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TABLE OF CONTENTS

- FROM THE DEAN'S DESK
- MENTOR'S MESSAGE
- ACKNOWLEDGEMENTS BY EDITOR-IN-CHIEF
- STUDENT'S MESSAGE
- FOREWORD

LONG ARTICLES

Climate Change Litigation in India: Analysing the Scope of Rights and Duties in Environmental Protection, *Sumedha Tewari*
2 – 23

Information Warfare: The Impediment for Cybersecurity Policy and Laws of India, *Divyanshu Dubey*
24 – 40

Prohibiting Hijab In Educational Institutions: An Ordeal For The Indulgent Indian Society, *Shruti Kumari*
41 – 63

SHORT ARTICLES

At-Will Employment: Fallacious Origin And Flawed Jurisprudence Disguised As Contracts, *Kaustubh Kumar*
65 – 73

Proxy Wars: Chink In The UN Charter In The 21st Century, *Varnik Kundaliya*

74 – 86

CASE NOTES & COMMENTS

Would Time Gap Between The Commission Of Crime And The State Of Drunkenness Still Constitute To Be A Valid Defence?, *Manvee Sharma*
89 – 96

FROM THE DEAN'S DESK

This publication serves as a significant milestone in our mission to institutionalise research and lays out the foundation for promoting open and objective quality legal discourse. I say with utmost pride that when review articles were solicited, we were surprised with the huge response from across the country. After a rigorous peer-review process, we have meticulously curated a distinguished compilation of original research articles. I am certain that these contributions will elicit profound appreciation and foster constructive dialogue amongst our readers. This year, our journal embarks on an insightful exploration of various contemporary debacles, thereby offering a meticulous legal analysis of these pressing issues. Encompassing a wide spectrum of current topics, our publication not only presents diverse perspectives on noteworthy subjects but also serves as a catalyst for raising awareness, creating an intellectual delight for our readership.

Kirit P. Mehta School of Law has garnered commendable endorsements from esteemed entities across the industry, academia, judiciary, bar, law firms, MNCs and regulatory bodies like SEBI. On behalf of the institution, I extend my warm welcome and heartfelt gratitude to our esteemed Board of Advisors and Peers, whose invaluable guidance has played an instrumental role in shaping this edition into a vital platform that generates and challenges existing paradigms of legal jurisprudence.

I congratulate the Editorial Board for their unwavering dedication and significant contribution to the growth of NMIMS Student Law Review. I earnestly encourage our readers to embrace and elevate the thoughts presented by our contributors, allowing them to soar and inspire fresh perspectives in the realm of legal scholarship.

- **Dr. Durgambini Patel**

MENTOR'S MESSAGE

It is with immense pleasure and a profound sense of accomplishment that I present to you this distinguished edition of the Student Law Review. The inception of this journal was fueled by our institution's unwavering commitment to foster a platform for the exploration of legal discourse and the cultivation of academic excellence. With the guidance of our esteemed peers, we have embarked on a rigorous journey to curate a publication that would showcase the finest scholarly contributions from our student community.

Within these pages, you will find a rich tapestry of legal scholarship, meticulously crafted by our talented contributors. Each article represents countless hours of research, critical analysis, and meticulous attention to detail. These contributions have not only enriched the pages of this publication but have also elevated the discourse within our academic community. The tireless efforts of our reviewers and peers, who provided invaluable feedback and engaged in thoughtful deliberations, have contributed to the exceptional quality of the articles presented herein. I extend my deepest gratitude to them for their dedication to maintaining the highest standards of academic rigor.

To those who missed out, I want to emphasize upon the incredible value of your efforts and the enduring impact of your dedication to the pursuit of legal scholarship. Each submission showcased immense potential and demonstrated your unwavering commitment to the highest standards of academic excellence. I encourage you to persevere, for your contributions hold immense promise and will undoubtedly find their rightful place in future endeavors.

It is important to acknowledge the countless hours of meticulous review, rigorous editing, and collaborative teamwork that have shaped this edition. I extend my deepest appreciation to the dedicated members of the Editorial Board who have meticulously assessed each submission, ensuring that only the most exceptional works grace the pages of this publication. I hope each one of you found the experience enlightening and will go on to play a role in developing the research culture in the field of law.

- **Mr. Harshal Shah**

This Fifth Issue of NMIMS Student Law Review has been a collective effort right from the moment we conceptualised its theme. We are filled with anticipation as we envision this issue to establish an unprecedented benchmark, surpassing all prior boundaries in terms of its comprehensive scope and profound depth. The chosen theme, explored with utmost precision and intellectual rigor, promises to deliver an unparalleled examination of contemporary issues.

We extend our gratitude to our Hon'ble Vice Chancellor, NMIMS University for his constant support and unwavering encouragement throughout the process. Furthermore, we are immensely thankful to Dr. Durgambini Patel, the Dean of NMIMS Kirit P. Mehta School of Law, for entrusting us with this responsibility of overseeing the curation of this edition of the NMIMS Student Law Review. Her support has been instrumental in the realization of this endeavour.

We thank the Registrar of NMIMS University for her continued support. We would also thank the administrative department; our Board of peer reviewers for their time and close reading of the articles; our faculty colleagues who have always provided the intellectual space and friendship that help sustain projects like these and make them a happy affair. We must also thank our contributors who so encouragingly responded to our call for papers, were very cooperative with keeping deadlines, and thought of us as a worthy venue for publishing their scholarship. It is your work that makes this special issue special.

Our team also deserves a very special mention: Our Student Head, Ms. Aashirwa Baburaj; Student Co-head, Ms. Prerna Hegde; Student Editor-In-Chief, Ms. Anushka Bhardwaj, Student Co-Editor in-Chief, Mr. Abhay; Student Blogs-Head, Ms. Riya Karkera; along with the entire team of Content Editors. Their unwavering dedication and professionalism have been instrumental in bringing this issue to fruition. Lastly, we extend our sincere gratitude to our Mentor, Mr. Harshal Shah, whose intellectual engagement and thought-provoking guidance have played a vital role in upholding the theoretical rigor of our publication.

- **Prof. Richa Kashyap**

Editor-in-Chief

FOREWORD

It gives us immense pleasure in publishing this fifth volume of the NMIMS Student Law Review. With the inclusion of this edition in our scholarly repertoire, we remain steadfast in our unwavering commitment to elevate legal discourse on pertinent issues. Our fervent ambition is for this volume to serve as a dynamic catalyst stimulating profound intellectual exploration, fostering consequential dialogues, and leaving an indelible imprint on the trajectory of legal scholarship for the years that lie ahead. This edition sets a remarkable precedent, as the authors have demonstrated exceptional depth of insight and critical analysis while addressing a wide spectrum of legal inquiries.

Sumedha Tewari, in her paper titled *"Climate Change Litigation In India: Analysing The Scope Of Rights And Duties In Environmental Protection"*, embarks on an insightful analysis of the scope of climate change litigation within the Indian context, with a specific focus on its two branches: mitigation and adaptation. The author astutely proposes a dual- pronged approach to achieve the desired objectives: firstly, cashing on the instrument of 'human rights' to question the State in its climate change adaptation measures; and secondly, using the doctrine of 'duty of care' and specific obligations to bring corporations and public-private entities to incorporate better mitigation measures in the existing laws itself. These solutions are formulated through a meticulous identification of key legislations and rights that can be harnessed to strengthen the fight against climate change in India.

In his paper titled "*Information Warfare: The Impediment For Cybersecurity Policy And Laws Of India"*, Divyanshu Dubey scrutinizes diverse forms of information warfare and their consequential impact on the national security of the country. The author critically evaluates the efficacy of the existing Indian cyber-security law in mitigating the threats posed by information warfare. Furthermore, the paper offers vital recommendations to fortify the laws governing information technology in India, providing strategic pathways to enhance cybersecurity policy and bolster the nation's resilience in the face of these evolving challenges.

In "*Prohibiting Hijab In Educational Institutions: An Ordeal For The Indulgent Indian Society*", Shruti Kumari explores the origin of Hijab in Islam, subsequently delves into the question of whether the Hijab forms an intrinsic part of Islam or not. While doing so, parallels have been drawn regarding the status of Hijab in other nations across the globe and in India. Further, the author has tried to traverse how the prohibition of Hijab is impacting the provisions of the Indian Constitution and what is the way ahead. Through a comprehensive analysis, this paper navigates the complex intersection of religious expression, constitutional rights, and societal dynamics surrounding the issue of Hijab in educational institutions.

In his article titled *"At-Will Employment: Fallacious Origin And Flawed Jurisprudence Disguised As Contracts"*, Kaustubh Kumar guides the readers through the underlying jurisprudence that shaped the evolution of at-will employment agreements/contracts. The author critically examines the essence of these agreements, scrutinizing their compliance with the standard definition of "contract" in tandem with the purpose and motive of their development. The paper elucidates the essentials of contract that at-will employment agreements fail to satisfy. Furthermore, it argues that at-will employment contracts cannot be enforced or implemented in India. Alternatively, even if such contracts were enforced, the paper contends that considerations of public policy and the rule of law would invalidate their applicability. Through a meticulous analysis, the author challenges the prevailing notion of at-will employment, shedding light on its inherent shortcomings and advocating for a more robust legal framework in India.

Varnik Kundaliya in his article titled *"Proxy Wars: Chink In The UN Charter In The 21st Century"*, has examined the evolution of Proxy Wars in the 21st century. In addition to that, he has focused on the loophole mechanisms that exist in the Charter as well as lack of definitive legislative mechanisms and sanctions against states exploiting the legal loopholes allows for the entire activity of proxy warfare to act as a breach of sovereignty, contrary to the UN Charter allowing for independent states to continue engaging in wars without grounds for UN intervention. Lastly the author has expressed that how it is crucial for states to evaluate the outcomes and risks associated with proxy warfare and the need to prioritize peaceful resolutions over prolonged and escalating conflicts.

In a concluding case note by Manvee Sharma titled *"Would Time Gap Between The Commission Of Crime And The State Of Drunkenness Still Constitute To Be A Valid Defence?"*, the author has analysed the case of *Paul v. State of Kerala*. The author pointed that unless the accused has the intention and the knowledge to commit the crime, they cannot be held liable for it. The author concluded that the time gap between the commission of offence and actual act of drinking would also be a crucial factor in determining the punishment in these cases.

Lastly, it would be remiss not to mention that the collective endeavor of the entire team involved in this edition warrants utmost admiration for their unwavering commitment, tireless perseverance, and unwavering dedication to fostering the dissemination of exemplary legal scholarship. Their ceaseless efforts have played an instrumental role in ensuring the publication of profound and exceptional legal literature of the highest calibre.

Board of Editors

At Mumbai, MH

May 2023

Long Articles

CLIMATE CHANGE LITIGATION IN INDIA: ANALYSING THE SCOPE OF RIGHTS AND DUTIES IN ENVIRONMENTAL PROTECTION

- Sumedha Tewari

ABSTRACT

Recent developments across the globe in Environmental law have been centred around the issue of 'Climate Change.' Countries including Germany, the Netherlands, the United Kingdom, the United States of America and Pakistan have been actively witnessing climate change related litigation against the corporations, governments, and even private entities. India, despite having an established environmental jurisprudence, has not seen many developments in this area. The main objective, therefore, of this paper is to analyse the scope of climate change litigation in India, in particular its two branches: mitigation and adaptation. The lurking issues in the judiciary that contribute to the lack of these developments are further analysed in detail. In order to resolve this problem, and identify the key areas in need for development, this paper argues that India should adopt an alternate approach in litigating climate change mitigation and adaptation measures. The paper proposes two-fold solutions to achieve the aimed goals: firstly, cashing on the instrument of 'human rights' to question the State in its climate change adaptation measures; and secondly, using the doctrine of 'duty of care' and specific obligations to bring corporations and public-private entities to incorporate better mitigation measures in the existing laws itself. These solutions are proposed by identifying the key legislations and rights that can be used for enhancing the fight against climate change in India.

KEYWORDS: Climate Change, Litigation, Public Interest Litigation, Human rights

I. INTRODUCTION

India is recognized as one of the most vulnerable regions to climate change on the planet, therefore, it becomes essential for India to find ecologically sustainable routes to growth.[1] Furthermore, India is the third-largest emitter of greenhouse gas **("GHG")** emissions after the USA and China.[2] These two key points bring India onto a crossroad where it needs to take some policy and legislative decisions regarding the control and adaptation of climate change. Climate change litigation is now being used all around the world to question governmental actions and policies. Countries like the USA, South Africa, Australia, and the UK have all seen certain climate-related actions in the courts. Our neighbors, such as Pakistan, have also successfully handled some monumental climate litigation cases that have been appreciated around the world.[3] This inevitably leads us into questioning the status of the Indian situation. Unfortunately, climate change litigation in India has not picked up the pace it should have. It could either be the lack of deference from the judiciary[4] or a lack of proper arguments presented by the petitioners. It is only when these problems are dealt with, should India undergo a successful change in its stagnant approach plaguing it today.

For the purpose of clarity, this paper is divided into three parts: Part I explains the concept of climate change litigation and the role played by Human Rights and Tort laws. Part II deals with Climate change litigation in India. It analyses various doctrines and principles developed by the judiciary in the past that can serve as a tool in fighting climate change in courts' battleground. It is argued that India has a much better jurisprudence for enhanced climate change litigation than many other countries who have usefully adjudicated such disputes, despite the barriers in their jurisprudential system. Part III of this paper deals with proposed solutions that can aid in developing better climate change jurisprudence in India and provide for a robust mechanism for aggrieved communities and individuals to

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[1] David Eckstein et al., Global Climate Risk Index 2021: Who Suffers Most from Extreme Weather Events?, GERMAN WATCH 8 (Jan. 2021) Briefing Paper 2021, https://germanwatch.org/sites/default/files/Global%20Climate%20Risk%20Index%202021_1.pdf.

[2] Robert Rapier, *The World's Top 10 Carbon Dioxide Emitters*, FORBES (Dec. 4, 2019), https://www.forbes.com/sites/rrapier/2019/12/04/the-worlds-top-10-carbon-dioxide-emitters/?sh=15e882812d04.

[3] Ashgar Leghari v. Federation of Pakistan, (2015) W.P. No. 25501/2015 (Lahore High Court) (Pak.).

[4] Ridhima Pandey v. Union of India, (2019) SCC OnLine NGT 187 (India) (dismissing the petition to include "climate change" under the Environmental Protection Act, which would have mandated consideration of its impacts in the EIA process.).

fight in the court of law. These solutions also analyse key areas that can not only aid litigations, but also help India in fighting climate change overall.

A. What is climate change Litigation?

The human cost of climate change has been time and again portrayed through a series of disasters ranging from typhoon *Haiyan*, massive floods in the Indian sub-continent, or even heatwaves in the Central Europe.[5] The world is facing climate change disasters at a much faster pace than expected, and little is being done to mitigate its effect by the states and its stakeholders. However, the codification of international norms and domestic rules have grown substantially over the last few years, highlighting the importance of climate change as an issue.[6]

Owing to the codification of laws and regulations, there is a rise in 'climate change litigation' around the world, where issues of law and interpretation regarding climate change adaptation measures and climate change mitigation measures are brought before administrative and judicial authorities.[7] Climate change litigation is a form of litigation where the petitioners/plaintiffs file a suit against private or public entities for violating the legal obligations/ human rights towards the victims due to their actions or inactions.[8]

Climate change litigation is divided into two main categories, based on the current jurisprudence around the world. The first is the "rights-based approach," where human rights and fundamental rights have been used an instrument to hold public entities liable for their failure to adapt to climate change or mitigate climate change in their country.[9] The relationship between human rights and climate change has become a focal point of international law and policymaking.[10] The United Nations

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[5]CENTRE FOR RESEARCH ON THE EPIDEMIOLOGY OF DISASTERS, THE HUMAN COST OF NATURAL DISASTERS 2015: A GLOBAL PERSPECTIVE (2015).

[6]E. SOMANATHAN ET AL., NATIONAL AND SUB-NATIONAL POLICIES AND INSTITUTIONS, EN: INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE: SUMMARY FOR POLICYMAKERS, PART OF THE WORKING GROUP III CONTRIBUTION TO THE FIFTH ASSESSMENT REPORT, 1049, at 1050–51 (Ottmar Edenhofer et al. eds., Cambridge Univ. Press 2014) ("**IPCC AR5**").

[7]Meredith Wilensky, *Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation*, 26 DUKE ENVTL. L. & POL'Y FORUM 131, 134 (2015)

[8] Ashgar Leghari v. Federation of Pakistan, (2015) W.P. No. 25501/2015 (Lahore High Court) (Pak.).

[9]Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation*, 7 TRANAT'L. ENV. L. 37 (2018).

[10]*See* M.J. Hall & D.C. Weiss, *Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law*,37(2) Yale J. of INT'L. L. 309, 310 (2012); *see also*, UNITED NATIONS ENVIRONMENT PROGRAM, CLIMATE CHANGE AND HUMAN RIGHTS (2015).

Human Rights Council **("UNHRC")** in 2008 was the first to take up such an issue.[11] The second type of litigation is the "duty of care approach." The litigation in these cases is based on mainly tort and negligence actions against the government.[12] These litigations are based on "duty of care" obligations by the state and have been brought up when the government has allegedly failed to perform its duty in mitigating or adapting to climate change.[13]

B. Human Rights and Climate Change

The link between Human Rights and climate change is now being officially accepted[14] although the action against it is mostly restricted to national litigation specifically. The 2011 UNHRC marked that "[c]*limate change poses an immediate and far-reaching threat to people and communities around the world, and has adverse implications for full-time enjoyment of human rights"*.[15] Even though this link has been recognized, there are hardly any cases of litigation on an international level concerning human rights and climate change.[16] One of the reasons for this could be a lack of an international forum adjudicating environmental disputes among the nations. Alternatively, countries would hardly sign up for their national environmental matters to go before international bodies. Doing so would entail them opening up to a robust screening process and obligations which is a concern for many nations. In addition to this, countries are also reluctant to enforce or ratify the present international environmental agreements. Therefore, what remains is to strengthen this link at a national level.

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[11]*See* Alejandro Artuci, *Report on the Human Rights Council on Eighth Session,* ¶ 3, U.N. Doc. A/HRC/8/52 (Sept 1, 2008) ("The right of every person and all peoples to a healthy environment and to an enhanced international cooperation that respond effectively to the needs of assistance of national efforts of adaptation to climate change, particularly in developing countries, and that promote the fulfilment of international agreements in the field of mitigation"); *see* J.H. Knox, *Linking Human Rights and Climate Change at the United Nations*,33(2) HARVARD ENVTL. L. REV., 477, 477-498 (2009).

[12]*See*Comer v. Murphy Oil USA, 607 F.3d 1049, 1054 (5th Cir. 2010); *Macquerie Generation v. Hodgson*, [2011] NSWCA 424, at 35-67 (Aust'l).

[13]Stichting Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment), ECLI:NL:RBDHA:2015:7145, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396 (Neth.).

[14] Human Rights Council Res. 7/23, U.N. Doc. A/HRC/RES/7/23, at 65 (Mar. 28, 2008).

[15] Human Rights Council Res. 18/1, U.N. Doc. A/HRC/18/L.26/Rev.1 (Sept. 30, 2011).

[16] Philippe Sands, *International Environmental Litigation and Its Future*, 32 UNIV. RICHMOND L. REV. 1619, 1619–1641 (1999); William Burns, *A Voice for the Fish? Litigation and Potential Causes of Action for Impacts under the United Nations Fish Stocks Agreement*, 48 SANTA CLARA L. REV., 605, 605 – 647 (2008); Brian J Preston, *Climate Change Litigation (Part 1),* 5 CARBON & CLIMATE L. REV. 1, 3–14 (2011); Brian J Preston, *Climate Change Litigation (Part 2),* 5 CARBON & CLIMATE L. REV. 244, 244 – 263 (2011).

Human rights as envisaged by Universal Declaration of Human Rights **("UDHR")**, International Covenant on Civil and Political Rights **("ICCPR")**, and other instruments and treaties are embedded into national Constitutions in the colour of "fundamental rights".[17] A 2012 Survey declared that there are at least 92 countries, that have a right to clean environment in their fundamental rights, and around 177 countries have read down these rights into their Constitution through case laws, legislations and international agreement ratification.[18]Article 3 of the UDHR talks about the "Right to Life"[19], a concept that finds space in the national laws as well.[20] Some countries also have special fundamental right that recognizes 'the right to live in a clean and balanced environment.' For example, Article 14 of the Ecuador Constitution gives citizens the right to live in a clean and balanced environment, entailing the environment, natural resources, and biodiversity to be in the public interest.[21] Article 225 of the Brazilian Constitution also gives a right to live in a clean and healthy environment allowing the state to impose penal sanctions against those who perform harmful activities against the environment.[22] Similarly, the Columbian Constitution also recognizes a special right to a healthy environment.[23] Countries like India and Pakistan, on the other hand, do not recognize a right to a healthy environment specifically, but these rights have been interpreted under the "right to life"[24] as a "right to enjoy a clean, healthy and livable environment."[25]

The issue of linking climate change with fundamental rights in national constitutions have also witnessed several peculiar ways. In *Leghari v. Pakistan***,** the Supreme Court of Pakistan established that the government's inaction in adopting and implementing the policies for climate change is a violation of the fundamental right to life under the Constitution of Pakistan.[26] The *Leghari Case* is a landmark decision in which the court directly linked protection from climate change to the fundamental right to life, narrowly subsumed under the pre-existing right to a

[17]*See* INDIA CONST. arts. 14-29; *see* PAKISTAN CONST. art. 14-25.
[18]David Boyd, *The Constitutional Right to a Healthy Environment*, 54ENV'T. SCI. & POL'Y. SUSTAINABLE DEV. 3 – 15 (2012).
[19]G.A. Res. 217 (lll) A, Universal Declaration of Human Rights (Dec. 10, 1948).
[20]*See* INDIA CONST. art.21.
[21]CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADORart. 14 (Eucador).
[22]CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.).
[23]CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art 11 (Colom.).
[24] Ashgar Leghari v. Federation of Pakistan, (2015) W.P. No. 25501/2015 (Lahore High Court) (Pak.).
[25]M.C. Mehta v. Kamal Nath, (2000) 6 SCC 213 (India).
[26] Ashgar Leghari v. Federation of Pakistan, (2015) W.P. No. 25501/2015 (Lahore High Court) (Pak.).

healthy environment. Many other countries have, however, failed to do this. For example, in the much-celebrated case of *Urgenda v. the Netherlands*, the petitioners argued that the Dutch Government's emission reduction goals and failure to implement proper mitigation policies violated human rights, including the right to life,[27] and the right to home and family life[28] under the European Convention on Human Rights **("**ECHR**")**. The extension of environmental jurisprudence to the stature of human rights in this case was sought through a petition presented by an NGO. However, the Hague District Court was not convinced by the human rights argument presented by the petitioners, and instead held the state as responsible under the "duty of care" to protect its citizens, which was already present under the Dutch Code itself.

Courts are more inclined towards upholding the national laws and using them as a tool to discuss the implications of climate change and human rights instead of international agreements like the Paris agreement. Similar to *Urgenda,* the French Supreme Court in *Synthe v. France*, while admitting the claims of the petitioners against the state, mentioned that the claims will be governed and administered through the French and European law only, with the Paris agreement only serving to aid the interpretation of national laws.[29] Alternatively, the Court in the case of *Friends of the Irish Environment v. Ireland* refused to entertain the petitioner's plea which alleged that the government's failure to adopt a more stringent plan for climate change action was a violation of their fundamental rights.[30] The outcome of these cases is not dependent on one particular factor, and while some courts are inclined towards reconciling climate change with the "right to a healthy environment" or the "right to life", others may not.

II. CLIMATE CHANGE AND TORTS /SPECIFIC OBLIGATIONS

Courts, most commonly in common law jurisdictions, have started recognizing lack of mitigation and adaptation efforts from states as negligence, nuisance etc. The idea behind torts as a basis of litigation is that government entity, in falling to

[27] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 UNTS 221, European Treaty Series 5, ETS 5, EHRR 35 (entered into force Sept. 3, 1953).
[28] *See id*. art 8.
[29] Romain Mauger, *The First French Climate Litigation Ruling – Commune De Grande Sythe,* ENERGY AND CLIMATE LAW (DEC. 8, 2020), http://energyandclimatelaw.blogspot.com/2020/12/the-first-french-climate-litigation.html (last visited May 12, 2023)
[30] Friends of the Irish Environment v. Ireland [2017] JR 793 (Ir.).

control the increasing GHG emissions and damages caused due to it, are the actions that come under negligence, nuisance and other tortious liabilities.

Sometimes, the 'duty of care' obligations owed by the state can serve as a means of holding it liable, while at other times, they may be a path of obstruction towards achieving positive results in the climate change litigation. For example, in the *Urgenda* case, the Hague court was not convinced by the international obligations of the Netherlands in terms of climate change mitigation or emission reduction. However, the Court ultimately found the state binding to the Dutch Code which imposes a "duty of care" to its citizens deriving its source from the ECHR. Conversely, in *Comer v. Murphy*[31] after protracted legal proceedings, the court ultimately rejected the petitioner's claim stating that they have failed to establish that the injuries caused to them can be traceable to the alleged companies.

