term not less than 10 years, but extendable to imprisonment for life + fine.[17]
Gang-Rape	Imprisonment with life + fine; or death.[18]	Imprisonment for life + fine.[19]	Rigorous imprisonment for a term not less than 20

[12]*See*Section 376-A, Indian Penal Code, 1860.
[13] The Criminals Laws (Amendment) Act, 2018 provides for different punishments for rape of girls below 12 years of age, 12-16 years of age and girls above 16 years of age.
[14] The State Amendments provides for different punishments for rape of girls below 12 years of age and girls above 12 years of age.
[15]The Criminal Laws (Amendment) Act, 2018, §5, introducing Section 376-AB to the Indian Penal Code, 1860.
[16]The Criminal Laws (Amendment) Act, 2018, §4, introducing Section 376(3) to the Indian Penal Code, 1860.
[17]The Criminal Laws (Amendment) Act, 2018,§4, amending Section 376(1) of the Indian Penal Code, 1860; This punishment is subject of Section 376-A, Indian Penal Code, 1860 which provides that if the person found guilty causes the death of the woman or causes the women to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than 20 years, but is extendable to imprisonment for life or with death.
[18]The Criminal Laws (Amendment) Act, 2018, §6, introducing Section 376-DB to the Indian Penal Code, 1860.

			years, extendable to imprisonment for life + life.[20]

Table 1: Punishments introduced to the Indian Penal Code, 1860 by virtue of the Criminal Laws (Amendment) Act, 2018

III. WHYS AND WHEREFORES OF DEATH PENALTY

The script under this part voices the blockades for justifiability of the Criminal Laws (Amendment) Act, 2018 and other alike state amendments [to be collectively referred as "**The impugned laws**"]. First, I shall discuss the challenges alluring from the Constitution of India ["**The Constitution**"] and the Extradition Act. Post that, I shall indulge into factual and statistical difficulties that such laws encounter. This will be followed by a discussion along the lines of rarest of the rare case doctrine and the trend of India Penal Code ["**IPC**"] in having provisions imposing death penalty. It will be trailed by presenting support to the proposition of this paper through various theories of crime and punishment, reports of authorities and International law developments.

A. The impugned laws faces constitutional scathing

The impugned laws infringe upon the rights guaranteed under Article 14[21] of the Indian Constitution via dual itineraries:

a. They result into over-classification, owing to microscopic differentiations among multiple age-classes;
b. They lead to an unequal treatment of an accused of committing sexual offence when extradited to India.

1. Over-classification finds no relief under the Constitutional scheme.

The Constitution of India warrants equality before law.[22] However, it does allow reasonable classification based on intelligible differentia for achieving certain purpose[23]. The requirement for deriving a just classification is that it must be real and substantial and must possess a rational relation with the object sought by the law making authorities.[24] The

[19]TheCriminal Laws (Amendment) Act, 2018, §6, introducing Section 376-DA to the Indian Penal Code, 1860.
[20]Indian Penal Code, 1860, §376-D.
[21]INDIA CONST. art. 14.
[22]INDIA CONST. art. 14.
[23]DharamDutt v. Union of India, (2004) 1 SCC 712.
[24]Naresh Kumar v. Union of India, (2004) 4 SCC 540; Municipal Committee, Patiala v Model Town Residents Association, (2007) 8 SCC 669.

Criminal Laws (Amendment) Act, 2018 does not specify any objects or reason for the introduction of enhanced punishments under three-level age classification of women.[25] Concerning the Criminal Laws (Rajasthan Amendment) Act, 2018, the object sought is the protection of girls up to twelve years of age and to impose a deterrent punishment on the rapists.[26] The state considers itself duty-bound to protect its off-springs.[27]Having such an object to support the classification, one must be afraid that this does not have a sufficient rationale. It is the awful, unfair and unreasonable attitude of the Government that they seek to achieve the protection of a limited section of women. The Government is duty-bound not only to protect its off-springs, but the entire society without any classification or differentiation. Comparatively lenient laws for the women above 12 years show nothing but presenting an illusion of responsible government just to pacify and simultaneously appease the citizenry for it being the most convenient way to do so.[28] It is a mere apparatus of penal populism,[29] utilized just before upcoming elections.[30]

Moreover, three-level age classification of woman under the Act is overdoing classification. The Supreme Court has time and again recognized that mini-classification based on micro-distinctions are false to our egalitarian faith thus, are violative of Article 14.[31] The classification must be substantial and straight forward; to overdo classification is to undo equality.[32]

The most subtle way to differentiate women classes based on the age and mental & physical development would be classifying them into minors and majors. The classification hitherto the impugned laws was based on the aforementioned cataloguing under the Protection of Children from Sexual Offences Act, 2012. Undertaking further classification and providing diverse levels of stringency in punishment among the different classes of women would be

