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FOREWORD

Nirma University Law Journal provides knowledge sharing platform the way of exploring and changing dynamics of law at national and global scenario, with the sense of sprit of inquiry resulting the new knowledge and path breaking insights of mundane ideas and ways of living.

I am pleased to present before you all that the Volume -XII Issue – I December, 2022 Nirma University Law Journal (NULJ) Peer reviewed and Referred Journal. The Journal aims to encourage writings that are interdisciplinary in nature expanding contemporary issues across disciplines likewise; Sociology, Political Science, Public policy, Economics, Science and Technology and contemporary aspects in the context of law. I am happy to share that the article which have been published in this Journal it is indexed to HeinOnline, Manupatra and SSC online. The overwhelming response we received from contributors for the publication of this Volume XII, Issue I.

The veritable contributions are indicative of the efforts and ingenuity of the author, the academic and practical impact on the reader its must be credited to the qualitative and insightful writings of authors. On behalf of the Nirma University, I congratulate the authors for maintaining the highest standards academic honesty and purity in thoughts.

We feel extreme pride in being a medium of expression the broadcasting novel ideas being a crucial platform for legal, interdisciplinary and contemporary legal discourse.

Prof. (Dr.) Madhuri Parikh
Chief Executive, Nirma University Law Journal
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PONDERING THE POTENCY OF DATA PROTECTION: A COMPARATIVE REVIEW OF DATA PROTECTION FRAMEWORK IN THE EUROPEAN UNION, THE UNITED STATES OF AMERICA & INDIA

Anushka Rao*

ABSTRACT

The idea of privacy is becoming increasingly complex ever since the advent of technological advancement and the internet in our everyday lives. Technology is now becoming so fundamental that its unrestrained use threatens the right to privacy. The right to privacy is guaranteed by regulating the collection, storage, and transfer of people's private information to prevent data breaches and cybercrimes. This paper examines how cybercrimes are growing around the globe and endangering humans as well as how the global community has responded to the problem of cybercrime prevention since the advent of the internet. It further analyzes how, why, and what makes the European Union's Global Data Protection Regulation, the most robust and comprehensive legal framework establishing the global standard for legal data protection along with the differences in how the US and India view privacy, personal data, and data protection. The paper ends with giving an overview of previous attempts by the Indian legislature to pass specific data privacy legislation, highlighting their deficiencies, current Acts and policy initiatives in place, the Personal Data Protection Bill 2019, arguing why it is a glimmer of hope for improved data protection laws in India, along with the criticism, potential challenges, and obstacles that prevent the bill from becoming law.

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Keywords: *Data Protection, Right to Privacy, GDPR, Information Technology Act 2000, Digital Data Protection Bill 2022.*

I. INTRODUCTION

Over the past 20 years, the Internet has expanded substantially, making cyberspace the fifth largest sector for human activity.[1] The phenomenon of technological development has increased the importance of the internet in our lives beyond anything we could have ever anticipated. We use the internet to manage our businesses, communicate with our loved ones, and transmit and store confidential information like bank details, medical records, tax information, client details, etc. Hence, daily transfers of personal data across public networks are significant. India has had a significant rise in online activity and consumption it is one of the top IT centers in the world. As of 2021, India has the third-largest Internet user population after China and the United States of America.[2]

Apart from empowering individuals, this unprecedented growth in accessibility has brought significant challenges for countries, governments, and cyberspace agencies. When personal data is breached, damaged, or exploited for profit, political or personal reasons by targeting computers, a computer network, or a networked device then it is called cybercrime. Therefore, due to its likelihood of misuse, data must be protected. Globally, there is significant worry about data protection because it is prone to criminals and terrorists committing financial and identity fraud, supporting terrorist operations, performing espionage, damaging infrastructure, and stealing business data which can affect national security and economic growth.

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[1] Ministry Of Communications and Information Technology (Department Of Electronics And Information Technology), Fifty Second Report on Cyber Crime, Cyber Security and Right to Privacy (Issued on 12th February, 2014).

[2] Ino Rossi, *Challenges of Globalization and Prospects for an Inter-civilizational World Order*, SPRINGERLINK BLOG (Dec. 10, 2022, 7:30 PM), https://link.springer.com/book/10.1007/978-3-030-44058-9.

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Countries around the globe are working towards ensuring the security of their cyber systems due to the dangers to their cyber assets and all-pervasive interconnected information systems. To tackle this, several international, national, regional, and inter-governmental organizations have been working like the European Commission, Asia-Pacific Economic Cooperation (APEC), the Organization for Economic Cooperation and Development (OECD), etc. According to United Nations Conference on Trade and Development (UNCTAD), 137 out of 194 countries have enacted legislation to secure the protection of data and privacy.[3] Among the strict legislations passed by countries all over the world, the European Union's (EU) General Data Protection Regulations (GDPR)[4] is the most stringent, extensive, and effective legislation concerning data protection. Both, India and the United States of America (USA) lag well behind the EU in terms of a stringent and effective system to govern data protection since they have sector-based laws for data protection rather than a single omnibus law.

In order to prevent and combat cybercrimes, the Central Board of Investigation (CBI) in India has set up dedicated cybercrime units. Article 21 of the Indian Constitution affirms the necessity of taking all necessary steps to protect the fundamental rights to privacy and individual liberties, including the right to informational privacy in the wake of the Supreme Court's landmark *Justice K.S. Puttaswamy v. Union of India (2017)*[5] decision, which made it essential that informational privacy be enacted in our regulatory structures.

So far, no bill introduced by the Parliament has seen the light of the day, and the Indian legislature is yet to pass appropriate data protection laws. Hence, the Information Technology Act 2000 (IT Act, 2000)[6] and other statutes are in place to regulate and penalize those who breach data privacy. Through this

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[3] UNCTAD.ORG, https://unctad.org/page/data-protection-and-privacy-legislation-worldwide#:~:text=137%20out%20of%20194%20countries,in%20only%2048%20per%20cent (last visited Dec. 9, 2022).

[4] EU General Data Protection Regulation (GDPR) 2016, Regulation (EU) 2016/679.

[5] Justice K.S. Puttaswamy (Retd) & Anr. v. Union of India & Ors., (2017) 10 SCC 1.

[6] Information Technology (IT) Act, 2000, No. 21, Acts of Parliament 2000 (India).

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paper, the concept of widespread cyberspace, the threats it poses to the community, the need for introducing laws for protecting cybercrimes, the GDPR, the laws in the US, previous attempts by the Indian legislature to enact specific legislation for data protection, their shortcomings, and other Acts and policy initiatives in effect in India will be examined.

II. CYBERSPACE, ITS CHALLENGES & NEED FOR DATA PROTECTION

The environment in which communications systems, computer systems, networks, and wireless connections are used is known as cyberspace. In this era, everyone is connected to the internet in one way or the other because it helps users connect, interact, share ideas, learn, expand businesses, and create intuitive media. It can be said that cyberspace exists everywhere where the internet is. The challenges in cyberspace stem mainly from the existence of a lack of regulation and anonymity. Hence, the need for the protection of data of these computer systems, servers, desktops & laptops, arise and the role of stringent regulations and laws becomes of key importance.

If data is not safeguarded, everything from individual identity theft, fraud, and valuable sensitive information theft to failure of military equipment and threats to national security can arise. These can limit an individual's ability to control the data that they store on their connected devices like phones, laptops, pen drives, or software that are run by businesses, governmental entities, and others which can result in financial loss, physical harm, or psychological harm.

Several cybercrimes are reported throughout the world, where hackers seek financial or even political benefits that indicate the urgent need for stricter regulation and legislation for data protection. A few of the cybercrimes are namely, cyber stalking, phishing, salami attacks, identity and personal information theft, pornography, child pornography, and video voyeurism. In India, since the current IT Act, of 2000 only covers a portion of the types of

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cyber-attacks, many other cybercrimes, such as spear phishing, trojan attacks, data breaches, intellectual property crimes, e-mail bombarding, spam, and spoofing, have seen a notable rise in the past years.

In recent times, fraud and cybercrime have significantly increased in India. Attacks on telecom infrastructure, IT assets, and even government, public sector, and private sector IT infrastructures have all been the subject of cyber-attacks such as website defacements, intrusions, network probing, and targeted attempts to steal data, identity theft (phishing), and service interruption.[7] This demonstrates the pressing need for robust data protection regulations. The GDPR, as previously stated, is the most effective piece of legislation that establishes international standards for data protection regulations. There is no comprehensive legislation that governs all the cybercrimes in either India or the USA. Most of the cybercrimes are covered under the IT Act, 2000, but despite repeated attempts, no specific legislation to make these crimes illegal by establishing stricter laws like the GDPR has been enacted by the Indian legislature. An analysis of this legislation is therefore essential to have a better understanding of the approaches taken by the EU, India, and the USA.

III. ANALYSIS OF THE EU & US DATA PROTECTION LEGISLATION

Protection of private information is among the many essential elements of people's rights. Europe is considered to have the most extensive and progressive data security laws in the world.[8] It has taken the lead in implementing effective data privacy legislation by enacting the GDPR. Other countries must follow this lead and develop a robust, practical regulatory framework for information privacy on a global basis. On the other hand, the

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[7] Ministry Of Communications and Information Technology (Department Of Electronics And Information Technology), Fifty Second Report on Cyber Crime, Cyber Security and Right to Privacy (Issued on 12th February, 2014).

[8] Campbell Chrisann, *A Review of Data Protection Regulations and the Right to Privacy: the case of the US and India*, CITY UNIVERSITY OF NEW YORK (CUNY) ACADEMIC WORKS 5,45-58 (2021).

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US does not currently have a single law protecting all kinds of data; in fact, the US has several sector-based data protection legislations governing and safeguarding the data of its citizens demonstrating that they lag well behind the EU in this aspect.

[A] EU'S APPROACH

In the EU, protecting people's personal information is seen as an essential part of preserving their fundamental right to privacy. Hence, on April 14, 2016, the EU enacted a stringent and comprehensive data security policy - the GDPR that unified data privacy laws across the EU. It governs the safeguarding of the personal data of EU citizens and encourages the development of a security strategy based on democratically supported basic rights. Through clear communication and information disclosures, the GDPR ensures transparency between users and organizations, and enterprises.[9]

(I) GDPR: A Breakthrough in Data Privacy

Due to their strenuous efforts to prevent cybercrimes and the extent of control over all enterprises and organizations using the personal information of EU residents, the GDPR safeguards its citizens from cybercrimes. Article 3[10] of the GDPR states that all organizations that provide EU citizens with any kind of products or services and keep track of EU citizens' behaviour and private information, must obey the law laid down by the state. This includes all Multinational organizations (MNCs) and businesses that are also subject to complying with the GDPR if they wish to gather and use the personal data of the citizens of the European Union. In conclusion, the GDPR legislation applies to all individuals and businesses participating in "professional, or commercial activity".[11]

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[9] Michelle Goddard, "The EU General Data Protection Regulation (GDPR): European regulation that has a global impact." 6 INTERNATIONAL JOURNAL OF MARKET RESEARCH 59, 703-705 (2017).

[10] EU General Data Protection Regulation (GDPR) 2016, Regulation (EU) 2016/679, art. 3.

[11] GDPR.EU, *Does the GDPR Apply to Companies outside of the EU?*, GDPR.EU, (February 13, 2019), https://gdpr.eu/companies-outside-of-europe/.

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The extensive obligations and broad rights for the persons whose information is collected are important components of the GDPR. These rights are critical because they provide customers with better access and knowledge of how their confidential data is used by allowing them to determine how long their information will be retained and where it originates from. Further, it puts strict compliance obligations on the businesses, companies, and organizations collecting data. Therefore, businesses have a responsibility toward EU citizens to ensure that they are in agreement with their data being collected, gathered, and stored for agreed purposes.

According to the GDPR, individuals have the right to request that their personal data be deleted if they consider that the original reason for which it was collected has been changed unlawfully and without their agreement.[12] This imposes an obligation on businesses to inform data subjects of the requested information and get their consent before processing it for a new purpose. Along with the right to access and the right to be forgotten, data users are given the right to object when their private information is utilized for objectives that the EU or a member nation has not authorized.[13] In essence, these rights make GDPR effective, effective, and the global standard for data privacy legislation by ensuring that internet users have their right to privacy.

Another feature that sets GDPR apart from previous data privacy laws is the severe legal penalties that may be imposed on a corporation if it fails to sufficiently secure against a breach or uses a person's personal data for purposes different from those for which the user has consented. Data subjects can sue numerous parties, including the controllers and the processors if they can demonstrate that an entity has injured them or caused them hardship.[14] Penalties of up to 10 million euros are levied for infractions,

[12] Campbell, *supra* note 8, at 26.
[13] ICO, *Guide to the General Data Protection Regulation (GDPR)*, GOV.UK (2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/711097/guide-to-the-general-data-protection-regulation-gdpr-1-0.pdf.
[14] Campbell, *supra* note 8, at 43.

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and fines of up to 20 million euros can be imposed for violating the rights of data subjects.

In conclusion, these features make the GDPR the strongest, strictest, and most protected data protection law as it applies to all entities using the data of EU citizens, from small businesses to multinational corporations; it grants data subjects and citizens a variety of powerful rights; and it imposes a variety of standardized compliance requirements on all businesses, organizations, and entities.

[B] USA'S APPROACH

The USA's data protection laws are regressive and frequently referred to as "patchy"[15] when compared to comprehensive and strict laws like the EU's GDPR. The USA is found in an uncertain and ambiguous condition[16] due to the absence of sector- or industry-wide rules to control consumer privacy and its laissez-faire policy of relying on sectors to self-regulate that regularly fail to apply fundamental data protection protections.

(I) Data Privacy Legislation Timeline

The sector-based legislation in the US came into existence after the data protection laws were enacted over the years by its legislature as the need arose. The journey began with the Watergate incident when it was permitted for federal agencies to discreetly locate, investigate, and preserve the personal information of Richard Nixon's political rivals. Following this, the Privacy Act of 1974 was passed by Congress in order to prevent illegal surveillance and inquiry. This law included provisions enabling residents to see and request changes in their data maintained by government agencies, albeit they were not explicitly mentioned as rights.[17] Other federal laws have since been developed, however, they have mostly focused on particular sectors, such as banking and healthcare. These legislations are Health

[15] *Ibid.*
[16] 5 ALEXANDRA REGEL, PRIVACY IN THE 21ST CENTURY 109, (Martinus Nijhoff 2013).
[17] Campbell, *supra* note 8, at 67.

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Insurance Portability and Accountability Act (HIPAA) and Gramm-Leach-Bliley Act. These laws were implemented to prevent private and classified data from being disclosed to the general public or transmitted to third parties. The Gramm-Leach-Bliley Act required the financial services sector and HIPAA mandated all healthcare sectors to disclose how customer data was being used and to create a framework that secures consumers' information whenever their information is used or shared for any purpose.

Furthermore, the Fourth Amendment to the United States Constitution, which outlaws any infringement on a person or their property, has been applied to the right to privacy and data protection in various US court cases. There have been few cases where the US Supreme Court has ruled that there exists a constitutionally protected right of privacy that covers both the desire for independence when making crucial personal decisions and they want to keep personal information private.

One such case is *Katz v. the United States (1967)*[18] where Charles Katz, a gambler was surveilled by the FBI on a public phone after which he was taken into custody, the Supreme Court broadened the horizons of the Fourth Amendment to have spying and monitoring in on a person's speech as invading "private talk".[19] Hence, the US Supreme Court acquitted the accused and addressed the issue of personal privacy, and deliberated upon how the right to privacy is constitutional.