The problem of standing and establishing a "wrong" attributed to the defendants is a problem shadowing over tort suits on climate change. The Australian court in *Macquarie v. Hodgson*, for instance, found that the plaintiff failed to prove that CO2 emissions coming from the coal plant in question has caused a nuisance to the parties.[32] Moreover, the court also suggested that it would be difficult to have an actionable nuisance claim on CO_2 since it is "colourless, odourless and inert".[33] In a more concrete case, the plaintiffs demanded damages for coastal encroachment and the cost of erecting shoreline protections. Mainly, two arguments were taken by the parties. *Firstly*, that the shoreline armouring taken up by the local government constituted a nuisance, and *secondly*, the failure to install hard shoreline armouring which has resulted in erosion, displacement of waves and property damage is a cause of negligent against the state.[34] Due to the more traceable actions of the local government and the more prominent damages caused to the locals, the cause of action was not dismissed. The case, however, ended up being settled outside the court.

Even though Tort and specific obligations from the state are more direct and concrete than human rights or fundamental rights, the problem of *standing, eligibility, and harm* is time and again obstructing the justice system. As seen above, it often becomes difficult to materialize the damage caused to the parties due to

[31]Comer v. Murphy Oil USA, 607 F.3d 1049, 1054 (5th Cir. 2010).
[32]Macquerie Generation v. Hodgson [2011] NSWCA 424, at 35–67 (Austl.).
[33] Macquerie Generation v. Hodgson [2011] NSWCA 424, at 45 (Austl.).
[34] Ralph Lauren 57 v. Byron Shire Council[2016] NSWSC 169(Austl.).

climate change or establish a link between the defendant's actions as the cause of action of the wrongs caused to the plaintiffs. However, the remoteness of the cause and lack of immediate harm should not prevent the courts from effectively safeguarding the rights of their citizens.[35] There is sufficient data and scientific evidence available backed by credible institutions like the United Nations **("**UN**")** that speak about the effects of individual and state actions on climate change, and in turn the effects of climate change on the human population.[36] The observations in the *Urgenda* case provides valuable guidance towards the future of private litigations on climate change.[37] This approach is based on the precautionary principle which has guided international and national environmental policies for decades now.

III. CLIMATE CHANGE LITIGATION IN INDIA

Climate change litigation in India is largely ill-informed and does not match the international pace up till now.[38] This is an unusual phenomenon, considering the richness of other environmental jurisprudence related to air pollution[39], water pollution[40] natural resources conservation[41] or wildlife protection[42], among others, in the country. At the time when neighbours like Pakistan have started speaking directly on the issues of climate change by questioning the actions of authorities and projects' implementations, the time has come for India to up its ante to encompass climate change-related issues and matters in its legal jurisprudence.

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[35] One of the main reasons the decision was celebrated was because it diluted the issue of causation and nexus in climate change cases under Tort Law. It undermined the arguments that the defendants played a very small role in emitting green House gases, and that Urgenda did not have a claim since it is not a victim.

[36] VALÉRIE MASSON-DELMOTTE ET AL., GLOBAL WARMING OF 1.5°C, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2018).

[37] Stichting Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment),ECLI:NL: RBDHA:2015:7145, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396 ¶ 4.4 (Neth.) (noting that "if the emission of greenhouse gases is not sufficiently reduced, the possibility that dangerous climate change will materialise in the foreseeable future cannot be excluded").

[38] There have been very few cases that directly deal with the issue of climate change in India. *See, e.g.,* Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401 (India); Ridhima Pandey v. Union of India, (2019) SCC OnLine NGT 187 (India).

[39] M.C Mehta v. Union of India & Ors., AIR 1997 SC 734 (India).

[40] Vellore Citizens Welfare Forum v. Union of India & Ors., (1987) 4 SCC 691 (India).

[41] Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh, (1989) Supp. (1) SCC 504 (India).

[42] T.N. Godavarman Thirumulkpad v. Union of India & Ors.,(2006) 5 SCC 25 (India).

India is one of the most vulnerable countries in terms of climate change, with its long coastlines, the Himalayan glaciers, forests and deserts. There are hardly any other countries that face so many climate change-related threats on multiple fronts.[43] While India is a party to the Framework Convention on Climate Change and Kyoto Protocol[44], however, due to the status of being a developing nation, it has been able to reject the imposition of any kind of binding GHG targets.[45] Nevertheless, India has pledged that its per capita emissions will not exceed those of developed nations, and it aims to reduce the emissions intensity by 20-25%, by 2030.[46] How that *goal* has worked out is still a question. According to a Pew Report, investments in renewable energy in India have risen to about 600% from 2004 due to its climate change policy and strategies.[47]

Even though India has a good consciousness regarding climate change,[48] there are still efforts that need a long way to go. The catastrophic effects of climate change in India have still not been fully acknowledged in its policy and decision-making processes. The main issue remains accountability concerning the efforts and police implementation of the state. Without any judicial accountability, however, the government is unlikely to catch up with adaptation or mitigation efforts that the country urgently needs.

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[43]*See* INDIAN NETWORK FOR CLIMATE CHANGE ASSESSMENT, CLIMATE CHANGE AND INDIA: A 4X4 ASSESSMENT - A SECTORAL AND REGIONAL ANALYSIS FOR 2030S 3 (2010) (report by the Ministry of Environment predicting the effects of climate change in India, including "a rise in annual mean surface air temperature by 1.7°C and 2.0°C in the 2030s; increased flood risk and decreased water supply due to melting glaciers; threats to coastal regions from sea level rise at the rate of 1.3 mm/year; more erratic monsoons with less rainfall; and increased incidence of malaria, vector-borne diseases, heat-related deaths and illnesses").

[44] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 International Legal Materials22 ("**Kyoto Protocol**").

[45]*Climate Change Negotiations: India's Submissions to the UNFCCC*, MINISTRY OF ENVIRONMENT AND FORESTS, GOVERNMENT OF INDIA (Aug. 2009), http://moef.nic.in/modules/about-the-ministry/CCD/.

[46] Amitabh Sinha, *India Promises To Cut Greenhouse Gas Emissions Intensity By 2030*, THE INDIAN EXPRESS(Oct. 3, 2015), https://indianexpress.com/article/india/india-others/will-cut-greenhouse-gas-emissions-to-a-third-by-2030-india-promises.

[47]PEW Charitable Trust, *Who's Winning the Clean Energy Race*, THE CLEAN ENERGY ECONOMY (Apr. 1, 2014), https://www.issuelab.org/resources/15171/15171.pdf.

[48]*See* Anthony Leiserowitz &Jagdish Thaker, *Climate Change in the Indian Mind*, YALE PROJECT ON CLIMATE CHANGE COMMUNICATION 1, 2. (2012) (this study on climate change in India found that 72% of Indian participants believe that global warming is happening, while 61% are worried about it, and 67% consider it important. Large majorities also stated that global warming will harm future generations (67%), plant and animal species (67%), people in India (66%), people in their own community (62%), and themselves and their own family (57%)).

IV. IMPORTANCE OF PUBLIC INTEREST LITIGATION

The Supreme Court of India has dispensed numerous environment friendly and progressive decisions that have paved the way for bright environmental policymaking and decisions in India. Starting from *SP Gupta v. Union of India*, where the Court relaxed the criteria of *locus standi* in India which paved way for advocating the case of poor, oppressed people before the courts.[49] The much-appreciated Public Interest Litigation **("PIL")** in India has allowed the parties (who may not be directly affected but wish to raise a voice on behalf of someone) to pursue cases before the High Court(s) under Article 226 for any legal wrong and the Supreme Court under Article 32 for any violation of a fundamental right.[50] Moreover, under Article 142 of the Constitution, the Supreme Court is empowered "to make such order as is necessary for doing complete justice in any cause or matter pending before it."[51] The concept of PIL in India has solved two problems facing the climate change litigation around the world: justiciability and causation.

One of the main issues that arise in climate change litigations around the world is the claim of causation. In terms of tortious claims, a sufficient nexus has to be shown between the conduct of the defendant and injuries alleged by the plaintiff[52] Even in public law cases, a sufficient chain needs to be shown that the parties or a local population were directly affected by the actions of the defendants. Through PILs, Indian courts have often taken cognizance themselves through open letters[53] and adjudicated public interest matters without questioning the *locus standi* of the petitioners.[54] In many cases, the courts have opined that a petition under Article 32 of the Constitution is to be adjudicated in a certain conventional manner moved by a particular kind of proceeding only.[55] A step by step examination of evidence by cross-examination based on the adversarial procedure is not obligatory under a PIL.[56] This interpretation and stance of the judiciary under Article 32, has resolved the problem of causation in India.

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[49] S.P. Gupta v. Union of India, (1981) 87 SCC 233 (India).
[50] INDIA CONST. arts. 32, 226.
[51] INDIA CONST. art. 142.
[52] Preston, *Supra* note 16.
[53] Sunil Batra v. Delhi Administration, AIR 1978 SC 1675 (India).
[54] Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1360 (India).
[55] Bandhua Mukti Morcha v. Union of India & Ors., AIR 1984 SC 802 (India); People's Union for Domestic Rights v. Union of India & Ors., AIR 1982 SC 1473, 1476 (India).
[56] Bandhua Mukti Morcha v. Union of India & Ors., AIR 1984 SC 802, 815 (India).

Another issue arising in climate change litigation is the issue of justiciability. A case is referred to as justiciable when the authority approached is capable of deciding the matter and sees it appropriate to do so.[57] This doctrine differs depending on jurisdictions.

In the USA, a justifiable case is the one which *"must be definite and concrete, touching the legal relations of parties having adverse legal interests...It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."*[58]

One of the major factors in justiciability is that it must not deviate from the separation of powers.

Most of the climate change litigations are in the form of public litigation, asking the state to perform its duties or uphold the rights of its citizens. In India, the writ of mandamus empowers the judiciary to ask the government to perform a task in which they have failed. This doctrine was expanded in PIL, where the Supreme Court has empowered itself to perform tasks that do not fall under the writ of mandamus.[59] For example, the Court had issued the writ of mandamus to the government, requiring them to provide timely treatment to people in need to protect their right to life.[60] The Court has also taken many other such issues, compelling authorities to perform their duties or prevent actions that could violate the fundamental rights of the citizens.[61]

In terms of environmental cases also, the PIL has allowed the judiciary to prevent and mandate the authorities to do certain tasks, that might conventionally question the balance of powers. In *Rural Litigation & Entitlement Kendra v. Union of Indi*a, the Court ordered the closing down of lime-stone quarries that were having a negative impact on the ecological balance to the people and animals of the locality.[62] Similarly, in the *Vellore Citizens Forum Case*, the Court directed the government to

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[57]UNITED NATIONS ENVIRONMENT PROGRAMME, THE STATUS OF CLIMATE CHANGE LITIGATION: A GLOBAL REVIEW ¶ 3.2 (2017) ("**UNEP REPORT**").

[58]Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–41 (1937).

[59] S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. & POL'Y 29, 80 (2001), https://openscholarship.wustl.edu/law_journal_law_policy/vol6/iss1/3

[60] P. B Khet Mazdoor Samity v. State of West Bengal, AIR 1996 SC 2426 (India).

[61] Sathe, *Supra* note 60.

[62] Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh, (1989) Supp. (1) SCC 504 (India).

take action under Article 3(3) of the Environmental Protection Act, 1986 to control the pollution in the area caused due to tanneries in Tamil Nadu.[63]. Another concept of "continuing mandamus" is also followed by the courts as explained in the *TN Godavarman Case* — this case is being heard for more than 15 years and the court continues monitoring the work of the exercise by passing orders and directions.[64] This concept has brought a tremendous change in forest governance in India. Recently, the High Court of Himachal Pradesh took *suo moto* cognizance of the abysmal conditions of hill stations due to tourists in the state. The Court has directed the state government authorities to put up checkpoints and ensure that the pollution and degradation of the environment is reduced to a negligent amount in the region to protect its ecological balance. [65]

These powers and method of interpretations can be used to resolve the issue of justiciability in India by the Hon'ble Supreme Court and various High Courts of the country.

Needless to say, it can be concluded that Indian Jurisprudence has a wide ambit of accommodating climate change litigation and adjudicating upon it without flouting the balance of powers or causation principle. With such vast and accommodative environmental case laws and actions in India, it is disheartening to see that climate change litigation has not yet picked up its space, and tribunals like NGT are readily dismissing the efforts of petitioners without going into the causes.[66]

The courts can only adjudicate when litigation is brought up by the petitioners. Litigation can be brought up by two ways, as suggested earlier, through Human rights/fundamental rights or tortious/specific obligations claims. Though these claims are used for mitigation and adaptation measures respectively, India needs a dynamic approach which allows the judiciary to adjudicate effectively and bring a change.

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[63] Vellore Citizens Welfare Forum v. Union of India, (1987) 4 SCC 691 (India).

[64] Geetanjoy Sahu, *Public Interest Environmental Litigations in India,* 69 INDIAN J. POL. SC. 745, 750 (2008).

[65] In re Court on Its Own Motion v. State of Himachal Pradesh, (2013) SCC Online NGT 3621 (India).

[66] *See* Ridhima Pandey v. Union of India, (2019) SCC OnLine NGT 187 (India) (here, the National Green Tribunal was quick to dismiss the petition on the assumption that the state undertakes climate change as a factor while conducting however there is no such provision or clause which binds the state into taking climate change as a factor).

V. PROPOSED APPROACH TO CLIMATE CHANGE LITIGATION IN INDIA

The "super wicked" problem of Climate change[67] is increasing due to the incomplete participation of member states in the Kyoto Protocol.[68] Under these circumstances, litigation serves as an important tool to encourage citizens to push policymakers towards an effective means of climate change mitigation and adaptation.[69] The Paris Agreement, to which India is a party, also provides a legal predicate to encourage governments in adopting and implementing climate-related laws.[70] It serves as a tool to fill the gap between the national policy and policies needed for effective mitigation and adaptation of climate change. India is no stranger to interpreting municipal law in line with international treaties and commitments that it did[71] or did not sign.[72] This litigation effort which needs to be addressed can be done by keeping in mind two major goals: Adaptation and Mitigation.

A United Nations Environment Programme **("UNEP")** report has divided the types of climate change litigation measures into different kinds, such as, governments, private entities, administration, etc. Litigation based on adaptation and mitigation is brought against these limited parties for different reasons including failure of implementation,[73] failure to adapt to the impacts of climate change,[74] applying public trust doctrine,[75] etc. These litigations, as the report suggests, are based on human right claims, administrative claims and tortious breach of duty. The mix and match of arguments and different defendants determine the nature of a climate change litigation.

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[67]Richard J. Lazarus, S*uper wicked problems and climate change: Restraining the present to liberate the future*, 94 CORNELL L. REV. 1153, 1160 (2009).

[68]*See* SOMANATHAN ET AL.,*Supra* note 6 ("The Kyoto Protocol was the first binding step toward implementing the principles and goals provided by the UNFCCC, but it has had limited effects on global GHG emissions because some countries did not ratify the Protocol, some Parties did not meet their commitments, and its commitments applied to only a portion of the global economy (medium evidence, low agreement)").

[69] UNEP Report, *Supra* note 58.

[70] *Id.* at 8.

[71] Consumer Education & Research Centre v. Union of India(1995) 3 SCC 42 (India); People United for Better Living in Calcutta v. State of W.B.,AIR 1993 Cal. 215 (India).

[72] Vellore Citizens Welfare Forum v. Union of India, (1987) 4 SCC 691 (India).

[73]UNEP REPORT, *Supra* note 58, at 14.

[74]*Id.* at 22.

[75]*Id.* at 23.

In India, we can use two types of claims that have a high chance of succeeding in the court of law. First, using human rights/fundamental rights to allege policy implementation failure as an infringement upon the citizens; and second, using an administrative breach of duty of legal obligations as a means to determine the liability of the defendants and grant of remedy. The author in this paper argues that the use of these heads of litigation should be used for different implementation measures, choosing the right combination keeping in mind the political, administrative and socio-economic conditions of the country. For climate change mitigation measures in the court, the right course would be the usage of current administrative actions and legal obligations from the part of the state as a tool to showcase an infringement of a "legal duty" towards the citizens.[76] On the other hand, adaptation measures are in the form of measures that should be taken to lighten the impact of climate change-related disasters and occurrences in the near future. These may include flood management, urban planning, agricultural diversity, water management, etc.[77] Adaptation strategies are purely a policy-making part of the executive,[78] so there are no legal obligations attached to it. Therefore, fundamental, and human rights are a more concrete way to question the state on such policies, by connecting the failure to implement these policies as a violation of one's human or fundamental rights.[79]

VI. LEGAL ARGUMENTS FOR MITIGATION MEASURES: USE OF DUTY OF CARE AND SPECIFIC OBLIGATIONS

Mitigation efforts require the state to actively take up policymaking, legislative actions and implementation of the present environmental standards in its utmost good faith to prevent any further harm to the environment in form of climate change. The author proposes the use of administrative actions and the "duty of care" obligations of the state to push them towards better and effective implementation.

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[76] In Urgenda, the court ultimately relied on the local breach of duty obligations to ask the government for mitigation measures. Even though interpretational aid was taken from Paris Agreement, the ultimate claim was defined under the National Dutch Code.

[77] Daniel A. Farber, *The Challenge of Climate Change Adaptation: Learning from National Planning Efforts in Britain, China, and the USA*, 23 J. ENVTL. L.359, 382 (2011).

[78] *Id.*

[79] *See, e.g.,* Ashgar Leghari v. Federation of Pakistan (2015) W.P. No. 25501/2015 (Lahore High Court) (Pak.).

Presently, two main legal obligations can be used as an argument against the state and private entities.[80] Firstly, the failure of the state to include climate change effects under the "Environmental Impact Assessment" **("EIA")**, and secondly, the failure of inclusion of major greenhouse gases under the Air Pollution Act, 1981 **("the APA, 1981 or the APA")**. These two legal obligations are not in a vacuum, and we will see how they can be used to promote effective mitigation efforts by the government.

A. Climate change should be used as a criterion in carrying out the EIA of large industries, power plants and similar potential hazards to the environment.

The EIA draft notification 2020, was set to be converted into the rules, but the process has not yet started.[81] The EIA is used as a tool to study the impacts of a proposed project on the ecological balance of the area, its population, and other living organisms thriving in the area. There are different measures to assess this impact, including the degree of emissions and pollutants to be released into the air after the functioning starts. However, one thing that is lacking in the present EIA system is consideration for the impact on climate change.

Many countries have witnessed climate change litigation based on inadequate EIA. For instance, in 2017, the South African High Court rejected the approval of a coal-fired power plant. The rejection was followed due to a lack of climate change impacts in considerations for an EIA of the project.[82] The project proposed aimed to operate till 2060, but the Court held that even if the statute does not explicitly include climate change as one of the factors, these considerations are still relevant in line with the country's commitments under national law and the Paris Agreement.[83] Similarly, in Australia, the courts have held that climate change impacts must be taken into consideration while approving a project under EIA;

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[80] Since India has already witnessed use of tortious claims for environmental compensation and rectification, the author here has not focused on that part. Instead, the author has used specific and statutory obligations that can be first interpreted by the judiciary, and later on used by the litigants to make their claims. In this way, the specific obligations will enable the state to focus more on climate change and allow for a wider path for climate change litigation.

[81] Ministry of Environment, Forest and Climate Change, Draft Environment Impact Assessment Notification, 2020, S.O. 1199(E) (Notified on Mar. 23, 2020).

[82] UNEP REPORT, *Supra* note 58 at 38.

[83] *Id.*

however, these contentions were not found powerful enough to reject the proposal of any project.[84]

The purport of the Environment (Protection) Act, 1986 **("the EPA or the Act")** is for the "protection and improvement of environment and prevention of hazards to human beings, and other living creatures, plant and property", as stated in the objects and reasons of the Act. The Central Government derives its powers for an EIA under Section 3(2) of the Act and Rule 5(3) of the Environment Protection Rules, 1986. Fortunately, Section 5(1) VII of the Act talks about consideration of "[n]et adverse environmental impact likely to be caused by an industry, process or operation proposed to be prohibited or restricted." In simple language, this section gives broad scope to the central government to consider hazardous environmental impacts to the environment that are not considered in other clauses. Climate change is a form of net impact on the environment, that is likely to cause degradation of the environment, human life, and animals. In line with the object of the EPA, it becomes imperative to interpret climate change as one of the environmental hazards of this century.

Inclusion of climate change under EIA will create a statutory claim for the plaintiffs which could then be challenged before the court of law. If a project is likely to adversely impact the climate over the next few decades, serious considerations and precautions should be taken into account before granting approval. In a country like India, interpreting climate change as one of the factors will help in rejecting such projects, if not ensuring better functioning and precautions against mitigating its impact. Such arguments will hold its merit in court only when a specific legal duty of the state (considering climate change as one of the factors) is breached, thus granting remedy to the citizens (scrapping environmentally harmful projects or amending them).

B. Inclusion of Major GHGs under "Pollutants" in Air Pollution Act, 1986.

Climate change is mostly related to the GHGs, which in turn relates it mostly to what we are sending off to the atmosphere. Air becomes a major factor in determining the mitigation efforts of climate change. How a state regulates its air, is how it is likely to change the course of its emissions. Neither the EIA (as

[84]E.g., Re Australian Conservation Foundation, [2004] 140 LGERA 100 (Austl.) (holding that the assessment panel must consider the impacts of GHG emissions on the environment); Greenpeace v Redbank Power, [1994] 86 LGERA 143, 153-55 (Austl.) (finding that the project should be approved despite climate change impacts).

mentioned above) nor the Air Pollution Act, takes into account the emission of greenhouse gases for air pollution.

The term 'Pollutants' under the APA, 1986 is not defined clearly. According to Section 2 of the APA, "air pollutant means any solid, liquid or gaseous substance [(including noise)] present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or the environment." These pollutants are widely the ones that come under the "Emission inventory" in India.[85] They include SPM, PM 10, PM 2.5, SO2, NO x, CO, HC, VOC, etc.[86] It cannot be said that GHGs are specifically not included as 'pollutants' under the Act and various policies of the state, however, the absence of major GHGs such as CO2 and Ozone show that the inclusion of GHGs in assessing air pollution is not into consideration under the present policy.

Owing to the uncertainties and wide range of emissions of the major GHGs in the atmosphere, it often becomes difficult to include them into air pollutants. Majorly all form of human functioning includes emitting major GHGs, from using electricity to the refrigerator or even watching TV.[87] Therefore, it becomes imperative to find a solution that is both environmentally appropriate and feasible to implement.

A conclusion that GHGs do not fall under the said definitions of "air pollutants" is not concrete. There have been no judicial interpretations or decisions excluding or including the said gases from the definition. This is the point where the judiciary can play a determinate role in pushing the government towards adopting more rigorous climate change mitigation efforts. For example, similar litigations have been observed in the US. In *Massachusetts v. EPA*, the Supreme court directly held that this fell within the definition of "air pollutants" under the Clean Air Act. After this judgement, there have been numerous lawsuits challenging the lack of standards issued for GHG regulations by the sources.[88]

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[85] Central Pollution Control Board, MINISTRY OF ENVIRONMENT & FORESTS, PARIVESH: CLIMATE CHANGE 11 (2002).http://cpcbenvis.nic.in/scanned%20reports/Parivesh%20Climate%20change.pdf

[86] CENTRAL POLLUTION CONTROL BOARD, MINISTRY OF ENVIRONMENT & FORESTS, NATIONAL AIR QUALITY INDEX 3 (2015). https://app.cpcbccr.com/ccr_docs/FINAL-REPORT_AQI_.pdf

[87] CLIMATE TRANSPARENCY, THE G20 TRANSITION TO A LOW-CARBON ECONOMY: BROWN TO GREEN REPORT 3 (2018).

[88] *See* Americans for Clean Energy v. Environmental Protection Agency, 864 F.3d 691 (D.C. Cir. 2017); Center for Biological Diversity v. EPA, 722 F.3d 401 (D.C. Cir. 2013).

Once GHG emissions are interpreted as being under the "air pollutants," it will inevitably mean that the central government has to issue a standard of permissible emissions into the atmosphere, like other pollutants. This standard emission will help in controlling and reducing the release of such gases into the atmosphere through projects, industrialization and other activities. When such standards are effectively set, litigants can push the state agencies to uphold their legal duty in monitoring these standards, and any action contrary to the same can be questioned effectively as a breach of a statutory duty. Moreover, even private entities can be questioned if they surpass the legally permissible limit.

VII. ADAPTATION MEASURES: WHAT THE JUDICIARY CAN DO.

Apart from the legal obligations arising through legislations and rules, there has been a "right turn" in climate change litigation.[89] This "turn" addresses climate change on human rights and fundamental rights grounds. Most of the claims made in cases against the government or private entities have been based on statutory obligations only.[90] Arguably, the *Urgenda* and *Leghari* cases are some of the few cases, where rights based litigation has found some ground in the courtrooms.

Some scholars argue that looking at these litigation clauses through a "rights-based" lens can help policymakers to develop strategies in mitigation as well as in adaptation.[91] However, the main problem of causation and actionable rights violations occur almost every time a right based litigation is conceived.[92] Mostly in terms of mitigation measures, actionable claims in future climate change impacts are often a hurdle faced by the claimants.[93]. It becomes illogical and difficult to show in the court of law, that any alleged wrongful action by the defendant has directly led to any climate-related right infringement of the parties in question.