[25]There is no attached 'Statement of Objects and Reasons' with the Criminal Laws (Amendment) Bill, 2018.
[26]*See*Statement of Objects and Reasons, The Criminal Laws (Rajasthan Amendment) Act, 2018.
[27]*Ibid*.
[28]*See*KailashSatyarthi, *Towards a culture of moral responsibility*, THE HINDU (Jul. 13, 2018), https://www.thehindu.com/opinion/op-ed/towards-a-culture-of-moral-responsibility/article24401822.ece.
[29]Penal Populism is an apparatus though which the political parties tries to gain advantage of the emotionally active or affected public by being tough on crimes and raising voices for harsher punishments for crime. *See also*Gilles Renaud, *Penal Populism, Sentencing Councils and Sentencing Policies*, 4 ORIGINAL L. REV. 68, 77 (2008).
[30]The term of the State Assemblies that have enacted the impugned laws ends on: Arunachal Pradesh: 01.06.2019; Haryana: 02.11.2019. The end of term of the 16th Lok Sabha is due on 03.06.2019. *SeeTerms of the Houses*, ELECTION COMMISSION OF INDIA, http://eci.nic.in/eci_main1/terms_of_houses.aspx.
[31]ChinnaiahE.V. v. State of Andhra Pradesh, (2005) 1 SCC 394;RoopchandAdlakha v. D.D.A., AIR 1989 SC 307.
[32]State of Jammu and Kashmir v. TrilokiNathKhosa, (1974) 1 SCC 19; Food Corporation of India v. Om Prakash Sharma, (1998) 7 SCC 676.

microscopic classification. In addition, it portrays that the State considers one class of women as more dear to it than others.

2. Unequal treatment of fugitive criminals flouts the Constitution

The constitutional derisive is not limited to the impugned laws, but extends to the Extradition Act as well. Section 34C of the Extradition Act, 1962 provides that notwithstanding any other law, where a fugitive criminal, who has committed an extradition offence punishable with death in India, is surrendered or returned by a foreign state on the request of the Central Government and the laws of such foreign state do not provide for a death penalty for the offence, then such fugitive criminal shall be liable punished with imprisonment for life at the maximum.[33]

Such provision would automatically come under the scrutiny of constitutional summons due to the impugned laws because a native shall be eligible for death penalty, but not the fugitive. This goes against the Indian constitutional scheme as it creates an unreasonable classification.

Should this be a recherché occurrence, the author would have been nonchalant. The archives of the Ministry of External affairs provides that multiple accused/convicts have been extradited to India for charges of child sexual offence.[34] This enhances the significance of the following discussion.

The Constitutional equality before the law signifies denial of any special privilege in favour of an individual and equal subjection of all individuals to the ordinary law of the land administered by the courts of a country.[35] The right to sue and to be sued, to prosecute and to be prosecuted, for the same kind of action should be the same for all citizens of full age and understanding and without distinction of race, religion, wealth, social status, or political influence.[36] However, it is acceptable that the question of discrimination should arise only

[33]The Extradition Act, 1962, §34C. *See*§§ 2(c) and 2(f) for the definition of fugitive criminal and extradition offence.
[34]*SeeList of Fugitives Extradited by Foreign Governments to India*, MINISTRY OF EXTERNAL AFFAIRS, GOVERNMENT OF INDIA (Mar. 19, 2018), http://www.mea.gov.in/toindia.htm.
[35]A. V. DICEY, LAW OF THE CONSTITUTION 193 (1959); 2DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 1430 (9th Ed. 2014); UNITED NATIONS, U.N. Covenant on Civil and Political Rights, art. 26 (1966); State of Karnataka v. B. SuvarnaMalini, AIR 2001 SC 606; Gajendra Singh v. State of Rajasthan, AIR 2001 Raj 328.
[36]IVOR JENNINGS, LAW AND THE CONSTITUTION 50 (5thed.).

between persons who are similarly situated;[37] for unequally or differently placed people, different laws can be envisaged.[38]

Therefore, the rational classification would be as following:

Applicable jurisdiction on Fugitive Criminal	Maximum Punishment	Reason
Foreign	Life imprisonment	He was not subject to the Indian laws at the time of crime and thus when he has been surrendered by a foreign state, he should be given certain benefit.
Indian	Death Penalty	He was subject to the Indian Jurisdiction and thus he cannot be placed on an alternative pedestal than other convicted or accused persons. If this is allowed, it will give way to the practice of committing crime in India and fleeing abroad to dodge death penalty.

As Section 34C does not classify between the accused/convicts based on the aforementioned classes, the impugned laws grants undue privileges to one class of people.[39]

B. Factual and Statistical cordons for death penalty being apposite

For ages, it has been vehemently argued that death penalty induces deterrence in the society, though the justification for the same have been diverse.[40] Per Contra, I shall be employing the data from the National Crime Records Bureau ["**NCRB**"] to counter the assertion of deterrence through the instrument of death penalty.