Another case is *Whalen v. Roe (1977)*[20], in which some patients claimed that the exchange and broadcasting of private sensitive data on medications and computers infringed their privacy. and hence, they opposed the New York State legislation that mandated the electronic recording and sharing of patients' personal information with pharmacies and the state. The Supreme Court ruled that the collection of personal data, in this case, did not violate the fourth amendment because there was no immediate danger, the data

[18] Katz v. the United States, 389 U.S. 347 (1967).
[19] *Ibid.*
[20] Whalen v. Roe, 429 U.S. 589 (1977).

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would only be disclosed to a handful of individuals, and a multitude of safeguards was in place to safeguard the privacy of the patient's private information as they were stored on the computer.

(ii) Limitations of US Legislation and its consequences

Given the evolution of numerous legislations for data protection in the US, this paper argues that the U.S.'s difficulties with privacy and data protection are a consequence of them. The present federal sector-based legislation that demands organizations to safeguard data in the banking and healthcare industries has been ineffective at preventing data breaches. According to current laws, the private sector is free to self-regulate, implement data protection laws as it sees fit, or adapt in response to laws like the EU's GDPR. However, this freedom leaves Americans unsatisfied and concerned about privacy breaches and their data being prone to be infringed.

Furthermore, in research from the 2000s, the Federal Trade Commission found that monitoring was ineffective and certain businesses conveniently neglected sufficient protections. Several big corporations, like Amazon, Google, and Microsoft, have skillfully handled and avoided criticism for their wide utilization of the confidential data of their customers.[21] State data privacy laws have increased in the US over the last three years as a result of these factors. Due to a lack of effective overarching legislation, California has established the California Consumer Privacy Act, while Nevada, Virginia, and Colorado have also passed extensive data protection legislation. Thus, a clear need is being reflected for an omnibus set of data protection laws that are both more stringent and more comprehensive.

IV. ANALYSIS OF THE INDIAN FRAMEWORK

India is regarded as one of the upcoming economic powerhouses. Indians are also consuming the internet more, browsing social networking sites, shopping, and purchasing more cell phones.[22] This highlights the country's

[21] Campbell, *supra* note 8, at 34.
[22] *Ibid.*

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need to handle new concerns within its borders while also adapting to the country's growing requirement for information protection. India's data protection and privacy laws are still in their infancy in comparison to those in the EU and the US and still do not have omnibus legislation governing all sectors of the economy.

In the lack of particular data protection legislation, India's legislative, administrative, and organizational structure for cybersecurity is regulated by a multitude of laws, guidelines, and industry-specific regulations. Similar to the US, privacy rights in India have been contested in court, but with the Puttaswamy ruling, they were finally included into the Indian Constitution. The Supreme Court of India has acknowledged the value of anonymity while emphasising the right to life and the independence of the person.

[A] TIMELINE OF INDIAN DATA PROTECTION JURISPRUDENCE

(I) The Information Technology Act, 2000 (IT Act)

India's journey toward establishing laws that would resemble a data privacy law began with the Information Technology Act, 2000[23]. Multiple amendments to the original statute were made between 2008 and 2011. The initial goals of the IT Act were to prosecute computer abuse and recognise e-commerce legally. It did not, however, make any explicit safeguards for data security.[24] The limitation of this Act was that under Sections 43[25] and Section 66[26] of the IT Act, breaches of data security lead to the prosecution of those who broke into the system, but the Act did not include further remedies, such as, for example, bringing legal action against the organization storing the data.

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[23] Information Technology (IT) Act, 2000, No. 21, Acts of Parliament 2000 (India).

[24] Aditi Subramaniam & Sanuj Das, *The Privacy, Data Protection and Cybersecurity Law Review: India*, THE LAW REVIEWS BLOG, (Dec. 3, 2022, 5:30 PM), https://thelawreviews.co.uk/edition/1001546/the-privacy-data-protection-and-cybersecurity-law-review-edition-7.

[25] Information Technology (IT) Act, 2000, § 43, No. 21, Acts of Parliament 2000 (India).

[26] Information Technology (IT) Act, 2000, § 66, No. 21, Acts of Parliament 2000 (India).

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(ii) The Information Technology Act (Amendment), 2008

In order to provide a remedy for people who are prone to suffer or have suffered a loss because of inadequate protection of their personal data, the IT (Amendment) Act 2008[27] was passed. Sections 72A[28] and 43A[29] were inserted to avoid the disclosure of sensitive personal data or information. These changes required organizations that owned, controlled, or used computational resources to create and keep up with the necessary security procedures and practices to safeguard any sensitive data. It also introduced a penalty for non-compliance. This clearly established the right to sue corporations if it was determined that people's personal data had been hacked.[30] However, this amendment drew criticism for reducing the punishments for various cybercrimes and for lacking adequate protections to protect people's civil rights.

(iii) Information Technology Rules 2011 (IT Rules)

Information Technology Rules 2011 (IT Rules)[31] establish minimum standards for the safeguarding of private information of Indian nationals, requiring companies to have a privacy policy, acquire consent before collecting or disclosing sensitive personal information or data, and make individuals aware of who would be accessing their data.[32] However, when the Rules were notified, questions have been raised regarding how they would be applied.

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[27] Information Technology (Amendments) Act, 2008, No. 10, Acts of Parliament 2009 (India).
[28] Information Technology (Amendments) Act, 2008, § 72A, No. 10, Acts of Parliament 2009 (India).
[29] Information Technology (Amendments) Act, 2008, § 43A, No. 10, Acts of Parliament 2009 (India).
[30] Campbell, *supra* note 8, at 41.
[31] Information Technology (Intermediaries Guidelines) Rules, 2011, Gazette of India, pt. II sec. 3(i) (April 11, 2011).
[32] Pallavi Patel, *Right To Privacy and Data Protection*, 6 THE LAW BRIGADE PUBLISHING GROUP 159, 153-162, (2021).

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[B] THE HISTORIC PUTTASWAMY JUDGEMENT AND CODIFICATION OF PRIVACY IN THE CONSTITUTION OF INDIA

The right to privacy was officially codified into India's constitution in 2017 after being contested in court. As established by the Supreme Court in various decisions, Article 19[33] and Article 21[34] of the Indian Constitution were interpreted to give basic privacy rights to all Indian citizens. According to Article 19 of the Indian Constitution, "speech and expression" refers to the freedom to speak or express anything and to communicate this without the fear of reprisals. Article 21 of the Indian constitution makes it illegal to violate one's right to privacy without following the required action and following the laws of the country. However, in one of the cases in which respondents complained that their privacy rights were being violated, both Articles 19 and 21 were deemed inadequate.

One such case was of *M.P. Sharma & Ors. vs. Satish Chandra and Ors (1954)*[35] where a search was undertaken and documents from certain Dalmia group companies were seized after the District Magistrate issued a warrant. The constitutional legitimacy of the searches was contested before the Supreme Court. The court ruled that, while comparing India's constitution to the Fourth Amendment in the United States, the original drafters did not deem it suitable to incorporate a right to privacy. Further, the court claimed that the state had the authority to remove the items and did so within its own authority, that these actions were only temporary, and that the claimant's property rights were not entirely violated.

Another case that was unsuccessful in invoking the right to privacy was *Kharak Singh v The State of UP*[36] in 1962, where Kharak Singh was subsequently brought under surveillance by the police department after

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[33] INDIA CONST. art. 19.
[34] INDIA CONST. art. 21.
[35] M.P. Sharma & Ors. vs. Satish Chandra and Ors, 1954 AIR 300.
[36] Kharak Singh v. The State of UP, *1963 AIR 1295*.

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being released due to lack of evidence. The appellant's home was inspected by the department at unusual hours, allegedly violating his privacy right. Similar to the previous case, the Court determined that the privacy right was not protected by the Constitution and was therefore irrelevant. However, the police department's rules were found to be unlawful since they limited Kharak's ability to exercise his freedom of movement under Article 19.

In the two earlier court rulings, the appellants raised the question of privacy, but the Supreme Court rejected their claims. In Justice K.S. Puttuswamy's case[37], the Supreme Court's nine judges decided to make a change and codified privacy rights in the Indian Constitution.

The Supreme Court of India recognized privacy as a basic human right in the KS Puttuswamy case and acknowledged that privacy was under threat due to the development of technologies. This decision laid the foundation for India to have a unified statutory framework for data protection by recognizing "privacy" as an essential component of the rights to life and liberty guaranteed by Article 21 of the Indian Constitution. This made the "right to privacy" a fundamental right.[38] It also discussed the protections that should be given to people in their private lives. The Supreme Court relied on past jurisprudence to conclude that State was responsible for protecting and maintaining this integrity, and it linked the virtue of confidentiality to the importance of a person's integrity.

(I) Personal Data Protection Bill, 2018

KS Puttaswamy's judgment led to the setting up of the Sri Krishna Committee which floated the Draft Personal Data Protection Bill, 2018[39] that has been withdrawn on August 4, 2022. It outlined the responsibilities that all entities processing data are required to uphold[40] along with strict

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[37] Justice K.S. Puttaswamy (Retd) & Anr. v. Union of India & Ors., (2017) 10 SCC 1.
[38] *Supra* note 27.
[39] The Personal Data Protection Bill, 2019, Bill No. 373 of 2019, (withdrawn on Aug. 3, 2022)
[40] Campbell, *supra* note 8, at 55.

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standards for obligatory data breach reporting and prior consent to acquire data.[41] The bill states no set amount of time for the keeping of sensitive personal information, but it must not last any longer than is necessary.[42] There are also provisions for the authorized collection of sensitive information for legitimate corporate entity objectives associated with a purpose on a need basis.[43]

In 2019, the Ministry of Electronics and Information Technology submitted the bill to the Rajya Sabha with revisions. Since 2019, they had requested a number of extensions for their discussions of the Bill.[44] Finally, it was withdrawn in August 2022 after receiving 81 changes from the Joint Parliamentary Committee and assurances that a new act will comply with India's complex legal framework. The Digital Personal Data Protection Bill, 2022,[45] a new privacy bill proposed by India's Ministry of Electronics and Information Technology, is now up for public consultation till December 17, 2022.[46]

The Digital Personal Data Protection Bill, 2022, like the GDPR, proposes to establish a Data Protection Authority to which corporations outside of India may be liable if they fetch or transmit data of their citizens and foreigners who reside inside their borders. Similar to the last data security law of 2018, the Bill also lists a number of information categories known as "sensitive personal data," which includes "important personal data" that the government would ultimately designate along with financial and health information.

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[41] Deloitte, *The Asia Pacific Privacy Guide*, DELOITTE (Dec. 12, 2022, 1:29 PM), https://www2.deloitte.com/content/dam/Deloitte/in/Documents/risk/in-ra-Deloitte_AP-PrivacyGuide_Interactive-noexp.pdf.
[42] *Supra* note 28.
[43] *Ibid.*
[44] Campbell, *supra* note 8, at 12.
[45] The Digital Personal Data Protection Bill, 2022 (draft bill, Dec. 7, 2022).
[46] Campbell, *supra* note 8, at 49.

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[C] CRITICAL ASSESSMENT OF THE DIGITAL PERSONAL DATA PROTECTION BILL, 2022 AND POTENTIAL ISSUES

Indian data protection laws must be created in conformity with the standards established by the EU and US data protection regulations. The current legislations governing data protection lack the level of protection, stringency, and comprehensiveness offered by the EU's GDPR and to some extent, the US legislation.

Similar to the 2018 law that was withdrawn, the 2022 Digital Personal Data Protection Bill (PDPB) gives internet users the following rights: the right to accessibility and verification, the rights to information mobility, the rights to correction and deletion, as well as the freedom to be forgotten, which includes five of the eight GDPR-guaranteed rights for data users. Additionally, GDPR grants data users the ability to ask for a limitation on processing where organizations or other entities are allegedly breaking the law, but the PDPB makes no mention of this right.[47] Rights pertaining to online monitoring are not defined in the PDP Bill.[48]

Similar to GDPR and US data privacy legislation, the PDPB also offers conditional exclusions for the handling of private data for national defence, enforcement agencies, judicial proceedings, the provision of help during disasters, the collapse of public security, etc.[49] Akin to GDPR, PDPB states that organizations outside of Indian borders may be governed by the federal government. Along with this, the provision of a sufficient degree of personal data protection and adherence to laws are conditions mandated before the government may approve such transfers.[50]

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[47] Campbell, *supra* note 8, at 33.
[48] *Ibid.*
[49] Bentotahewa, V., Hewage, C. & Williams, *The Normative Power of the GDPR: A Case Study of Data Protection Laws of South Asian Countries*, SPRINGERLINK BLOG (Nov. 23, 2022, 3:14 PM), https://link.springer.com/article/10.1007/s42979-022-01079-z?code=f13e8d71-488b-4f55-bccb-55d681b5eb1b&error=cookies_not_supported.
[50] *Supra* note 45.

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Current Indian legislation does not establish a level of sanction for information security infractions or the employment or duty of a confidentiality protection officer. If the PDPB is adopted, the government must appoint a data privacy officer and describe the officer's specific tasks that are in line with the PDPB.[51] As with the GDPR, stringent measures have been created for non-compliance to taking standard necessary action rapidly in the event of a cybersecurity breach, with fines of up to 2% of total revenue in the preceding fiscal year. The same will be true if a data protection officer fails to fulfil his or her obligations.[52]

(a) Potential Issues

Since the adoption of legislation defending data privacy, one of the most likely issues has indeed been effective implementation. Critical concerns have been expressed regarding whether the measure would be effective in protecting the confidentiality of 2 billion people, as well as the effects on microenterprises. How small and medium-sized multinational corporations, business groups, and organizations in the public sector will handle the transition to such stringent, onerous limitations should be properly examined before Bill is adopted and put into effect. Despite the fact that major digital giants like Microsoft, Google, and Facebook are willing to comply with the Bill, small Indian businesses form the majority, and the government doesn't seem to be listening to their opinions or voices about potential problems for them after this bill is approved and implemented.[53]

Another aspect included in the PDPB 2022 bill is an exclusion that specifies that the State is excluded from the requirements of this act. The government has the authority to collect and utilize internet users' private information for the purposes of national defense since it is covered by extensive law that

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[51] Fernanda Giorgia Nicola Dr., *The Balkanization of Data Privacy Regulation*, 123 W. VA. UNIV. L. REV. 61, 64-115 (2020).

[52] *Ibid.*

[53] Manasi Gopalakrishman, *India's Personal Data Privacy Law Triggers Surveillance Fears*, DW.COM, (Dec. 13, 2022, 10:15 AM), https://www.dw.com/en/indias-personal-data-privacy-law-triggers-surveillance-fears/a-55564949.

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governs all the sectors of the economy.[54] The government may use this data to monitor and track common citizens since this bill eliminates all limitations on government access to data of all residents, corporations, and organizations in the case of a national emergency. If this authority is not adequately controlled, it might encourage more corruption among government employees and pose a risk to the security of the country.

In today's society, upholding one's right to privacy necessitates protecting personal information. Adopting legislation that addresses all facets of data protection is necessary, as is creating accountability frameworks for corporations, organizations, and even governments. As illustrated above, in order to prevent gaps that jeopardize the confidentiality of persons who are vulnerable to theft in peril, data protection must be comprehensive and accessible. Organizations are also in danger of data breaches, which might have a negative impact on all businesses.