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[89]PEEL & OSOFSKY, *Supra* note 9.

[90] David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual,* 64FLA. L. REV.15 (2012); JACQUELINE PEEL & HARI. M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY(Cambridge Univ. Press 2015); MICHAL NACHMANY ET.AL, GLOBAL TRENDS IN CLIMATE CHANGE LEGISLATION AND LITIGATION, GRANTHAM RESEARCH INSTITUTE ON CLIMATE CHANGE AND THE ENVIRONMENT 13 (2017) (noting that the US has the most cases at around 600 decisions, followed by Australia with over 50 climate change-related cases).

[91]HALL & WEISS, *Supra* note 10, at 310.

[92]John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L. L. 163, 165 (2009).

[93] John H. Knox (Special Rapporteur), Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc. A/HRC/31/52, ¶. 22 (Feb. 1, 2016).

If today's climate change litigation has to be usefully argued in front of an Indian court, the first thing would be focusing on the right remedy. In terms of fundamental rights and human rights breach, the author argues that the main remedy should align with the adaptation measures to be taken by the state. In terms of adaptation measures, the problem of future impacts is weakened, as comparatively, adaptation is less further away in the prism of climate change than mitigation. Moreover, the problem of causation will also be strategically solved, if it can be usefully established that a lack of proper adaptation measures towards a local population — that has faced climate-related disasters — has led to infringement of their right to life under Article 21 of the Constitution. However, for this to occur, the judiciary first needs to interpret something along the lines of "right *to* environment/ right against climate change" as opposed to the present right to a clean and healthy environment.

A. Article 21 and Right against Climate Change

The current issues surrounding the judicial approach towards climate change litigation are two-fold. First, it has not interpreted the "right against climate change" under Article 21, similar to the "right to a clean and healthy environment" as is done in India and many other countries. Secondly, the vague interpretations concerning climate change in the *obiter* of various domestic judgments have left the issue open-ended, and without any concrete precedent. These issues have led to a weak climate change jurisprudence in India, even when there is a huge scope to accommodate it.

Human rights are concerned with "avoiding the worst, than achieving the best"[94], which derails the mitigation stance, since climate change is not seen as a catastrophic effect for the present generation. Adaptation of climate change will be served better under the fundamental rights course, mainly because to establish a violation of human rights and fundamental rights, disastrous effects of lack of adaptation policies can be shown directly affecting the local population of the area/community. In *Leghari v. Pakistan*, a similar stance was adopted by the petitioners, that claimed a violation of the fundamental right to life under the Constitution of Pakistan, which was accepted by the court. The reasoning and remedy adopted in *Leghari* as opposed to other prominent case laws such as

[94]*See generally* JAMES NICKEL, HUMAN RIGHTS, STAN. ENCYCLOPEDIA PHIL. (2014).

Urgenda and *Massachusetts*[95] shows us that in order for a right based litigation to succeed, climate change adaptation cause of action is must more likely to be useful in the courts than mitigation-based cause of action.

Indian judiciary has played a huge role in mounding the environmental jurisprudence in India. In the cases of *Subhash Kumar v. UOI*[96]and *Virendra Gaur v. the State of Haryana,*[97] the Supreme Court recognized several liberties that are implied in Article 21, including the right to a healthy environment. The High Courts of various states have followed the Supreme Court's lead, and virtually now all the High Courts recognize an environmental dimension to Article 21. The "right to environment" in India encompasses the right to a clean environment which includes clean rivers, free from pollution,[98] control of mining in ecologically sensitive areas[99], control of air pollution in and around monuments,[100] etc. What it does not include is any reference to "climate change".

Right to environment is very different from the right against climate change. Right to a clean environment means the right to enjoy a pollution-free environment including air, water and natural resources.[101] As regards climate change, UNEP has described climate change as a phenomenon that can negatively impact the enjoyment of other human rights such as the right to health, right to education, right to shelter and right to a healthy environment as well.[102] Climate change is a phenomenon that affects the enjoyment of many fundamental rights, including the right to a healthy environment, which makes it much more serious and graver than the right to the environment itself. Right to environment means enjoying the physical well-being of natural resources around you, while right against climate change includes obligation of the state and other stakeholders in effectively adapting and mitigating the risks related to climate change, to facilitate better enjoyment of all human or fundamental rights.

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[95] Leghari approached the adaptation policy implementation through the rights lens, as opposed to Urgenda and other US Cases, that were focused on statutory laws and obligations of the state to direct a remedy and liability.

[96] Subhash Kumar v. Union of India, AIR 1991 SC 420 (India).

[97]Virendra Gaur v. the State of Haryana, (1995) 2 SCC 577 (India).

[98] Vellore Citizens Welfare Forum v. Union of India, (1987) 4 SCC 691 (India).

[99] Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh, (1989) Supp (1) SCC 504 (India).

[100] M.C Mehta v. Union of India, AIR 1997 SC 734 (India).

[101]Damodar Rao v. The Special Officer, MunicipalCorporation,AIR 1987 AP 171 (India).

[102]UNITED NATIONS ENVIRONMENT PROGRAMME, CLIMATE CHANGE AND HUMAN RIGHTS (2015). https://web.law.columbia.edu/sites/default/files/microsites/climate-change/climate_change_and_human_rights.pdf

Till now, Indian courts have often considered climate change as one of the discussion points in the right to a healthy environment,[103] something which has impacted the ability of the judiciary to litigate upon the matter with more serious concern. This has curtailed the role of the Indian judiciary, which could instead have played in pushing the government towards adaptation policies to fight climate change.

As suggested in *Leghari v. Pakistan*, the failure of the Central Government in implementing climate change-related policies is a violation of the right to life under the Constitution of Pakistan, the Indian courts can adopt a similar stance in upholding the accountability of central government and private entities. The adaptation role of the central government is limited to policymaking, without any legal obligations, to perform such activities as opposed to preserving the environment.[104] This aspect of non-enforceable obligations gives fundamental and human rights a better prospect to claim remedies against the government than other measures such as torts or administrative claims which need the specific "duty of care" to be breached.

Right against climate change, if included under Article 21 of the Constitution of India, will enforce an implication on government and other stakeholders to ensure that lack of actions and implementation is not infringing the rights of common people. The inclusion of a wide variety of rights under the right against climate change, as discussed in the UNHCR report, makes it easier to prove infringement of any of those rights due to the actions of the state. Although this right has been recognized on an international level,[105] it will still be easier to implement it domestically through Article 21, as we have seen through case laws like *Urgenda* that international human rights infringement does not stand a very firm ground for climate related actions, unless those rights can be traced into the domestic law through some statutory provisions.

VIII. CONCLUSION

Climate change is no longer a question of drawing-room discussions. It has started posing various challenges on several fronts. In this endeavour, the citizenry has to work together with all the stakeholders. India, a country that is one of the most

[103] State of Madhya Pradesh v. Uday Singh,AIR 2019 SC 1597 (India).
[104] The specific legal obligations to protect the environment which will inevitably lead to some kind of climate change impact mitigation is provided in the form of Environment Protection Act, 1986.
[105] Human Rights Council Res. 7/23, U.N. Doc. A/HRC/RES/7/23, at 65 (Mar. 28, 2008).

endangered in terms of climate change repercussions, needs to take some serious actions both in terms of adaptation and mitigation. In this paper, the author has tried to explain the background of climate change litigation around the world, and the two different aspects through which it is approached i.e., the "specific obligations" approach and the "rights-based" approach. When we look at these two approaches, cases around the world show that both these approaches can be used for mitigation as well as adaptation measures related to climate change. The question then arises, what approach is good for a country like India? The author has tried to answer this question by analysing the vast environment friendly jurisprudence in India.

By analysing case laws around the world and in India, it can be seen that the first approach of specific obligations arising from domestic legislation or "specifical obligation" by the state or private entities will serve well for pushing the parties for mitigation-based measures in the court of law. If arguments regarding Environmental Impact Assessment and inclusion of GHG emissions in the Air Pollution Act are taken, there is the likelihood that a remedy towards mitigation measures can be adopted by the courts. In terms of adaptation measures, the author has tried to argue that the approach of "right-based" litigation, mainly concerning "right against climate change" can be interpreted by the judiciary. Such interpretation will provide a foundation for future actions and an infringement of this right can be shown if the state fails in making or implementing adaptation policies for its citizens. Logically, if adaptation is not done, climate change will cause huge damage to the lives, property, wealth, and health of the people, therefore it then gets easier to show an infringement in such cases. However, this can only be done if climate change is specifically interpreted under Article 21 of the Constitution. Through the two approaches, as discussed in the paper, directing each on to the cause it will best serve, normal citizens and activities of the country can play a huge part in shaping the future of India and saving the upcoming generation from a degraded and unsustainable life

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INFORMATION WARFARE: THE IMPEDIMENT FOR CYBERSECURITY POLICY AND LAWS OF INDIA

- Divyanshu Dubey

ABSTRACT

*The last two decades have witnessed a dramatic rise in the information technology sector which has boosted an ongoing evolution of cyber-space, microcomputers, and other technologies associated with the internet. The rapid evolution of information, communication, and technology ("**ICT**") has created complexities with respect to the traditional borders of countries, grabbing the attention of defence strategists and policymakers. Heavy dependence on information is seen as a security challenge because it makes the State vulnerable to manipulation and misguidance. This security challenge in the realm of information technology gives birth to the concept of 'information warfare'. Though information warfare has many dimensions and has no concrete definition, it involves information as a crucial element. As opposed to traditional warfare which involves militaries, information warfare is considered as the'4th generation' warfare which is a contactless but effective mode of warfare.*

The paper scrutinizes various forms of information warfare and the challenge that each form poses to the national security of the country. It also examines the effectiveness of the existing Indian cyber-security law framework in countering the threats of information warfare. Further, the paper makes some crucial recommendations for strengthening the laws governing information technology in India.

KEYWORDS: Information, Communication, Technology manipulation, Cyber-space, 4thgeneration warfare.

I. INTRODUCTION

In the past decades, the world has witnessed a revolution of information which boosted the flow of communication among people belonging to different regions of the world. The revolution did not just improve the flow of information but also made the traditional borders of countries much more complex and blurred. The rapid advance of information reflects the advancement in computerized information and communication technologies and other related innovations.[106]

Just as wealth was a valuable resource during the Middle Ages and the availability of capital and labour was crucial during the Industrial Age, 'information' has emerged as a strategic resource to the present world. While military power and economic power have some role to play in the present world, new resources such as effective communication may prove to be more relevant.[107] Therefore, it is axiomatic that the power is passing from the 'economically rich' countries to 'information rich' countries.[108] A substantial amount of the activities of our daily life is heavily dependent on information infrastructure. Thereby, it is pertinent to mention here that technology and the rapid flow of information have not only improved the social life of an individual but have also shifted the mode of conflict from conventional to non-conventional methods of warfare, in which the cyber-space would be used.[109]

This method of warfare is convenient and is economically and ecologically less burdensome.[110]An unconventional method of warfare based on information infrastructure involving mainly the cyber-world does not require direct contact with militaries; rather, in this type of warfare, an individual with expertise in information technology can cause severe damage.

Advanced ICT has enlarged the scope of cyber-warfare. Cyber-criminals have become more sophisticated, and emerging cyber-espionage and hacking activities have created an impression that cyber-attacks are becoming more organized and

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[106] John Arquilla & David Ronfeldt, *Cyber war is coming! Comparative Strategy*, 12 TAYLOR & FRANCIS ONLINE, 141–165 (1993).
[107] Joseph S. Nye, *Soft Power*, 80 FOREIGN POLICY, 153–171 (1990).
[108] *Id.*
[109]Anita D. DeVries, *Information Warfare and Its Impact on National Security*, THE UNITED STATES NAVAL WAR COLLEGE (Jun. 13, 1997), https://apps.dtic.mil/sti/pdfs/ADA325003.pdf.
[110] *Id.*

professionalized.[111] Considering the high gravity of this threat, states across the world have recognized cyber-security as a top priority security issue.

As far as the situation in India is concerned, cyber-security has received less attention than that in developed countries. India lacks effective capabilities for offensive and defensive cyber-security. Moreover, there are crucial mechanisms which are vital to counter complex malware like Stuxnet, Flame, and black shades are lacking.[112]India has witnessed over 1.1 million cyber-attacks in the year 2020. The number of cyber-attack cases has skyrocketed in the last five years. As per the data released by the Ministry of Electronics and Information Technology("**MeitY**"), the number of cyber-attacks in India was around 49,000 in 2015, 50,000 in 2016, 53,000 in 2017, 208,46,000 in 2018, 394,50,000 in 2019 and 1,158,21,000 in 2020.[113]

Considering the primitive state of India's cyber-security mechanism in tackling the threats of cyber-warfare, it is suggested that the parliament to pass a stringent statutory regulation to curb the illegal activities in the cyber-world and protect India's information infrastructure.[114] It is a fact that illegal operations in the cyber-space cannot be detected easily, and that detection requires specialized knowledge. Thereby, it is suggested that a law enforcement authority specifically related to cyber-space be designated, along with a legal framework addressing illegal activities amounting to cyber-warfare.[115] The ultimate purpose of this paper is to assess and scrutinize the efficacy of the existing Indian cyber-law framework in countering the real threats of cyber-warfare. To justify the relevance of information warfare in the domestic legal system, the paper has analysed various dimensions of this concept.

II. INFORMATION INFRASTRUCTURE: CONCEPT AND SIGNIFICANCE

Information warfare revolves around information infrastructure. Pertinently, the aggressor state targets information infrastructure to disrupt the smooth flow of

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[111] Sushma Devi Parmar, *Cyber Security in India: Evolving Concern for National Security*, 1 THE J. OF INTELLIGENCE AND CYBER SECURITY, 6-9 (2018).

[112] *Id*.

[113]*More than 6.07 lakh cyber security incidents observed till June 2021: Government*, THE HINDU (Aug. 04, 2021), https://www.thehindu.com/business/cert-in-observed-more-than-607-lakh-cyber-security-incidents-till-june-2021-government/article35726974.ece.

[114] Sakshi Shairwal, *Legal Understanding of Cyber Warfare in India*, LEXOLOGY (Jan. 24, 2022), https://www.lexology.com/library/detail.aspx?g=c6b3d880-d816-47a4-84ab-609859df23cd.

[115] *Id.*

information in another state. Thereby, a discussion regarding the core of information warfare and cyber-laws requires a conceptual understanding of information infrastructure. Hence, it becomes relevant to define this concept for the subject matter of this paper.

The term information infrastructure has not been categorically defined in any authentic document. The definition of this term is based on interpretations which may vary from person to person. The most widely accepted definition has been provided by Ole Hanseth, an informatics professor at the University of Oslo. He states that, "information infrastructure can be defined as shared, evolving, heterogeneous and standardized bases which ensure the flow of information".[116] As per Hanseth, internet or universal infrastructure, business inter-organizational infrastructure, and corporate infrastructure, all qualify as information infrastructure.[117] Further, the Cambridge dictionary defines the term information infrastructure as "a computer, software or any device which can be used to send or receive information". As per the US-based information infrastructure task force, which was created in 1993 by the Clinton administration, "the information infrastructure is a web of a communication network; computer or databases which put a huge amount of information on the fingertips of the user and such information are easily accessible".[118]In the business sense, information and data from one process can be applied to another process.[119]

In the military sense, the data can be used to deliver real-time targeting information to weapons.[120] As in the case of war, the side which has superior information wins the war. Therefore, information has a high degree of strategic importance. As far as the term 'infrastructure' is concerned, it is a fixed foundation upon which the whole organizational or communication activities take place and are exploited.

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[116] JOHNY HOLMSTROM, MIKAEL WIBERG & ANDREAS LUND,INDUSTRIAL INFORMATICS DESIGN USE AND INNOVATION: PERSPECTIVES AND SERVICES 155 (IGI Global 1998).

[117] *Id.*

[118]*The National Information Infrastructure: Agenda for Action*, ERIC (Sep. 15, 1993), https://eric.ed.gov/?id=ED364215.

[119]J.V. MCGEE, MANAGING INFORMATION STRATEGICALLY: INCREASE YOUR COMPANY'S COMPETITIVENESS AND EFFICIENCY BY USING INFORMATION AS A STRATEGIC TOOL 68–69 (John Wiley & Sons, 1993).

[120]EDWARD WALTZ, INFORMATION WARFARE: PRINCIPLES AND OPERATIONS54–55 (Artech House Publications, 1998).

The infrastructure upon which the information flows is provided by information technology.[121] Therefore, the advent of information technology has made information infrastructure significant in various domains of the country including administration, military, power, energy, transportation, e-governance, and strategic public enterprise.

Information infrastructure involves interconnected computers and networks and the flow of information. It is pertinent to mention that there are some core sectors within the administration of the country which are of high importance. Such critical information infrastructure includes power generation, gas or oil pipelines, banking or telecom, etc. The importance and contribution of these core sectors make them critical for every nation. These networks which control the government's essential societal functions are heavily dependent on their information infrastructure to control functions and communication.[122] Thereby, it is the utmost responsibility of the government to protect these networks because any manipulation may hamper the smooth flow of administration.

Under the Information Technology Act, 2000 ("**IT Act**"), "the Government of India and state governments have been authorized to declare any computer resources which directly or indirectly affect the critical information infrastructure as a protected system".[123] Further, the explanation appended to Section 70 of the IT Act defines Critical Information Infrastructure as, "a computer resource in whose destruction the national security, economy and public health shall be compromised".[124]

This reflects that the framers of the IT Act have taken notice of the significance of information infrastructure. However, the increasing cyber-attacks on the country question the efficacy of these provisions.

III. DIGITALISATION OF WARFARE

The information age has made the lives of humans more convenient, but, it has also brought a new form of vulnerability for society at large. Today, information is so accessible that it can be easily manipulated for illegal purposes. As discussed earlier, a country's administration heavily relies upon a critical information

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[121] Antonio Cordella, *Information Infrastructure*, 2 INT'L J. OF ACTOR-NETWORK THEORY AND TECHNOLOGICAL INNOVATION 27-53 (2012).

[122] *Guidelines for Protection of Critical information infrastructure,* NCIIPC (Jan. 16, 2015),https://www.asianlaws.org/gcld/cyberlawdb/IN/guidelines/NCIIPC_Guidelines_V2.pdf

[123] Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India), § 70.

[124] *Id*.

infrastructure, which if destroyed, can disable a whole nation.[125] Therefore, it can be inferred that the boon of information technology has also brought about vulnerability with it. Cyber-warfare makes use of this vulnerability and disrupts national security. The threats of cyber-warfare not only jeopardize the economic and national security but also hamper the daily lives of the individuals in the country. Another advantage that cyber-warfare yields to the attacker state is cost-effectiveness. Even a relatively weaker state with a poor economy can wage cyber-warfare owing to its lower cost relative to the mobilization of tanks, soldiers, or aircrafts.[126]

It is also pertinent to note that while the technology that is used to protect the computer resource, such as a firewall, is very expensive and complicated, a cyber-attack can be executed with simple and comparatively cheaper tools.

A. Information Warfare and Cyber-Warfare

Today, the internet is acting as the medium for free-flow of information within and between nations. Be it business, international relations, or social cohesion, communication in every field is heavily dependent on the internet. In this connected world, the territorial borders of countries are more complex and access to information is easier, which makes cyber-space vulnerable to attacks and manipulations.

In information warfare, the vulnerability of cyber-space is used to target the information infrastructure via fraud, theft, industrial espionage, and disruption in business continuity.[127] Therefore, civilian IT systems, command, control, communication, computers, intelligence, and surveillance of a country come under great risk if adequate measures haven't been taken to defend them.[128]

Considering the speed of communication via internet, it becomes convenient to speedily reach both the citizens of the target country and the international community at large. Social media also has a crucial role to play in cyber-warfare since it can be used to initiate disinformation campaigns against target countries.

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[125] Robert F. Behler, I*s America Losing the Cold War in Cyber- Space,* US STRATEGIC COMMAND (Apr. 13, 2022), https://irp.fas.org/news/1998/05/virtual_cold_war.htm.
[126] *Id.*
[127] Gary Waters et. al., *Australia and Cyber-warfare*, 168 ANU PRESS 1-4 (2008).
[128] *Id.*

Information warfare via social media involves troll factories, bots, and fake news.[129]

B. The Concept of Cyber-Warfare

Cyber-warfare involves attacking and defending information and computers in cyber-space.[130] Offensive cyber-warfare or cyber-attack involves the stealing of any secret information or attacking any process which deals with the collection, analysis, and dissemination of information or attacks on the critical information infrastructure.[131] The potential attacker in cyber-warfare may indulge in any activity which includes *inter alia*(i) intelligence gathering; (ii) cyber-terrorism motivated by politics or religion; (iii) industrial espionage; or (iv) corporate information warfare.[132]

Similarly, there are certain actions that the defenders perform during cyber-warfare. The defending action would mainly involve the element of protection. As per Winn Schwartau, a lecturer on information warfare, information warfare via cyber-space can be divided into 3 classes *viz*.

First. Class 1 is personal information warfare which involves attacks against an individual's electronic privacy[133];

Second. Class 2 is corporate information warfare which involves attacks against the information infrastructure of a business to steal confidential trade secrets, also known as industrial espionage.[134]

Third. Class 3 is global information warfare.[135] Under class 3, the war is waged against industries, the political sphere, or even entire countries. This class is bigger and most widespread because the targets are not only computers, companies, or economies but, tens of millions of people who are heavily dependent upon information technology.

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[129]Information Warfare, NATO, https://www.nato.int/nato_static_fl2014/assets/pdf/2020/5/pdf/2005-deepportal4-information-warfare.pdf.

[130] KENNETH V. PEIFER, AN ANALYSIS OF UNCLASSIFIED CURRENT AND PENDING AIR FORCE INFORMATION WARFARE AND INFORMATION OPERATIONS DOCTRINE AND POLICY (2012).

[131] GLOBAL INFORMATION ASSURANCE CERTIFICATION PAPER, *https://www.giac.org/paper/gsec/3873/information-warfare-cyber-warfare-future-warfare/106165* (last visited Apr. 26 2022).

[132] *Id.*

[133] WINN SCHWARTAU, WHAT EXACTLY INFORMATION WARFARE IS, 17-19 (Elsevier Science Ltd., 1997).

[134] *Id.*

[135] *Id.*

It is significant to strengthen the cyber-security of the country and for this purpose requirement of stringent cyber-law is axiomatic.

IV. INFORMATION WARFARE AND INDIAN CYBER-SECURITY LAWS

Before embarking upon a detailed discussion on the information warfare and cyber-security laws of India, it is pertinent to note that information warfare may not necessarily be between nations, and can also necessarily involve cyber-terrorists, cyber-criminals, and commercial organizations.[136] The executioner of information warfare can be an adversary state or a terrorist group.

Martin Labicki, an American professor highlights seven distinct forms of warfare within information warfare i.e., command and control warfare, intelligence-based warfare, electronic warfare, psychological warfare, hacker warfare, economic warfare, and cyber warfare. Out of these seven different forms of warfare, cyber-warfare and hacker warfare are the only methods that are purely internet-based and require a high degree of cyber-security to counter their threats. However, cyber-warfare is the most dynamic and complex concept of war because it constitutes situations that may not be dealt with by the cyber-security laws of the country.

Nevertheless, cyber-warfare is distinct from seemingly similar concepts of cybercrime and cyber-attack. However, there are two situations when all three categories overlap. The first situation occurs when an attack that is launched in the context of an armed conflict undermines the functions of computer networks for a political purpose and violates the criminal law of the target country.[137] The second situation comes into the picture when an attack that causes damage equivalent to a conventional armed conflict undermines the computer system and violates the criminal law of the targeted country.[138]

Even hacker warfare can constitute cyber-warfare when the hacking activity is completely state-sponsored. Thereby domestic cyber-laws of the country are of great significance to combat the threats of cyber-warfare because several times cyber-warfare includes not only cyber-attacks but also cyber-crimes which are mainly dealt under municipal cyber-laws with extraterritorial reach.[139]

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[136] PETER LILLEY, HACKED, ATTACKED AND ABUSED: DIGITAL CRIME EXPOSED, 103 (Kogan Page Publishers 2002).

[137] Oona A. Hathaway, *The Law of Cyber-Attack*, 100 CALIF. LAW REV. 817–885 (2012).

[138] *Id.*

[139] *Id.*

V. ANALYSIS OF INDIAN LAWS VIS-A-VIS INFORMATION WARFARE

There are three dimensions of cyber-warfare, *viz*. (i) adjunct to military operations, (ii) limited cyber-war, and (iii) unrestricted cyber-war.[140] Under the first dimension, cyber-warfare generally occurs as military operations. During military hostility, the key objective for the enemies is to gain an information advantage. Activities like suppressing the enemy's air defences by blocking radars are performed under this head of cyber-warfare. Computers are hacked to degrade the enemy's information processing and communication capabilities.