A heinous offence like murder, which has beheld death penalty as one of the punishments since the inception of the Indian Penal Code, is still committed at an average of 30,000 per year.[41] This is a portrayal of bungled process to control crimes in the country. Mere emphasis on death penalty is of no avail as no person commits a crime after analysing the punishment attached. A crime is committed for a pre-determined or instantly formed motive or without a

[37]Food Corporation of India v. BhanuLodh, (2005) 3 SCC 618; Pranab Kumar Roy v. RBI, AIR 1993 Cal 50.
[38] Lord Wright, *Liberty and the Common Law*, 9(1) CAMB. L. J. 2, 16 (1945).
[39]A person who committed the crime while being subject to the Indian jurisdiction but taken under custody as fugitive criminal stands on a privilege than a person who generally committed the crime while being subject to the Indian jurisdiction and taken under custody as a normal criminal.
[40]J. B. Cederblom, Gonzalo Munevar, *The Death Penalty: The Relevance of Deterrence*, 7 CRIM. JUST. REV. 63, 66 (1982).
[41]*Table 2A.1, Murder Cases – 2014-2016*, NATIONAL CRIME RECORDS BUREAU (Jan. 15, 2018) http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/Table%202A.1.pdf.

motive owing to an unconscious impulse.[42] As has been correctly said, execution kills the criminals and not the crime.[43]

Another fallacy emerges if one analyses the NCRB data on incidence of rape on women under different age groups. The data can be summarized as follow:

Age-Group	**Number of Cases**
Below 12 years	1,936 (5.16%)
12 years to 16 years	5,769 (15.40%)
16 years and above	29,762 (79.44%)

***Table 2: Number of cases reported by female victims of rape under different age-groups - 2016*[44]**

We find here that the stringency of punishment under the impugned laws reduces with the increased frequency of crime, i.e. the age-class fearing maximum crime has been secured with the minimum punishment by the lawmakers. The impugned laws are nothing but a façade of deceit to serene the ignited subjects of their mighty decrees, loosely called penal populism. This would reveal to be an abortive measure for not being scientifically analysed.

The deterrence is further diminished with the state policy of no-hanging. During the period of 2001-2017, only four prisoners have been executed in India, of which, three were associated with terror attacks.[45]

Further, many of the cases of rape remains unreported in India because of social-disgrace, victim-shaming and the sorry state of the criminal justice system. This sociological aspect combined with an NCRB data would project the inconveniences created by the new law.[46] The NCRB data on cases in which offenders were known to victims may substantiate:

Relation between offender and victim	**Number of cases**	**Percentage of cases**
Grandfather/father/brother/son	630	1.61
Close family members	1087	2.79
Relatives	2174	5.58
Neighbours	10520	27.01
Employer/Co-worker	600	1.54

[42]*See*Mithu v. State of Punjab, AIR 1983 SC 473.
[43]ChaitanyaMallapur, *Only 4 Executed in 13 years. Is death penalty even working?*,THE QUINT (May 28, 2018), https://www.thequint.com/news/politics/death-penalty-for-child-rapists-deterrence.
[44]*Table 3A.3, Women & Girls Victims of Rape under Different Age-Groups - 2016*, NATIONAL CRIME RECORDS BUREAU (Jan. 15, 2018), http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/Table%203A.3.pdf.
[45]*See Prisoners Executed in India*, PROJECT 39A-NLU DELHI, https://www.project39a.com/prisoners-executed-in-india-since-independence-1.
[46]*SeeIndia: Reject Ordinance on Death Penalty for Rape*, HUMAN RIGHTS WATCH (Apr. 24, 2018), https://www.hrw.org/news/2018/04/24/india-reject-ordinance-death-penalty-rape.

Live in partner/Husband	557	1.43
Known persons on promise to marry	10,068	25.86
Other known persons	11,223	28.82
Offenders not known to victims	2,088	5.36

Table 3: Number of cases reported by female victims of rape in which offenders were known/non-known to the victims - 2016[47]

The data presents that in about 94.64% rape cases registered in India, the offenders were known to the victim. In such circumstances, provision for death penalty would make the victims more reluctant to approach the law enforcing authorities because the fear of ridicule from the near and dears for being personified as killers or the reasons for the death of the known, if the death penalty is awarded, would submerse them.[48]

Moreover, provisions prescribing death penalty may upshot certain negative implications for the victims in the bargain. Death penalty for the offence of rape would compel the accused to disregard the hapless state of the victim and attempt her murder to escape the gallows of law.[49]This goes in consonance with the recommendations of the Justice V. S. Malimath Committee Report.[50]

Visualizing all the above stated data, I am inclined to conclude that death penalty in the cases where the victim survives are not an apposite form of punishment; and providing it only for women below 12 years is specious and unfounded.

C. A rape, where the victim survives, does not qualify as rarest of the rare cases.

Rarest of the rare cases doctrine, as evolved by the Hon'ble Supreme Court of India to balance the arguments of complete abolishment of the death penalty and the argument for retention of the death penalty for limited purposes, provides that a person shall not be killed save in the rarest of the rare cases when the *alternative option is unquestionably foreclosed*.[51] This comes as a real and abiding concern of the apex court for the dignity of human life that postulates resistance to taking a life through an instrumentality of the state.