V. CONCLUSION

It has become alarmingly essential for nations all over the world to build powerful, strict, and comprehensive legislation to combat the issues that arise after such an upsurge of increased use of technology as people, businesses, companies, and different types of organizations rely more on the usage of personal data in the era of digital transformation to extract crucial narratives which may fuel business results. As the paper illustrates, there are many laws in place in India, the European Union, and the United States, and they differ in terms of how strict, comprehensive, and long-lasting, and how these countries have gone about safeguarding their citizens' rights to privacy and data.

The paper makes the assertion that legislations regulating the safeguarding of confidential data in Europe are the most stringent and comprehensive. By adopting the GDPR, the European Union has taken the lead in implementing data privacy laws into practice because of the level of control the EU

[54] *Ibid.*

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exercises over all businesses utilizing the personal data of EU citizens. On the other hand, the USA has sector-based regulations rather than a single data protection legislation that applies to all data types and all economic sectors which has put the US data protection law in an ambiguous and unclear position.

In India, like the US, there is no overarching national law that regulates the use of personal data. Over time, legislation other than the IT Act, 2000, and other sector-specific regulations has also included suitable safeguards and defences for data privacy. However, India is susceptible to legal flaws because of the patchwork of laws and the quick development of technology. Hence, both India and the US lag well behind the EU in this respect, as evidenced by the several sector-based data protection rules that control and protect the data of its residents.

The Digital Personal Data Protection Bill, 2022 is a brilliant beacon of a legislative framework for data protection that would significantly improve Indian law and society. Though concerns exist due to India's relative lack of experience with such stringent data privacy legislation, casting aspersions on the Indian government's capability to supervise all of the requirements outlined in this bill. Another significant issue highlighted by people in the Bill is an exclusion that exempts the government from the rules of this bill and allows it to access this data to monitor and follow common individuals, residents, corporations, and organizations in the case of a national emergency. Similarly, there is a growing acceptance of government mass monitoring in the United States, where large tech corporations have significant legislative sway. Both India and the USA are currently navigating the issue between privacy rights and national security.

However, it is hoped that the Government would soon issue clarifications to shed light on the current inconsistencies as indicated in the preceding analysis, even if the Rules are reformatory and give some opportunity for interpretation, querying, and discussion among the parties that will be

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impacted by the impending implementation of this bill. Furthermore, enacting national legislation will boost commerce, harmonize international relations, eliminate inconsistent data practices, and establish a worldwide standard for data governance.

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PRISON GOVERNANCE AND CONJUGAL RIGHTS: AN HOHFELDIAN ANALYSIS

Swati Kumari Mawandiya* & Vineet Tayal**

ABSTRACT

The prison administration forms a vital part of internal security of State and the Nation at large. The prisoners, although removed from the society, are a part of the population which cannot be ignored, as the prison life leads to dehumanizing effect on the prisoner. The last century has witnessed the change in the prison management, governance, and jurisprudence. The new jurisprudence of prison revolves around reformation of the prisoner and reclaiming them to the society.

Indian Judiciary has played a major role in humanizing prisons of India, emphasizing the goal of reformation of prisoners and resocialization. Recognizing the conjugal rights of the prisoners has been a contemporary development where various High Courts propounded that such right should be identified as a Fundamental Right and depending on certain conditions, must be accorded to them. However, the latest Judgment in Meharaj case disagrees with this stand and states that conjugal rights are available to members of civilized society alone and cannot be provided to law violators.

In this paper, the conjugal rights would be analyzed jurisprudentially in the light of the Hohfeldian theory to examine whether such right can be

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understood as claim or privilege in order to understand the nature of this right, such as safety, security, and other concerns of prison governance.

Keywords: *Prison Governance, Conjugal Rights, Jurisprudential, Hohfeld's, Rights*

I. INTRODUCTION

The matters of internal security in a civilized society are incomplete without a vivid discourse on prison conditions and rehabilitation of prisoners. The offenders of law who commit a crime are as much a threat to society as are prisoners who remain unreformed. The segment of population which returns to the society after serving a term of imprisonment is perceived as an outsider which needs to be changed. The prison administration and the process of punishment, being part of internal security, needs to be thoroughly thought over in order to address this ignored population.

Prison, as per the Black Laws Dictionary is the place for confinement or safe custody, where persons are kept either for the punishment or in the course of administration of justice[1] in the criminal justice system or it is a properly equipped and arranged place for safe custody of persons, who are committed to it by the legal process, either awaiting trial or for punishment.[2]

This whole idea of prison settings is based in exclusion and incarceration, wherein they become the other within the society. [3] This is one form of the exercise of control or authority of state, in the form of punishment or prevention, over the conduct of individuals, which the state believes is 'harmful' or against the 'interest' of the society. It is said that prisons are built with the stones of laws[4] wherein these laws are being enforced, [5] casting

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[1] Henry Campbell Black, Black's Law Dictionary, 4 West Publishing (1968).

[2] Pachauri S.K., *History of Prison Administration in India: Human Rights in Retrospect*, 492, PROCEEDINGS OF THE INDIAN HISTORY CONGRESS, 55 (1994).

[3] Bawa, P.S., *Towards Prison Reforms*, 27 INDIA INTERN'L CEN. QUAR.,151, 155-162 (2000).

[4] Duane Williams, *Prisons of Law and Brothels of Religion: William Blake's Christian Anarchism*, STOCKHOLM UNIV PRESS, 232–277 (2018).

[5] Jasvir Singh v. State of Punjab, 2015 CriLJ 2282.

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higher duties on the state. The base structure that lies behind the whole idea of punishment is the retention and protection of the desired *status quo* to protect the society[6] with the threefold objectives of retribution, rehabilitation or deterrence.[7] The first objective is broadly rejected as per the new penal jurisprudence and the approach of rehabilitation is established with the view that the prisoners, incarcerated and on whom we are enforcing these laws are not denuded of their basic fundamental and constitutional rights.[8]

The twentieth century came up with a wave of reforms for the prisoners wherein the correctional approach as a part of rehabilitation has changed their status from mere offenders to 'individuals'. The society centric value system of state often comes against the individualistic idea of human rights.[9] But the origin can be traced back to Social Contract theories, which urged for the existence of certain natural rights with each individual.[10] The discourse on human rights of prisoners have been inspired and initiated by the Declaration of Human Rights in 1948, which was adopted in the Constitution of India as Fundamental Rights.[11] The preamble of the Constitution seeks to secure fraternity assuring the 'dignity' of the 'individual'. This means that every person, be that a person under trial, or serving punishment has the right to dignity and basic liberties.[12] The prisoner or under trial is also not stripped of these rights, except those which are inconsistent with incarceration or due procedure.[13]

The idea of dignity coupled with human rights gave rise to reformation and rehabilitation over recidivism and the focus has been changed to

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[6] Nahum Fasil, *Punishment and Society: A Developmental Approach*, 12, J. ETHIOPIAN L, 119 (2011).
[7] *Ibid.*
[8] D. Bhuvan Mohan Patnaik v. State of Andhra Pradesh, (1975) 3 SCC 185.
[9] Nair, Anil R., *Human Rights Violations of Under-Trial Prisoners: Judicial Irresponsibility or Impunity*, 1 NUALS L.J., 9 (2007).
[10] Yadav, Anita, *Prisoners' Rights in India: An Analysis of Legal Framework*, 6, IND J.L. & JUST, 131 (2015).
[11] Bawa, P.S., *Towards Prison Reforms*, 27 INDIA INTERN'L CEN. QUAR.,151, 155-162 (2000).
[12] Sunil Batra v. Delhi Administration, (1978) 4 SCC 494.
[13] Francis Coralie v. Admin, UT of Delhi, (1981) 1 SCC 60.

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resocialization. There were various steps taken to enshrine and recognize the rights of prisoners and incorporate them into the civil society. The Judiciary, reposed with the duty to execute and promote rule of law, has recognized this special role in protecting the rights that prisoners possess as part of the mechanism and process to deliver justice. In light of this, the Supreme Court in Sunil Batra-I, while putting emphasis on the human rights and social justice approach, upturned the restrictive construction of Constitution stating that, *"Karuna is a component of Jail Justice"*.[14] The Court held that objective of incarceration and deprivation of their freedom of locomotion and expression is rehabilitation and social defense; and even a person serving death sentence or a dangerous prisoner who stands in trial, has their basic liberties which cannot just be bartered away.

Later the Court in Sunil Batra-II delved into the social rights of prisoners and identified the right to society of fellow-men, parents and other family members within the sweep of Article 19 of the Constitution.[15] The Courts has time and again recognized their onerous duty to protect these detenus and held that when human rights are hashed behind bars, constitutional justice impeaches such law,[16] and affirmed that just because of incarceration we cannot spell farewell to the fundamental rights of the individual however the full panoply as granted in usual situations, cannot be guaranteed.[17]

The Court observed that we have moved to the correctional approach and in the art of correctional confinement, cruelty only when inevitable and compassion whenever possible should be employed, and if there is no relevant purpose for the restriction then it becomes arbitrary.[18]

In the same context lies the issue of conferring conjugal rights and the right to procreation of prisoners. The objective is to understand the role that recognition of conjugal rights can play in rehabilitation and reformation of

[14] Sunil Batra v. Delhi Administration, (1978) 4 SCC 494.
[15] Sunil Batra v. Delhi Administration, (1980) 3 SCC 488.
[16] Sheela Barse v. State of Maharashtra, AIR 1988 SC 378; Munn v. Ilino's, [1878] 94, US 113.
[17] Charles Sobraj v. Supt. Central Jail, Tihar, AIR 1978 SC 1514.
[18] *Ibid.*

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prisoners. The higher Judiciary in India have always been pro-active and granted such rights for the well-being of prisoner and to improve the prison conditions. However, there is need of a balance to be maintained while granting such rights so that it does not affect the concerns the internal security of the Nation. This paper, through Hohfeldian analysis, aims to draw a balance by discussing the nature of conjugal rights which need not be a claim but still be provided by making certain infrastructural and legal amendments.

The major argument is whether conjugal visits can be granted to prisoners in India. The first part of the paper deals the concept of conjugal rights with special focus on the term 'right' in light of Hohfeld' s theory as claim and privilege. The second part discuss the trajectory of Indian cases on the question of conjugal visits followed with comparison and critical analysis. The last part an analysis along with suggestions as to how Indian prisons can make space for such conjugal visits.

II. UNDERSTANDING CONJUGAL 'RIGHTS'

Marriage as an institution is considered sacrosanct in majority population of the Indian Society and its maintenance is encouraged since time immemorial. Conjugal rights in a marriage are of fundamental nature and there is no sentiment as effective to preserve the happiness, comfort or tranquility of a man and woman in a wedlock as their conjugal relationship.[19] The modern penal jurisprudence revolves around the rehabilitation where the denial of conjugal rights contributes to breakup of marriages, and deprivation from freedoms making rehabilitation a cruel joke.[20]

Studies have established that incarceration serves as a concurrent punishment to the spouse (who has committed no offense) of prisoner, depriving them of their right to personal liberty.[21] The right to procreation

[19] Gist v. French, 136 CA 2d 247 (1956).
[20] Paul Halvonik et.al., *Prisoner's Rights to Conjugal Visits*, 29, GUILD PRAC., 91 (1972).
[21] Schneller, Donald P., *Conjugal Visitation: Prisoner's Privilege or Spouse's Right*, 2, NEW ENG. J. PRISON L., 165 (1976).

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survives incarceration, and prevails over the penological interests of the State and can be traced within the Constitutional framework which inheres right to dignity, respect and privacy of the individual, but subjected to the reasonable restrictions and social order.[22]

The term rights in ordinary sense subsumes various terms which have entirely different connotations and legal relevance. So, when we are discussing the idea of conjugal visits for prisoners, it is essential to differentiate and carve out the proper terminology to locate the idea concerning the homonym 'right'. For this analysis, we would refer the Hohfeldian analysis of rights with reference to two terms i.e., claim and privilege (liberty). The term claim presupposes that the other person should behave in a certain manner. It means where there is a claim, there is a correlative duty, because the content of claim lies in the duty itself. The term privilege refers to the freedom of a person, to do or not to do something. This is different from claim, in the idea that for a claim, there lies a corelative duty on some other person, whereas for a privilege there is no such duty on other person, except for the duty of non-interference.

This difference of right or privilege holds relevance in the present context of discussion because it is necessary to understand that when we are asserting on conjugal visits as a right, what is it that are we asserting- a claim or a privilege.?

The essential characteristic of a claim is that it presupposes a duty on others. It has no content apart from the duty. The term 'conjugal rights' is defined as the right which husband and wife have to each other's society, comfort, and affection.[23] This can be understood in two different ways- firstly, the right which the husband and wife have as against each other. Secondly, the right they have as against the society or people at large. We are concerned with the second type of rights in our context of conjugal rights of prisoners.

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[22] Jasvir Singh v. State of Punjab, 2015 CriLJ 2282.
[23] Henry Campbell Black, Black's Law Dictionary, 4 West Publishing 450 (1968).

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So, the rights which the husband and wife have against each other in lieu of their marriage are enforceable and casts duty on them as against each other, so they can be termed as claims. On the other hand, when we talk about their rights as against the society, they do not cast any corelative duty on anyone, except the duty to non-interference. The presence of this right does not pre-suppose the existence of any duty; hence it cannot be a claim, but only a privilege. The Madras HC in case of *Meharaj*, while interpreting the terms conjugal rights termed them as 'privilege' of husband and wife in lieu of marriage, which includes mutual right of companionship.[24] Hence, it is amply clear from this analysis that the term 'conjugal rights' of prisoners does not refer these rights as claims but as privileges.

The second reason for treating them as privileges can be located in the Marxist critique of the concept of right. The modern concept of right, which is individualistic in nature has parted away from the moral force governing the conduct of human being. This dichotomy of rights has restricted the horizons of each act in the four walls of a corelative duty, and conditioned the mind in a way that conceptualize the preservation of human dignity by endowing rights only. This leads to the sheer violation of the term 'rights' in itself by endowing the rights without any content, *stricto sensu*. This means that these rights are mere abstract ideas, a kind of juristic fiction, endowing equality on a very flimsy plane; whereas the actual reality on ground is something else.

These abstract notions of rights create illusion in the mind of individual, who is the focal point of this whole right and duty dichotomy, that they are endowed with equal rights which can be claimed. However, this is not the case and this is a mere 'camouflage' having no claim value. So, when we are asserting these rights as 'privileges' then we are doing away with the illusionary nature of these rights and delving into the real and possible connotations of them. The assertion of conjugal rights being the 'claims', defy the very reason for asserting them, because it will cast a corollary duty

[24] Meharaj v. State, AIR 2022 Mad 69.

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on State to protect and respect these rights, which is not possible in practical sense due to various financial and social factors. The assertion of them being 'privileges' differentiate them as being exercisable at the legal plane, and not mere illusionary claims which are present only on papers and academic discussions.

The High Court in the case of *Jasvir Singh*, while recognizing the conjugal rights as fundamental rights, understood them as 'claims' squarely falling under the ambit of Article 21, which can be asserted time and again. However, this assertion of conjugal rights came with the proviso of *sole prerogative of state and subject to procedure established by law*. It is submitted that these claims are mere illusion because there is no procedure established for the exercise of these rights as of yet and the State has completely failed to take up the prerogative. There is a different demarcation reflected in the case of *Meharaj*, wherein the Court recognized conjugal rights coupled with some *specific reasons* as fundamental rights guaranteed under Article 21 and not conjugal rights per se. It means that the conjugal relationship cannot be granted as fundamental right, as a course but there must be some *'extra-ordinary reason'*. It is so because if they are given the status of fundamental rights then the prisoner can claim it time and again. This is how the Court demarcated the difference of conjugal relationship to prisoners as being 'privileges' and not 'claims.