Further, the second dimension of cyber-warfare involves the information infrastructure of the civilian administration as the medium. As discussed earlier, the information infrastructure forms a crucial part of the administration. If hampered, it can paralyze a whole nation. For limited cyber-war, links for sharing data, wide area network connections or an inside agent can be used to insert malicious software to damage the whole information infrastructure of the target country.[141]

However, the damage is done in a restricted manner. Lastly, the third category is much more serious because the damage is inflicted upon the civilian information infrastructure. Under this category, the enemy tries to paralyze the country's flow of information by destroying the information infrastructure. The enemy targets critical information infrastructure like the social fabric of the country (by spreading propaganda), air traffic control, power generation, water resources management, etc. It is also pertinent to mention here that information warfare in the form of cyber-war can be performed by way of espionage (intended to obtain the official secrets of a state), malware (used to alter or remove or modify any critical information in the cyber-space of a country), distributed denial of service (performed to shut down the server or any important website of the targeted country).[142]

A proper cyber-security law is necessary to counter various cyber-warfare threats. In India, cyber-security-related aspects have been dealt with under the IT Act. The IT Act has a separate chapter for dealing with cyber-offenses. In the year 2008, an amendment was brought in the IT Act which enabled it to exercise extraterritorial

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[140] *Id.* at 25.

[141] *Id.*

[142] *Id.* at 9.

jurisdiction.[143] Thereby, any offender who is working as a cyber-warrior for a hostile country which performs a cyber-attack on India from a foreign country would be tried under the IT Act. Chapter IX of the IT Act deals with a few violations which can be related to the activity of cyber-warfare. Such offenses are:

First. Hacking i.e., gaining unauthorized access to a computer system by breaching a firewall,

Second. Virus spreading i.e., helping in transferring the computer data to a third party by corrupting the computer system,

Third. Email spoofing i.e., an email consisting of phishing link for downloading malware sent with a malicious intent.[144]

Further, several provisions under the Indian Penal Code, 1860 ("**IPC**") deal with cyber-security. By virtue of Section 4(3), the provisions of IPC would be applicable in case of any offence that is committed outside India, but targets computer resources situated within India.[145] However, it is often witnessed that the provisions of the IPC and the IT Act overlap, leaving the ground open for judicial interpretation.

For instance, an act of tampering with computer documents is penalized under Sections 65[146] and 66[147] of the IT Act and Section 378[148] of the IPC. Though the punishment for the offense is the same under both statutes, its form is different. Under the IT act, the offense of tampering with computer documents is considered a compoundable and bailable offense. On the contrary, under the IPC the same offense has been deemed as a cognizable and non-bailable offense.

This overlapping of the statutes gives two alternatives to the court i.e., whether to treat the offense of tampering with the computer document as a bailable offense under the IT Act or as a non-bailable offense under IPC. This paradox is resolved by Section 81 of the IT Act which contains a non-obstante clause.[149] The provision states that "if any provision of another statute is contradictory to the provisions of IT Act, then the IT Act shall have an overriding effect".[150]

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[143] *Id.* at 19.
[144] *Id.* at 43.
[145] Pen. Code § 4 cl. 3.
[146] Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India), § 65.
[147] Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India), § 66.
[148] Pen. Code § 378.
[149] APAR GUPTA & AKSHAY SAPRE, COMMENTARY ON INFORMATION TECHNOLOGY ACT WITH RULES, REGULATIONS, ORDERS, GUIDELINES, REPORTS AND POLICY DOCUMENTS (LexisNexis 2016).
[150] *Id.* at 19.

Thereby, the IT Act would have an overriding effect over the provisions of the IPC. However, it is also important to note that the IT Act being in the rudimentary stage may quagmire in case of a criminal act that has not been listed under the act.[151]In case the IT Act fails, the IPC may come into the picture, but this time-tested statute remains vulnerable when it comes to internet crimes.[152]

A. Peculiar Extraterritorial Applicability

As discussed, information warfare is not just one nation attacking the other but rather involves cyber-terrorists, cyber-criminals, or commercial organizations.[153]

Even non-state actors or terrorists having some political agenda can wage a cyber-war against a country, subject to the availability of a computer, internet, and technical knowledge. For instance, a non-state actor settled in any rival country can wage information war against India by damaging the critical information infrastructure. In such a situation, the extraterritorial applicability of the cyber-law and penal provisions becomes crucial. The extraterritoriality application of the penal laws ensures that the state is addressing transnational crimes and achieves political objectives by exerting pressure on the host state.[154]

As far as the extraterritoriality of the information technology act is concerned, it applies to offenses and contraventions committed outside India and involves "computer, computer system or computer network" located in India.[155] However, IPC will be having extraterritorial jurisdiction over any offense which is committed from overseas and the targeted 'computer resources' situated in India.[156] In simple words, IPC would be applicable in case the target is a "computer resource" located in India. There exists an inconsistency between IPC and IT acts on the aspect of extraterritoriality which leads to absurdity. To trace this loophole and absurdity in the Indian cyber-law framework, it is apposite to examine the definition of the terms computer and computer resources provided under the IT act. The IT act

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[151]DR. TALAT FATIMA, CYBER CRIMES (EBC 2021).

[152] *Id.*

[153] *Id.* at 36.

[154]*Extraterritorial Jurisdiction as a Tool for improving the Human Rights Accountability of Transnational Corporations*, BUSINESS AND HUMAN RIGHTS ABUSE CENTRE (Dec. 1, 2006), https://www.business-humanrights.org/en/latest-news/pdf-extraterritorial-jurisdiction-as-a-tool-for-improving-the-human-rights-accountability-of-transnational-corporations.

[155] *Id.* at 19.

[156] Pen. Code § 4 cl. 3.

provides an exhaustive and comprehensive definition of the term computer. As per Section 2(i), a device shall fulfil three conditions to be called the computer.

First. It can be any electronic, magnetic, optical, or any other high-speed data processing device.

Second. Such a device specified under the first condition shall perform logical, arithmetic, and memory function.

Third. The device can perform the functions specified under the second condition by manipulating electronic, magnetic, or optical impulses. The most critical aspect of this definition is that "the device shall be able to perform logical, arithmetic and memory function.[157]

This condition scales and limits the definition of the computer to these 3 functions. Though the device has characteristics of a computer, if it lacks any of the above-mentioned functions, it would not be considered a computer. Further, discussing the definition of computer resources as specified under Section 2(l) of the IT act, it consists of both software and hardware interface of the computer, computer system, and computer network.[158]

For an instance, a computer without an operating system would not be able to perform the basic functions of a computer as specified under Section 2(i) but, it would still be a qualified computer as part of computer resources.

The scope of the definition is wide which makes it to be constituted of both generals as well as specific aspects of computer resources. Thereby, along with the computer, computer network, and computer system, it also includes data, computer databases, or software.[159] It can be inferred from this examination that the definition of computer resources is much wider as compared to the other three terms which are computer, computer system, and computer network. This is where the issue rests.

The information warfare generally involves overseas attacks. In simple words, the main offender or executor of the attack sits in a foreign country. Thereby extraterritoriality of laws should be strengthened to curb these transnational offenses. As stated earlier that IPC deals with the cyber-offenses committed from overseas and targets computer resources in India. For instance, any cyber-offense

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[157] 5, VAKUL SHARMA, INFORMATION TECHNOLOGY LAW AND PRACTICE- CYBER LAWS AND LAWS RELATING TO E-COMMERCE (Universal Law Publishing 2021).

[158] *Id.*

[159] *Id.* at 46.

which is committed against any device or machine fitting into the definition of only 'computer resources' is not punishable under any explicit provision of IPC then in such a situation there would be a need for judicial interpretation. Therefore, it is suggestive that Section 75 of the IT Act shall be modified to expand the extraterritorial applicability in the matters of "computer resources" as well. This would reduce the obscurity of Indian cyber-laws and reliance upon the judicial interpretation would be reduced to some extent.

B. Fuzzy Logic Technology Remains Unaddressed

Fuzzy logic technology is used to control a device by using the mathematical approach of analysing input value in terms of a logical variable. In simple terms, fuzzy logic involves intermediate values to determine which is partially true or partially false. The logic values are used in the operations of fuzzy logic.

These values lie between 0.0 and 1.0 in which 0.0 means false and 1.0 means true. As opposed to the Boolean system, fuzzy logic doesn't work upon the logic of absolute truth or absolute false rather it uses an intermediate value between 0 and 1 to determine the magnitude of truth and false.[160] Thereby, it involves the coding in which a set of rules and if-then conditions are coded by the expert based on which the decision-making of the whole system takes place.[161] The functioning of fuzzy logic consists of three stages i.e. (i) fuzzification, (ii) inference engine, and (iii) defuzzification. When the user enters data into the device, such input data is converted into fuzzy sets. The fuzzy sets of data are transferred to the inference engine which infers the fuzzy sets and determines the set of rules that need to be applied. Lastly, the fuzzy sets are converted into crisp data and the result comes out as an output based on the rule applied.[162]

This technology is purely based on ROM (read-only memory) which means the data once entered into the device cannot be amended or manipulated. Therefore, such devices are not fit for arithmetic operations because the data cannot be entered to perform calculations like multiplications, subtractions, division, or additions.[163]

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[160] *Fuzzy Logic | Introduction*, GREEKS FOR GREEKS (Apr. 19, 2022), https://www.geeksforgeeks.org/fuzzy-logic-introduction/.

[161] *Id.*

[162] *Id.*

[163] *Id.* at 54.

Data named 'firmware' is stored in the device's ROM, which is nothing but the programming or set of rules on which the device functions. This data is completely non-volatile and cannot be modified until hacked.[164] The hackers generally use malware named equation drug and gray fish which replaces the existing firmware with the malicious firmware and allows the hackers to collect the system's critical information or make the system malfunction by DOS (denial of service attack) to the victim.[165] Considering, the fact that fuzzy logic technology is purely a ROM-based technology it is prone to this type of hacktivism. It is worth noting that fuzzy logic technology has a lot of relevance in today's world. It is used in air conditioners, washing machines, vacuum cleaners, antiskid braking systems, and many critical sectors consisting of power transmission systems, subway control systems, power systems, defence equipment, weather forecasting, etc.[166] Therefore, such technology or devices involving that technology shall be protected under Indian IT law because it is prone to information warfare.

As far as Indian law is concerned, it is rigid in the definition of computer. As stated earlier the computer shall perform three essential functions named logic, arithmetic, and memory function by the virtue of IT act. As noted by the Bombay High Court, though Fuzzy logic technology can perform logical as well as memory functions it lacks arithmetic functions because it is purely ROM-based and data neither can be entered nor the existing data can be modified thereby it cannot be regarded as computer.[167] Hence, any contravention with regards to a device working on Fuzzy logic cannot be punished under the IT act because it wouldn't be fulfilling the basic criteria of a computer.[168]

This rigidity of Indian law can be a setback for India's cyber-security against cyber-warfare or information warfare because today fuzzy logic technology is used in critical information infrastructure of the country and until such technology is explicitly protected under the act, the Indian cyber-security and information infrastructure would be in the state of quagmire.

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[164] *What is Hacking*, DIGIT (Apr. 09, 2022), https://www.digit.in/technology-guides/fasttrack-to-hacking-your-mobile-device/what-is-hacking.html.

[165] Kim Zeter, *How the NSA'S Firmware Hacking Works and Why it's so unsettling*, *WIRED*(Feb. 22, 2015, 8:09 P.M.), https://www.wired.com/2015/02/nsa-firmware-hacking.

[166] Harpreet Singh, Real-Life Applications of Fuzzy Logic, HINDAWI (Jun. 26, 2013), https://www.hindawi.com/journals/afs/2013/581879.

[167] Whirlpool of India Ltd. v. Videocon Industries Ltd., MANU/MH/0639/2014 (India).

[168] Syed Asifuddin. v. The State of Andhra Pradesh, MANU/AP/0660/2005 (India).

C. Unregulated Access to the Dark Web

The dark web consists of websites that are not accessible via normal browsers. It is generally accessed by people who want a high degree of confidentiality and privacy for their activities on the internet. The dark web keeps the users' activity anonymous and private.[169] Initially, the dark web was developed for defence purposes by the US military and was not easily accessible.[170]Today, it can be easily accessed by common internet users by simply using a specialized browser made for this particular purpose.[171] In 2019, statistics published by the Centre for International Governance Innovation ("**CIGI**") stated that "on an average 12% of the total internet user across the globe access dark web. However, in India, such percentage is 24% which is the highest in comparison to other countries.[172]

Generally, whenever users access the web under normal circumstances, a signal is sent from the users' devices across the internet to the server that hosts the material.[173] This direct mechanism allows ISP's to monitor the activities of users. This directness even allows law enforcement agencies to capitalize if the user is trying to access something unlawful.[174] However, the dark web breaks this direct connection which ultimately gives anonymity to the user.[175] The anonymity hides the personal details like name, address, or search history of the user which makes it exceptionally difficult for either Internet Service Provider ("**ISP**") or law enforcement agencies to pinpoint the actual user.[176]

Considering the high degree of leverage that the dark web provides to its user, it can lead to serious cyber-security issues which shall not be overlooked. From a national security perspective, the dark web can be used by various actors be it state-sponsored or terrorist, or any insider (an actor with insider access to national security who intends to harm their sponsoring state) with an intent to conduct

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[169]*What is the Deep and Dark Web?*, KASPERSKY (May 01, 2022), https://www.kaspersky.com/resource-center/threats/deep-web.

[170] Aditi Kumar & Eric RosenBach, *The Truth about the Dark Web*, IMF (Sep. 2019), https://www.imf.org/Publications/fandd/issues/2019/09/the-truth-about-the-dark-web-kumar.

[171] *Id.* at 66.

[172]Sean Zahar, *The "Dark Net" should be shut down: CIGI-Ipsos global survey: But what about its benefits?*, CIGIONLINE (Mar. 24, 2016), https://www.cigionline.org/articles/dark-net-should-be-shut-down-cigi-ipsos-global-survey-what-about-its-benefits.

[173] Laura De Nardis, *Cyber security in volatile world*, CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION (Jul. 23, 2012, 8:30 P.M.), https://www.cigionline.org/publications/cyber-security-volatile-world/.

[174] *Id.*

[175] *Id.*

[176] *Id.*

planning, recruiting, intelligence gathering or any other activity which hampers national security.

From an Indian law perspective, there is no law or regulation which directly regulates access to the dark web by the internet user within the country. The fact that India has the highest percentage share in terms of dark web users is a matter of concern and no regulation concerning the use of the dark web aggravates the concern of national security.

Therefore, it is suggested to the government to frame rules and regulations to regulate the use of the dark web. The government should make it compulsory for internet users intending to access the dark web to obtain prior authorization from the government or any authorized body set up by the government for this particular purpose.

VI. CONCLUSION AND RECOMMENDATIONS

Sun Tzu in the Art of War states that "good military commanders don't just gather information but, also exploit and manipulate the flow of information of their adversaries". This statement is relevant even today. The constant development in the domain of ICT has made information prone to manipulation.

4th generation warfare or information warfare exploits this vulnerability of ICT and targets the information infrastructure of the adversary state. Thereby, as a response to the threat of information warfare, almost every country in the world today is working to protect critical information infrastructure by reinforcing cyber-security measures and laws.

In the Indian context, when it comes to combating information warfare, the cyber-security law and policy framework seem to be haphazard. According to the aforementioned analysis of Indian cyber-security laws under the light of information warfare, three major developments in the realm of IT law are needed.

First. The exterritorial applicability of the IT act should be expanded to include the matter relating to 'computer resources as well.

Second. The IT act should be modified to address the contravention of devices that are purely ROM based or works on fuzzy logic technology.

Third. The government needs to regulate the usage of the dark web in the country by either introducing new IT rules or modifying the IT Act for this particular purpose.

Implementing these three recommendations would reinforce India's cyber-security and certainly reduce the risks from information warfare or cyber-warfare.

PROHIBITING HIJAB IN EDUCATIONAL INSTITUTIONS: AN ORDEAL FOR THE INDULGENT INDIAN SOCIETY

- Shruti Kumari

ABSTRACT

In February 2022, a petition was filed in the Supreme Court for a student from Karnataka, Fatima Bushra who was denied entry into her college because she happens to wear a Hijab. The Karnataka High Court had held that Hijab does not form an essential practice under Islam, so her right was not being violated. This paper analyses whether women's preferences and choices hold any value at the fore of our Indian Constitution or not. The predicament surrounding the Hijab is not just prevalent in India but the world over. In Afghanistan, women are coerced to wear the Hijab whereas here in India, they are being coerced against wearing it. In America, Muslim women who did not wear the Hijab had greater job opportunities compared to those who wore the Hijab. What remains similar in all these situations is the deprivation of women from deciding for themselves. This article explores these connections by concentrating on the Indian Constitution and statutes and how it draws a parallel with the critics of faith-based arbitration, the majority of whom self-identified as Muslims or as descended from Muslims. The paper while exploring the origin of Hijab in Islam, subsequently delves into the question of whether the Hijab forms an intrinsic part of Islam or not. While doing so, parallels have been drawn regarding the status of Hijab in other nations across the globe and in India. Further, the author has tried to traverse how the prohibition of Hijab is impacting the provisions of the Indian Constitution and what is the way ahead.

KEYWORDS: Hijab, Secularism, Freedom of Choice, Women, Infringement, International Law, Fundamental Rights, Patriarchy.

I. INTRODUCTION

Women's contributions to the promotion of peace and concord across many religions and civilizations, notably between Islam and the state, have been frequently highlighted. It is suggested that women should be involved in processes that aim to put an end to disputes at regional and international levels. However, the discourse changes and involves a variety of perspectives when women themselves constitute the focus of a conflict. The recent change in policy regarding college-going Hijab-wearing women in the Indian state of Karnataka questioned the conventional assumption of the pacifist character of women.

Similarly, various assessments about the role of women in stoking or controlling violence were motivated by their views and attitudes toward political conflicts and propaganda. The development of feminism and a growing concern in cultural or disputes have already broadened the study of such state interactions. The reorientation of this discipline was the result of dynamic advances at the turn of the 20th century.[177] The feminist school of thought created fresh viewpoints that contested the sexism of the discourse on international politics and economics. On the other side, in the context of globalization, migration, and religion-cultural disputes came to the fore.

This context led to the development of concepts including Islamic feminism and secular fundamentalism. The Hijab as a sign of Islamic revival as several topics concerning women and interfaith harmony combined the narratives of the two sub-fields. Although the Hijab debate primarily concerns a specific dress code for Muslim women, it also touches on religious sensibilities. Its opponents' hostility to the value of Islam entrenched in the Quran confirms the rise of Islamophobia.[178] The voice of the Muslim woman, whose right to make her own decisions was in jeopardy, has been ignored throughout the entire discussion.

This dispute has presented a dual challenge for feminism as a whole: to defend women's rights to exercise their religion and to cover or reveal themselves, or to oppose women who were disobeying liberal norms that most feminists have suggested as remedies for women's issues.

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[177] MALISE RUTHVEN, ISLAM IN THE WORLD 474 (OUP 2006).

[178] *Id.*

Women, frequently victimised as the inferior gender,[179] have experienced various types of injustice and repression throughout human history. There have been instances[180] where women have been given power and independence, but *in toto*, women have never experienced perfect equality or freedom from repression. It is thought that women had more freedom and rights in the ancient world when they were viewed as equivalent participants of society, such as in ancient Egypt. The oppression and discrimination faced by European women now are similar to those she has always faced.[181]

Women's rights in India have advanced tremendously. Various circumstances[182] influence how women view and are affected by veiling. Religious rationales for women to exhibit their feminine attractions at home as it is a religious duty and an ibadah for a woman to express her feminine affinity to her husband have been prevalent.[183] While women who wear the veil of their own volition may view it as liberating. *Per contra*, others who are compelled to do so may view it as oppressive.

The impact of veiling for a woman depend on a variety of factors, including whether she chose it for herself, whether it was imposed on her, how much she is covered, the level of acceptance in the society in which she lives, how it impacts her movement, education, and independence, whether it makes her domestic and, therefore, subject to male surveillance, how it creates boundaries among her and her male acquaintances.

Women have often been coerced into wearing veils by their relatives in patriarchal societies. Similar circumstances apply to many Muslim women residing in the West, for whom wearing the veil is a necessity and not a choice. Some women decide to wear the Hijab on their own initiative. In this situation, it is necessary to offer individual choice, which is a luxury enjoyed by a small percentage of Muslim women in India. In the event of a headscarf or Hijab ban, the former group would undoubtedly feel emancipated, while the latter group would perceive it as an assault on their freedom and right to independent choice.

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[179] United Nations, *Report of the Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20/Rev.1 (Sept. 4-15, 1995).

[180] On a global scale, bias against women continues to be a major issue, and even where laws guaranteeing gender equality are in place, they are not currently being implemented. *Cf.United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women).*

[181] *Id.*

[182] MAHMOOD S., POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT (Princeton University Press 2011).

[183] *Id.*

This paper attempts to assess the issues regarding Hijab, i.e., the dictums issued by various authorities and political leaders about whether women should practice their volition of wearing or not wearing the Hijab in India in light of a recent incident in which girls wearing the headscarf were refused admission to a college in Karnataka, while taking into account diverse viewpoints offered by Islamic and liberal feminists.

II. THE ORIGIN OF THE HIJAB

Notwithstanding prevalent perceptions among non-Muslims that Muslim women are coerced into donning veils by a predominately patriarchal society, many Hijab-wearing women contend that they decide to do so.

According to Tabassum Fahim Ruby,[184] the Hijab is a collection of regulations stating that both men and women must conceal particular bodily parts. Legal schools have varying opinions on whether women are required to cover their feet, faces, and wrists while the rules for males are comparable to modern ideals of public decency. The restrictions for women include the entire body except for their hands and faces. Colloquially, "Hijab", is used to describe the headgear worn by Muslim women to conceal their neck and hair. The Hijab garment has several ethnic modifications, many of which offer various levels of coverage, notably the burqa, niqab, and dupatta.[185]

The Hadith is more specific in its exposition of the circumstances surrounding the revelation of the Hijab regulations and what specifically it comprises, whereas the Quran provides general instructions on why and how the Hijab should be observed. The justification and requirements found in the Quran and Hadith are different, with the account in the Hadith suggesting that the Hijab is intended to protect women's privacy, notably Muhammad's wives who were being geared and harangued by his close companion Umar (also the second of the rightly guided caliphs), and the record in the Quran suggesting that the Hijab is aimed to conceal women's beauty to prevent molestation.[186]

Both of these narratives have historically been accepted, and efforts have been made to bring them together. However, both accounts have had trouble of late. The Hadith account has proven challenging because it portrays Umar, a highly

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[184] Tabassum Fahim Ruby, *Listening to the Voices of Hijab*, WOMEN STUDIES INT'L FORUM (2006).

[185] Tabassum Fahim Ruby, *Discourses of Sharia Law and Muslim Women: A Critical Reflection on Sharia in Canada*, 28 FEMINIST FORMATIONS, 121-147 (2016).

[186] *Id.*

revered religious figure and Muhammad's friend, as an unsavoury person, and since it indicates that Muhammad was not on his account for the composition of the Sharia, which is presumed to be divinely revealed and unchanging. The Quranic account has drawn criticism because it implies that women share culpability for their harassment on the grounds of their attire.[187]

The Quran typically supports the idea that a woman who is not covered is purposefully increasing her risk of harassment or attack. Therefore, among Islamic academics and civilizations, the notion that the criminal's culpability was in some way diminished as a consequence of this so-called "encouragement" is common. The Quran states that the purpose of the Hijab is to hide women's beauty from men.[188] In addition, it states that the purpose of the Hijab is to distinguish free Muslim women (presumably from non-Muslim or slave women, who do not have to observe the Hijab) to prevent them from being molested/harassed.[189]

This justification contrasts greatly with the Hadith's account of the discovery of the Hijab's obligations, which leaves out any mention of modesty or attack prevention. The explanation of modesty provided in the verses was likely Muhammad's later justification of the practice rather than the initial impetus, according to critics, if the Hadith tale about the discovery of the Hijab verses is true.[190]

Several reasonings have been provided while espousing the usage of the Hijab by its supporters. The majority of people today hold that the practical justification for the Hijab requirement is that it shields women from sexual assault by stifling their attractiveness and helps them guard their chastity, despite the assiduous efforts of Islamic legal scholars to argue that Islamic laws, being immediate commands from God, need not offer a pragmatic advantage to merit fulfilment. This line of thinking frequently refers to the following Hadith story.

The traditional insight and the understanding directly found in the Islamic scriptures themselves appear to be that the Hijab provides to disguise the individuality of women to some extent and inhibits men from monitoring their physique, whereas modern scholars have leaned abruptly forward into the rationale of chastity and protection from assault, most likely due to its enticing to

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[187] Sharan Todd, *Veiling the "Other," Unveiling Our "Selves": Reading Media Images of the Hijab Psychoanalytically to Move beyond Tolerance, 23* CANADIAN J. OF EDUCATION 438-451 (1998).
[188] Quran 24:31.
[189] Quran 33:59.
[190] *Supra* note 8.

some form of practical reasoning. If Muhammad's priority had been the chastity and defence of the women from assault, then whether or not they wore the Hijab in the existence of the eunuch should not have made a distinction. This is one criticism that has been levelled at the above interpretation of the account of the eunuch found in the Hadiths. After all, a eunuch could not endanger the women's safety or purity. Muhammad did justify the Hadiths: he did not desire the eunuch to watch the women. This seems to fit both the legal obligations of the Hijab and the narratives found in Islamic scriptures better than the reasoning based on the security of women.