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[47]*Table 3A.4, Offender Relation to Victims of Rape - 2016*, NATIONAL CRIME RECORDS BUREAU (Jan. 15, 2018), http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/Table%203A.4.pdf.

[48]*See*Vrinda Bhandari, *Kathua and After: Why the death penalty for child rape will not deter offenders*, THE WIRE (May 7, 2018), https://thewire.in/law/kathua-and-after-why-the-death-penalty-for-child-rape-will-not-deter-offenders.

[49]Rituparna Chatterjee, *India's death penalty for rapists of young girls could push them to kill*, THE GUARDIAN (Apr. 24, 2018), https://www.theguardian.com/global-development/2018/apr/24/india-death-penalty-rapists-young-girls-murder-avoid-detection; Moushumi Das Gupta, *Will death penalty for rape of children help reduce crime?*, HINDUSTAN TIMES (Apr. 26, 2018, 08:12 AM), https://www.hindustantimes.com/india-news/will-death-penalty-for-rape-of-children-help-reduce-crime/story-pJlrWKuAL41YToJUQTHifI.html.

[50]1REPORT OF COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM 291 (Mar. 2003).

[51]Bachan Singh v. State of Punjab, (1980) 2 SCC 684.

The reasons to impose or not to impose the death penalty includes the circumstances of the crime as well as the criminal; and that whether or not any other alternative option of punishment can be applied.[52] Taken a reformation action as an alternative, the apex court has held that there is no way of accurately predicting or knowing with any degree of moral certainty that the accused will not be reformed or is incapable of reformation.[53] "*All we know is that there have been many successes even with the most vicious of cases*"[54]-it summarizes the entire essence of the proposition which this paper argues.

Applying the same principle and emphasising on the suitability of reformative methods in the criminal justice system of any modern state, the Supreme Court has refrained from imposing death penalty several times even in those cases where rape had resulted in the murder of the victim.[55]

Moreover, the rarest of the rare case doctrine had already been laid down in 1980. Therefore, if rape not resulting into death of the victim was to be considered equivalent to the magnitude of rarest of the rare cases, then the Indian Parliament would have included death penalty in the law books while negotiating the Criminal Laws Amendment Act, 2013.[56] I understand that the law is volatile and should adapt itself to the apprising requirements of society, however, I believe that it should, on any given day, align itself to just, fair and reasonable principles of criminal jurisprudence and rule of law prior to societal behest. The rule of law embraces certain theories of punishment and crime, which must be preferred over uproars by the legislators. I shall focus on such theories in the further parts to manifest fallaciousness of death penalty.

Before advancing to another leitmotif, I wish to postulate a trend that the IPC is following. Under the IPC, the common thread in all the provisions providing for death penalty is that it is imposed only when the acts of the accused assassinates the right to life of the victim or

[52]Bachan Singh v. State of Punjab, (1980) 2 SCC 684.
[53]Bachan Singh v. State of Punjab, (1982) 3 SCC 24 (dissenting opinion by Bhagwati, J.).
[54]*Ibid.*
[55]State of Rajasthan v. Jamil Khan, (2013) 10 SCC 721; Bhaikon v. State of Assam, (2013) 9 SCC 769; Surendra Pal Shivbalakpal v. State of Gujarat, (2005) 3 SCC 127; State of Maharashtra v. Man Singh, (2005) 3 SCC 131; KumudiLal v. State of Uttar Pradesh, (1999) 2 SCC 108; Akhtar v. State of Uttar Pradesh, (1999) 6 SCC 60; Bantu v. State of M.P., (2001) 9 SCC 615; Haresh Mohandas v. State of Maharashtra, (2011) 12 SCC 56; Neel Kumar v. State of Haryana, (2012) 5 SCC 766; State of Rajasthan v. Balveer, (2013) 16 SCC 321; Raj Kumar v. State of M.P., (2014) 5 SCC 353.
[56]If the parliament had deemed child rape itself as rarest of the rare case, without any concerns from the fact that whether the victim died or survived, it would have at least provided provisions for death penalty in Protection of Children from Sexual Offences Act, 2012. However, the Parliament restricted death penalty only to those cases where rape results into death of the victim.

threatens the existence of the State.[57] Thus, employing death penalty for cases where the victim survives would be commissioning one-size fits all approach, which makes the impugned laws unreasonable.

D. <u>Numerous theories and reports of authorities would gainsay death penalty.</u>

Under this part, I shall be underscoring the fallaciousness of the impugned laws while taking assistance from first, theories of crime; second, theories of punishment; third, certain judgments; fourth, Justice J. S. Verma Committee Report and fifth, the 262nd Law Commission Report.