The flaw or misconception in recognizing the rights as being fundamental rights subjected to procedure established by law can be understood in terms of the negative and positive liberty as propounded by Berlin. The negative liberty is the *'freedom from'* whereas the positive liberty is *'freedom to'*. This means that when we are talking about negative liberty, we are asserting a privilege of non-interference which is free from all kind of restrictions caused by human or some institutions. The question that lies for negative liberty is to demarcate the area of subject to be left without interference from others. Whereas when we are talking about positive liberty, we are asserting claims to choose from varied options, in the way we like it. The question that lies for

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positive liberty is what or who is the source of control defining the content of duty on another person. In this way, it can be seen that positive liberty and negative liberty runs congruent to claim and privilege, respectively, wherein the positive liberty tries to trace the content and source of duty with respect to the liberty holder, and the negative liberty trace the idea of non-interference.

The Court in Jasvir, while interpreting it in light of reformative theory, misinterpreted the right as claim or positive liberty but the idea of positive liberty lies in self-control or self-realization, which is not in the case of conjugal rights. These are privileges in lieu of marriage, which requires a vacuum free from interference.

III. TRAJECTORY OF INDIAN JUDICIARY ON CONJUGAL RIGHTS

The Indian Judiciary, especially the High Courts, began with the discourse on conjugal rights in the last decade. The differing opinion on the subject matter keeps the subject matter unresolved. It is indeed a difficult area as it talks about an innate personal right of a person who is incarcerated and is within the limited and restricted provisions of State. The prison administration and governance has been humanized over time with the help of rising human rights jurisprudence. However, the issue of conferring of conjugal rights raises questions which might have a larger effect on internal security owing to infrastructural constraints of State and prison system.

The Higher Judiciary has reflected upon these concerns and the different Courts have arrived at extremely differing resolutions. This part puts light on the approach and observations of the different Courts in order to understand the nature of the right being claimed which can further be analyzed from the Hohfeldian perspective. The objective is still to be able to draw a balance between these extreme points and reach a place where neither internal security is comprised nor the conjugal rights of a prisoner.

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a) *Jasvir Singh* v. *State of Punjab*[25]

In the case of *Jasvir Singh*, the Punjab and Haryana High Court addressed the issue of a couple who were both serving time in prison. The petitioner couple was awarded death sentence for the offence of kidnapping and murder of a 16-year-old for ransom. The death sentence of the wife was later commuted to life imprisonment vide an appeal. The couple sought to enforce their conjugal right and a permission to procreate within the jail premises. They stated that their petition for resumption of conjugal life is solely for their desire of a progeny and not sexual gratification and they were open to the alternative of artificial insemination.[26]

The Court looked at the issue as one of public importance and traced historical and international perspective over jail conditions and conjugal visits to assimilate the broad consensus over the issue. The High Court was of the opinion that our society is progressing and has taken leaps with debates over 'gay-rights' and identifying the 'third gender', then we can follow our own lead for the concept of conjugal visits of inmates.[27] The Court added that the aim of our criminal justice system has been reformation and once the prisoner has served the punishment, they should be restored in the social system.[28] The goal of re-socialization can be achieved with the remarkable provisions of parole and furlough which can be utilized for the purpose of conjugal visits.

The Court pointed out that the practical application and facilitation of such visits lie with the policy makers and a mechanism can only be made through legislative or executive process. In the past few decades, the three organs have come together to improve the living conditions of prisoners and seen pragmatic application of the entire reformative jurisprudence. The Court, in

[25] Jasvir Singh v. State of Punjab, 2015 CriLJ 2282
[26] *Ibid*, at Para 2.
[27] *Ibid*, at Para 84.
[28] *Ibid*, at Para 85.

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this case, also provided with directions for policy makers and stated that such right was "subject to certain caveat conditions like-

1. the gravity of the offence committed by a convict and its likely effect on the society in the event of temporary release;
2. likelihood of absconding in the case of offenders of heinous crimes;
3. good behaviour while in jail;
4. duration of the actual sentence already undergone;
5. the expected date of release on completion of a tenure sentence;
6. pre-conviction conducts of the convict;"[29]

The Court concluded the case by recommending formation of a jail reforms committee which can address various aspects of jail reforms including the conjugal visits in view of the above directions. The Court accepted the ground of "conjugal visits" as valid and sufficient for temporary release on parole or furlough under the clause of "any other sufficient cause" in the 1962 Act till the time there is an appropriate mechanism set by State.[30] As for the decision of the case in hand, the Court disallowed the petitioners' claim on the ground of the gravity of the offence committed by them and also the existing insufficient infrastructure.

The Court located the right to procreation under Article 21 and stated that a prisoner is entitled to such a right as it does not inherently conflict with incarceration.[31] However, such right is not absolute and is subject to reasonable restrictions, procedure established by law and reasonable classification that the statute can provide.[32]

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[29] *Ibid*, at Para 89.
[30] Punjab Good Conduct Prisoners (Temporary Release) Act, 1962, No. 11, Acts of Punjab Legislature, 1962.
[31] Jasvir Singh v. State of Punjab, 2015 CriLJ 2282 (Para 94).
[32] *Ibid*.

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It implies that such a classification would allow only those prisoners whose applications are allowed to have a claim under Article 21. Only those who successfully pass the test will carve a corollary duty on the State. The author intends to point out that such restrictions might merely amount as a privilege- a privilege to apply or file a petition for such conjugal visits which can be denied by the State. A reasonable classification of prisoners based on their conduct or need cannot be called a claim if the State reserves the right to disallow.

It is submitted that such restrictions are important in the light of safety and internal security. The penological interests of the State cannot be done away with. It is only with regard to the approach of the Court which seems confused and is uncertain of the kind of right it desires to impose. The Bench seems to have correctly examined the question in the light of humanitarian grounds and the social developments of our country. The question is whether acclaiming the right to conjugal visits as a fundamental right under Article 21 without making it absolute in nature seem an overstatement?

b) *Rajeeta Patel* v. *State of Bihar*[33]

The husband of petitioner was sentenced to undergo imprisoned for life and petitioner was looking for her treatment for infertility and was claiming leave of 90 days for conjugal visits of her husband.[34] The Court while tracing the historical, national and international perspectives observed that the place of child or high breed progeny holds much relevance in Hindu families and the right to life includes the right for conjugal visits or artificial insemination. The Court relied heavily on the *Jasvir* case and added that there is no statute directly recognizing the conjugal visits but it can be treated in nature of family problems of convicts, which is well covered under of Parole Rules, 1973.[35]

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[33] Rajeeta Patel v. State of Bihar, 2020 (4) PLJR 669.
[34] *Ibid.*
[35] Rule 6(2) (k), Bihar Prisoners (Parole) Rules, 1973.

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The Court observed that the term 'leave' is insignificant and it has to be considered as Parole or Furlough under Parole Rules, which cannot be denied mere for the reason of conviction in heinous or serious crimes.[36] The judgment was premised on the reformative theory, which will afford the opportunities to the convict to maintain links with the society and family.

The Court concluded that the conjugal visits or artificial insemination is included under Article 21 subject to regulatory procedures of law. Hence, disallowing the husband to take his wife for the medical treatment would defeat the purpose of this right, leaving it as a hollow concept. The Court in this case directed that until there is an appropriate legislation, cases such as these are to be treated under Rule 6(2) ([k) of Parole Rules, along with the broad category of 'sufficient cause' laid down by Supreme Court for Parole or Furlough.[37]

It is submitted that even in this case the Court agreed that right to conjugal visits are to identified under Article 21 but along with restrictions such as the parole rules, a prior legislation, executive decision etc. The question here is emphasized: Can such a right be understood as a claim if it is subject to numerous restrictions as identified by Courts in *Jasvir* and *Rajeeta*.

c) *Meharaj* v. *The State*[38]

The petition in this case was filed by the wife of convict to grant a leave to have conjugal relationship, and to undergo infertility treatment along with her husband. The petitioner was granted 2 weeks leave for undergoing infertility treatment and filed a fresh petition for another 6 weeks of leave on the same ground. The Division bench referred questions to larger bench for that purpose. The Court observed that as per Rule 3 of Tamil Nadu Suspension of Sentence Rules, 1982 Rules [hereinafter 1982 Rules'] *leave cannot be claimed as a matter of right*. The Court first went on to analyze

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[36] Asfaq v. State of Rajasthan, (2017) 15 SCC 55.
[37] *Ibid.*
[38] Meharaj v. State, AIR 2022 Mad 69.

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the meaning of words Conjugal rights and said that Conjugal rights means the *'privilege'* to the husband and wife arising from the marriage, including the mutual rights like that of companionship.[39] A conjugal right in the sense of common parlance is for maintaining marital status by husband and wife.[40]

The Court said that the 1984 rules does not provide for the leave for conjugal relationships, because then the parties can 'claim' it time and again. However, Rule 20 (vii) of 1982 Rules allow leave on 'extraordinary reasons.' The word "extraordinary" read in conjunction with the word "reasons" makes it vivid that the reasons should be beyond the usual, regular or common. In other words, they should be in contrast to ordinary reasons or that of exceptional nature. The Court explained that if leave for having conjugal relationship is recognized as a matter of right under Article 21, the prayer for such a claim can be there, time and again.[41]

The Court premised the analysis on the difference between a convict vs. common person and law-abiding citizen vs. law violating prisoner and held that the 1982 Rules itself protect the rights of the prisoner guaranteed under Article 21 to the extent it is required. The rules provide for the extraordinary reasons, so that it cannot be misused and used for the purpose they are meant or required.

The Court concluded that *the conjugal relationship should not be construed to be a fundamental right, as a course,* but conjugal rights coupled with some specific purpose. This means that the Court recognized the Conjugal rights as a privilege which can only be used for some specific purposes and *only* for those 'specific purposes' it would be considered as a fundamental right protected as per Article 21.

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[39] *Ibid* at Para 14.
[40] *Ibid* at Para 24.
[41] *Ibid* at Para 22.

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IV. DIFFERENCE OF OPINION: *JASVIR* AND *MEHARAJ*

Sr. No.	Jasvir	Mcharaj
1.	Identified conjugal visits as a fundamental right as per Article 21.	Did not identify conjugal visits as a fundamental right.
2.	Directed that State must allow and make space for conjugal visits within jail.	Directed that such visits can be applied only as leave for extraordinary reasons.
3.	The Court made no distinction between prisoner or a civilian for the notion of conjuga l right as it is available for all on humanitarian and social grounds.	The Court distinguished between law abider and law violator and stated that such rights are not available to violators of law.
4.	The Court located and stated a number of restrictions fo r the 'right' to be claimed such as reasonable classification, sole prerogative of the State, penological interests of the State.	The Court stated the it need not to be identified as a 'right' as the existing parole rules are sufficient to provide remedy for extraordinary reasons.
5.	The Court located conjugal visits as ***rights*** in the sense of claim - duty by stating that "procreation survives incarceration".	The Court located conjugal visits as ***liberty*** and stated that prisons limit liberties and hence, procreation cannot be allowed in prisons.

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V. ANALYSIS: A BALANCE BETWEEN TWO EXTREMES

To reconcile the two extreme approaches taken by the Courts in the two cases of *Jasvir* and *Meharaj*. The *Jasvir* case though recognised the conjugal visits as a facet of right to life within the meaning of Article 21, it also circumscribed it with various riders which is to be adhered by the prisoner and the State. These conditions were primarily motivated to ensure the State interests with respect to security and prison governance which cannot be compromised. It is submitted that the approach of the court in the *Jasvir* case appears to be a sound proposition of law with respect to State interests. However, the conditions imposed on the exercise of the 'right' declared under Article 21 appears to be problematic. There seems no sense in proclaiming something as a facet of right to life and then circumscribing it with riders making it hollow and superficial.

However, the position taken in *Meharaj* with respect to having the repugnance in locating the same under Article 21 also appears to be an extreme view in the light of the reformative jurisprudence which is emphasised by the Apex Court and also in the international and national laws. *Meharaj* case provides a strict demarcation between law abiders and law violators for the purpose of conjugal rights. It is submitted that the Reformative theory provides that the objective of imprisonment is to reform the prisoner and enable them to make space for themselves in the society. The curtailment of liberty is understood as the prisoner stays in the four corners of the prison but a human, in order to reform, needs to remember what the real society is.?

Thus, on the one hand *Jasvir* recognised the conjugal visits as a right and circumscribed it with various riders in State interest. On the other hand, the Meharaj has shown a clear antipathy to the reformative theory and took the stand that the law breakers cannot be given any scope of conjugal visits.

If we analyse the position taken in *Jasvir* from the perspective of Hohfeldian analysis of right, conjugal visit does appear to be a claim as *Jasvir* while

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recognising a claim, also imposes a duty on the part of the State to provide for such facilities. However, it has been left to the State to decide the restrictions which shall be imposed in the enforcement of such claim. This discretion given to the State may lead to non-implementation of such claims in the garb of safety, security or financial justifications by various States within the same country. It may happen that some States will adhere to the guidelines and provide for the infrastructures and facilities for conjugal visits while others will simply take the defence of safety, security and financial constraints.

The position taken by *Meharaj* in having repugnance to locating the same in right to life appears to be a very orthodox approach and pedantic interpretation of prisoners' rights in the light of reformative jurisprudence. The larger goal of a prison system in India has always been "resocialization". Maintaining of social and familial linkage will help in achieving such goals. The prisoners who get the opportunity of meeting their spouse, child or family members while imprisoned will always work towards improvement and reformation. The Jail reforms committee can look through and policies can be made to allow 'family visits' not limited only to infertility treatment or need of a progeny.

The State needs to identify the infrastructure requirements to enable such visits, preferably within jail premises. The parole rules as identified in *Rajeeta* as grounds for leave as being sufficient and effective leaves room for further deliberation. The rules do not expressly mention conjugal visits and every time any application is brought to the prison authorities will require rigorous deliberations as being 'extraordinary reason'. Hence, such parole rules which provide for leave for 'extraordinary reasons' can be amended and given a broader definition to enlarge its fold and recognise conjugal needs of the prisoner and their spouse.

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VI. CONCLUDING REMARKS

In the prison meet held at Ahmedabad in September 2022, it was reflected that the prison administration forms a very important part of internal security and that it cannot be ignored.[42] The Jail administration plays a vital role in rehabilitation of prisoners who become a part of the society. It becomes pertinent for the jails to be equipped with mechanism for better education, health, skills, modern technology and proper infrastructure to ensure better process of reformation.

India has witnessed a massive growth in the way our prisons have developed and accommodated interests of the prisoners in the light of reformative theory. Tihar jail has been identified as a model jail which has worked towards the rehabilitation of the prisoners with vocational training and an industry run within the prison.[43] Post the *Jasvir* judgment, the State of Punjab has also facilitated visits of the prisoner with their spouse for two hours every two months. This *Parivar Mulakat initiative* was started in three jails of Punjab in September 2022, making it the first time such conjugal visits were allowed in India.[44]

The general feedback of such visit has been positive in the State which aims to provide it in other jails soon. Such visits have been associated with proper channelising of energy and boosting the prisoners to do better. Other States can also follow the lead of the State of Punjab and make similar arrangements with regard to the infrastructure and space for such visits. The States must now address the concern balancing the need of family visits in the light of reformative theory and the security in light of prison governance and matters of internal security.