However, a more poignant point made by detractors was that if the Hijab is meant to shield women from sexual assault, it utterly fails to do so. Women report suffering sexual harassment of various kinds at some of the highest rates in Islamic nations where the vast majority of women wear the headscarf.[191]

Regardless of these various claims by followers of Islam regarding it being an intrinsic part of Islam, there are views stating that Islam was not the religion where the Hijab originated. Islam was not the first society to shroud its female members. Long before the Islamic prophet Muhammad was born, people began to wear veils. Veiling was a common practice in cultures like the Byzantines, Sassanids, and others in the Near and Middle East.[192]

Evidence suggests that the *Ban Isml* and *Ban Qan* clans[193] in Southwest Arabia, who practiced veiling in pre-Islamic periods, did so. In such countries, wearing a veil was an indication of a woman's social standing.[194] The veil was a symbol of a woman's superior position and respectability in Mesopotamia. The veil was worn by ladies to set themselves apart from slaves and immoral women. Unchaste or filthy women, like harlots and slaves, were forbidden from donning veils in several ancient legal traditions, such as Assyrian law[195]. They faced harsh punishments if they were discovered veiling illegally. The technique of veiling expanded throughout the ancient world due to invasions.[196]

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[191]Lori L. Heise, *Violence Against Women: An Integrated, Ecological Framework*, SAGE JOURNALS, 262–290 (1998).

[192]*Id.*

[193] Ibn Hisham, ABD AL-MALIK, THE LIFE OF THE PROPHET, (Dar al-Kutub alIlmiyyah, 1990).

[194] John L. Esposito, *The Oxford Dictionary of the Islam*, OXFORD ISLAMIC STUDIES ONLINE, http://www.oxfordislamic studies.com/article/opr/t125/e839.

[195]*Supra* note 17.

[196]*Id.*

These texts demonstrate the significance of a woman's head covering, even by early Jews and Christians. Because a woman represents the glory of man and a man reflects the glory of God, a woman who chose not to cover herself would insult both Christ and her, as well as her husband or other male relatives.

John L. Esposito has described how in Islam only Muhammad's wives and women from higher social classes wore the veil as a sign of their status throughout his lifetime. Muhammad had numerous adversaries who wanted to harm him as well his family members. The concerned women hid their identities from strangers by donning veils to protect themselves and other household members of Muhammad.[197] Until the Hijab commandment was propagated, Muhammad's women actively participated in Medina's civic life. The community's other women were not compelled to wear veils. It was not until a generation had passed since Muhammad's passing that Islamic women began to cover themselves. Veiling was no longer exclusive to the affluent.[198]

Because Quranic verses backed the practice, veiling expanded more widely throughout Islam. The Hijab is mentioned in the Quran as a type of partition or curtain rather than as a women's attire. Several of the other passages that discuss wearing a veil or the Hijab emphasize the separating feature of the Hijab. In the early days of Islam, wearing a veil or Hijab was thought to help separate or identify two persons.[199]

III. FATHIMA BUSHRA V. STATE OF KARNATAKA[200]

At the outset of February 2022 in Karnataka, certain Muslim junior college students opted to wear the Hijab to classes were refused entry because the Hijab violated the college's uniform policy, which applied to students belonging to all religions. In the following weeks, the conflict expanded to other colleges and universities in the state, prompting factions of Hindu students to stage their rallies by calling for the wearing of saffron scarves. The Karnataka government issued an order dated 5th February, 2022, mandating the use of uniforms and noting that the Hijab cannot be an exception ("**Hijab Order**"). Numerous educational institutions used the

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[197] John L. Esposito, *What Everyone Needs to Know About Islam*, OXFORD ISLAMIC STUDIES ONLINE, 87-116 (2013).

[198] *"Ḥijāb", Guindi and Zuhur*, 99 YALE L. J. 1419, 1327-34 (1991).

[199] K. Zh. Monkebayeva et. al., *History of Appearance and Distribution of Hijab and its types*, WORLD ACADEMY OF SCIENCE, ENGINEERING AND TECHNOLOGY, 1405-08 (2012).

[200] Fathima Bushra v. State of Karnataka, Writ Petition (C) No. 000095 of 2022 (India).

Hijab Order as justification to bar Muslim girls donning the Hijab from entering college premises.[201]

Students who were aggrieved by the situation filed petitions before the Karnataka High Court ("**Kar HC**"). Kar HC granted a temporary injunction prohibiting all students from donning any kind of religious garb on 10th February, 2022. The directive was put into effect in all of Karnataka's schools and colleges; teachers and students were required to take off their Hijabs before entering college premises. On 15thMarch, 2022, the Kar HC issued a judgment sustaining the Hijab Order. According to the Kar HC, wearing Hijab is not an essential religious practice. The judges comprising the relevant bench of the Kar HC have been granted Y-category protection and two people have been detained for making ominous statements.[202]

The controversy has its rooted in a debate regarding the wearing of the Hijab at the government-run Pre-University College for Girls in Udupi, which had forbidden the Hijab as a violation of its uniform policy. In addition to their college uniform, six Muslim female students wore Hijabs to class, claiming that doing so was both a constitutionally protected practice and a requirement of their faith. The college said that wearing a Hijab was against their uniform rules. The concerned girls proposed using the dupatta that came with the uniform to cover their heads, reasoning that they did not require to wear Hijabs of a distinct colour or fabric, but the college rejected their request. The college let them wear the Hijab on campus but did not permit the concerned girls to attend classes. They were discovered using their notebooks while seated in hallways.[203]

Ansar Ahmed, the district head of the non-profit organization Karnataka Rakshana Vedike, alerted the media to the situation. The college set up a police presence after Campus Front of India ("**CFI**"), the student arm of the militant Islamic group Popular Front of India ("**PFI**") and the Social Democratic Party of India ("**SDPI**"), the political arm of the PFI, threatened to hold a protest. The college administration met with the parents and had a conversation with them, but the college was adamant that religious dress would not be permitted.[204]

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[201] *Hijab Row: How Karnataka Hijab Row Unfolded, Spread*, TIMES OF INDIA (Feb. 09, 2022), https://timesofindia.indiatimes.com/city/bengaluru/how-karnataka-hijab-row-unfolded-spread/articleshow/89443877.cms.

[202] *Id.*

[203] *Taslima Nasreen says burqa like chastity belt of dark ages, uniform civil code a must*,HINDUSTAN TIMES (Mar. 14, 2022), https://www.hindustantimes.com/india-news/taslima-nasreen-burqa-like-chastity-belt-of-dark-ages-uniform-civil-code-must-101644662510295.html.

[204] *Id.*

It is unclear what led the students to change their minds about wearing a Hijab. They acknowledged that they followed the college's no-Hijab regulation by enrolling in the first year of classes. They arrived at the university wearing burqas, which they took off in a "women's room" before entering the classroom. One of the pupils added that when their parents enrolled them in college in 2020, they were informed about this, others had their doubts. The problem subsided after the Covid-19 pandemic forced the classes to shift online.

Some students requested authorization to wear the Hijab when on-campus studies resumed in September 2021 but were refused on the basis that everybody needed to wear a "common uniform". Two of the concerned students participated in an anti-rape demonstration in October 2021, and a photo of the demonstration was widely shared. This helped their parents and the CFI understand the severity of their situation. According to the Udupi Police probe, CFI addressed the parents and assisted in opposing the college administration. As claimed by one of the pupils, the agreement included a mandatory uniform and mentioned nothing about a Hijab. The six students and their parents decided to demand Hijab as a result.[205]

The conflict between Muslim students who wished to wear the Hijab and the authorities forbidding them subsequently started to extend to other institutions throughout Karnataka. In February 2022, the controversy became more heated. There were counter-protests led by the students against letting other students donning the Hijab to enrol in college between 4thFebruary, 2022 and 7thFebruary, 2022. These students marched in saffron shawls to the campus. Authorities, however, prevented them from accessing the grounds and ordered the students to take off their shawls. After the pupils complied with the request, entry was granted. In support of Muslim girls wearing the Hijab, some students participated in Jai Bhim chant on 7thFebruary, 2022 at a college in Chikkamagaluru while sporting blue shawls (as opposed to the saffron shawls that were against the wearing of Hijab).[206]

On 31stJanuary, 2022, several students from the Udupi PU college filed a writ petition before the Kar HC praying for acknowledgment of wearing of the headscarf as a fundamental right within Articles 14 and 25 of the Constitution of

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[205] *Id.*

[206] *Blue shawls back Muslim girls in hijab row against saffron shawls in Chikkamagaluru college*, THE HINDI (07 Feb., 2022), https://www.thehindu.com/news/national/karnataka/hijab-row-takes-a-new-turn-as-blue-shawls-counter-saffron-shawls-in-chikkamagaluru-college/article38391579.ece.

India. According to CFI, it assisted the concerned students with legal counsel. Additionally, the petition contented that it is against constitutional morality to single out the petitioner because she wears a headscarf. Senior advocate Mr. Ravivarma Kumar along with other attorneys appeared on behalf of the petitioner.

Around 4th February, 2022, a student from Kundapura (identified as Smt. Rasham) submitted a second petition praying for a rule allowing Muslim students to wear Hijabs to classes. Senior advocate Mr. Davadatt Kamat appeared on behalf of the petitioner. Senior advocate Mr. Yusuf Muchhala represented two students from Bhandarkar's Arts and Science College in Kundapura who also instituted a petition (collectively, "**Petitioners**" and "**Petitions**").[207]

On 8thFebruary, 2022, Krishna S. Dixit, J., heard the Petitions. Dixit, J. concluded that the primary issue raised was (i) whether wearing a headscarf constituted an essential religious practice and, (ii) if it was, whether the state should get involved in the administration thereof.

Given the public importance, Dixit, J. referred the matter to a full bench of the Kar HC. The following day, a full bench consisting of Ritu Raj Awasthi, CJ, Dixit, J and Khazi Jaibunnisa Mohiuddin, J, heard the Petitions. There were reportedly five Petitions in front of the court at this point, each of which was believed to represent 18 Petitioners. On 10th February, 2022 hearings were resumed.[208] On 11th February, 2022, the full bench issued an interim order asking the State to reopen the educational facilities and prohibiting pupils from donning any kind of religious garb in the classroom until the disposal of the Petitions.[209]

By order dated 15th March, 2022, the Kar HC upheld the educational institutions' ban on the Hijab. According to the Kar HC, the Hijab did not constitute an essential religious practice, and as a result, it is not covered under Article 25 of the Constitution.[210] Kar HC placed reliance upon the literature authored by Abdullah

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[207]*Karnataka: After passing over, High Court takes up Hijab row matter*, THE FREE PRESS JOURNAL (Feb. 08, 2022), https://www.freepressjournal.in/india/karnataka-high-court-passes-over-hijab-row-in-state.

[208] Johnson T A & Apurva Vishwanath, *Hijab Plea goes to Three-judge Bench including Karnataka Chief Justice*, THE INDIAN EXPRESS (Feb. 10, 2022), https://indianexpress.com/article/cities/bangalore/karnataka-hijab-row-hc-three-judge-bench-woman-judge-7764966/.

[209]*Id.*

[210] Mustafa Plumber, *Hijab Not Essential Religious Practice in Islam': Karnataka High Court Dismisses Muslim Girls' Petitions Against Hijab Ban in Colleges*, LIVE LAW (Mar. 15, 2022), https://www.livelaw.in/top-stories/hijab-not-essential-religious-practice-in-islam-karnataka-high-court-dismisses-muslim-girls-petitions-against-hijab-ban-in-colleges-194192.

Yusuf Ali,[211] which was earlier relied upon by the Supreme Court in *Shayara Bano*.[212]

According to Ali's commentary, the Hijab was not a religious practice and was not fundamental to the Islamic faith; rather, it was recommended by the Quran to address instances of "molestation of innocent women" during the Jahiliya (periods of pre-Islamic ignorance before Islam) as a social security measure.

Subsequently, the Petitioners requested an immediate hearing before the Supreme Court but were denied. The counsel for the Petitioners prayed for an early hearing in view of the Petitioners to participate in the school tests and maintain the progress gained in the previous year. N. V. Ramana, CJ, denied these requests, saying that exams had little to do with the situation and that it shouldn't be sensationalized.

On 26thApril, 2022, Ramana, CJ gave the assurance that the Supreme Court would schedule a hearing on the appeals of the Kar HC order.[213] In October, a two-judge panel issued a split judgment: Hemant Gupta, J. affirmed the Kar HC order, but Sudhanshu Dhulia, J. believed that the same had been made in error. The bench referred the appeal to a larger strength bench.[214]

IV. AN ANALYSIS OF WHETHER THE CONSTITUTIONAL PROVISIONS ARE GETTING IMPACTED IN THIS CASE

A. Impact On Article 25

The Kar HC order excluding religious symbols from educational places is being rationalized to enforce a feeling of uniformity or homogeneity in colleges. A government directive was used to accomplish this.

According to Kar HC order, however, "*the restriction of a headscarf or a garment covering the head is not a breach of Article 25 of the Constitution*."[215]

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[211]ABDULLAH YUSUF ALI, THE HOLY QURAN: TEXT, TRANSLATION AND COMMENTARY(1934).
[212] Shayara Bano v. Union of India, (2017) 9 SCC 1 (India).
[213] *'Wait for two days': Supreme Court says on plea to list appeals challenging Karnataka High Court hijab ruling,* THE INDIAN EXPRESS (Apr. 27, 2022), https://indianexpress.com/article/india/wait-for-two-days-supreme-court-says-on-plea-to-list-appeals-challenging-karnataka-high-court-hijab-ruling-7888023.
[214]*Supreme Court on hijab: India top court judges split on the headscarf in classrooms,*BBCNEWS(Oct. 13, 2022),https://www.bbc.com/news/world-asia-india-63225351.
[215] *Id.*

The request is for private colleges to "*mandate a uniform determined by their board of management*." Are these actions, however, legitimate? Does the Hijab-wearing of Muslim women constitute a basic right? If so, can they do so in all public areas? How far can this right be restricted? Are the orders of pre-university colleges and the government constitutionally valid?

The freedom of conscience and the right to free exercise, professing, and the spread of religion are covered by Article 25 of the Constitution of India. Article 25 does not guarantee protection for every part of one's religion.

The term "essential practice" refers to actions that must be taken to follow a certain religion for it to exist. Many jurists have outlined various issues with this test. Even though a said essential practice is covered by Article 25, it is subject to public morals, health, and order, which frequently causes conflicts between religious practices and the interests of the state in matters of public affairs or associated secular activities.

In *Amnah Bint Basheer v. Central Board of Secondary Education*,[216] where the required attire for the All India Pre-Medical Entrance Test 2016 was contested by petitioners, the Kerala High Court ("**Ker HC**") evaluated whether the Hijab was an essential religious practice. The Board's justification for establishing a dress rule is to prevent examination fraud. The portion of the clothing code that conflicted with donning a Hijab was: "*a) Light, non-buttoned, half-sleeved clothing with a salwar or trouser with a pin, emblem, flower, etc*."

The Quran and the Hadith are the two main components of Sharia that the Ker HC examined as the origins of Islamic law. The Ker HC cited chapter 33 of the Quran in its ruling, holding that it is banned to expose one's body in any other way and that it is *farz* to cover one's head and wear long-sleeved clothing save for one's face (*haram*).[217] However, based on *ijtihad*, Muslims can hold various beliefs or viewpoints (independent reasoning).[218] Such opinions are not rejected by Ker HC.

The mere potential of various propositions is not a reason to deny freedom. As previously mentioned, the Petitioners' assertion was strongly supported. Another viewpoint was conceivable. Ker HC was expected to uphold such freedom by the Constitution. However, Ker HC recognized the Board's justification for wanting to ensure the credibility and openness of the examinations and used the balancing of

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[216] Amnah Bint Basheer v. Central Board of Secondary Education, 2016 (2) KLT 601 (India).
[217] *Supra* 5.
[218] *Id.*

interest strategy by allowing female invigilators to frisk such candidates, including by removing their veil while respecting their religious obligations. This appeared a wise way to put the idea into practice.

It is interesting to note that the same Ker HC Justice had previously denied a request by a Muslim student to wear the Hijab in a private, unaided secondary school, claiming that doing so would violate the dress code established by the school. The justification was based on the private school's basic right, granted by Article 19,[219] to manage and oversee an institution, giving it autonomy and immunity from Constitutional review. The Ker HC[220]went on to find that the Petitioners cannot pursue infringement of their rights as opposed to the greater right of the institution based on the premise that "*personal desire must surrender to the broader public interest*." The judgment does not explain why the independence of private institutions of higher learning is of more public importance than the freedom to wear a Hijab. This argument goes further than the autonomy granted to institutes of minority education by Article 30 of the Constitution.

When both judgments are weighed, we arrive at the following legal conclusion: the wearing of the Hijab is a fundamental right that can be restricted for a specific reason, except in private institutions of higher learning.[221] This stance raises issues because it completely exempts private, non-profit educational institutions from any Constitutional review, with the exemption of horizontal fundamental rights. The right to wear a hijab was not incorporated into the context of the right to privacy by either of these rulings.

The Supreme Court's nine-judge bench recognized the right to privacy as a fundamental right in *Puttaswamy*.[222] The idea of privacy was thoroughly explored, with many Justices expressing it in their own ways. The "right to be left alone", and freedom from unwanted intrusion by public or private actors was a feature shared under all the interpretations. "*Privacy has distinct implications, including geographical control; (ii) decisional autonomy; and (iii) informational control*," per Chandrachud, CJ (then Chandrachud, J) in a judgment authored on behalf of the other three Justices.

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[219] INDIA CONST. art. 19

[220]*Supra* 307.

[221] Mustafa Plumber, *Hijab Not Essential Practice Of Islam, Karnataka AG Says; What Was Necessity Of Saying This In GO, Asks High Court?,*(18 Feb, 2022) Live Law.

[222] K.S. Puttaswamy and Anr. v. Union of India, (2017) 10 SCC 1.

Creating private places is referred to as spatial control. Decisional autonomy includes both private decisions affecting reproduction and public decisions affecting things like faith or attire. Informational control enables people to maintain personal control over information relevant to them by using privacy as a shield. This makes it clear that forms of dress and statements of faith are covered under the right to privacy.

Comparing to the test of essential religious practice, this position seems to have more support. This does not imply that the right to wear a Hijab within the confines of a private institution is unalienable. If the government or a private organization wants to restrict this right, they must pass the three-part *Puttaswamy* test,

First. Any invasion of privacy must be authorized by law.
Second. In terms of a valid governmental goal, there is a condition of need.
Third. The means that the legislature chooses to use are appropriate for the demands and goals that the law seeks to address.

B. Drawing Parallel with Other Countries

Different nations have differing stances on the Hijab. Though a thorough examination of the Hijab prohibition covers a wide range of complex legal issues, including gender equality, secularism, the right to practice one's religion, cultural rights, and freedom of speech imply, the author here just attempts to briefly address certain queries here.

First. Does International Human Rights Laws ("**IHRL**") protect those who wear the Hijab or any other head or facial covering?
Second. Are there any legal restrictions on the IHRL?
Third. How does the prohibition on the Hijab at Karnataka's colleges and schools and the consequent order of the Karnataka high court fare under IHRL scrutiny?

India is not the first nation to face controversy regarding the Hijab. A rule prohibiting the wearing of garments used to obscure the face in public spaces was enacted in France on 11thOctober, 2010. The rule was penalized by imprisonment and monetary fines.

As per Article 18 of the International Covenant on Civil and Political Rights ("**ICCPR**") everyone has the right to freedom of thought, conscience, and

religion.[223] This includes the freedom to have or adopt a religion or belief of his choosing, as well as the freedom to publicly or privately, individually or in community with others, exhibit his religion or belief by worship, observance, practice, and teaching.[224]The United Nations Human Rights Committee ("**UNHRC**" or "**Committee**") originally understood the ambit of Article 18 to include "*not just ceremonial acts but also such traditions as the adherence of dietary rules, the wearing of distinguishing clothes or head-coverings*".[225]

France has signed and ratified the ICCPR. This means that France has a duty under IHRL to uphold and apply the ICCPR within its domestic law. It cannot, at the absolute least, violate them. Two women addressed the UNHRC claiming that the French law infringed upon their right to religion, which is protected by the ICCPR.

In two historic rulings from 2018, *Miriana Hebbadj v. France* and *Sonia Yaker v. France*,[226] the UNHRC determined that the French Hijab ban does violate both the right to equality and the freedom of religion as per Article 18 of the ICCPR. Wearing a burqa or Hijab is recognized as a right to religion within IHRL. The restriction in Karnataka extends to Hijabs, which are only headscarves.

The Committee concluded after considering arguments of fraternity, public order, and public safety that prohibiting the burqa in public places does not achieve any of these claimed goals. It determined that the condition of "living together" was extremely ambiguous and was not encompassed by the exemption under Article 18. Additionally, it was determined that there was insufficient evidence to support an outright ban on full-face veiling because it "*poses no harm to public security or public order in and of itself*."[227]

The Committee made a few crucial observations. The ban was justified as being "*based on the belief that the full-face veil is fundamentally unfair and that women who wear it are compelled to do so*," according to the statement. The Committee noted that while some women may choose to wear the burqa due to social or familial constraints, it "*may also be a decision - or even method of establishing a claim - predicated on a religious belief*."

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[223] International Covenant on Civil and Political Rights, art. 18, Dec. 16, 1996, 999 U.N.T.S. 171.
[224] Rashmi Venkatesan, *What Does International Human Rights Law Say About the Hijab Ban?*, THE WIRE (Mar. 22, 2022), https://thewire.in/rights/hijab-ban-karnataka-international-human-rights-law.
[225] *Id.*
[226] Hebbadj v. France, Co. No. 2807/2016, UN Doc. CCPR/C/123/D/2807/2016.
[227] *Id.*

Notably, it was stated that the restriction may confine fully veiled women to the home, restrict their access to public facilities, and expose them to mistreatment and isolation rather than protecting them. As a result, the UNHRC determined that the French law violated both gender equality and the right to freedom of religion.

C. Conflicting Perspectives of The Nation

There is a certain part of India espousing the Hijab ban, while *per contra*, there is a section seeking that the ban be uplifted.

The contradiction of opinion is not just among the general population but even various organizations and political parties of the country. The incidents were met with clear disgust by the ministers of the Karnataka government, which was governed by the Bharatiya Janata Party ("**BJP**") at the time of the issuance of the Hijab Order.

B.C. Nagesh, the Minister of Education, described the wearing of Hijabs as an "act of indiscipline".[228] In his opinion, pupils were not entitled to conduct their "religious practices" in public educational facilities. He claimed that the Hijab has been in use for more than three decades without incident up to this time. He accused "political figures," presumably referring to the PFI, of inciting the students to act out by accusing them of "playing politics." Nagesh instructed the college that students could only arrive to courses in uniforms and that neither the Hijab nor saffron scarves would be permitted because Hindu students had reportedly worn them the day before.

Home Minister Araga Jnanendra stated that the standard code established by institutions must be adhered to, for there to be a widespread sentiment that "we are all Indians" at schools and colleges.[229]

Pupils were concerned because of the political situation owing to upcoming public examinations. Forty students at the private Bhandarkars' Arts and Science College in Kundapura were prohibited from accessing the building. The college rulebook,

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[228]*Hijab won't be allowed during PUC examinations: Karnataka minister B C Nagesh*, THE INDIAN EXPRESS (Mar. 03, 2023), https://indianexpress.com/article/cities/bangalore/hijab-not-allowed-during-puc-examination-karnataka-minister-b-c-nagesh-8477978/

[229]*Hijab row: Karnataka govt sets up expert committee,*THE HINDUSTAN TIMES (Jan. 27, 2022), https://www.hindustantimes.com/india-news/hijab-row-karnataka-govt-sets-up-expert-committee-101643224367207.html.

which allowed the Hijab to be worn, was cited by the students. The treatment by their college, according to some of the students, was "humiliating".[230]

Several instances of violence were recorded considering the aforementioned dispute. There have been several violent incidents that have occurred alongside the protests. These allegedly occurred as a result of the victims' social media statements opposing the Hijab's acceptance at campuses. A member of the Bajrang Dal who was engaged in the Hindu student anti-Hijab demonstrations was found killed in the Shivamogga district. He may have been involved in the incident as a result of his earlier involvement in at least five assault cases and a murder attempt with religious undertones, according to the police. Earlier in 2015, the "Mangalore Muslims" Facebook group issued a fatwa against him.[231]

The leader of the opposition from the Indian National Congress party, Rahul Gandhi, chided the administration and said that the college is robbing the future of the daughters of India by letting students 'Hijabs come in the way of their education. It is contrary to the law to restrict Hijab-wearing students from accessing schools.[232] Rashtriya Swayamsevak Sangh ("**RSS**") Muslim's wing, Muslim Rashtriya Manch ("**MRM**"), had a Burqa-clad student at Karnataka college heckled by youth yelling "Jai Shri Ram" chants supported by the statement that claims "purdah" is a part of Indian culture. The MRM then stated that it did not endorse "religious hysteria" and that it was in favour of the enforcement of the clothing code in Karnataka's educational institutions.