1. Theories of Crime

Cesare Lombroso, the father of modern criminology, has provided that determinism as opposed to free will is the basis of criminal behaviour.[58] This view has been endorsed by other scholars such as Raffaele Garofalo and Enrico Ferri.[59] They believe that factors such as heredity and environment determines whether an individual would become a criminal.[60] On similar notes, biologists have also given their account on why a person commits crime. They claim that there are some genetic and hereditary factors responsible for delinquent behaviour of an individual.[61]

Psychologists such as Sigmund Freud believed that those who commit criminal acts do so as a result of a personality disturbance which is a product of uncontrollable id, a faulty ego, or an underdeveloped superego.[62] Sociologists have tried to find the reasons for an individual's delinquent behaviour and they trace it to certain societal circumstances and factors such as fighting family members; failures in school or career; specific place of residence; subscribing to a particular association of people; getting labelled as criminal or delinquent by the society; excessive control or no control etc.[63]

The logical inference is that the impugned laws are arbitrarily over-punishing the offender for his deed that has taken effect owing to great influence from his heredity and society.

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[57] *See* §§120B, 121, 132, 194, 195A, 302, 305, 307(2), 376A, 376E, 364A and 396, Indian Penal Code, 1860.
[58] CESARE LOMBROSO, HENRY P. TRANSLATOR, CRIME: ITS CAUSES AND REMEDIES (1918).
[59] *Juvenile Justice,* THEORIES OF CAUSATION86.
[60] *Ibid*.
[61] *See* C. Ray Jeffery, *Biological Perspectives,* 4 J. CRIM. JUST. EDUC. 291, 306 (1993); Nicole Hahn Rafter, *Seeing and Believing: Images of heredity in biological theories of crime*, 67 BROOK. L. REV. 71 (2001).
[62] *See* Gerhard Falk, *The psychoanalytic theories of crime causation 4 Criminologica 1 (1966).*
[63] *See* Strain Theory, Ecological Theory, Differential association theory, Labelling theory, Control theory of crime. *See also* Daniel Glaser, *The sociological approach to crime and correction*, 23 L.&COMTEMP. PROBS. 683 (1958).

Deeming the offender as the sole convict seems incorrect. Recently in April 2019, the Madras High Court also voiced this argument while it constituted a committee to suggest criminal justice reforms:

"*No one is born as a criminal. The men and the women on death row have some combination of bad genes, bad parents, bad environments, and bad ideas. Which of these quantities, exactly, were responsible for his genes or his upbringing, yet we have every reason to believe that these factors determine his character. Our system of justice should reflect an understanding that any of us could have been dealt in a very different hand in life.*"[64]

Respect to these theories can be given only through stressing on reformative measures rather than death penalty. Hereditary characteristics cannot be altered, but I contain an impregnable belief that with modifications in the offenders' milieu, we can provide him a background for reforming his character and put on a better life subsequently.

2. Theories of Punishment

Theory of Proportionality disallows death penalty

The prime consideration while imposing punishment is that any penalty imposed must be commensurate with the gravity of misconduct; and any penalty disproportionate to the gravity of misconduct would be violative of Article 14.[65] Proportionality signifies that the society's censure of the offender's actions is communicated to the offender by imposing a proportionate sentence – one that is not greater than what the offender deserves.[66]A severe punishment overpowers the element of censure.[67] The Indian criminal law adheres to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct; the punishment is unjustifiable when it is out of proportion to the crime.[68]

Under such rule of law, imposing death penalty becomes unfair and unjust because the author moots that it defeats the proportionality thesis. A lawful killing cannot be authorized by law in cases where the accused has not gone to the extent of killing the victim.

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[64]Meera Emmanuel, *"No one is born a criminal", Madras HC constitutes Committee to suggest Criminal Justice reforms*, BAR & BENCH (Apr. 25, 2019), https://barandbench.com/no-one-born-criminal-madras-hc-constitutes-committee-criminal-justice-reforms/.

[65]Bhagat Ram v. State of Himachal Pradesh, (1983) 2 SCC 442; Sardar Singh v. Union of India, (1991) 3 SCC 213; Ranjit Thakur v. Union of India, (1987) 4 SCC 611.

[66]ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 84 (2005).

[67]ANDREW VON HIRSCH AND ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 143 (2005).

[68]State of M.P. v. MunnaChoubey, (2005) 2 SCC 710.