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[42] Union Home and Cooperation Minister Shri Amit Shah inaugurated the 6th All India Prison Duty Meet at Kankaria, Ahmedabad today, PIB Delhi, (Sep 04, 2022, 5:30PM), https://pib.gov.in/PressReleseDetailm.aspx?PRID=1856659

[43] Chhavi Bhatia, The Tihar Transformer: Kiran Bedi, DNA INDIA, (Mar 22, 2018, 06:45AM), https://www.dnaindia.com/india/report-the-tihar-transformer-kiran-bedi-2596274

[44] Varsha, India's First State to Start Conjugal Visits in Prison: Punjab Allows Two Hours of Spouse Visit For Prisoners, BNB LEGAL, (Sep 21, 2022) https://bnblegal.com/news/indias-first-state-to-start-conjugal-visits-in-prison-punjab-allows-2-hours-spouse-visit-for-prisoners/

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CORPORATE GOVERNANCE LEGISLATIONS FOR ISLAMIC BANKS IN NIGERIA: REVIEW OF COMPLIANCE WITH ISLAMIC PRINCIPLES

Ahmed A. Muhammed-Mikaaeel* & Abdulrazaak O. Zakariya**

ABSTRACT

Legislation is the bedrock of every endeavor for better outcome; mostly enabling environment for certain systems, practices and procedures. In any complex system, legislation plays pivotal role to solidify it. Hence, it is not debatable that corporate banking governance requires effective legislation to thrive. As with Islamic corporate banking governance in Nigeria, experts have made several complaints regarding the unsuitability of the existing legislations from the perspective of Shari'ah tenets. This thus prompted this article to examine the corporate governance legislations for Islamic Banks in Nigeria by way of review with Islamic principles. The article adopts doctrinal method of legal research by relying on the relevant legislations for corporate governance of Islamic banks in Nigeria as well as the primary sources of law under Shari'ah to fathom the Islamic principles as they relate to Islamic corporate banking governance. The article finds that the existing legislations for the corporate banking governance of Islamic banks are best suitable for the conventional banks. The legislations failed to incorporate Islamic principles for proper corporate banking governance of Islamic banks. The article thus places the burden of ensuring amendment of the Companies and Allied Matters Act (CAMA), 2020 on the Central Bank of

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Nigeria being the apex and regulatory bank in the country as against the usual style of issuing mere guidelines for that purpose.

Keywords: *Corporate Governance, Governance Legislations, Islamic Banks, Islamic Principles, Nigeria*

I. INTRODUCTION

Importance of legislation as bedrock of all endeavors cannot be over emphasized. Every sphere of human endeavor requires enabling legislation to thrive.[1] In the same token, banking industry needs legislation to function maximally.[2] This makes formulation of the rules and regulations for banking operation easy on the part of the supervisory institution. Thus, the nature of particular financial institution usually determines the kind of legislation to be put in place for its existence and administration.

Islamic Banks on a global view have thrived beyond expectation even in the face of global recession.[3] The feat is credited to the well-structured enabling legislation for Islamic Financial Institutions. Malaysian experience has been profusely cited as a case in point.[4] Though Islamic Banks in Nigeria are still young in age having not operated for more than a decade, reports have it that legislation for corporate banking governance in Nigeria is not in line with Shari'ah principles of governance.[5] Hence, this study examines corporate governance legislation of Islamic banks in Nigeria vis-à-vis the Islamic principles with a view to making recommendation.

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[1] David A. Funk, *Major Functions of Law in Modern Society*, 23(2) Case Western Reserve Law Review 257-306 (1972).

[2] Matthew E. Nwocha, *Banking Law and Economic Development in Nigeria: Contributions and Constraints of the Bank and Other Financial Institutions Act*, 8 Beijing Law Review 451-464 (2017).

[3] Mohammed Y. Abdulle, & Salina H. Kassim, *Impact of Global Financial Crisis on the Performance of Islamic and Conventional Banks: Empirical Evidence from Malaysia*, 8(4) Journal of Islamic Economics, Banking and Finance 9-18 (2012).

[4] Sheila A. Yussof, *The Islamic Financial Services Act, 2013: Malaysia's Model Framework for Shariah-Compliance and Stability*, 391-408 available at: https://icrjpournal.org/index.php/icr/article/download/454/452 (last visited on 28 November, 2022).

[5] Abdulqadir I. Abikan & Ismail B. Ahmad, *Shariah Governance of Islamic Financial Institutions (IFIS): An Analysis of the Central Bank of Nigeria (CBN) Regulatory Guidelines*, 3(1) KIU Journal of Social Sciences 303-316 (2017).

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II. ISLAMIC BANK AS CORPORATE ENTITY

Before examining the corporate nature of Islamic Bank, it is imperative first and foremost to understand the concept of banking from *Shari'ah* perspective. As the name implies, Islamic bank is a bank established pursuant to tenet of *Shari'ah*.[6] It could also be explained as a bank established to function in an Islamic way.[7] Banking activities are *Halal* (permissible) under *Shari'ah* provided they are in line with the dictates of *Shari'ah*.[8] It is worthy of mention that Islamic bank is primarily established to serve Muslims by providing them with *Halal* (lawful) banking services.[9] Therefore, Islamic bank is a bank established pursuant to *Shari'ah* principles in Islamic jurisprudence.[10]

Islamically, banking activities had long existed since the inception of Islamic legal system though in crude form.[11] Example that ready comes to mind is the Institution of *Baytul-Mal* which was the financial house of the then Islamic State.[12] Thus, the idea of banking is not a novel one in Islamic jurisprudence. But the incidence of modern development and the attendant effect of colonialism had dictated a new shape of the formation of Islamic bank.[13]

Nigeria, being a predominantly Common law country, has adopted certain condition precedent for the formation and establishment of banks in the country. As part of requirements to secure license to establish Islamic bank in Nigeria; there is need to comply with the extant law enacted for

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[6] Ahmad Alharbi, *Development of Islamic Banking System*, 3(1) Journal of Islamic Banking and Finance 12-25 (2015).

[7] Mohi-ud-din Sangmi and Ahmad B. Khaki, *Islamic Banking: Concept and Methodology*, 1-18 available at: https://www.researchgate.net/publication/272236489_Islamic_Banking_Concept_and_Methodology (last visited on 19 November, 2022)

[8] *Id.*

[9] Funk, *supra* note 1

[10] Nwocha, *supra* note 2

[11] Said Muhammad and Kong Ximei, *Islamic Financial System: A Brief Introduction from the Literature*, 6(2) Al-Azhar 1-12 (2020).

[12] Md. H. Rahman, *Baytul-Mal and Its Role in Economic Development: A Contemporary Study*, 2(2) Turkish Journal of Islamic Economics 21-44 (2015).

[13] Abubakar B. Umaru, *Colonialism and Development in Nigeria: Effects and Challenges*, 70 International Affairs and Global Strategy 9-18 (2019).

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incorporation of companies in the country.[14] Thus, in line with the relevant provisions of Companies and Allied Matters Act (CAMA, 2020), any-would-be Islamic Bank in Nigeria has to be duly incorporated in compliance with the requisite laid down rules, regulations and procedures designed for that purpose.[15]

After complying with the condition precedent of pre-incorporation and the subsequent issuance of Certificate of Incorporation, then Islamic bank becomes a body corporate. That is, it attains the status of artificial entity or corporate entity as the case may be. It is therefore not gainsaid that all Islamic banks in Nigeria are corporate entities existing in abstraction. Taking JAIZ Bank Plc as an example, the bank is a corporation separate and distinct from individuals that established it. The same thing goes for all other full-fledge Islamic bank(s) or conventional banks operating Islamic windows.

The essence of discussing the corporate nature of Islamic Bank is therefore to demonstrate that Islamic Bank becomes artificial entity or corporate entity after incorporation.[16] By virtue of the law, it is also empowered to render Islamic banking services despite its artificial nature.[17] The question that therefore comes to mind is: how does a corporate entity, whose existence is in abstraction, perform the complex banking services required of an Islamic Bank? The answer to this question is the central focus point of the next subtopic.

III. CORPORATE GOVERNANCE AS THE AFTERMATH OF INCORPORATION

By way of explanation, corporate governance is the way and manner a duly incorporated company is being governed or controlled for the achievement of

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[14] Chidi E. Halliday & Krakase K.N. Briggs, *Formation of Companies under Company Law Jurisprudence in Nigeria: Lessons from other Jurisdictions*, 10(1) Journal of Jurisprudence and Contemporary Issues 182-192 (2018).

[15] *Id.*

[16] Darwanto & Anis Chariri, *Corporate Governance and Financial Performance in Islamic Banks: The Role of the Sharia Supervisory Board in Multiple-Layer Management*, 14(4) Banks and bank Systems 183-190 (2019).

[17] *Id.*

the purpose(s) for which the company is incorporated. It is the accumulation of the periodic and relevant laws, rules, regulations guidelines, standards and codes carefully designed purposely to regulate the affairs of the shareholders of a corporation vis-à-vis the management of the corporation and the employees.[18] Thus, corporate governance is an instrument of controlling and checking the excesses of the human agents of the company who are its directing minds.[19] The framework of corporate governance is divided into internal and external corporate governance. The foregoing explanation of the concept corporate governance falls under internal corporate governance framework. The reason being that internal corporate governance is only concerned with the regulation of the internal organs of the company such as the Board of Directors (in the case of an Islamic bank, *Shari'ah* Board has been recommended), the Annual General Meeting (the shareholders) as well as the employees of the company.

The external corporate governance framework takes care of the third parties who have stakes in the company either by virtue of the private agreement as in the case of companies' creditors or by virtue of statutory requirement as in the case of the Central Bank of Nigeria (CBN), Corporate Affairs Commissions (CAC) and other regulatory institutions such as the Financial Regulation Advisory Council of Experts (FRACE), Advisory Council of Experts (ACE) etc. It is in view of the foregoing that a standard corporate governance framework encapsulates the activities and interests of the internal stakeholders of the company as well as that of the external stakeholders whose activities towards the company may be private or statutory.[20]

The essence of the foregoing discussion is to lay a foundation with respect to the understanding of the concept of corporate governance. It is thus imperative to note that without proper incorporation in compliance with the

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[18] Ahmed A. Muhammed-Mikaaeel *et al*, *Corporate Governance and Practice in Nigeria: Exploring its Tricky and Prognoses*, 1(2) International Review of Law and Jurisprudence 108-114 (2019).
[19] *Id.*
[20] Abikan & Ahmad, *supra* note 5

extant law, the issue of corporate governance cannot arise. It is therefore not gainsaid that corporate governance is an aftermath of incorporation.[21] Before concluding on this point, it is equally necessary to explain the concept of incorporation.

Incorporation is simply the processes laid down for formation of a company.[22] Before a company can be called a company properly so-called, it must have successfully passed through the processes of incorporation. The process of incorporation in this clime is governed by the Nigerian corporate law which is applicable to all intending banks in Nigeria be it Islamic or conventional bank.[23] The processes are supervised by the Federal Government Agency established for that purpose.[24]

Thus, after successful incorporation, the company in question (i.e., Islamic Bank in the instant case) becomes an artificial person created by law but exists in abstraction. To complete the processes of its artificiality, the law gives it powers to perform a number of activities. To this end, the company can transact businesses, can enter into a valid contract with any persons, can hold land anywhere within territory of Nigeria, can sue and be sued in the Court of law, can have perpetual succession, can have common seal etc.[25]All the foregoing functions recognized of an incorporated company in Nigeria is also applicable to Islamic banks after due incorporation. Islamic Bank, being an artificial person created by law with the status of a body corporate in pursuance to the relevant Nigerian corporate law, cannot ordinarily discharge the varieties of functions and obligations imposed on it artificially.[26] It becomes necessary that it relies on certain human agents to perform all its functions maximally. Thus, this is where corporate

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[21] Umaru, *supra* note 13
[22] Funk, *supra* note 1
[23] *Id.*
[24] *See generally*, The Company and Allied Matters Act, 1990 (stipulating that the Federal Government Agency in charge of incorporation of companies in Nigeria is the Corporate Affairs Commission).
[25] Ahmed A. Muhammed-Mikaaeel, *Application of Corporate Personality Doctrine under the Nigerian Corporate Law and Shari'ah*, 8(1) Lexigentia, 4-5 (2022).
[26] *Id.*

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governance comes into regulate and check the excesses of the human agents who are in the control of the Bank.

As it is common to business tycoons, the very essence of incorporating or floating a company is to meet the need or requirements of profit making and risk minimization as well as to adequately secure the funds injected into the business against unforeseen circumstance.[27] It is therefore not a gain saying that this cannot be achieved except with a virile corporate governance framework.

History had it that a number of banks have gone into extinction in Nigeria due to improper corporate governance.[28] While the banks that have existed from generations to generations, were able to achieve that feat as a result of sound corporate governance framework and proper implementation.[29] Therefore, the nature of a company will determine the nature of the corporate governance to be designed for its administration. Using Islamic bank as a case in point, one needs not be told that it is corporate governance legislation designed pursuant to the principles of Islamic jurisprudence that is applicable. The reason being that corporate governance legislation generally enables a company to achieve the purpose for which it was incorporated. This is because, failure to implement the appropriate corporate governance inevitably leads to corporate governance failure.[30] Thus, incorporation of Islamic banks in Nigeria and the aftermath of their banking licensing gives rise to emergence of Islamic corporate governance.

IV. EMERGENCE OF ISLAMIC CORPORATE GOVERNANCE FOR ISLAMIC BANKS

It is important at this juncture to first and foremost give an explanatory insight into the concept of Islamic corporate governance with a view to

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[27] *Id.*

[28] Lateef O. Ahmodu *et al, Corporate Governance Failure: Lesson from on-going Financial Crisis in Nigeria (2015-2017)*, 4(1) Direct Research Journals of Social Science Education Studies 9-13 (2017).

[29] *Id.*

[30] Muhammed-Mikaaeel, *supra* note 18, 108-114

properly showcasing the emergence of Islamic corporate governance. As discussed above, corporate governance ordinarily entails the totality of laws, rules, regulations, codes and standard carefully designed for the management and administration of a company by spelling out the right, duties and obligations of the human agents of the company for the overall interest of the company's shareholders and other stakeholders of the company.[31] This is a general explanation of the concept of corporate governance. It must be noted that the explanation is applicable to Islamic corporate governance save for the fact that *Shari'ah* content and *Shari'ah* compliance must be emphasized. It in on this note that Islamic corporate governance is explained as the totality of the rules, regulations, principles, codes and standards designed pursuant to the relevant provisions of the Holy Qur'an and Sunnah of the Prophet (PBUH) for management and administration of a company.[32] The very essence of corporate governance, be it under the conventional law or under Shari'ah, is to avert the situation of corporate governance failure.[33] It must however be noted that the incidence of corporate governance failure are not on all fours under the two systems of law. The concept of corporate governance is wider under *Shari'ah* because any administration of a company that is not *in tandem* with the dictates of *Shari'ah* can constitute a situation of corporate governance failure.[34] That is to say that fraud, embezzlement, mismanagement of funds alone does not constitute corporate governance failure under *Shari'ah*. Administering the affairs of the company to engage in any unlawful business is an incidence of corporate governance failure under *Shari'ah* even though, the conventional law does not recognize such situation as constituting corporate governance failure.