The education ministers of West Bengal and Maharashtra, two states then-controlled by opposition parties, charged at the BJP with "politicizing" school dress. The Education Minister for West Bengal vowed that his state will "never" prohibit the headscarf. The Education Minister for Maharashtra said that the Indian Constitution guarantees religious freedom. Bulaki Das Kalla, the minister of education for Rajasthan, claimed that Hijab is not prohibited in his state and accused the BJP of "making issues out of non-issues."[233] There were instances of people from the entertainment industry also supporting the Hijab claiming it to be

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[230]*Id.*

[231] Harshit Sabarwal, *Three arrested for Bajrang Dal activist Harsha's murder: K'taka home minister*, HINDUSTAN TIMES (Apr. 14, 2022), https://www.hindustantimes.com/cities/bengaluru-news/three-arrested-for-bajrang-dal-activist-harsha-s-murder-k-taka-home-minister-101645445404474.html.

[232]*Id.*

[233]*Hijab issue has become jihad', says Vishwa Hindu Parishad leader*, THE SIASAT DAILY (Feb. 09, 2022)https://www.siasat.com/hijab-issue-has-become-jihad-says-vishwa-hindu-parishad-leader-2272452/.

a matter of freedom of choice for the girls and women in the country. Sonam Kapoor questioned why a turban could be a choice but a Hijab couldn't be, in an Instagram post. Harnaaz Sandhu, the 2021 Miss Universe, remarked that let them live their lives as they see fit. At the end of the day, the patriarchal system dominates that girl, or if she chooses to cover her head, that is her option. She must speak up even though she is being dominated. And if she decides to do that, it is her prerogative. Let her live her life as she sees fit. We need to appreciate one another because we are ladies of many races and cultural backgrounds.[234]

Dissenting opinions were recorded from outside India as well. Rashad Hussain, the US Ambassador-at-Large for International Religious Freedom, characterized the prohibition on the Hijab as a violation of religious freedom[235]. Bahrain had stated that the restriction on the headscarf in educational institutions in Karnataka was denounced by the National Assembly of Bahrain. Kuwaiti MPs supported the global call for an end to the Hijab controversy and demanded that Kuwait forbid BJP leaders from visiting the nation. Shah Mahmood Qureshi, the foreign minister of Pakistan, charged India with depriving Muslim females of their access to education. He allegedly asserted, as reported by the Economic Times, that India is denying Indian Muslim girls an education simply because they choose to attend their classes while wearing religious headgear.[236]

The spokesperson for the MEA responded to remarks made about the controversy by some nations, such as the United States, by stating that the matter is currently being investigated by the courts and that it will be resolved by the constitutional structure and mechanisms as well as the democratic ethos and polity. He said that biased remarks on India's domestic problems are not acceptable. The MEA spokeswoman responded to the OIC General Secretariat's statement by calling it *motivated and deceptive* and criticizing the OIC Secretariat's communal ethos. He added that certain interests continue to use the OIC as a platform for their malicious propaganda against India. It has only damaged its reputation as a

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[234]*Bahrain Parliament condemns hijab ban, calls for end to discrimination against Muslims in India*, THE KASHMIRIYAT(Feb. 16, 2022), https://thekashmiriyat.co.uk/bahrain-parliament-condemns-hijab-ban-calls-for-end-to-discrimination-against-muslims/.

[235]*'Motivated': MEA Dismisses US Envoy's Critical Tweet on Hijab Issue"*, THE WIRE (Feb. 12, 2022), https://thewire.in/diplomacy/mea-india-rashad-hussain-usa-hijab.

[236]*'Ghettoisation': Pakistan Foreign Minister Shah Mahmood Qureshi jumps into India's hijab row*,THE ECONOMIC TIMES (Feb. 09, 2022), https://economictimes.indiatimes.com/news/india/ghettoisation-pakistan-foreign-minister-shah-mahmood-qureshi-jumps-into-indias-hijab-row/articleshow/89458779.cms.

result.[237] The impact of different viewpoints and opinions from across the world has however not aided Muslim women. There have been people espousing the rights of women to do the Hijab, but such opinions have not been considered by either the judiciary in its ruling, or by the government or authorities while dealing with the issue.

V. CONCLUSION AND FINDINGS

The purpose of uniforms in educational institutions has been to bridge the gap between the financial backgrounds of students and make all of them feel like they belong to the institutions irrespective of where they come from. In the present situation, where these girls are agreeing to wear the Hijab made out of the same colour and material as the uniform of their institution, the reason for banning them in the name of the uniform, does not seem justified. The girls are wearing the uniform prescribed by their college only, but just in a way that espouses their modesty, and they are fully entitled to do so according to our Constitution. The people, on the other hand, wearing saffron shawls and claiming it to be equivalent to the Hijab in the present context are missing the fact that the saffron shawl is of a different colour and does not mix with the existing uniform of the students. No question that prohibiting Hijabs in colleges restricts Muslim women's freedom of religion, which is safeguarded under the IHRL. The only issue is whether or not the restriction is legal. The Government PU College's decision to forbid students wearing Hijabs from entering the university seems utterly sudden and arbitrary. It appears to be unsupported by any legislation or official directive, making it blatantly illegal.

Unexpectedly and depressingly, the Karnataka High Court issued an interim judgment that forbids all students from donning religious attire in response to writ petitions submitted by certain Muslim pupils. Due to concerns over public order, this ruling effectively outlaws the Hijab. Its justification for this is that both Hijabs and saffron shawls are subject to prohibition. However, the edict is founded on the false and deceptive premise that the headscarf and the saffron shawl have equivalent religious and cultural value. The shawl was not worn as a sincerely believed religious practice or as a part of the wearer's identity; rather, it was worn to politicize and intensify the situation. This is why Muslim women stayed at home

[237] *OIC Expresses Deep Concern over Continued Attacks on Muslims in India*, ORGANISATION OF ISLAMIC COOPERATION (Feb. 14, 2022),https://www.oic-oci.org/topic/?t_id=30849&t_ref=19650&lan=en.

when requested to remove their religious attire at the gate, whereas Hindu men took off their saffron shawls and proceeded to college.

Equality, fraternity, and public order are the same arguments made by France and cited by the Karnataka government and high court in their orders. And in IHRL, none of these three explanations is sufficient. The justification for the Hijab ban, "equality," is predicated on a very flimsy and superficial interpretation of equality, "sameness." Even if the law's goal was to promote equality, as was previously argued, it is indisputably discriminatory toward both women and religious minorities. More harshly punished than men and women of other religions, including Muslim men, are Muslim women. The concept of equality was rejected as a justification for the ban on burqas in public spaces in decisions like S.A.S. v. France,[238] which upheld the prohibition on other grounds.[239]

Similar to the "living together" argument offered by France, the HRC rejected the "unity" argument because it was ambiguous and did not fall under the Convention's exceptions. Article 25 (1)[240] of the constitution does not also provide a basis for "unity." And with justification. Otherwise, "unity" could be used to mean uniformity that gets rid of all kinds of diversity. If Hijab is prohibited in schools and colleges, educational institutions will only become hostile environments. Public order is likewise an utterly unsupported and false justification. Contrary to popular belief, fully clothed ladies are a threat to public order, not nude Sadhus! The course of events is demonstrating that the danger to public order is the prohibition of the Hijab as well as its non-wearing.

It is important to keep in mind that France did not become more peaceful or secular as a result of the burqa ban. Instead, it fostered mistrust among the country's Muslim minority and polarised French society more than before. One aspect should be kept in mind during the discussion of the Hijab. Not the Hijab itself, but its prohibition, needs to be examined in light of constitutional law and human rights standards. Hijab wearing may be a form of gender discrimination, but so is prohibiting it. Both coercively removing a woman's clothing and coercively covering her up negate her agency.

The dispute about the Hijab is a prolongation of the long-running discussion over women's bodies, behaviour, and sexuality. Concerns of the group of people who

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[238] S.A.S. v. FRANCE, 43835/11, Arrêt (au principal et satisfaction équitable), Cour (France)
[239] *Id.* at 29.
[240] INDIA CONST. art. 19, cl.1.

were at the forefront of the Hijab controversy—women—had been overshadowed throughout the entire discussion. Liberal feminists and Islamic feminists have very different perspectives on a woman's right to wear a veil, but neither group pays much attention to a woman's authority over her own body or how she dresses. Even feminists seldom saw this issue of women's decisions—which was politicized for understandable reasons their top priority. This brought to light the reality that advocates for women's rights can sometimes be biased when there is an intellectual disagreement, which hurts the cause for which they battle.

The incident brings attention to the predicament faced by Muslim women who are required to wear veils in Eastern nations for traditional reasons and to show their faces in Western societies for a combination of security and cultural reasons. In the West, where people choose to wear veils based on reason, women's ability to make reasoned decisions is put to the test. They were encircled by discourses that gave them demanding directions about how to conduct themselves, just like in the conservative East. Like in Eastern societies, they were forced to conform. The strategy used by liberal and Muslim feminists was to persuade veiled women to criticize an Islamic interpretation of the Hijab that is unfavourable to them.

In a way, the discussion was tied to a lengthy paradigm that holds that culture determines women's values and behavior. The emphasis remained on "what women should wear" rather than "what they want to wear." The decision to be "normal" for societal and safety considerations stood face to face with the decision to be "moral" for religious reasons. This meant that these rules for women, which are often created by patriarchal societies, are now emerging as a concern of international politics, which is by its very nature patriarchal. Women wearing Hijabs have advocated their practice by providing several reasons. In support of their convenience and choice. Many women remarked how starting to cover helped them obtain the respect of males. Discouragement of unwanted flirtation or sexual attention may be one definition of regard in this situation. It is not difficult to conceive that women who wear clothing that covers their bodies are considerably less likely to be approached by non-Muslim or even Muslim men. Such overt displays of devotion can clear up ambiguities in unfamiliar social situations. Co-religionists who may be there may react to such obvious devotion to helping deter individuals from temptation. Others may respond differently to a covered woman. Women who wear the Hijab immediately identify themselves and the organization they belong to, making their affiliation with their religion and community evident.

Drawing consonance with other countries, Muslim women in contemporary Europe faced state authorities for donning a particular style of clothing, just like in medieval Europe. Was the trial of Joan of Arc in the 15th century in Europe[241], where she was burned at the stake by the church for donning a particular type of clothing (among other reasons), and subsequently when circumstances changed when she was given the status of a saint by the church, comparable?[242] Can we make a connection between incidents involving the wearing of the veil and the indictments of women by the church in medieval Europe or by jirga systems in Pakistan? Do legal protections in the contemporary world give Muslim women a better chance to stand up for their rights than those who are subject to anti-women policies in Islamic societies? They certainly don't.

The issue of societal conventions restricting women's choices is brought up once more in the discussion. When women take an unpopular path, the entire society, even those women who follow society's rules, will oppose them. The "easiest method" is to conform to the social order's standards and accept compromise because you are a "weaker" gender. If you make a different decision, you will undoubtedly face social and legal discrimination because you are a woman. The true challenge for Muslim women who live in both Muslim and Western environments is to protect their right to free decisions, whether it be through liberal values or faith. Women's rights have emerged as a top political concern for a variety of political players, from secularists to Islamists, in nations where modern Islam is defined by the state as a code of public morality. An effort was made to modernize state policy toward Islam and Sharia to achieve gender equality in education as well as in economic and political rights. When such policies were implemented, they helped promote women's education and social situations more generally. In liberal ideology, the idea of personal autonomy and the secular principle is closely related. the notion that "the most essential human qualities are freedom of decision and the capacity for self-directed conduct within a social setting." The liberal idea that people are independent actors who should be free to pursue their ways of life would be at odds with the state imposing an official dogma on its religious critics, for instance. One choice accessible to independent individuals is to choose to follow a specific religion (and its associated customs,

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[241] DuParc, Pierre [in French], *Procès en Nullité de la Condamnation de Jeanne d'Arc*.,1977, Vol. 1. SOCIÉTÉ DE L'HISTOIRE DE FRANCE.

[242] Pakistan Horizon, Women's Concerns in International Relations, October 2007, Vol. 60, No. 4, at. 27-45.

such as its dress codes); the state's function is to establish a fair environment in which such selections may be made.

In furtherance of the findings made it can be concluded that women still are subject to the decisions that patriarchal societies across the world impose on them. The topic of how societal norms limit women's options is brought up once more in the conversation. The entire society, including those women who abide by social norms, is against women who choose an unpopular path. The simplest approach is to embrace compromises since one is considered to be the inferior gender and is assumed to follow the rules of the social order. The women surely experience social and legal prejudice only because of the fact that they are women and are expected to accept and adhere to the things as have been stated to them. Protecting their right to make their own decisions, whether through liberal principles or faith, is the real problem for women. Not because she challenged the system, but rather because she stood up for everyone who was too afraid to stand up for themselves, Fathima Bushra took a decision that demanded fortitude. The Honourable judiciary of our nation needs to take these considerations into account and then mandate its decision for the upliftment of not just Muslims but women in general.

SHORT ARTICLES

AT-WILL EMPLOYMENT: FALLACIOUS ORIGIN AND FLAWED JURISPRUDENCE DISGUISED AS CONTRACTS

- Kaustubh Kumar

ABSTRACT

At-will employment is defined as an agreement entered into by two parties – employer and employee – where an employer exercises a right to wilfully terminate the employee at any stage without providing any reasons of the termination. However, common law defines at-will employment as an agreement by one party (employee) to work for another (employer), under the latter's authority, in exchange for pay, for as long as either party wishes the relationship to continue. By definition, at-will employment is open to termination from either side. Thus, basing most of the argument on the premise that both parties are free to terminate the contract at will, this article takes the reader through the jurisprudence behind the development of at-will employment agreements/contracts and assail the essence of these agreements for satisfying the standard definition of "contract" in tandem with the purpose and motive of their development. The paper elucidates the essentials of contract that at-will employment agreements fail to satisfy. At-will employment agreements/contracts are non-est in India. Moreover, the paper maintains that at-will employment contracts cannot be enforced or implemented in India. In the alternative, even if at-will employment contracts are enforced, public policy and rule of law would oust the same.

KEYWORDS: At-will Employment, Workers, Labour Law, Employment Contracts

I. INTRODUCTION

Eminent scholars, including Locke,[243] Bentham,[244] and Rousseau,[245] noted the significance of 'property' and provided material analysis to understand property. Historically, 'property', has signified 'status'.[246] Maine propounded that there is a movement in progressive societies from 'status' to 'contract'.[247] With this transition, 'contract' became omnipresent. One such contract, the jurisprudence and history of which arose from 'capitalism', is 'Employment at Will' contracts ("**EAW**").[248]

English law developed a sophisticated approach to termination of contract. India adopted the same law. Termination of contract in English law relied on two questions i.e., (i) What is the duration of the relation presumed to be when none is specifically stated?; and (ii) What length of notice must be given before the relation can be terminated?[249] The said questions are clarified by the subject contract. A plethora of judgments have established what rule of law would be followed if any contract fails to mention the same.[250] For example, in India, a contract cannot run as a perpetual.[251]*Per contra*, in the US, the jurisprudence and laws relation to contract are developed in supervision of the courts in a manner conducive with its economic structure. This gave rise to EAW contracts.[252]

The paper shows how the US jurisprudence gave rise to EAW contracts. It further shows the repercussions of EAW contracts on workers and employers, which are often used as an oppressive tool of employers' tyranny. To assail EAW contracts, the paper argues that first, the essentials of a standard form of contract are not satisfied by EAW contracts. Second, the paper maintains that EAW contracts

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[243] Melvin Cherno, *Locke on Property: A Reappraisal*,68(1) UNIV. CHICAGO PRESS J. 51 (1957).

[244] Jeremy Bentham, *Principles of the Civil Code*, UNIVERSITY OF TEXAS, (Oct. 25, 2022), https://www.laits.utexas.edu/poltheory/bentham/pcc/pcc.pa01.int.html.

[245] David S. Siroky & Hans-Jörg Sigwart, *Principle and Prudence: Rousseau on Private Property and Inequality*, 46(3) UNIV. CHICAGO PRESS J. 381 (2014).

[246] R.H. Graveson, *The Movement from Status to Contract*, 4(4) MLR 261, 261 (1941).

[247]HENRY JAMES SUMNER MAINE, ANCIENT LAW 182 (Cosimo Classics, 2005).

[248] Jay Feinman, *The Development of the Employment at Will Rule*, 20(2) AM. J. LEGAL HIST. 118, 118 (1976).

[249]*Id.* at 119.

[250] 01, SIR WILLIAM BLACKSTONE, COMMENTARIES 425 (J.B. Lippincott Co., 1893).

[251] Classic Motors Ltd. v. Maruti Udyog Ltd., 1996 SCC OnLine Del 872 (India); M/s. Unikol Bottlers Ltd. v. M/s. Dhillon Kool Drinks, ILR 1994 II Delhi (India).

[252] Davis v. Gorton, 16 N.Y. 255 (1857); 01 CHARLES BAGOT LABATT, MASTER AND SERVANT 155 (The Lawyers Co-operative Publishing Company, 1913).

cannot be enforced or implemented in India. To the end, the paper concludes that EAW contracts must be done away with.

II. JURISPRUDENTIAL HISTORY

Despite following English precedents, the US developed EAW contracts.[253] During the colonial period, day labourers were terminable at will.[254]

In the US, Smith's presumption was developed. According to the said presumption, general hiring is yearly hiring for all servants. This presumption is rebuttable only by evidence subject to the condition that the contracts will be terminable at any stage if a notice is provided.[255]

The development of the general theory of contract was developed in 1870 by Christopher Columbus Langdell, Oliver Wendell Holmes, Jr., and Samuel Williston ("**General Theory**"). The General Theory discharged all assumptions and provided a new mechanism.[256] The mechanism provided that the law would provide a framework for the dealings between parties, but parties would be free to design their own relationships through contract. The law would then give effect to their design.[257] The consequence of this legal obligation shall be interpreted only on the manifest intention of the parties to contract; the intentions of the parties were the source of the law.[258]

The General Theory was adopted as a *laissez-faire* policy and individualism.[259] As a result, the courts of the US departed from the pure contract doctrine. This led to the development of the EAW rule.[260] The immediate cause behind the concretisation of EAW was the confusion that existed in courts of different states with regards to what rule was to be considered to analyse the instant matters.[261]

In this confusion, Wood, propounded the EAW doctrine, as under.

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[253] Feinman, *Supra* 6 at 122.

[254] RICHARD BRANDON MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 219 (Colombia University Press, 1946).

[255] CHARLES MANLEY SMITH, A TREATISE ON THE LAW OF MASTER AND SERVANT 41 (S. Sweet, 1852).

[256] GRANT GILMORE, THE DEATH OF CONTRACT 14-15 (Columbus: Ohio State University Press, 1974).

[257] J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 14 (University of Wisconsin Press, 1956).

[258] PHILIP ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 3 (Oxford University Press, 1961).

[259] LAWRENCE FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY 22-24 (University of Wisconsin Press, 1965).

[260] Labatt, *Supra* 10.

[261] Feinman, *Supra* 6 at 125.

> With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. ... [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect, there is no distinction between domestic and other servants.[262]

The breakthrough for the EAW rule was *vide* the judgment authored by the New York court of Appeals in *Martin v. New York Life Insurance Co.*[263] The court adopted the EAW rule. The ruling in *Martin* is significant owing to the position of New York as a centre of commerce and leader in law.

Martin was the head of New York Life's real estate department drawing an annual salary of USD 10,000. On being discharged, he sued, alleging that his indefinite hiring was annual, relying on the *Adams v. Fitzpatrick*.[264] The trial court granted judgment to Martin but reversed the general term. The Court of Appeals upheld the reversal. The Court of Appeals misread *Adams* and announced a two-fold rule: "…*that an indefinite hiring was presumed to be a hiring at will, and that stating a rate of payment (e.g., $10,000. per year) did not raise a presumption that the contract was intended to be of that duration*."[265]

In a later case *Watson v. Gugino*, the court of Appeals mentioned that its decision in Martin was "deliberately adopted, all the judges concurring, to settle the differences of opinion [confusion] which had prevailed in the lower court."[266] As a result of this precedent, the cases that arose in post-Martin period caused irreparable harm to employees and workers. In the two decades after the judgment of Martin, thirty cases having issue of duration of contract at central level came up. Of these, nineteen were disposed of against employees, four did not adopted EAW due to difference in facts, and the other seven were decided on examination of contract and/or surrounding circumstances in favour of the employee.[267]

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[262] HORACE GAY WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT: COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES 134 (J.D. Parsons, Jr. Publisher, 1877).

[263] Martin v. New York Life Insurance Co., 148 N.Y. 117 (1895).

[264] Adams v. Fitzpatrick, 125 N.Y. 124, 26 N.E. 143 (1891).

[265] Feinman, *Supra* 6 at 128.

[266] Watson v. Gugino, 204 N.Y. 535, 541-42, 98 N.E. 18, 20 (1912).

[267] Feinman, *Supra* 6 at 128-129.

III. CONSEQUENCES OF EAW DOCTRINE

Scholars argue Wood's reasoning behind EAW was based on incorrect interpretation of legal texts.[268] Wood incorrectly suggested that (i) no American court in recent years had approved the English rule, (ii) the EAW rule was inflexibly applied in the United States, and (ii) the English rule only applied to yearly hiring, making no mention of notice.[269] Irrespective of Wood's reasoning, the American courts adapted the EAW rule as a general principle in law of the US.[270]

The consequences of the recognition and adaptation of the EAW rule was immediately detrimental to mid-level employees.[271] In long run, the EAW rule expanded to manual workers, lower-level employees and white-collar workers.[272] By 1930, the rule was adopted by every State of the US.[273] Wood presented the EAW as a default rule and allowed the parties to contract on mutual understanding by defining the duration of the contract –

> It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party…

The American courts shifted from this interpretation of the rule and made EAW applicable even above the terms of the contract mutually decided by the parties.[274] The court also made it impossible for the employees to establish that the duration of the contract was mutually decided by them.[275] To this, Professor Sanford M. Jacoby stated that the "*courts invariably concluded that "permanent" or "lifetime" employment contracts were at-will, even in cases where the employees had bargained for long-term employment by agreeing to drop injury claims against their employers*."[276]

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[268] Theodore J. St. Antoine, *You're Fired!*, 10 HUM. RTS. 32, 32 (1982).
[269] Feinman, *Supra* 6 at 126.
[270] Martin, *Supra* 21; Labatt, *Supra* 10 at 159.
[271] Feinman, *Supra*note 06 at 130-132.
[272] Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 85, 85-86 (1982).
[273] Richard A. Bales, *Explaining the Spread of At-Will Employment as an Interjurisdictional Race to the Bottom of Employment Standards*, 75 TENN. L. R. 453, 453-454 (2008).
[274] Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 684 (1994).
[275] *Id.*
[276] Jacoby, *Supra* 30 at 117-118.

This is highlighted in *Skagerberg v. Blandin Paper Co.*,[277] where an employer promised "permanent" employment to the employee if he accepted the offer, rejected the competing offer, and promised purchase of a supervisor's home. When the employee challenged his subsequent discharge, the court dismissed the case, stating that:

> [I]n case the parties to a contract of service expressly agree that the employment shall be 'permanent,' the law implies not that the engagement shall be continuous or for any definite period, but that the term being indefinite the hiring is merely at will.[278]

With the passage of time, by the end of twentieth century, the American court acknowledged the harm done to employment and service contracts. The courts propounded new jurisprudence, *viz*. providing exceptions to the rule.[279] These exceptions can be marked into three categories *viz.*(i) public policy exception, (ii) implied covenant of fairness, and (iii) enforceable promise of job security.

D. Public Policy Exception

The public policy exception involves an employee being let go for committing an act/omission in line with public policy. This includes, serving on a jury,[280] filing a worker's compensation claim,[281] or cooperating with law enforcement,[282] refusing to take part in a price-fixing scheme,[283] refusing to perform a medical procedure for which they are not licenced,[284] refusing to take part in lobbying.[285]

The most contentious cases in this category are cases of whistle-blowing including retaliatory discharges for employee complaints, voiced within the employing organization or externally, charging employer misconduct.[286]

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[277]Skagerberg v. Blandin Paper Co.,266 N.W. 872 (Minn. 1936).
[278]*Id.* at 873-874.
[279] Jon E. Pettibone, *Assault on Employment-at-Will*, 2(1) ABA 43, 43 (1985).
[280] Nees v. Hocks, 536 P.2d 512 (Or. 1975).
[281] Firestone Textile Co. v. Meadows, 666 S.W.2d 730 (Ky. 1983); cf Dockery v. Lampert Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978).
[282] Palmateer v. Int'l Harvester Co., 85 111. 2d 124, 421 N.E.2d 876(1981).
[283] Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980).
[284] O'Sullivan v. Mallon, 160 N.J. Super. 416,390 A.2d 149 (1978).
[285] Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983).
[286] Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471,427 A.2d 385(1980); Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978).