Theory of deterrence is an illusion

The assumption underlying the theory of deterrence is that all persons are rational individuals, and they economize the crime. An offender will commit a crime only if he perceives that the resultant gain overpowers the pain he might suffer via penal consequences. [69] Per contra, after years of research and debate among statisticians, practitioners and theorists, a worldwide consensus has emerged that there is no evidence to suggest that the death penalty has any deterrent effect over and above its alternative - life imprisonment.[70] The United Nations has noted that deterrence is nothing more than a myth.[71] The Supreme Court of India has corroborated this view when it stated that sentencing policy should not be influenced and decided based on empirical analysis and perceived deterrent effect of the death penalty.[72] About-to-be lawbreakers do not look up penalties in the law books; they plan, if at all on how to avoid being caught.[73]

Moreover, on a factual side, given the rarity with which executions are carried out in India, none of the criminal should be deterred by the threat of execution, thus the negative incentive of death penalty isn't serious enough for a criminal to change his behavior.[74] Long story short, in the word of U.S. Supreme Court Justice Harry A. Blackmun, "*I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed*."[75]

If the legislator still preserves death penalty in the law books on the apprehension of it being a contrivance of deterrence, it is first, definitely unscientific; second, definitively a tool of penal populism as the legislators are always aware of its unfoundedness; third, definitively a mechanism to deceit the justice aspiring electorate.

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[69]ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 71 (4th Edition 2005).
[70]LAW COMMISSION OF INDIA, *Report No. 262*:*The Death Penalty*(2015); John Donohue and Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791; NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, *Deterrence and Death Penalty* 102 (Daniel S. Nagin 2012); *Report of the UK Royal Commission on the Death Penalty* (1953); UNITED NATIONS GENERAL ASSEMBLY, *Resolution on the Moratorium on the Use of Death Penalty: Resolution* 62/149 (2008).
[71]UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *The Myth of Deterrence in moving away from the Death Penalty: Arguments, Trends and Perspective* (2014).
[72]Bachan Singh v. State of Punjab, (1980) 2 SCC 684.
[73]David Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pick-Pockets Hanging*, AMER. L. & ECO. REV. 295 (2002).
[74]STEVEN D. LEVITT AND STEPHEN J. DUBNER, FREAKONOMICS 123 (2009).
[75]Callins v. Collins, 510 U.S. 1141 (1994) (Justice Blackmun dissenting);*SeeBlackmun: 'I…concede that the death penalty experiment has failed'*, THE NEW YORK TIMES (1994), https://www.nytimes.com/1994/02/23/us/blackmun-i-concede-that-the-death-penalty-experiment-has-failed.html.

Theory of incapacitation disregards the reformative measures

The theory of incapacitation states that if the state is of the firm belief that the existence of the offender in the society is an unreasonable threat to the society, in such cases death penalty is an acceptable social cost insofar as it reduces the crime.[76] However, the flaw lies in the fact that it is virtually impossible to be able to predict if the convicted offender is likely to reoffend.[77] A deeper fallacy is that it punishes the individual for something he has not done yet. Therefore, resorting to theory of incapacitation would not be a correct scheme as reformation is always a winnable bet.

Theory of retribution is candidly unconstitutional

Theory of retribution asserts that culpability is made operative only through punishing the one who deserves unpleasant consequences in recount of his criminal act.[78] Under the Indian constitutional jurisprudence, the retributive theory has had its day and is no longer valid; it has no place in the scheme of civilized jurisprudence[79] for lacking constitutional values.[80] The modern criminology aims for reformation, whereas retribution aims for deprivation of life and liberty as penal panacea.[81] Thus, the author contends that though the popular discourse calls for retribution, the rhetoric of rule of law countermands it.

3. Judgments

Multiple judgments of the Supreme Court reckoning death penalty as unjust form of punishment have seen light of the day.[82] Late Justice Bhagwati, in his profound dissent in *Bachan Singh v. State of Punjab,*[83] while holding death penalty as unconstitutional for it being violative of Articles 14 and 21 Constitution, detailed its discriminatory nature because it strikes mostly against the poor and deprived sections of the community and the rich and

[76]Guyora Binder and Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 Am. CRIM. L. REV. 1, 56 (2017)
[77]Sara F. Werboff, *Halting the Sudden Descent into Brutality How Kennedy v. Louisiana Presents a more restrained Death Penalty Jurisprudence*, 14 LEWIS & CLARK L. REV. 1601 (2010).
[78]*See*Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 986 (2000).
[79] Deena v. Union of India, (1983) 4 SCC 645.
[80]Shatrughan Chauhan v Union of India, (2014) 3 SCC 1.
[81]Rajendra Prasad v. State of Uttar Pradesh, (1979) 3 SCC 649.
[82]*See*Rajendra Prasad v. State of Uttar Pradesh, (1979) 3 SCC 649; Dalbir Singh v. State of Punjab, (1979) 3 SCC 745; Bachan Singh v. State of Punjab, (1982) 3 SCC 24, (Dissent of Justice P. N. Bhagwati).
[83]Bachan Singh v. State of Punjab, (1982) 3 SCC 24.

affluent usually escapes from its clutches. This arbitrariness have been illustrated recurrently.[84]

Taking a view of the American judgments, the US Supreme Court, in vain, had deemed death penalty as unconstitutional in 1972, only to be overruled by subsequent statutes.[85] The underlined reasoning as pronounced in *Furman v. Georgia* was that death penalty differs from all other forms of criminal punishment, not in degree only, but in kind also. It is unique for its total irrevocability and rejection of rehabilitation of the convict as a basic purpose of criminal justice. As it is unique, finally, in its absolute renunciation of all that is embodied in the concept of humanity.[86] Another fascinating case comes from the year 2008, which was vis-à-vis child rape where the victim survived. It was held in *Kennedy v. Louisiana*,[87] that the law imposing death penalty for child rapes where the victim survives is unconstitutional as it being violative of Eight Amendment's Cruel and Unusual Punishments Clause. I aspire that this ray of hope becomes a precedent for our country in the like manner.