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[31] *Id.*

[32] Abdussalam M. Abu-Tapanjeh, *Corporate Governance from the Islamic Perspective – A Comparative Analysis with OECD Principles*, 1-17 available at: <hppts://www.researchgate.net/publication/222527039_Corporate_governance_from_the_Islamic_perspective_A_comparative_analysis_with_OECD-principles> (last visited on 24 November, 2022)

[33] *Id.*

[34] Qur'an, Surah *Al-Maidah* (5:44, 45 & 47)

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The foregoing thus serves as one of the bases for emergence of Islamic corporate governance because the concept of corporate governance failure under the conventional law and *Shari'ah* differs. Muslim corporate managers therefore need to internalize *Shari'ah* tenets and principles in corporate governance. This shows that for all intent and purposes, the conventional legislation for corporate government of Islamic Banks cannot adequately fulfill the requirements of *Shari'ah*. Thus, this brings to therefore the need to have full-fledge *Shari'ah* compliant corporate governance legislation.

Allah (SWT) in the Glorious Qur'an categorized any Muslim who fails to apply the dictates, rulings, and teachings of *Shari'ah* in his/her worldly affairs as *Kaafirun*,[35] *Faasikun*,[36] *Dhaalimun*.[37] This is not far fetch in the sense that *Shari'ah* as a legal system offers complete codes of lives touching on every aspect of Muslims' lives of which banking corporate affairs and banking corporate governance are not exempted. Although, the concept of corporate governance as we have it in the recent time is modern in nature, *Shari'ah* corporate governance is therefore applied as a result of the dynamism of the Divine law to any emerging situations. Thus, the relevant aspects of the rules and principles of *Shari'ah* are applied to govern the modern corporate practices as observed in the case of Islamic banks.

The principle of law governing Muslims is that they are not permitted to go outside the provisions of *Shari'ah* to regulate their affairs whether corporate or not.[38] Thus, since incorporation of a company brings to the fore the necessity of corporate governance as in the case of Islamic banks in Nigeria which are corporate entities, it follows that *Shari'ah* compliant corporate governance legislation has to be designed with a view to administering their affairs, activities and modes of operation. As it was observed in the Nigerian situation, Islamic banks surfaced as novel and special type of bank in the banking sector in addition to the age-long conventional banks which already

[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] Qur'an, Surah Al-*Ahzab* (33:36)

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have their conventional corporate governance legislation.[39] Therefore, the birth and emergence of Islamic bank in the country inevitably leads to the emergence of Islamic corporate banking governance in line with *Fiqh* of *Shari'ah*.

V. ISLAMIC PRINCIPLES EXPECTED OF THE CORPORATE GOVERNANCE LEGISLATION OF ISLAMIC BANKS

The principles of Islamic corporate governance are derived from the primary sources of *Shari'ah*. To this end, it is imperative to reflect on the understanding of *Shari'ah* and its sources of law before delving into the discussion of the various Islamic principles expected of corporate governance legislation of Islamic banks.

Shari'ah simply refers to the legal system brought by Prophet Muhammad[40] (PBUH) from Allah (SWT) to all mankind. The general misconception about *Shari'ah* is the fact that majority believe it is only legislated for Muslims alone. The correct view thus is that *Shari'ah*, as a Divine legal system, is promulgated by Allah for the generality of mankind. However, those who accept, believe and submit to the Divine law are typically called Muslims.

Shari'ah does not only contain comprehensive codes, standards or principles for all spheres of lives of Muslims but also remains the best legislation for any given circumstances.[41] The foregoing is not an exaggeration because the law was promulgated by the Highest, the Wisest, the Most Knowledgeable i.e., Allah (SWT), the Creator of the universe and everything under or above it. That is why it is inappropriate to compare *Shari'ah* standard to that of any other system of law. The unique feature of Shari'ah is that it shapes the lives of its subjects in all ramifications. Allah (SWT) explained in the Holy *Qur'an*

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[39] Suraj T. Ajagbe. & Alhassan .N. Brimah, *Islamic Banking Development and Evolution: Current Issues and Future Prospects*, 3(2) Journal of Research in International Business and Management 73-79 (2013)

[40] *See generally*, Mirza B.M. Ahmad, Life of Prophet Muhammad 1-9, Islam International Publications Limited, UK (2013) (contending that Prophet Muhammad is the seal of all Prophet sent from Allah. By implication, Shari'ah is the last and applicable legal system till the Day of Judgment).

that: 'do the man think, after their creation, that they will be left to do whatever they like without been regulated?'[42] It is therefore not gain-said that *Shari'ah* is a Divine law which regulates every aspect of Muslims' endeavors without the exception of banking corporate affairs and banking corporate governance.[43]

With the foregoing understanding of *Shari'ah*, it is therefore imperative to examine the various Islamic principles expected of corporate governance legislation of Islamic banks. As discussed earlier, *Shari'ah* is comprehensive codes of life that touches every aspect of Muslims' affairs which Islamic corporate governance practice is not an exception. It is therefore worthy of note that principles of corporate governance are many from the provisions of *Qur'an* and *Sunnah*. However, few of them shall be discussed to showcase the position of *Shari'ah* on banking corporate governance practices.

Firstly, is the Principle of *Taqwallah* (i.e., fear of Allah).[44] In any endeavor that a Muslim embarks upon, be it religious or otherwise, the first watch word is fear of Allah. Without the fear of Allah, every action will not achieve its objective. That is why the principle of *Taqwallah* is referred to as the most important of all Islamic corporate governance principles. Fear of Allah is bedrock of every successful action. Allah (SWT) warns Muslims to fear him in all their actions, inactions and omissions. In the Sunnah of Prophet Muhammad (PBUH), he equally admonished Muslims to fear Allah wherever they are. The implication of *Taqwallah* in corporate is such that those at the helms of affairs in corporate setting must act on behalf of the company as if Allah (SWT) is directly supervising them. The *Taqwallah* imbibed by the Islamic banks' managers would enable them to comply with all the dos of

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[42] *See generally*, Ghulam Azam, Islam the Only Divine & Complete Code of Life 7-63, Kamiub Prokashon Limited (2009) (stating that apart from the beauty of Qur'an as source Shari'ah of this last dispensation is that-unlike the previous legislation, it does not only focus on theology but also encapsulates other aspect such as politics, economics, transactions, businesses, sociology, etc.).

[42] Qur'an, Surah *Al-Qiyamah* (75:36)

[43] Qur'an, Surah *Al-An'am* (6:38)

[44] Qur'an, Surah *Al-Hashr* (59:7 and 18)

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Allah in their corporate governance and at the same enhance them to avoid all the don'ts of Allah. This is because Allah loves those who fear Him in all their endeavors. The corporations' alter ego deals with the company's properties and funds. Thus, to overpower the whisper of Shayton, it is expected that they cannot do without fear of Allah in their corporate governance practice. This Islamic principle of *Taqwallah* in corporate governance is more relevant to those involved in the governance of the affairs of Islamic Bank. The reason being that, as good as banking services is, it may be a disastrous endeavor if not governed in line with the fear of Allah. Most corporate governance failures recorded in the past cannot be divorced from lack of observance of *Taqwallah*. The managers of Islamic banks will find *Taqwallah* indispensable in every sphere of operations of Islamic bank with a view to avoiding lucrative and tempting forbidden businesses and even excessive profit making.

Secondly is the Principle of Accountability for banking corporate governance.[45] The general sense of the principle of accountability under *Shari'ah* is such that each of the action of a Muslim exhibited overtly or secretly is subject to accountability on the Day of *Qiyamah* (Judgment Day).[46] Allah has promised pertaining to accountability that nobody shall be subjected to injustice.[47] That is, it was a person does that he shall be accountable upon.[48] Principle of accountability is firmly established a number of *Quranic* verses. Importantly, Allah made it clear in the *Qur'an* that man should not think that after their creation on earth, they will be left to freely do whatever they desire without being accountable for the consequence. The Sunnah of Prophet Muhammad (PBUH is very apposite when it admonished that everyone is a shepherd and shall consequently be responsible for his flocks. This *Hadith* is an all-encompassing *Hadith* in the sense that it leaves no one out in the issue of accountability. Thus, Islamic corporate governance principle of accountability is very unique one which

[45] Qur'an, Surah *Al-A'raf* (7:6-7); Qur'an, Surah *Al-Ghashiyah* (88:25-26)
[46] *Id.*
[47] Qur'an, Surah *Al-Israa'* (17:15)
[48] Qur'an, Surah *Al-A'raf* , *supra* note 45, 8-9

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deviates from the conventional notion of accountability in corporate governance. From *Shari'ah* perspective, the bank managers directing the affairs of the Islamic banks though accountable to the shareholders, their foremost accountability is to Allah (SWT). All their corporate activities shall be questioned upon on the Day of Judgment. This is because governance of whatever level is not be taken with levity by sincere Muslims. Thus, by the Islamic corporate governance principle of accountability, the corporate managers should take cognizance of the indisputable fact that Allah (SWT) is interested in the consequence of the corporate actions, in actions, omissions and even overall decisions.

With respect to the corporate governance of Islamic Bank, the respective alter egos are to ensure that all their corporate decisions do not occasion injustice to the shareholders and the stakeholders of the banks as well as ensuring that their decisions do not give room for non-*Shari'ah* compliant practices in the banking services. The reason being that, by that Islamic corporate governance principle of accountability, such non-*Shari'ah* compliant decision shall not go without its consequence with Allah on the Day when secret shall become overt.[49]

Principle of Justice is also one of Islamic corporate governance principles.[50] Justice refers to giving entitlements/rights to whom it is due. Allah (SWT) in the Holy *Qur'an* admonished Muslims to observe justice at any given situation even if it be against oneself.[51] In a number of Traditions of the Messenger of Allah (PBUH), he frowned against unjust treatment to the weak and preferential treatment to the strong or influential.[52] This principle

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[49] *Id.*

[50] Qur'an, Surah *An-Nisa'* (4: 58 and 135); Qur'an, Surah *Al-Mai'dah* (5:8); Qur'an, Surah *An-Nahl* (16:90); Qur'an, Surah *Ar-Rahman* (55:7-9)

[51] Qur'an, Surah *An-Nisa'* (4: 135)

[52] *See generally*, Abu-Amina Elias, *Daily Hadith Online- The Teachings of Prophet Muhammad in Arabic and English*, available at: htpps://www.abuaminaelias.com/dailyhadithonline/2021/10/28/ilm-quran-sunnah/ (last visited on 24 November, 2022) (in which one of the Aadith of Prophet Muhammad (PBUH) reported by Abdullah bn Umar, he quoted the Prophet as saying: "Knowledge is three types and anything else is a surplus: a decisive verse, or an established Sunnah, or an obligation of justice").

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of Islamic corporate governance is pivotal to corporate banking governance setting. This is owing to the fact that there is need to deal justly with the corporate employees, shareholders and creditors. No one should be denied his/her due rights especially the weak among them. Doing justice must also prevail in transaction of business on behalf of Islamic banks. For instance, it will be a great injustice to the shareholders for the bank managers to embark on businesses with *Gharar* (uncertainly or too much risk).

Islamic banking sector deserves more observance of justice especially on the part of the bank managers. The investment window of Islamic bank should be carefully managed. It will be unjust to leave it to the hands of incompetent officials who had little or no experience in Islamic investment practices. By the Islamic corporate governance principle of justice, *Shari'ah* demands that experts with '*adalah* (probity) should be recruited to man the respective departments or units of Islamic banks for proper corporate governance practices. Experts with '*adalah* in this sense means people who are ready to commit themselves to the services of the bank for the sake of Allah without placing emphasis on the derivable worldly benefits.

The Islamic Principle of *Shura* (Consultation) cannot be over-emphasized.[53] The hallmark of Islamic banking governance rests on the *Shura* which greatly differentiates the mode of decision making in Islamic banks from that of the conventional banks. Principle of consultation simply means taking decision in corporate organization by way of mutual consultation. Mutual consultation is a Divine commandment in the Holy Quran which Prophet Muhammad (PBUH) practicalised during his life. Thus, taking corporate decision by way of *Shura* (Mutual Consultation) involves taking the views of everyone into careful consideration before coming up with a unanimous decision. This is sharply in contradistinction with the voting system adopted under the conventional corporate governance practice. The significant feature of the decision making by way of *Shura* in that such decision cannot contradict the tenets of *Shari'ah* contained in the *Qur'an* and *Sunnah*.

[53] Qur'an, Surah *Ash-Shura* (42: 38)

Because as a rule, the subject matter of deliberation and the consequent decision must be Shari'ah compliant.

Therefore, the corporate governance legislation of Islamic bank cannot be complete without the inclusion and observance of the Islamic corporate governance principle of consultation when it comes to decision making. By doing so, the corporate managers will attract the pleasure of Allah at all times in their corporate governance practices.

The Principle of Integrity and Truthfulness is also worthy of mention.[54] It is one of the integral parts of the Islamic corporate governance principles. The principle of integrity connotes being in a state of honesty and uprightness at every material time. Allah charges Muslims to be upright and honest either in the private or public. The principle directly relates to the concept of *Amanah* (Trust). The man who has integrity is presumed to be a trustworthy fellow. Such a person does not bend his position to any unscrupulous tempting situation. The Messenger of Allah enjoins Muslims to render trusts back to whom they are due. Thus, integrity and trustworthiness should top the list of requirements of any-would-be a corporate manager. The reason is that where integrity and trust is lacking in those who stir the affairs of a corporation, the end result would be corporate governance failure. From *Shari'ah* perspective, the corporate managers should be persons who are above the board in term of integrity and trustworthiness. It is this that will enable them to be able to observe moral and ethical standards in accordance with *Shari'ah*.

With respect to the corporate governance of Islamic bank, *Shari'ah* stipulates that the various professionals to be appointed must be people with good virtue in words, actions and in *Eeman* (Faith). This is because, there in clear distinction between an expert in a particular profession and his/her qualities in term of integrity, truthfulness, honesty and trustworthiness. Both must be present in any-would-be corporate manager of Islamic banks. Thus, the foregoing Islamic corporate governance principle dictates that people of

[54] Qur'an, Surah *Al-Ahqaf* (46: 13-14)

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integrity and honesty should be appointed to the relevant boards or committee for maximum performances. This is because, the various board members are there as the trustees of the investors and expected to play a fiduciary role with integrity in the overall interests of all the stakeholders of the bank.

The Islamic corporate governance principles also include the Principle of Sincerity and Intention in corporate governance practice.[55] As already discussed above, the life of a Muslim should be lived in such a way to please Allah alone. Allah (SWT) enjoins Muslims in the Holy *Qur'an* to always seek His pleasure in what they do. This is a matter of intention which is only known by Allah alone. Corporate governance practices attract enormous worldly benefits and rewards. But what the Islamic corporate governance principles dictate is that corporate governance should be practices with the utmost sincerity and intention to please Allah with a view to earn His *Rahmah* (mercy). To this end, the Messenger of Allah warns that Allah is not concerned with Muslims' appearances and their wealth accumulation but He is only concerned with Muslim's state of mind and their deeds. Thus, whoever does a thing because of Allah will certainly be rewarded and whoever does otherwise, that would be his reward.

The significance of the foregoing to concept of Islamic corporate governance of Islamic bank is that those stirring the affairs of Islamic banks are to perceive their actions as religious duties which can earn them innumerable rewards from Allah apart from the worldly immediate benefits. These principles enhance maximum performance on the part of the alter egos of Islamic bank having been motivated with the expectation of the everlasting and permanent rewards from their Creators, Allah (SWT).