E. Implied Covenant of Fairness

There lies an implied covenant of good faith and fair conduct between the employer and employee. The good faith and fair dealing covenant are judicially defined as a promise not to discharge an employee for a "bad" reason. Illustratively, "bad" reasons include refusal to pay salary,[287] deliberate retaliation,[288] and depriving a long-term employee of employment benefits.[289]

The concept of fair dealing[290] buttresses the second exception as the most expansive.[291] The said rule has since been softened.[292]

F. Enforceable Promise of Job Security

An enforceable promise of job security may be written or spoken, express or implied, and is frequently made during recruitment,[293] at or soon after the moment of hire,[294] in general policy statements released by the business.[295] Verbal promises made by managerial staff or recruiters that the employee would have a "place" if they performed their jobs well are enforceable.[296] Similarly, progressive disciplinary clauses, discharge "for reason" clauses, and other procedural prerequisites to discharge found in personnel manuals are enforceable.[297] It is assumed that there lies an enforceable guarantee of continuing employment in the absence of cause for termination. This is supported by an employer's continuous practise of terminating employees for only good reason.[298]

The aforesaid exceptions gave rise to further exceptions. This led the to the deterioration of the EAW rule.

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[287] Fortune v. Nat'l Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977).
[288] Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).
[289] Cleary v. American Airlines, Inc., Ill Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).
[290] *Id.* at 728.
[291] Thompson v. St. Regis Paper Co., P.2d, 116 L.R.R.M. 3142 (Wash. 1984); Murphy v. American Home Products Corp., 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983); Parnar v. Americana Hotels, Inc., 652 P.2d 625 (Hawaii 1982).
[292] *Monge*, *Supra* 47; Howard v. Dorr Woolen Co., 414 A.2d 1273 (N.H. 1980).
[293] Weiner v. McGraw-Hill, Inc., 457 N.Y.S.2d 193, 443 N.E.2d 441 (1982).
[294] Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980).
[295] Southwest Gas Corp. v. Ahmad, 668 P.2d 261 (Nev. 1983); Weiner, *Supra*note 52.
[296] Toussaint, *Supra* 53; Weiner, *Supra* 52; Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 320,171 Cal. Rptr. 917, 921; 4); Hadley v. County of DuPage, 715 F.2d 1238 (1983).
[297] Weiner, *Supra* 52; Pine River State Bank v. Mettile, 333 N.W.2d 622 (Minn. 1983); Southwest, *Supra* 54.
[298] Toussaint, *Supra* 53, at 897; Pugh, *Supra* 55, at 927.

IV. ABSENCE OF ESSENTIALS OF CONTRACT IN EAW CONTRACTS

The essentials of a contract are (i) communication of an offer and its acceptance; (ii) consideration; (iii) meeting of minds; and (iv) legal intention. EAW contracts fail to satisfy the elements of consideration, meeting of minds, and legal intention.

A. Consideration and Legal Obligation

EAW contracts lack consideration. Terms laid down in EAW contracts are not binding upon either of the parties.[299] While waiver of consideration with mutual consent of parties is legally accepted, EAWs are not effective if consideration is ineffective. The consideration in the contracts is primarily created on the basis of promise.[300]

In EAW contracts an employment may be terminated before the payment of consideration to an employee. There would be no remedy as it is upon the will of the parties to perform the contract or not. Thus, there is complete neglect of consideration as promise. As in words of Corbin, "*One who states, 'I promise to render a future performance, if I want to when the time arrives,' has made no promise at all*."[301]

Corresponding dependence clarifies that workers are dependent on employers.[302] EAWs provide a dominant and abusive power in hand of employers to lay-off or terminate the contract.

B. Consensus ad idem or Meeting of Minds

There is no meeting of minds about the duration of the contract in EAW contracts. For instance, if an employer contracts through EAW with a worker that he will be paid annually eight thousand if he performs certain job and worker assents to perform the same. In the present contract, employer was of opinion that he will terminate the contract in a year however the worker thought that the contract is extendable at every one year. When after one year, the employer terminates the contract, then the worker would have no remedy as he would not be able to show

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[299] White v. Roche Biomedical Laboratories, Inc., 807 F. Supp. 1212, 1219–20 (D.S.C. 1992) aff'd, 998 F.2d 1011 (4th Cir. 1993).

[300] *Definition of 'consideration'*, CORNELL LAW SCHOOL (Oct. 25, 2022), https://www.law.cornell.edu/wex/consideration; *Consideration under the Indian Contract Act*, TAXMANN(Oct. 18, 2022), https://www.taxmann.com/post/blog/consideration-under-the-indian-contract-act-1872.

[301] ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW (West Publishing Company, 1995).

[302] McCormick v. Fasken Martineau DuMoulin LLP (2014) 2 SCR 108 (India); Hussainbhai v. Alath Factory Union (1978) 4 SCC 257 (India).

from the terms of the contract that the contract was extendable at the end of every year. Here, if we follow the precedent of landmark Martin case, then the worker will have no remedy and it can again be asserted that "… *and that stating a rate of payment (e.g., $10,000. per year) did not raise a presumption that the contract was intended to be of that duration*."[303]

C. Notice of Termination of a Workman

While a notice of termination is not an essential under contract law, it is an essential in employment contracts. As per US law, except in certain mass dismissals or as provided for in an employment contract or a collective bargaining agreement, there is no formal "notice period" to terminate an individual employment relationship.[304] In India, at least 21 to 30 days' notice is required before retrenchment of a workman.[305]

In the case of EAW contracts, there exists no such essential, thereby putting an abusive power at hands of the employee to retrench the workman without serving any notice. The importance of notice can be elucidated from a judgment of the Hon'ble Apex court – "[The notice is required] *so that the workmen can get an opportunity to show to the management that retrenchment of their services is not necessary due to the new scheme of rationalisation*."[306] The judgment was in case of a new change brought in the workplace however the same can be reason behind serving a notice of retrenchment in EAW contracts as a worker might showcase as to how s/he is still relevant for the employment and can perform different work, which might change the views of employer and the worker would not be retrenched.[307]

These essentials find no place in EAWs. As the US is a common-law country, where the judiciary is 'might' and considering the prevailing circumstances in the UK and developing jurisprudence of the law of contracts in the US,[308] itself, might have taken care of by the US judiciary, then the two essentials of consideration and

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[303] Martin, *Supra* 21.

[304] *Employment & Labour Laws and Regulations USA 2022*, ICLG (Mar. 25, 2022), https://iclg.com/practice-areas/employment-and-labour-laws-and-regulations/usa.

[305] Archita Mohapatra, Ajay Singh Solanki and Vikram Shroff, *Notice of Termination (India)*, THOMSON REUTERS (2022), https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Notice-of-Termination-(India).pdf.

[306] Lokmat Newspapers Pvt. Ltd. v. Shankarprasad, (1999) 6 SCC 275 (India).

[307] *Id.* at 32-36.

[308] Walter Pratt, *American Contract Law at the Turn of the Century* 39 S. C. L. REV. 415 (1987-88).

meeting of minds had been considered as a result of which the EAWs would have been rejected as any form contract at the very threshold.

V. EAW RULE IN INDIA AND ITS FUTURE AHEAD

EAWs cannot be implemented in India. They do not meet the essentials of consideration and meeting of minds. Under Section 10 of the Indian Contract Act, 1872 it is mandatory for parties to have *consensus ad idem* to enforce an agreement as contract.[309]

Even considering waiver of consideration by mutual consent, consideration cannot be illusory as in the case of EAWs.[310] Thus, EAW contracts are non-enforceable in India. Labour laws in India lay protect workers' rights by laying down standard procedure be satisfied to retrench or lay-off a worker. These safeguards include notice and protected periods such as maternity leave. Collective bargaining is asserted by a trade union.[311]

The EAW rule is diluted by the US courts, as per the exceptions highlighted above. Moreover, modern EAWs enable employees to resign at any time without providing any reason.[312]

US laws do not *per se* prohibit EAW contracts. Today, EAW contracts provide protection to the workers against dismissal due to unlawful discrimination or protected activity, such as union activity or whistleblowing.[313] Moreover, reports show that US laws place significant obstacles before workers and unions in bargaining with the employers.[314]

As noted, in *Decro Wall International SA v. Practitioners in Marketing Limited*,[315]

> For these reasons commercial contracts can never be in perpetuity and even if in a contract there is no termination clause, the contract

[309] The Indian Contract Act, 1872, No.9 of 1872, Acts of Parliament (India) §10.
[310] Stilk v. Myrick, (1809) 2 Comp 317; Taxmann, *Supra* note 59.
[311] AZB & Partners, *At a glance: termination of employment in India*,LEXOLOGY (Apr. 13, 2022), https://www.lexology.com/library/detail.aspx?g=1d02a20d-8c07-4f8a-9ad3-ed4c71d42c0c.
[312] Suzanne Lucas, *Employment-at-Will Does Not Mean What You Think It Means*, INC., (Feb. 13, 2020), https://www.inc.com/suzanne-lucas/employment-at-will-does-not-mean-what-you-think-it-means.html.
[313] ICLG, *Supra* 64 at 6.3.
[314] Lynn Rhinehart and Celine McNicholas, *Collective bargaining beyond the worksite*, ECONOMIC POLICY INSTITUTE (May 04, 2020), https://www.epi.org/publication/collective-bargaining-beyond-the-worksite-how-workers-and-their-unions-build-power-and-set-standards-for-their-industries/.
[315] Decro Wall International SA v. Practitioners in Marketing Limited, (1971) 2 All E.R. 216.

> will be allowed to be terminated through a reasonable notice if the power to terminate is sought to be exercised bona fide.[316]

VI. CONCLUSION

The interpretation of EAWs has remained variable. Initially, from at-will contracts that legitimised power in the hands of employers to terminate workers at its will, now the at-will contracts mean both the employer and employee have equal power to terminate. There is no law that legitimises EAWs. Further, there exists no remedy.

Lawmakers must enact straightforward reforms to labour law that would facilitate collective bargaining. Several jurisdictions do not enforce EAWs. Further, there exist well-established norms that a contract cannot run till perpetuity.

[316] Unikol, *Supra* 9 at 7.

PROXY WARS: CHINK IN THE UN CHARTER IN THE 21ST CENTURY

- Varnik Kundaliya

I. INTRODUCTION

A proxy war is war that is fought by multiple states in the territory of another state usually having two factions supported by larger, more powerful states, each having their separate and collective interests in the war.

"Proxy war" has slowly crept into popular language following the Arab Spring. World War II (1938-1945), perhaps the most devastating conflict in recent history, left substantial death and destruction in its wake. The war crippled economies, destroyed entire nations, kick-started the nuclear arms race, and led to the death of an estimated 70 to 85 million people.[317] As a result, nations all over the world came together and established the United Nations Organization ("**UN**"). The purpose of the UN was to prevent and protect future generations from wars, to promote fundamental human rights and international justice and to improve the overall quality of life.[318]

The period of time following the close of World War II, known as the Cold War, resulted from the rise of two superpowers, *viz*. (i) the democratic bloc: the United States of America ("**USA**"); and (ii) the communist bloc: the Union of Soviet Socialist Republic ("**USSR**"). Contemporaneously with the Cold War, the world entered the era de-colonialization. Both the USA and the USSR actively tried to recruit newly formed independent states to accept their respective forms of governance. Even though the USA and the USSR never explicitly declared war against each other, tensions between the two superpowers escalated to a great degree during the course of the Cold War, and the said states remained adversarial towards each other.

The term 'Cold War' was coined by Bernard Baruch who used it to describe relations between the United States and the Soviet Union. The term gained popularity after George Orwell used it in his essay "You and the atom

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[317] *Research Starters: Worldwide Deaths in World War II*, THE NATIONAL WWII MUSEUM (Jul. 17, 2020), https://www.nationalww2museum.org/students-teachers/student-resources/research-starters/research-starters-worldwide-deaths-world-war.

[318] U.N. Charterpreamble.

bomb".[319]The Cold War was a period of uprisings and unstable governments, which formed ideal conditions for more stable and powerful governments to sway weaker nations. As such, civil wars erupted in nations across the world, with the US supporting one side and the USSR supporting the other.

The Truman Doctrine, introduced by the then-president of the USA, Harry S. Truman, can be credited for this. The Truman Doctrine postulated that nations across the world were under the threat of being subjected to the communist regime by the USSR. Therefore, Truman believed that it was the USA's responsibility to contain the rise of communism. Contrastingly, the USSR aimed to spread the communist form of governance and to increase its sphere of influence. Even though these superpowers never directly engaged in war, they supplied various civil wars with weaponry, finances, and training thus engaging in numerous proxy wars, which occurred throughout the four decades of the Cold War.

II. REIMAGINING THE NOTIONS OF A PROXY WAR

A proxy war differs from traditional forms of warfare. A traditional war focuses on offense, annexation, or aggression by a state. A proxy war, *per contra*, provides a reason for exercising self-defence by a state in order to justify foreign intervention. Moreover, 'support' in a traditional war often involves the provision of military personnel. In the case of proxy wars, 'support' is confined to the provision of weaponry, military intelligence, and monetary funds. For example, the United States supporting Afghanistan by deploying its own troops against Al Qaeda and Talibani forces is an example of traditional alliance warfare.[320] On the other hand, Iran's support of Houthi rebel forces in Yemen is a proxy war, as Iran primarily supplies them with weapons and funding and not its own troops.[321] However, the presence of foreign military intervention is not a requisite condition for a conflict to be labelled as a proxy war.

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[319]*Bernard Baruch popularizes the term "Cold War"*, HISTORY (Nov. 13, 2009), https://www.history.com/this-day-in-history/bernard-baruch-coins-the-term-cold-war.

[320] Robert Burns, *Amid little scrutiny, US military ramps up in Afghanistan*, MILITARY TIMES (Mar. 10, 2018), https://www.militarytimes.com/flashpoints/2018/03/10/amid-little-scrutiny-us-military-ramps-up-in-afghanistan/.

[321]*Yemen crisis: Why is there a war*, BBC NEWS (Apr. 14, 2020), https://www.bbc.com/news/world-middle-east-29319423.

While there is no set definition of a proxy war, a proxy war may be defined as a war instigated by a major power, or a pre-existing war entered into third- party, which does not itself become involved in the conflict to satisfy a strategic interest.[322]

The term "proxy war" was first introduced in 1964 by Karl Deutsch, a political scientist, who defined it as,

> [A]n international conflict between two foreign powers, fought out on the soil of a third country; disguised as a conflict over an internal issue of that country; and using some of that country's manpower, resources and territory as a means for achieving preponderantly foreign goals and foreign strategies.[323]

There has been a shift in the paradigm of proxy warfare since the Cold War. Today, a proxy war is best defined as sponsorship of conventional or irregular forces that lie outside the constitutional order of states.[324] Since the ways a proxy state or a benefactor state might act in a situation differs from conflict to conflict, it becomes difficult to determine a singular definition of proxy war. Nevertheless, there is one point of similarity between nearly all proxy wars: a distinctive relationship between a principal-sponsor, or benefactor, which delegates some authority over the pursuit of strategic war aims to a proxy-agent.[325]Essentially, a proxy war can be defined as a conflict between two factions which invites support from foreign states in the form of resources or military aid to satisfy an ulterior motive of the supporting foreign nation.

From the perspective of a benefactor,[326] its engagement in proxy war is beneficial for several reasons. Declaring an outright war may not be feasible, the benefactor uses the local population as its troops and prevents the sacrifice of its own armed forces. The presence of local communities prevents nationalistic backlash that often

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[322]GARETT W. BROWN, A CONCISE OXFORD DICTIONARY OF POLITICS AND INTERNATIONAL RELATIONS(4thed.,2018*).*

[323] Andrew Mumford, *Proxy Warfare and the Future of Conflict*, 165(2) RUSI J.40,40-46 (2013).

[324] Candace Rondeaux& David Sterman, *Twenty-First Century Proxy Warfare Confronting Strategic Innovation in a Multipolar World Since the 2011 NATO Intervention*, NEW AMERICA(Jul. 2020), https://www.newamerica.org/international-security/reports/twenty-first-century-proxy-warfare-confronting-strategic-innovation-multipolar-world/.

[325]*Id.*

[326] A benefactor state is the one which supplies the smaller state with resources, like the USA or USSR.

accompanies foreign interventions.[327] Furthermore, local communities provide better ground intelligence due to the confidence of the local population in them. In case of guerrilla warfare, the locals are well aware of the terrain and can blend in with the population in ways foreigners cannot. In some cases, ideological similarities also influence the benefactor's support for a proxy. Despite these advantages, engaging in a proxy war remains a risky endeavour.

A. Open Secret

While political leaders may deny their country's involvement in a war, the same is often found to be untrue. During the Cold War, the USA's involvement in Central America and its support to the Nicaraguan Contras was in the sphere of public knowledge. Even after the USA officially stopped funding the Contras, the Central Intelligence Agency ("**CIA**") continued to assist them covertly.[328] The involvement of foreign actors in the Central American War was common knowledge. Today, with increased global connectivity owing to the internet and social media, it is highly unlikely that a proxy war would remain a secret.

B. Negotiations and Escalations

"Support" in a proxy war is based on a flawed assumption: if the proxy's cause is deemed just, then the benefactor's support for them is justified as well. This assumption ignores that every time a benefactor like USA or USSR has supported a proxy, the conflict has only escalated.[329] The support of a strong benefactor tends to further aggravate the conflict, rather than subsiding it. Greater resources and the support of likeminded thinkers encourages a proxy to ignore negotiating and adopt a more aggressive approach instead. This is illustrated by the Vietnam War; the conflict, which started with a few thousand American soldiers ended with the death of 58,000 troops.

C. Transactional Alliance

A proxy war is only successful until the benefactor and the proxy have similar interests. As long as the benefactor is motivated to achieve a desired result it will supply the proxy with resources. When the benefactor deems that the motive of the war has been fulfilled, it ends the alliance. Thus, proxy wars are just temporary

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[327] Daniel L. Byman, *Why engage in proxy war? A state's perspective*, THE BROOKINGS INSTITUTION (May 21, 2018), https://www.brookings.edu/blog/order-from-chaos/2018/05/21/why-engage-in-proxy-war-a-states-perspective/.

[328] Rondeaux & Sterman, *supra* note 9.

[329] Anthony Pfaff & Patrick Granfield, *The Moral Peril of Proxy Wars*, THE SLATE GROUP (Apr. 05, 2019), https://foreignpolicy.com/2019/04/05/proxy-wars-are-never-moral/.

transactional relationships between the benefactor and the proxy and not a long-term alliance.

D. Cost of Wars

While the cost of proxy warfare is considerably lower than traditional warfare, it is still an unnecessary expense. Taxpayers are bound to believe that the funds spent on a foreign war could be better utilised for the socio-economic development of their own country. The USA is the biggest military spender in the world,[330] and it has spent a significant amount of funds to further proxy wars in the Middle East and Asia since the dawn of the century.[331]It may be argued that these funds should have instead been used towards improving healthcare services in the country or for providing aid to a more disadvantaged nation.

E. Moral Responsibility

One of the most important aspects when it comes to proxy wars is the moral responsibility of the actions of the proxy. While the benefactor supplies the proxy with weapons, artillery, intelligence, and funding it has limited control over the usage of these resources, which is comparatively lower than its control in a traditional war. Proxies are often accused of committing human rights abuses, such as in the case of the Contras who massacred innocent Nicaraguan civilians,[332] or the sexual abuse of Somalian females by members of the African Union Mission in Somalia ("**AMISOM**")[333]. A CIA report revealed that it had sent the Mujahedeen 150 Stinger missiles[334] to fight the Soviet war in Afghanistan in the mid 1980's. As the insurgent group evolved over time into a terrorist organization it used the said missiles to commit war crimes as acts of terror.

Thus, benefactor states must prevent far-reaching outcomes of any support that

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[330] Aaron Mehta, *Global defence spending sees biggest spike in a decade*, DEFENSE NEWS (Apr. 27, 2020), https://www.defensenews.com/global/2020/04/27/global-defense-spending-sees-biggest-spike-in-a-decade/.

[331] Amanda Macias, *America has spent $6.4 trillion on wars in the Middle East and Asia since 2001, a new study says*, CNBC (Nov. 20, 2019), https://www.cnbc.com/2019/11/20/us-spent-6point4-trillion-on-middle-east-wars-since-2001-study.html.

[332] Zack Gold& William Rosenau, *The Future of Conflict is Proxy Warfare, Again*, DEFENSE ONE (Jul.25, 2019), https://www.defenseone.com/ideas/2019/07/future-conflict-proxy-warfare-again/158697/.

[333]Laetitia Bader, *The Power These Men Have Over Us*, HUMAN RIGHTS WATCH(Jul. 22, 2020), https://www.hrw.org/report/2014/09/08/power-these-men-have-over-us/sexual-exploitation-and-abuse-african-union-forces.

[334] Christopher Woody, *A fighting war with the main enemy: How the CIA helped land a mortal blow to the Soviets in Afghanistan 32 years ago*, BUSINESS INSIDER(Oct. 03, 2018), https://www.businessinsider.in/defense/a-fighting-war-with-the-main-enemy-how-the-cia-helped-land-a-mortal-blow-to-the-soviets-in-afghanistan-32-years-ago/articleshow/66046809.cms.

they extend. The support lent can lead to adverse outcomes after the fact. Nevertheless, it cannot be denied that unless effective laws are created against the use of proxies in war, proxy warfare will inevitably become the future of conflict.

III. THE HISTORY OF PROXY WARS

The conditions that foster a proxy war are (i) the presence of an unstable government, (ii) the existence of insurgency forces, and (iii) two opposing factions willing to tussle against each other. It is under such conditions that benefactor nations offer their support to either side, often based on factors such as identical political ideologies, which are also helpful in establishing an allied government subsequently. Such conditions have proved to be the model arena for proxies to engage in warfare without sacrificing their home troops.

A. The Vietnam Wars [1946-54 and 1955-1975]

The Vietnam Wars are a set of two wars fought at different time periods in Vietnam *viz*. (i) the First Indo-China War (1946-54) was a war of liberation from French forces; (ii)the Second Indo-China War (1955-1975) is also known as the 'Resistance War against America' in Vietnam.[335]

The First Indo-China War is one of the earliest examples of a proxy war during the Cold War. It was a war of independence from the French Imperial forces, which were being majorly funded by the USA. The war was followed by negotiations between the USA, the United Kingdom, France, China, the USSR and North and South Vietnam resulting in the Geneva Accord of 1954,[336] which divided the country into two parts, *viz*. (i) the communist North Vietnam; and (ii) the republican South Vietnam.

The Second Indo-China War was originally a part of the regional conflict between North Vietnam and South Vietnam, which turned into a proxy war between the USA and the USSR. After obtaining freedom from France, North Vietnam wanted to unite the Vietnam under a singular communist regime. In this endeavour, it was backed by the USSR and China. South Vietnam, *per contra*, was backed by the USA and closely aligned to its governance as well.

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[335] Ronald H. Spector, *Vietnam War*, ENCYCLOPEDIA BRITANNICA (Jul. 18, 2020), https://www.britannica.com/event/Vietnam-War.

[336]Geneva Agreements, UN PEACE MAKER, (May 13, 2023), https://peacemaker.un.org/sites/peacemaker.un.org/files/KH-LA-VN_540720_GenevaAgreements.pdf.

The weapons, finances and training provided by China and the USSR overwhelmed the USA, which ultimately suffered an embarrassing defeat at the hands of North Vietnam. Following the defeat of South Vietnam, the nation became a communist country.[337]

B. The Congo Crisis [1960-1965]

The Congo Crisis was a complex political commotion that began after Belgium granted the Congolese people independence in 1960.[338] The Congolese army supported Patrice Lumumba, who went on to become the first Prime Minister of independent Congo. Joseph-Desire Mobutu was made the army chief of staff. It was suspected that Lumumba was supported heavily by the USSR and other communist nations. Mobutu, on the other hand was supported by the West, prominently by the USA, which helped Mobutu to orchestrate a military coup.

Following the failure of Mobutu's coup, the conflict became a dangerous proxy war amidst the Cold War. It led to the execution of Lumumba, which was followed by political riots and increased political instability in Congo for the next five years.

Subsequently, Mobutu attempted a second coup, which was successful and resulted in a brutal dictatorship which lasted till the year 1997.[339]

C. The Central American Crisis [Late 1970's-1996]

The Central American crisis is a proxy war that took the lives of thousands of innocent civilians and led to the establishment of several movements by thousands of Central American leaders, to promote peace and end foreign intervention.[340]

Central America was facing through uprisings and wars of liberation. The USSR capsized the opportunity to promote communism in countries that were geographically close to the USA. The USSR backed the Sandinistas in Nicaragua, while the USA, under then-president Ronald Regan, backed the Nicaraguan guerrilla warriors, known as the Contras. The conflict quickly converted into a proxy war with both sides heavily supplying their respective proxies with

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[337]Ruby Zhao, *The Vietnam War – SecondIndochina War,*ASIA HIGHLIGHTS (Nov. 22, 2022), https://www.asiahighlights.com/vietnam/war.

[338]Ryan Hurst, *Congo Civil War (1960-1964)*,BLACKPAST,(Jul. 15, 2009),https://www.blackpast.org/global-african-history/congo-civil-war-1960-1964/.

[339]Carole J.L. Collins, *The Cold War Comes to Africa: Cordier and the 1960 Congo Crisis*, 47 J. OF INT'L AFF. 243, 243-269, (1993).