4. Reports of authorities

Justice J. S. Verma Committee

Justice J. S. Verma Committee was constituted to give recommendations on the amendments to the criminal laws that were brought into force in 2013. On the aspect of rape and sentencing policy, the committee suggested that though rape deserves serious punishment being a reprehensible crime, death penalty is unjust and regressive in nature.[88] The offence of rape has to be graded and there may be instances where the victim is still in a position to overcome the trauma and lead a normal life.[89]

Law Commission of India

The 35th Report of the Law Commission of India had recommended that death penalty be retained in the law books.[90] The reasoning for the same was based on the canard of deterrence induced by the death penalty. With time, entities evolve. The Law Commission in its 262nd Report have metamorphosed their stance and have recommended that time has come for India

[84]AlokeNath Dutta v. State of West Bengal, (2007) 12 SCC 230; SwamyShraddhananda v. State of Karnataka, (2008) 13 SCC 767; Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498; Farooq Abdul Gafur v. State of Maharashtra, (2010) 14 SCC 641.
[85]*See*Furman v. Georgia, 408 U.S. 238 (1972).
[86]*Ibid.*
[87]Kennedy v. Louisiana, 554 U.S. 407 (2008).
[88]JUSTICE J. S. VERMA COMMITTEE, *Report of the Committee on Amendments to Criminal Law*, 2013.
[89]*Ibid.*
[90]LAW COMMISSION OF INDIA, *Report No. 35: Capital Punishment* (1967).

to move towards abolition of death penalty.[91] It has accentuated the right to life, signified the respect for human dignity and the prevailing standards of the constitutional morality.[92]

Reading these reports conjointly along with the recommendations of Justice Malimath Committee Report, the answer that we derive is that the impugned laws and aforementioned reports do not stand aboard together. Penal populism has overridden the scientific understanding.

E. International perspective to better appreciate the motif of this paper

I shall be concisely reflecting upon the treatment of death penalty under the international law. Article 6(2) of the International Covenant on Civil and Political Rights, which has been signed by India, provides that in countries that have not yet abolished death penalty, sentences of death may be imposed only for the most serious crimes.[93] The UN Human Rights Committee discussed Article 6 of the ICCPR extensively and has provided that death penalty should be an exceptional measure.[94] Addedly, the special rapporteur on torture has noted that corporeal punishment amounted to cruel, inhumane, and degrading punishment because of its impact on human dignity.[95] The plausible inference suggested through these norms is that death penalty, when victim survives, would be unjust.

If we resort to the numbers, 106 counties have discontinued death penalty for all crimes and 142 countries have abolished it in law or practice.[96] Concerning particularly about death penalty for child rape, where the victim survives, only 13 countries retain such law besides India.[97]

Moreover, obliterating death penalty as a punishment has been the rule for entire series of International Criminal Courts but Nuremberg and Tokyo Tribunals. Howbeit the fact that these tribunals engage with the most dreaded criminals under extreme crimes such as genocide, war crime and crimes against humanity, natheless they do not entail death penalty

[91] LAW COMMISSION OF INDIA, *Report No. 262: The Death Penalty* (2015).
[92] *Ibid.*
[93] INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 6, cl. 2; *SeeSafeguards Guaranteeing protection of the rights of those facing the death penalty*, United Nations Economic and Social Council (1984).
[94] HUMAN RIGHTS COMMITTEE, General Comment No. 6 (1982).
[95] Manfred Nowak, *Report of the Special Rapporteur on torture and other cruel, inhumane or degrading treatment or degrading treatment or punishment,* HUMAN RIGHTS COUNCIL, A/HRC/10/44 (Jan. 14, 2009).
[96] *The Death Penalty in 2017: Facts and Figures*, AMNESTY INTERNATIONAL (Apr. 12, 2018), https://www.amnesty.org/en/latest/news/2018/04/death-penalty-facts-and-figures-2017/.
[97] The countries being: Bahrain, China, Cuba, Jordan, Kuwait, Mauritania, Qatar, Sudan, Tajikistan, Thailand, The UAE, Tunisia and Vietnam. *See* Shalini Nair, *Why death penalty for child rape, or why not*, THE INDIAN EXPRESS (Apr. 30, 2018), https://indianexpress.com/article/explained/why-death-penalty-for-child-rape-or-why-not-kathua-minor-murder-rape-5156458/.

as a form of punishment.[98] Ergo, it is benign to conclude that death penalty does not locate viability under the International law.