The last but not the least is the Principle of Brotherhood. Principle of Brotherhood is a general principle applicable under *Shari'ah*. It is has been shown to be applicable to corporate governance practice under *Shari'ah*. By

[55] Muhammad M. Suplhey, *Corporate Governance in Islam vis-à-vis the Modern Corporate World*, 14(1) Malaysian Accounting Review 81-92 (2015).

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the principle of brotherhood, Muslims perceive themselves as one and do not let the differences in race, color, complexion, background, ethnic, tribe, clan, family, state and country to disunite them. The principle is a Divine commandment under *Shari'ah*. Allah (SWT), in a number of the verses of the Holy Qur'an, warns Muslims to hold unto the rope of Allah by shunning any issue that may cause their division. The traditions of Prophet Muhammad (PBUH) equally follow suit when he made the Muslims to realize that they are brothers of each other. He was emphatic when he cautiously proclaimed that Arab is not better than non-Arab and that the whites are not better the blacks because all of them hailed from Allah (SWT).[56] In the spirit of the Islamic principle of brotherhood, lawful cooperation, interactions and dealings have been encouraged.

In relation to Islamic corporate governance, Islamic jurists have interpreted the relevant provision of the Holy *Qur'an* to cover the aspect of corporate activities.[57] Without lawful cooperation with the spirit of brotherhood, there would be nothing like corporate activities. This is because corporate activities involve association of two or more for common purposes. In the sphere of corporate governance, *Shari'ah* has divinely recommended *Shura* (mutual consultation) for decision making of mechanism.[58] Thus, the members of *Shura* Committee or *Shari'ah* Board would only achieve meaningful deliberations if they observe the Islamic corporate governance principle of brotherhood. This shows that the importance of the Islamic corporate governance principle of brotherhood cannot be over emphasized especially with respect to the corporate governance principle of Islamic Banks.

It is important to state at this juncture that Islamic bank and all its operations are expected to be regulated by *Shari'ah*. It is not gain-said that Islamic Banks sprung up in Nigeria solely to offer lawful Islamic banking services to Muslims and any interested members of the populace. Though,

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[56] Qur'an, Surah *Al-Hujurat* (49: 13)
[57] Surah *Al-Mai'dah* (5:2)
[58] Surah *Ash-Shura, supra* note 53

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the position in Nigeria now seems to recognize Non-interest based financial institutions in the country without necessarily tagging them Islamic Banks; the bitter truth remains that Islamic Banks do not become as such simply because it is a non-interest financial institution, they are banks that emerged from the overall understanding of the unique Islamic financial jurisprudence.[59] That is why the only suitable corporate governance legislation for Islamic Banks is the one fashioned out in line with the provision of *Shari'ah* in all ramifications. The pertinent question here however is: do the legislations for corporate governance of Islamic Banks conform to Islamic principles of corporate governance?

VI. REVIEW OF THE LEGISLATIONS FOR CORPORATE BANKING GOVERNANCE OF ISLAMIC BANKS IN NIGERIA VIS-À-VIS ISLAMIC PRINCIPLES

Applicable legislations for corporate governance of Islamic banks in Nigeria are principally the Central Bank of Nigeria (CBN) Act, 2007; the Banks and other Financial Institutions Act (BOFIA), 1991 (as mended); Regulation on the Scope of Banking Activities and Ancillary Matters No. 3, 2010; and the Companies and Allied Matters Act (CAMA), 1990.[60] The purpose of this section is to examine the legislation and their compliance level with Islamic principle of corporate governance.

VI.1 Central Bank of Nigeria (CBN) Act, 2007

This legislation is primarily enacted to establish the Central Bank of Nigeria and empowers it to function as the apex bank in Nigeria.[61] The CBN Act positions the Central Bank of Nigeria as banker to both the federal government of Nigeria and other banks operating in the country.[62] As banker to the government, the CBN Act empowers the Central Bank to play advisory

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[59] Muhammad & Ximei, *Supra* note 11

[60] Now, Companies and Allied Matters Act (CAMA), 2020 having been amended recently

[61] Ekundayo P. Mesagan & Olatunji A. Shobande, *Role of Apex Banks: The Case of Nigerian Economy*, XXII (2) Journal of Economics and Business Research 171-186 (2016)

[62] Central Bank of Nigeria Act, 2007, *s.* 40

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role to the federal government of Nigeria in terms of budgetary preparation and overall economic well-being of the nation. As banker to other banks in Nigeria, the CBN Act empowers it performs some sort of supervisory, oversight functions and control over the activities of other banks in the country.[63] Banks are of three main categories in Nigeria such as commercial banks, merchant banks and specialized banks. Thus, the CBN Act empowers the Central Bank of Nigeria to have control over these banks in terms of licensing, issuance of guidelines for their operation, withdrawal of license in deserving situation to mention but a few.[64]

It is thus important to mention that Islamic banks in Nigeria are categorized under specialized banks being non-interest charging banks. A cursory look at the CBN act shows that it makes provisions for licensing of specialized banks such as non-interest banks to which Islamic banks belong. However, the CBN Act, apart from licensing the operation the banks, does not give credence to any Islamic corporate governance principles which cannot be divorced from operation of Islamic banks. The CBN Act only recognizes non-interest banks from general perspective and not from Islamic corporate governance principles standpoint. Little wonder the Act forbade toga of Islamic religion in the name of Islamic banks that can operate in Nigeria.

VI.2 Banks and other Financial Institutions Act (BOFIA), 2020

This legislation is primarily enacted to ensure that all banks in Nigeria mandatorily undergo licensing processes under BOFIA and possess certifications before they can carry on banking businesses in Nigeria.[65] It is important to point out that BOFIA was originally enacted for the regulation of the conventional banks in Nigeria.[66] However, with the approval and introduction of Islamic banks, it was amended in that direction to recognize non-interest banks.[67] The issue thus still remains that the major inter-

[63] *Id.*, s. 51
[64] *Id.*
[65] Banks and Other Financial Institutions Act, 2020, *s.* 2.
[66] Abdulqadir I. Abikan, *The Legal Framework for Islamic Banking in Nigeria* in Essentials of Islamic Banking and Finance in Nigeria 106 - 119 Benchmark Publishers Limited, Kano (2013).
[67] Banks and Other Financial Institutions Act, *supra* note 65, Ss. 57-62

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banking businesses, operations and activities are of the conventional banks governance principles which are far different from Shari'ah corporate governance principles.[68] This lacuna has enhanced exploitations by some conventional banks in Nigeria granted license to operate non-interest banking services without recourse to the core Islamic corporate governance banking principles.[69]

VI.3 Regulation on the Scope of Banking Activities and Ancillary Matters No. 3, 2010

This Regulation is an important legal instrument that directly affects Islamic banks' operation in Nigeria. The purport of formulation of this Regulation is to put an end to the universal banking license regime which permitted foreign banks to directly carry on operation in Nigeria.[70] Thus, foreign Islamic banks cannot directly operate in Nigeria except by undergoing certain mandatory licensing procedures. With the Regulation, the scope and framework of banking businesses is modified in Nigeria to such an extent that indigenous banks are encouraged while foreign banks approval and licensing to operate.

The subject matter of formulation of the Regulation is to provide guidelines for the general scope of banking business in Nigeria.[71] It is observed that at the time the Regulation was made, Islamic banking business was not envisaged because the Regulation predates emergence of Islamic banks in Nigeria.[72] Thus, Islamic principles of corporate governance are outside the coverage of the Regulation. Despite this lacuna, Islamic banking business and operations are still subjected to the Regulation.

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[68] *Id.*, Ss. 63-73

[69] Ibrahim A. Abdulkareem *et al*, *Shariah Compliance Practice: An Analysis of Trends among Islamic Banks in Nigeria*, 23(1) International Journal of Business and Society 137-151 (2022)

[70] Omoh Gabriel, *CBN Releases Guidelines for new Banking Model*, available at: https://www.vanguardngr.com/2010/11/cbn-releases-guidelines-for-new-banking-model/amp/ (last visited on 26 November, 2022)

[71] *Id.*

[72] The reason is that the Regulation was released in 2010 while Islamic Banks got official license to operate in Nigeria in year 2011.

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VI.4 Companies and Allied Matters Act (CAMA), 2020.

The leading corporate law in Nigeria is the Companies and Allied Matters Act (CAMA), 2020.[73] The CAMA, 2020 is indispensable for all corporate entities in Nigeria with the inclusion of Islamic banks.[74] This is because, the Central Bank of Nigeria (CBN) makes incorporation condition precedent for securing license for banking operation.[75] Thus, any-would-be-Islamic bank in Nigeria must undergo the rig our of incorporation laid down in CAMA. CAMA is thus the first point of call for Islamic banks in Nigeria.

Noticeably, importance of CAMA is not limited to incorporation stage. Its importance transcends throughout the life and death of corporations in Nigeria.[76] The aspect of post-incorporation relevance of CAMA to Islamic banks as far as this study is concerned is the corporate governance framework orchestrated in the Act.[77] As a matter of law, Islamic banks in Nigeria must have structure of corporate governance framework laid down in the CAMA.[78] Hence, in accordance with CAMA, Islamic banks must have Board of Directors for their corporate governance structure with mandatory statutory duties in the course of their various corporate banking governance decisions. The decision-making process, as laid down in CAMA for the Board, favors majority rule by voting system.[79] This of course is a great departure from Islamic principle of *Shura* mechanism for corporate decision amongst other relevant Islamic principles of corporate governance.[80]

More so, the governance structure laid down in CAMA is a common law pattern which cannot satisfy Shari'ah yearning for corporate banking

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[73] Abikan & Ahmad, *supra* note 5, 1-7

[74] Oluwakemi Odeyinde, *Appraisal of Companies and Allied Matters Act, 2020,* 1(1) Bells University of Technology Journal of Management Science 116-123 (2021).

[75] The CBN Guidelines for Licensing and Regulation Payment Service Bank in Nigeria, 2020, *s.* 6.1

[76] Companies and Allied Matters Act, 2020, Parts A-G

[77] *Id*, Chapter 11

[78] *Id.*

[79] The Companies and Allied Matters Act, 2020, *supra* note 60, *Ss.* 289-292

[80] Qur'an, Surah *Ash-Shura* (42: 38)

governance of Islamic banks with respect to Islamic principles of corporate governance. The reason is that notion of accountability expected of managers in Islamic banks extended beyond this present world due to its divinity.

VII. DISCUSSION AND OBSERVATION

The above legislations are in existence to regulate the affairs of Islamic Banks in Nigeria. The observation on the CBN Act, BOFIA and the 2010 Regulation on the Scope of Banking Activities and Ancillary Matters is that the three legislations are generally for the operation of banking business rather banking governance framework in the real sense of it. However, CAMA sets out the governance framework to administer and control the business of the Islamic banks as corporations like any other corporations in the country. According to CAMA, Islamic banks as corporation exist in abstraction and depend on human organ which would their directing minds.[81] It is on this basis that CAMA makes provisions for board of directors as controlling organ of Islamic bank who are at the helms of affairs of their control, administration and governance.[82]

Thus, the governance structure and framework set out by CAMA cannot actualize the internalization of Islamic principles in Islamic banking governance. To have proper banking governance for Islamic banks, there is need for CAMA to make special provisions for Shari'ah board, Shari'ah audit and other special units that can internalize Islamic principles in corporate governance of Islamic banks in Nigeria. As it were, CAMA, as legislation, does not recognize Shari'ah board, Shari'ah audit for Islamic banks. The implication of this is that if the affairs of Islamic banks are run contrary to Islamic principles, there is no legal sanction for it under the existing Nigerian corporate banking legislation.

Thus, with birth and introduction of Islamic banks in Nigeria, it is thus high time for the regulatory legislation to be amended to provide enabling

[81] Umaru, *supra* note 13
[82] Odeyinde, *supra* note 74

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environment for full-fledged operation and governance of Islamic banks. By doing so, corporate governance legislation for Islamic banks in Nigeria will be able to be rated as Shari'ah compliant in terms of Islamic principles of corporate banking governance.

VIII. INDIAN POSITION REGARDING CORPORATE GOVERNANCE LEGISLATIONS FOR ISLAMIC BANKS

India has a similar legal system with Nigeria especially in the area of dominance of the common law with existence of supreme constitution binding on all authorities and persons across the country.[83] With respect to corporate governance of Islamic banks, India does not have a special legislation for that purpose. The general banking legislations for the operation of the conventional banks are equally made to govern the affairs of Islamic banks. To this end and by implication, the corporate governance legislations of Islamic banks in India are primarily the Banking Regulation Act, 1949 and the Reserve Bank of Indian Act, 1935.[84] Of particular interest is therefore the Banking Regulation Act, 1949 which is the leading banking law in the country. The banking governance implementation is anchored mainly by the Reserve Bank of India (RBI) and the Central Government.

It is apposite to note that the review of the corporate banking legislation of Islamic banks in India revolves round the existence of the Banking Regulation Act, (BR Act) 1949. In this vein, Islamic banks face a number of challenges from the salient provisions of the BR Act. The reason, which is not far-fetched, is basically because of the fact that the BR Act had being in existence far more before the introduction of Islamic banking system. The purpose for which the BR Act was enacted was to govern the affairs the conventional interest-based banks in India. However, with the subsequent introduction of Islamic banks, the relevant banking regulations' provisions of the BR Act continue to affect their smooth operation.

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[83] Prajwal Dwivedi, *Legal System in India*, 2(8) White Black Law 1-22 (2021).
[84] Aisah Badruddin, *Islamic Banking and Finance in India: A Kosher or Myth*, 1(1) International Journal of Management, Innovation & Entrepreneurial Research 1-6 (2015).

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The first point of attraction is the issue of the legal status of Islamic banks within the legal framework of BR Act. According to the BR Act, banks are recognized as companies established for the transaction of banking business in India.[85] By extension, the BR Act defines the banking business strictly to be the companies accepting deposits from the public for the purpose of loan or investment which is payable by on demand and other vide various instruments such as cheque, draft etc.[86] The definition of banking business according to BR Act primarily favors the conventional interest-base banks because there is prohibition of outright trading in the activities of banks in India.[87] A cursory look at the foregoing shows that Islamic banks in India have much to contend with in this regards. This is because the Islamic banks have zero-tolerance for interest (*riba*) and its stead focus on the implementation of the Shari'ah principles of profit and loss vide a number of its trade-based products such as *Mudarabah*, *Murabaha*, *Musharakah*, *Ijarah*, *Istisna* etc.[88] The hallmark of Islamic banking business is deeply rooted in trading to satisfy the principle of profit and loss and to avoid interest-based transactions. Thus, legal status of Islamic banks from the perspective of banking business under the BR Act does not enjoy automatic recognition.