[340]Virginia S. Williams, *Central America wars 1980s*, UNITED STATES FOREIGN POLICY HISTORY AND RESOURCE GUIDE(Jul.18, 2020), http://peacehistory-usfp.org/central-america-wars/.

economic and military aid.[341]

The Central American Crisis also highlighted an important aspect of proxy wars, i.e., the responsibility of the supporting nations. The Contras participating in the war were accused of war crimes committed using weapons provided by the USA and the CIA. The Crisis shaped the current socio-economic landscape of most Central American countries and was responsible for one of the worst humanitarian conflicts in recent history. In the Nicaragua case the International Court of Justice ("**ICJ**") held that an independent State can be held liable for violations of international law by a non-state actor if it can be shown that the State had active control over the military or paramilitary actions in the course of which the supposed violations were committed.[342]

D. The Arab Spring [2011-2013]

The Arab Spring refers to the period of political upheaval which spread throughout the Middle East in the last decade. It saw the participation of the youth, who protested to take back their freedom and rights and raised voice against injustice and unfair politics.

The protests quickly developed into a major conflict which garnered support from various nations, thereby dividing most Middle Eastern nations into insurgents and counter-insurgents, both supported by powerful states. The Syrian Civil War, lied at the heart of the Arab Spring[343]. The War started as long-standing sectarian rivalry between the Shia-dominated Iran and the Sunni-ruled Gulf monarchies; prominently Saudi Arabia. Syria became a battleground for these warring sides with Iran supporting the Syrian ruler, Bashar-Al-Assad and Saudi Arabia, Qatar and Turkey supporting the opposition insurgents.[344]

The war soon attracted the attention of the entire Middle Eastern region and tensions started to escalate. Iran and Israel were engaged in conflicts ever since the

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[341] Sasha Lilley, *Ronald Reagan Made Central America a Killing Field,* THE WIRE(Jun. 02, 2021),https://thewire.in/world/ronald-reagan-made-central-america-a-killing-field.

[342]Nicar v. United States, 14 I.C.J 115, (1986)

[343] Mehdi Rais, *Syrian crisis: a proxy war*, LE JOURNAL INT'Ll (Jul.19, 2020), https://www.lejournalinternational.fr/Syrian-crisis-a-proxy-war_a692.html.

[344]*Timeline: How the Arab Spring unfolded*, AL-JAZEERA(Jan. 14, 2021), https://www.aljazeera.com/news/2021/1/14/arab-spring-ten-years-on.

2006 Hezbollah-Israel war, and the attack on an Israeli jet further sparked the fuel.[345]

Soon Turkey joined the battle against the Kurds which resulted in a ripple effect, inviting the USA into the war. Moreover, Russia saw this as an opportunity to strengthen their naval power since Syria houses Moscow's only naval base with direct access to the Mediterranean. These conflicts ultimately led to death of thousands of innocent civilians including women and children and ultimately ceased only after the first truce in the Battle of Aleppo was made.

IV. LEGISLATIVE FRAMEWORKS

The threat posed by proxy wars is acknowledged globally. There are international treaties, domestic statutes and tenets of customary international law which provide relief against such activities. The UN charter, the Geneva Conventions, and the Hague Convention[346] are some of international instruments that regulate the conduct of hostilities during a proxy war at bay.

In most cases, states justify the usage of proxies by showing the necessity of self-defence and the use of force[347] (*jus ad bellum*) to protect their own borders, allies or territories. However, while the UN Charter does allow for this use of force, the force thus used ought to be proportional to the attack or threat faced.[348] Furthermore, the methods deployed must be in consonance with international law governing armed conflicts to mitigate, if not prevent, the loss of human life and suffering.

Unfortunately, most proxy wars result in a battleground for powerful non-state actors to indirectly engage with each other. Liability for the violation of international law can only be imposed on the non-state actor when it is proved that it had an effective control over the military or para-military action in the acting state, during the time of the alleged war crimes.[349]The mere presence of supply of weapons, equipment, information and support is not enough to impose liability on non-state actors. Rather, the existence of an overall, high degree of control over

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[345] Ian Bremmer, *These 5 Proxy Battles Are Making Syria's Civil War Increasingly Complicated*, TIMEUSA(Feb. 16, 2018), https://time.com/5162409/syria-civil-war-proxy-battles/.

[346] 1907 Convention for the Pacific Settlement of International Disputes UKTS 6 (1971) Cmnd. 4575, 1 Bevans 577, 2 AJIL Supp. 43 (1908).

[347] *Supra*note10.

[348] Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. OF INT'L. L. 769, 770- 777 (2012), https://www.un.org/law/counsel/Bethlehem%20-%20Self-Defense%20Article.pdf.

[349] Nicar v. U.S., 1986 I.C.J.

the proxy becomes relevant.[350]

States are cognizant of such treaties and obligations. Benefactor states often employ private security or professional security contractors[351] as third-party nationals within the acting state, whose sole purpose becomes teaching "defensive abilities" to military personnel of the proxy state, such as by having joint military exercises or training. This provides a loophole to direct military intervention or control of the proxy state. This counts as an indirect involvement of the state in the war which are often part of bilateral treaties between the states.

In response thereto, the Red Cross formulated the Montreux Document,[352] a compilation of legal standards and best practices to foster respect for international humanitarian law and human rights in situations where private military and security companies are present in armed conflicts.

Article 16 of the International Law Commission Draft ("**ILC Draft**")[353] aims to establish the liability of private persons. Presently, the Wagnar Group, which is a mercenary group under the control of Russian oligarch Yevgeny Prigozhin, comes closest to being under the scrutiny of the ILC Draft for their actions in the Russia-Ukraine war.[354]

According to Article 16, if a state provides another state with any support, aid or assistance of any kind to commit an act that is deemed wrongful internationally, the state providing the support shall be responsible for the act, provided it had the knowledge of the circumstances as well as the fact that the act would be deemed wrong internationally. This establishes three elements to identify whether or not a State is liable for engaging in proxy warfare, *viz.* (i) the state aided and assisted another state; (ii) the state had the knowledge of the circumstances of the internationally wrongful act; and (iii) the act would be internationally wrongful if committed by that State.

A. Aid and Assistance

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[350]Bosn. & Herz. v. Serb. & Montenegro, 2007 I.C.J.

[351]*Report on the Legal Framework Regulating Proxy Wars*, AMERICAN BAR ASSOCIATION(Dec., 2019), https://www.americanbar.org/content/dam/aba/administrative/human_rights/chr-proxy-warfare-report-2019.pdf.

[352]*The Montreux Document*, ICRC (Sep. 17, 2008), https://www.icrc.org/en/doc/assets/files/other/icrc_002_0996.pdf.

[353]Draft Articles on Responsibility of States for Internationally Wrongful Act with Commentaries, adopted by the ILC at its 53rdSess., U.N. Doc. A/56/10pp. 47 (2001).

[354] Jennifer Maddocks, *Russia,The Wagner Group, and the Issue of Attribution*, ARTICLES OF WAR, (Apr.21, 2021) https://lieber.westpoint.edu/russia-wagner-group-attribution/.

As stated, any support, i.e., weapons, intelligence or manpower[355]provided by a state qualifies as aid and assistance and the liability of the state shall extend to the aid and assistance provided by it that results in the commission of the wrongful act. Furthermore, the ILC draft also highlights the fact that the support provided by the state does not have to be actual performance of the wrongful act and can even be a significant contribution to the same.[356]

B. Knowledge of Circumstances

As per customary international law, states are liable for those actions which can be reasonably foreseen by them, such as providing weapons to insurgents and rebel groups to enable them to engage in conflicts. The state must have knowledge of the fact that any support provided by it to another state could lead to conditions which might escalate conflict in the area, thereby leading to a full-fledged proxy war.

For instance, if the proxy state has a pattern of engaging in international wrongdoings, and it uses support from a benefactor state, then the said benefactor state would most likely be held accountable if it continues to provide support. To illustrate, the USA knowingly helping the Contras in the Central American Crisis amounted to the USA having knowledge of the same in the Nicaragua Case.

C. Internationally Wrongful act

An internationally wrongful act is defined as an act which is in contravention of the international obligations of the state and that can be attributable to it.[357] The ICJ defined an internationally wrongful act as one wherein there is a violation of the existing international juristic standards of a state.[358] It was further held that mere knowledge of conditions likely to cause an incident and failure to act responsibly in accordance with international standards can also qualify as an internationally wrongful act.[359]

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[355] Ryan Goodman & Miles Jackson, *State Responsibility for Assistance to Foreign Forces (aka How to Assess US–UK Support for Saudi Ops in Yemen)*, JUST SECURITY(Aug. 31, 2016), https://www.justsecurity.org/32628/state-responsibility-assistance-foreign-forces-a-k-a-assess-us-uk-support-saudi-military-ops-yemen/.

[356]Collins, *supra* note 24.

[357]*Responsibility of States for Internationally Wrongful Acts*, (2001) Y.B. Int'l L. Comm'n , U.N. Doc. A/56/49(Vol. I)/Corr.4.

[358]United States of America v. Islamic Republic of Iran, 1981 I.C.J. Rep.45, ¶ 29, 56. (Nov. 29).

[359]U.K v. Albania, 1949 I.C.J. Rep.4, ¶ 4, 23. (Dec. 15).

V. RISE OF THE TALIBAN WAR

The ideal conditions for a proxy war exist by virtue of an unstable government and an insurgency or militia force wanting to overturn it. The Islamic Republic of Afghanistan fulfils all the essential conditions required for a proxy war. In the days leading up to the uprising, Afghanistan demonstrated the signs of an unstable government due factors such as fractured faith in government, lack of inclusivity among certain groups and communities and structural inequalities providing for a disproportionate representation to certain other actors involved,[360] even before the Taliban seized power in 2021.[361]The Taliban has formed a legitimate government under the participation of the United Nations Security Council asking for an inclusive government.[362] A new resistance group comprising of former Mujahedeen troops and Afghan soldiers is gathering in Panjshir to take down the Taliban government.[363]

VI. CONCLUSION

Thus, a proxy war is a conflict fought between multiple states in the territory of another state, with each state supporting different factions to serve their own separate and collective interests. Proxy wars have been a recurring phenomenon throughout history, particularly during the Cold War. Support in proxy wars typically includes the provision of weaponry, military intelligence, and funds to the proxy forces, rather than the deployment of a benefactor's own troops.

Proxy warfare has evolved over time, and it is challenging to define a singular definition for proxy wars due to the varying ways in which benefactors and proxies act in different conflicts. However, a common characteristic is the distinctive relationship between the benefactor and the proxy-agent, where the benefactor delegates authority over strategic war aims to the proxy. Engaging in proxy wars can be beneficial for benefactor states, as it allows them to pursue their

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[360] Alex Thier & Scott Worden, *Political Stability in Afghanistan: A 2020 Vision and Roadmap*,US INSTITUTE OF PEACE(Jul. 10, 2017), https://www.usip.org/sites/default/files/2017-07/sr408-political-stability-in-afghanistan-a-2020-vision-and-roadmap.pdf.

[361]*Taliban are back – whatnext for Afghanistan?*, BBC NEWS (Aug. 30, 2021), https://www.bbc.com/news/world-asia-49192495.

[362] Edith M. Lederer, *UN Security Council: Taliban must form inclusive Afghan govt*, AP NEWS (Sep. 18, 2021), https://apnews.com/article/europe-afghanistan-united-nations-taliban-c99d18e654dcab64db4deac1b87939fa.

[363] Jim Huylebroek & Victor J. Blue, *In Panjshir, Few Signs of an Active Resistance, or Any Fight at All*, THE NEW YORK TIMES (Sep. 17, 2021), https://www.nytimes.com/2021/09/17/world/asia/panjshir-resistance-taliban-massoud.html.

ulterior motives without directly sacrificing their own soldiers. However, it is a risky endeavour with unpredictable outcomes.

The existence of proxy wars is an open secret with states often joining warring factions and providing them with amenities. States bypass Section 2(4) of the UN Charter, as individual nations are allying to support each other and justify the usage of each and every resource provided as either a sovereign matter or in self-defence under Article 51 of the UN Charter, without necessarily engaging in a direct war. Thus, the loophole mechanisms that exist in the Charter as well as lack of definitive legislative mechanisms and sanctions against states exploiting the legal loopholes allows for the entire activity of proxy warfare to act as a breach of sovereignty, contrary to the UN Charter allowing for independent states to continue engaging in wars without grounds for UN intervention.

In conclusion, such wars highlight the need for benefactors to carefully consider the long-term consequences of their support. These conflicts have had far-reaching consequences, shaped the geopolitical landscape and have left lasting impacts on the affected regions. Unless effective regulations are put in place to deter the use of proxies in warfare, proxy wars are likely to continue as a future mode of conflict.

It is crucial for states to evaluate the outcomes and risks associated with proxy warfare and prioritize peaceful resolutions over prolonged and escalating conflicts.

Case Note

WOULD TIME GAP BETWEEN THE COMMISSION OF CRIME AND THE STATE OF DRUNKENNESS STILL CONSTITUTE TO BE A VALID DEFENCE?

- Manvee Sharma

NAME OF THE CASE

PAUL v. STATE OF KERELA

CITATION

(2020) 3 SCC 115

DATE OF THE JUDGMENT

JANUARY 21 2020

BENCH

DIVISION BENCH: J. SANJAY KISHAN KAUL & J. KM JOSEPH

PARTIES INVOLVED

PAUL (APPELLANT) AND STATE OF KERELA (RESPONDENT)

LAWS AND ACTS APPLIED IN THE CASE

INDIAN PENAL CODE 1860, INDIAN EVIDENCE ACT, 1872 AND THE CODE OF CRIMINAL PROCEDURE, 1973

I. INTRODUCTION

Two essentials for an act to constitute a criminal offence are (i) *actus reus* i.e., the guilty intention which leads to the commission of the offence; and (ii) *mens rea*. i.e., the act of committing / omission to act is called *actus reus*. The acts of a person are determined by their intention to act in that manner or if they had the knowledge of the likely consequences of their act.

Involuntary intoxication is a defence in criminal law. A person is considered incapable of determining the nature of their act under a state of intoxication.[1] *Per contra*, in cases of voluntary drunkenness, intention is gathered from the general circumstances and the degree of intoxication.[2] Hence, if the person has the knowledge of the act that they are committing/ omitting to commit and its consequences, it is to be presumed that they are not in a state of drunkenness.[3] In such cases, they must bear the natural consequences of their actions.

II. FACTS OF THE CASE

The Appellant is the husband of the deceased victim. On 11th October, 1998, the Appellant's mother created a ruckus at home. The ensuing quarrel, and the unbearable harassment compelled the deceased to leave in search of her husband. She found him with his friends, consuming liquor. The Appellant then assaulted the deceased and ill-treated her in front of them. Later, at about 11:00 pm on the same night, he throttled her to death.[4] *Per contra*, the Appellant stated that on the said day he was heavily drunk, and that he was at his friend's house (PW 7). As a result of the quarrel between the deceased and his mother; the deceased arrived at PW 7's residence and escorted him (the Appellant) back home. Upon reaching home, a quarrel arose between the deceased and the Appellant's mother, and the Appellant was beaten by his mother. Thereafter, the Appellant fell asleep, and when he woke up, he found that the deceased had hung herself to death.[5]

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[1] Pen. Code § 85.
[2] *Id.*
[3] *Id.*
[4] Paul v. State of Kerala, (2020) 3 SCC 115 (India) ¶ 6.
[5] Paul v. State of Kerala, (2020) 3 SCC 115 (India) ¶ 8.

III. RELEVANT SECTIONS OF THE PENAL CODE

The Appellant and his mother were booked under the following Sections of the of the Indian Penal Code, 1860 ("**IPC**") *viz.*

First. *Sections 498A* (cruelty i.e., for harassing the deceased and giving her mental and physical injury);

Second. *Section 300* (when culpable homicide amounts to murder);

Third. *Section 302* (punishment for murder i.e., causing the death of his wife);

Fourth. *Section 86* (acts committed in a state of voluntary drunkenness); and

Fifth. *Section 34* (common intention).

IV. LEGAL ISSUES RAISED

First. Whether the defence of intoxication should be accorded to the Appellant even when there was a substantial time gap between his intoxication and the commission of the crime?

Second. Whether the Appellant's acts were the result of grave and sudden provocation? a

Third. Whether the Appellant's acts amounted to culpable homicide not amounting to murder instead of murder?

V. ARGUMENTS PRESENTED BY THE APPELLANT

The Appellant sought to claim the benefit of grave and sudden provocation.

Expatiating, he contended that homicide does not amount to murder if committed under the influence of grave and sudden provocation. For example, the defence applies if the act is committed after a sudden fight under the heat of the arguments without the offender acting in a cruel manner or gaining any advantage.

He suggested that on the evening in question, the deceased went to the house of PW 7 wherein the Appellant was enjoying drinks with his friends. The Appellant submitted that he had an injury which strengthens his case of having had a quarrel and thus, this was an appropriate case for alteration of the charge from Section 302 of the IPC to Section 304 of the IPC. Further, the trial court had acquitted him from charges under Section 498-A which elucidates the fact that the Appellant never inflicted any matrimonial cruelty on the deceased.

Further, nail clippings and blood samples were taken from the dead body as well as from the deceased. According to the Appellant, the blood in the deceased's nail

clippings was on account of the attempt made by him to untie the noose out of deceased's neck.

VI. ARGUMENTS PRESENTED BY THE RESPONDENT

The Prosecution argued that since deceased's marriage with the Appellant on 31st October, 1997, she was subjected to mental and physical agony at the hands of the Appellant and his mother. On the date of the commission of the crime, the mother of the Appellant created a scene at home and harassed the deceased to the extent that she had to run away from the house in search of her husband, the Appellant. She found him consuming liquor with his friends; he assaulted her in front of them. Later, he throttled her to death.

Although the Appellant acknowledged the fact that he and his wife were together in the bedroom that night he failed to give any justifiable reason for the injuries caused to the deceased.

The Appellant was injured as well. It is pertinent to note here that when throttling takes place – unless the victim is unconscious – there would be some kind of resistance. Thus, injuries on aggressor are quite common.

After examination under Section 313 of the Code of Criminal Procedure (**"CrPC"**),[1] it was found that the death was the outcome of force applied on the neck of the deceased. Additionally, the Prosecution highlighted that, PW 1 (the brother of the deceased) in his examination-in-chief stated that he was informed by the Appellant's brother that his sister was hospitalised due to a sore throat. Subsequently, he was intimated that she had died by hanging herself. He also testified before the trial court that he saw the swelling on the forehead, marks indicating throttling on the neck, contused abrasion on the left cheek and nail marks on the face of deceased.

VII. JUDGMENT OF THE COURT

The court appreciated the medical evidence led and conclusively determined that the present case was a homicide rather than a suicide. The court held that the death of the deceased was caused due to throttling. The couple resided in a separate bedroom and the blood in the deceased nail clippings clearly asserted the factum of homicide. Moreover, the Appellant's defence that the blood in the nail clippings was on account of an attempt by the deceased and the Appellant to untie the noose

[1] Code Crim. Proc. § 313.

around her neck was baseless. As per expert evidence led, once the victim becomes unconscious and they will not be able to make any efforts to loosen the ligature.

Further, the court pointed out that there were injuries on the neck and other body parts of the Appellant which support the fact that there was resistance by the deceased.

The Appellant's request to reduce the punishment of murder under Section 302 to culpable homicide not amounting to murder under Section 300, while giving the defence of grave and sudden provocation and intoxication, was turned down. The Supreme Court held that Section 300 of the IPC declares that except in those cases which are categorically excluded culpable homicide amounts to murder in all the other situations. These are specifically laid down under Section 300. To punish the perpetrator for murder, it must be homicide which is declared as murder. Murder is a case of special *mens rea* and is a homicide of the most serious form. However, it needs to be noted that all cases of homicide do not amount to murder.

Moreover, the court opined that since the incident had occurred at night, in the couple's bedroom, where there was no other person present, under Section 106 of the Evidence Act, 1872, it is the responsibility of the Appellant to cull out the truth. The court held that the theory of suicide was an embellished version of the story, and the Appellant is liable for committing murder by throttling.

The court held that the Appellant had throttled his wife to death in drunken state however, his drunkenness was not enough to prevent him from forming requisite intention, to be mitigating factor in reducing his punishment from murder to culpable homicide not amounting to murder. This is owing to a huge gap between the state of drunkenness and the actual commission of crime. Intoxication thus, cannot be considered to be an immediate or contributory factor. The act of the Appellant clearly shows that he knowingly throttled his wife and that he intended the natural consequences of his act.

VIII. BENCH'S RESPONSE TO THE DEFENCES CLAIMED

A. Grave and Sudden Provocation

Grave and sudden provocation must come from the victim. The provocation must be such that it made the accused commit the act. Nothing from the facts establishes even the case of mere provocation let alone sudden and grave provocation. There was no sudden quarrel which led to a sudden fight. *Arguendo*, if the Appellant's case was taken at its best, it can be said that till the time he fell asleep there was no

hint of any sudden quarrel or fight. Moreover, what transpired within the privacy of their bedroom is within the exclusive knowledge of the Appellant and must be established by him under Section 106 of the Evidence Act, 1872.

B. State of Intoxication

Section 86 of IPC reads as under,

> **86. Offence requiring a particular intent or knowledge committed by one who is intoxicated.**—In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.[2]

Here, there is no mark to show how drunk the Appellant was or whether this drunkenness came in way of forming the required intention. Further, there was also a gap between the time he was found drinking and the commission of the offence.

IX. PRECEDENTS CITED

A. Basdev v. State of PEPSU [3]

In *Basudev*, the Appellant was a retired military official who attended a wedding in a state of intoxication. At the venue, he had an altercation with a young boy, during which he fired his pistol, killing the boy. The Supreme Court held that the circumstances show that he was not intoxicated to the extent that he could not understand the nature and consequences of his act. The same was evident from the fact that he was talking to people coherently and was capable of moving himself without any aid or faltering on his way. After shooting the boy, he tried to escape from the scene and also sought for an apology. Thus, his conviction was not reduced to culpable homicide not amounting to murder.

B. *State of AP v. Ravavarapu Punnayya*[4]

Here, the Supreme Court held that whenever there is an iota of doubt as to whether the offence is culpable homicide not amounting to murder or murder, the court

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[2] *Supra* note 1, § 86.

[3] Basdev v. State of PEPSU, 1956 AIR 48 (India).

[4] State of AP v. Ravavarapu Punnayya, 1977 AIR 45 (India).

shall approach the case in three stages. Once a connection between the death and the acts of the accused is established, the court shall proceed to the second stage to determine whether the accused's actions constitute culpable homicide as defined in Section 299 of the IPC. If this is an affirmation, at the third stage, the court determines the ambit of Section 300 IPC. If the case does not fall under Section 300 IPC, then, the person shall be punishable for culpable homicide not amounting to murder, however, if it falls under Section 300 but is defenced by any of the exceptions enumerated in *Section 300,* the offence would remain still the same – culpable homicide not murder.

X. ANALYSIS

The Supreme Court has issued a detailed judgment differentiating the elements under Section 302 from Section 304; the court has dwelled upon the time gap between the drunkenness and actual commission of crime has been dwelled upon. Section 86 only provides a defence to the acts which are committed by persons who are involuntary intoxicated as they neither capable to form an intention to kill nor are aware of the probable consequences of their actions.

With respect to the defences claimed by the Appellant being grave and sudden provocation, the Supreme Court rejected the same as the Appellant himself acknowledged that after a small quarrel at home all residents of the house went to sleep. This clearly suggests that there was no provocation from the deceased.

On comparison with *Basdev,* it can be deduced that both Appellants were drunk out of their own will and were in state of mind to understand the consequences of their actions. The fact they were drunk did not stand in way of forming the requisite intention. Thus, it can be presumed that they intended the natural consequences of their actions.

Applying the principle laid down in *R. Punnayya*, it is clear that it is the act of the Appellant that has caused the death of the deceased. Examining the circumstances, it is evident that it falls within the scope of Section 300. The Appellant has throttled his wife to death thus, none of the exceptions of Section 300 are attracted. Thus, the appeal was dismissed.

XI. CONCLUSION

It can be concluded that the exposition of suicide demonstrated by the Appellant is a farce. It is clear that the death of the deceased has been caused due to throttling by the Appellant. The injuries on the deceased such as contusion on the forehead

in the midline, injuries to the neck, contusion on the outer aspect of the left arm, and upon the middle of the nose indicate that the death has been caused by throttling.

From the above discussion, it is absolutely clear than unless the accused has the intention and the knowledge to commit the crime, they cannot be held liable for it. Usually, under the state of drunkenness, there is lack of knowledge as in such cases a person is incapable of understanding the nature of his acts. Thus, intoxication is a defence in law provided there is no voluntary intoxication on the part of the offender. However, in cases where intoxication has no influence on the actions of the accused no defence can be claimed merely on the basis that the person had consumed liquor sometime before the commission of the crime. Such a situation would fall under Section 86 of the IPC, and it would be presumed that the accused had the requisite intent or knowledge to commit the crime. Thus, time gap between the commission of offence and actual act of drinking would also be a crucial factor in determining his punishment

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