IV. CONCLUSION

This article has tried to deal with the copious objections to the impugned laws, some in a soupcon manner and other comprehensively. From constitutional hostilities, factual cordons to criminological blockades, the impugned laws do not stand good anywhere. The reason is straightforward -the impugned laws have merely attempted to feed the demanding public with a new stringent law to calm them down. We need to understand that this is not the way out. The society requires a scientifically analysed step and not a mere acts of penal populism. The leaders of political parties and the lawmakers need to get above their political agendas and make some true efforts towards a sinless society, or at least a women-respecting society. Last year, Pope Francis also approved a revision of paragraph 2267 of the Catechism of the Catholic Churches effectively deeming the death penalty as inadmissible for the belief that 'every life must be guarded without exception and that capital punishment is a serious violation of the right to life belonging to every person'[99]:

"*2267. Recourse to the death penalty on the part of the legitimate authority, following a fair trial, was long considered an appropriate response to the gravity of certain crimes and acceptable, albeit extreme, means of safeguarding the common good.*

Today, however, there is an increasing awareness that the dignity of the person is not lost even after the commission of very serious crimes. In addition, a new understanding has emerged of the significance of penal sanctions imposed by the state. Lastly, more effective systems of detention have been developed, which ensure the due protection of citizens but, at the same time, do not definitely deprive the guilty of the possibility of redemption.

Consequently, the Church teaches, in the light of the Gospel, that 'the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person', and she works with determination for its abolition worldwide.[100]"[101]

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[98] *See* Statute of the International Criminal Tribunal for the Former Yugoslavia; Statute of the International Criminal Tribunal for Rwanda; Statute of the Special Court of Sierra Leone; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia; Rome Statute of the International Criminal Court.

[99] Ines San Martin, *Pope says Church's teaching on death penalty has 'matured*', CRUX (Feb. 27, 2019), https://cruxnow.com/vatican/2019/02/27/pope-says-churchs-teaching-on-death-penalty-has-matured/.

[100] Sr. Bernadette Mary Reis, *Pope Francis begs for end to death penalty through an ethic of caring*, VATICAN NEWS (Dec. 17, 2018), https://www.vaticannews.va/en/pope/news/2018-12/pope-death-penalty-begs-end-ethic-caring.html.

The conceivable courses for succeeding in the said goal could be [*author's suggestions*]:

- The Government needs to shift its focus from curative measures to preventive measure if it genuinely desires to curb an evil. The deterrence effected by preventive measures will be much higher than the deterrence of curative measures such as increased punishment.
- Good and effective socialization of the new-borns because it is the surrounding, the society, the family from which a child learns a majority of its knowledge and way of thinking. The art of perceiving an event in a particular way develops through socialization. A prime contribution in healthy socialization can be rendered by NGOs, government run programmes, additions in the school syllabus about morality and good conduct or any other like method.
- Death penalty is not the solution of wearying of the criminal justice system. The law enforcing and policing agencies needs to tackle matters more diligently and with sensitivity[102]to achieve maximum reporting of crime. Simultaneously, they should be focussed on conclusion of rape trials on a fast but on a fair and judicious note. Criminal justice system should be made more sensitized towards the genuine claims of prosecutrix.
- The legislators need to discontinue the practice of calming the public discourse through appeasement. The political interests are not, on any given day, superior to the grand societal interests. Penal populism needs to be abandoned for a bright rise of the society having moral foundations amalgamated with respect to human dignity.

The imposition of death penalty via impugned laws will merely gloss over fundamental defects without addressing them at their core.[103] The reaction emerging in Sri Lanka over re-introduction of death penalty for the convicted drug peddlers stands valid even in India. To

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[101] Linda Bordoni, *Pope Francis: 'death penalty inadmissible'*, VATICAN NEWS (Aug. 2, 2018), https://www.vaticannews.va/en/pope/news/2018-08/pope-francis-cdf-ccc-death-penalty-revision-ladaria.html: The paragraph previously reads as follow:*"2267. Assuming that the guilty party's identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor. If, however, non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity to the dignity of the human person. Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm – without definitely taking away from him the possibility of redeeming himself – the cases in which the execution of the offender in an absolute necessity 'are very rare, if not practically nonexistent'."*

[102]*See*SaumyaMaheswari, *The Language of Evidence in Rape Trials*, 10 NLSSOCIO-LEGAL REVIEW (2014).

[103]*See*Meera Srinivasan, *An Island in Search of Hangmen*, THE HINDU (Jul. 14, 2018), https://www.thehindu.com/news/international/an-island-in-search-of-hangmen/article24421044.ece.

conclude, I quote Kishali Pinto Jayawardena, a constitutional lawyer of Sri Lanka, "*there is little doubt that an already brutalised society, accustomed to death and destruction after decades of conflict, would be further brutalised by the grisly spectacle of individuals being intentionally killed by the state*."[104]

[104] *Ibid*.