The RBI mandatory special directive on interest charging is another challenging issue for Islamic banks in India.[89] RBI is empowered by the BR Act to make regulation, guidelines, directives and policies in the interest of the general public, banking sector and of course the depositors.[90] The nature of the power conferred on the RBI is mandatory and binding on all banks in India. The fulcrum of the RBI's directives so far has being to statutorily

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[85] Abhishek Gupta, *Banking in the name of Faith: A Legal Perspective of Islamic Banking in India*, available at: https://ssrn.com/abstract=3872321 (last visited on 24 February, 2023).
[86] The Bank Regulation Act, 1949, *s* 5b
[87] *Id.*, *s* 8
[88] Ahmed A. Muhammed-Mikaaeel & Mistura A. Mohammed-Yusuf, *Enhancing Islamic Banks' Participation through Agriculture under Nigerian inclusive Financing Policy: Musaqah and Muzara'ah as Panacea* in Legal Paradigm in Nigeria 386-406, Department of Islamic Law, Faculty of Law, Usmanu Danfodiyo University, Sokoto (2022).
[89] The Bank Regulation Act, 1949, *supra* note 86, *s* 21
[90] Gupta, *supra* note 85

prevent banks from engaging in risks on their advances while financing businesses.[91] In the same token, the RBI, in the exercise of its power, places statutory obligation on banks to charge interests on their respective advances.[92] The forgoing issues directly conflict with Islamic banks' zero-tolerance for interest (*riba*) as well as risk taking in line with the principle of profit and loss while engaging in banking trading activities geared towards avoiding *riba* (interest) in all ramifications.

Another area of challenge to Islamic banks within the framework of the RBI Act is the issue of statutory mandatory cash reserve requirement. According to the RBI Act, all banks are required to maintain minimum daily balance in form of cash reserve with the RBI.[93] The primary essence of this is to enhance solid financial base for all banks in the country. It is thus expedient to note that the conventional banks will find this requirement easier to comply with due to their interest-based approach giving them opportunity to draw more monies from clients through facility servicing. For Islamic banks to make profits, there is need for them to take risk and embark on certain trading. This of course might expose Islamic banks to the risk of the default of the statutory mandatory daily cash reserve requirement. This is because Islamic banks cannot boast of cash flow and availability compared to their counterpart conventional banks.

The requirement of interest payment to depositors is another issue that poses great challenge to Islamic banks in India. Base on the banking regulation in India, banks are required by law to pay interest to depositors especially for savings and fixed deposits. This requirement inevitably conflicts with Islamic principle of zero-tolerance for interest either in form of taking or accepting.

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[91] *Id.*
[92] *Id.*
[93] The Reserve Bank of India Act, 1935, *supra* note 86, *Ss.* 18 & 42

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Of great importance is the lack of Shari'ah governance provisions in the BR Act as well as in the RBI Act.[94] Since Islamic banks are primarily incorporated to transact banking businesses within the Shari'ah compliant principle, there is need for periodic checks and balances by Shari'ah experts to ensure compliance. For effective compliance, legislation is required to make it mandatory otherwise cases of abuse without remedies will become recurrent. It is expedient to point out that both the BR Act and RBI Act are silent on the provisions for Shari'ah governance of Islamic banks which require Shari'ah expertise. The absence of the mechanism to ensure compliance with Shari'ah principle in the corporate governance of Islamic banks in India remains a great challenge probably due to the common law legal system in operation. In the clime like Malaysia which has the blend of common and Islamic law in their legal system, utmost importance is paid to this aspect of legislation for Shari'ah governance if Islamic banks.

There is however a green light after the tunnel. The BR Act has a very flexible provision that can be explored to solve the various challenges of Islamic banks in the Act.[95] Under the BR Act, an exceptional power is granted to the Central Government to exempt any bank, institution or agency from any provision of the BR Act. This power may be exercised generally or specifically. What the Central Bank needs to do is get a recommendation of the RBI with respect to the exercise of the power to exempt which must be presented before the Indian two Houses of parliament for consideration and approval.

IX. CONCLUSION AND RECOMMENDATION

The extant legislation for corporate governance is Islamic banks in Nigeria include the Central Bank of Nigeria (CBN) Act, 2007; the Banks and other Financial Institutions Act (BOFIA), 1991 (as mended); and the Regulation on the Scope of Banking Activities and Ancillary Matters No. 3, 2010; and the Companies and Allied Matters Act (CAMA), 2020. The legislations are very

[94] Gupta, *supra* note 85.
[95] The Bank Regulation Act, 1949, *supra* note 86, *s.* 53

robust for administration and governance of the conventional banks in Nigeria. The reason is that as at the time these legislations were being made, the intendment of the policy only focused on the conventional banks in the country. This thus accounted for the reason the legislations for short of Islamic principles of corporate banking governance. For there to be serious Islamic corporate banking governance, the existing legislations ought to be amended to enable full-fledged Islamic banking Shari'ah governance setting. To this end, the Central Bank of Nigeria is therefore charged to champion the course of amendment of the existing legislation to a view ensuring that they adequately create enabling environment for corporate banking governance of Islamic banks in Nigeria. Hence, it is high time the apex bank acted outside the box, i.e., beyond mere issuance of guidelines for Islamic corporate banking governance but to procure solid legislation for corporate governance of Islamic banks through legislative processes. Specifically, it is imperative that the Companies and Allied Matters Act (CAMA), 2020 is sufficiently amended to incorporate Islamic corporate banking governance principles, systems and procedures.

With respect to the legislation for corporate governance of Islamic banks in Indian, Islamic banks similarly face a number of challenges in the country owing to the fact that the BR Act which regulates the affairs of all banks was purposely enacted for the operation of the conventional interest-based banks. The introduction of Islamic banking system came far more after the enacted of the BR Act. Little wonder the Islamic banks had to contend with certain provisions in the BR Act to survive as corporate banking entities in Indian banking sector.

The leeway in section 53 of the BR Act, which enables the Central Government on the recommendation of the RBI and upon the due consideration by both Houses of parliament in India to exempt any bank from any of the provision/obligation in the BR Act. Is it therefore recommended that the various challenges of Islamic banks identified in the

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BR Act be tackled through the exceptional power granted the Central Government under section 53 of the BR Act.

Nigeria has to borrow new leaf from the unique provision of section 53 of the BR Act of India. If such provision is included in the various legislations for corporate governance of Islamic banks in Nigeria, the challenges being presently faced by Islamic banks might have been tackled without necessarily having to go through the regour of enacting separate legislation specially for Islamic banks as was the case in Malaysia.

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ENERGY SECTOR IN INDIA: REFLECTIONS ON ECONOMIC AND LEGAL ISSUES

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ABSTRACT

Energy occupies a dominating role in economic development of a Nation and so is the case of India. Renewal and Non-renewal are the source of energy and India highly depends on Supply of nonrenewal energy depends on availability of oil, natural gas, coal and nuclear energy source. Oil, gas and coal are collectively known as fossil fuels. Renewable energy resources include solar, wind, water, biomass and geothermal. India depends on coal as resource of energy though of late, she started developing solar panel for generating solar energy. Burning coal for generation of energy is a serious threat to environment and hence to human civilization. This paper is an attempt to examine the legal and economic issues involved with generation, transmission and distribution of energy in the form of electricity under the ambit of international guidelines and conventions such as UNO Framework Convention on Climate Change, Paris Convention, World Resources Institute, Prayas (Energy group) looking at the 2016 report "Future Electricity Grid" raised the issue of how legislators in developing nations will find it increasingly difficult to make decisions in a time of rapid change in the energy sector of developing nation like India particularly in context of growing instability in fossil fuel demand-supply and mismatch sequel of

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which give unprecedented rise in cost of generation of power. Contextual ecological cost etc. and compliance with the same simultaneously recommending tentative measures to meet those challenges.

***Keywords**: Energy, Energy Sector, Issues, Electricity, Renewable Energy, Non- Renewable Energy*

I. INTRODUCTION

India is a developing economy and this has been accomplished by improvement in different areas, like foundation, data innovation, medical services, telecom, etc. The energy area of any economy holds basic significance for understanding its development goals (IEA 2015). The supremacy of energy, be that as it may, has gotten a recharged pushed in a time where the nexus among energy and environmental change has involved the focal situation in the strategy plan and requires vital energy area intercessions to capture the inevitable dangers of environmental change.

India isn't well accomplished with energy assets aimed at the interest of the situation huge populace. About 600 million individuals in India are non-approaching power then about 700 million Indians use biomass as their essential liveliness asset for culinary. As per Combined Liveliness Policy Safeguarding, we are energy safe assuming that we can give lifetime line liveliness toward altogether notwithstanding this stockpile of clean energy to everything is important for rising humanoid advancement record, supporting comprehensive development in India's.[1]

Various reasons including essentially the absence of coal supply, absence of long-haul power buy arrangements, failure of advertisers to mix the value and over the top postponements in administrative orders and receivables from conveyance organizations added to the troubles of the energy market in the country.

[1] http://planningcommission.nic.in/sectors/index.php?sectors=energy

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In India, the energy set-up presents reliably increasing difficulties aimed at its liveliness strategy and the energy area is overwhelmed through dependence on steady, non-renewable wellsprings of liveliness which prompts proceeding with reliance on importations. Consequently, the for the predictable financial development, energy request is relied upon toward increment and rising liveliness requirements thus, have attracted thought toward the significance of energy security, which ensuring 3 variables - accessibility, obtainability and reasonableness of energy assets.[2]

The power creators are beginning to look past the dangers with the centre is moving away from contracts with government-possessed utilities to serving direct customers. The Government's proposition to correct the Electricity Act, 2003, which among others remember a concentration on renewable energy, presentation of smart grids, greater strengthening of state legislatures to separate the dissemination and supply business and decrease of cross endowment charges will give an incredible catalyst to this area. The Indian Government's arrangement to move towards electric versatility by 2030 likewise adds to that expectation. In this article covers the official system, issues in energy area and further the job of area explicit controllers and difficulties looked in different fragments of this area.

II. OBJECTIVES

- To understand the Structure of energy Sector.
- To analyse the legal issues & challenges of energy sector.
- To understand the ambit of international guidelines and conventions such as UNO Framework Convention on Climate Change, Paris Convention.
- To analyse the 2016 report "Future Electricity Grid" raised the issue in developing nations.

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[2] India's Energy Security Key Issues Impacting the Indian Oil and Gas Sector (FICCI, 2011)

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III. REVIEW OF LITERATURE

- Arpita Asha Khanna,[3] This paper intends toward take a gander at the significant administration trials in coal sector. Specifically, the attention is on contest matters, natural administration, then community matters in the area. The functioning paper manages the difficulties emerging out of the existing official set active and the modern design, the different elements hindering contest in the area, and the requirement for legal changes and so on.

- Manisha Gulati and Piyush Tiwari,[4] This article centres around the renewable energy in power sector. India has been putting forth attempts to interface environmentally friendly power to satisfy concerns connected with energy security, energy access and environmental change. However, these points can 8 be accomplished in the event that the administrative structure for Renewable Energy then the official system in the power part are favourable.

- Mohammad Naseem,[5] This paperback covers the controlling system of energy regulations in India. It portrays regulatory association, and significant case regulation according toward the turn of events, and utilization of such types of energy as power, gas, petrol, and coal, through consideration on a case-by-case basis to the unavoidable lawful impacts of rivalry regulation.

- Rafiq Dossani,[6] This article examines the issues looked through power area in India. It diagrams the subject connected with control dispersion in control area in India. The situation focuses on rearrangement of force area for powerful working.

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[3] Arpita Asha Khanna, *"Governance in Coal Mining: Issues and Challenges"*, TERI-NFA, (2013).

[4] Manisha Gulati & Piyush Tiwari, Development of Renewable Energy in India: Role & Effectivensess of Electricity Regulators (Oxford University Press, 2009).

[5] Mohammad Naseem *"Energy Law in India, Kluwer Law International"*, (2011).

[6] Rafiq Dossani, *"Reorganization of Power Distribution sector in India"*, ENERGY POLICY, (2004).

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IV. STRUCTURE OF ENERGY SECTOR

- Coal Sector

Coal is characterized as "Coal is an ignitable minimized dark or dim brown carbonaceous sedimentary stone framed from compaction of layers of somewhat decayed vegetation and happens in defined sedimentary stores, principally utilized as a strong fuel to create power and heat through combustion. There are other accessible fuel assets are oil, gaseous petrol, and uranium." Though, coal is all over banquet which is accessible by way of non-renewable energy source all over the planet.[7]

Coal sector has forever been the fundamental then fundamental asset toward join the essential of the emerging cheap and for Indian Industry coal is basic. It has donated impressively toward the quick mechanization of the country. Coal at present records for 55% of India's complete energy utilization; it will stay the main oil for heavy supported financial development for a long time toward originate. Thusly, reasonable then practical stockpile of coal remains inseparably connected toward the objective of guaranteeing energy safety for India. Coal gave everywhere 53% of the energy which is as essential business, in India in 2012 and is relied upon to give around 47% of essential business energy in 2031-32, as indicated by the Integrated Energy Policy.[8]

- **Oil and Gas sector**

The oil and gas area assumes an important part in the development of the economy. It joins more than 15% of the GDP of republic, as transportation, refining and promoting of oil-based commodities and gas and about 10 years prior, the petrol area was totally constrained by public oil organizations. The requirement for oil gas in upcoming will remain definitely advanced, in light of financial development then thus here resolve be developing utilization of families then manufacturing.

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[7] Aquites, *Legal Competitiveness in the coal sector*, Prepared for Ministry of Corporate Affairs, Government of India, (Feb 2012).

[8] CIRC Working Paper 11, *Competition and Regulatory Issues in Coal Sector in India* (CUTS Institute for Regulation & Competition, 2015).

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- **Electricity Sector**

Power in India is yet not accessible toward the whole populace and around 25% or 289 million Indians need admittance towards power albeit the power area has been at the centre of India's liveliness strategy. By way of it realized that improvement of the power area is firmly combined with India's energy strategy objectives of all-inclusive energy admittance and energy security. As indicated by IEA, 2011 India had as of now assembled the world's fifth biggest introduced limit with respect to control age starting at 2009 and nearly significantly increased power age from 289-terawatt hour (TWh) toward 899 TWh after 1990 to 2009". However, its per-capita control operation stays on only one fifth of the world usual and 7% of OECD nation's level, showing the pure size of problems looked through the Indian government in fostering this significant area.

Today the power area in India actually experiences the very issues, for example, –financial non reasonability and lacking speculation and it additionally now faces a genuine fuel deficiency.[9]The current change strategies won't be sufficient to get dependable, effective power since dispersion change has not been finished.[10]

- **Renewable Energy**

Renewable Energy is gotten from regular cycles that are recharged continually like daylight, wind, rain, tides, waves then geothermic hotness then is climate agreeable. Additional it can give energy security and offers appropriated arrangements. Environmentally friendly power has capacity to manage the developing trouble over unpredictable utilization of petroleum derivatives and its effect on environmental change. Since environmental change has become the overwhelming focus in the homegrown and worldwide arrangement field it has turned into a principal plan of India's

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[9] India energy Outlook: *World Energy outlook Special Report - 2015*, INT'L EA, Secure Sustainable together (2015)

[10] Rafiq Dossani, '*Reorganization of Power Distribution sector in India*, EP. ELSEVIER 32 (2004)

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energy arranging process particularly concerning lessening the petroleum product promise towards the universal energy outline, also exactly liability as such with maintainable control bases, is a strange test for the creation.

- **Atomic energy or nuclear energy**

Atomic energy could accept an essential part in watching out for India's energy challenges, dealing with tremendous imperatives request prospects, directing carbon releases and updating energy security through the diminished of dependence on external energy sources. One of the fundamental challenges for India is alteration the situation present energy mix which is correct now administered through coal, toward outfit an additional vital proposal of cleanser and legitimate wellsprings of energy. Among the various wellsprings of clean essentialness conversely, with coal and additional oil-based commodities that have been researched, nuclear energy is perhaps the principle strong and sensible wellsprings of energy for gigantic scope then predictable industrialisation and urbanization.

V. ISSUES RELATED TO ENERGY SECTOR

Electricity Sector-There is predominance of public area in the question of power production network which without a doubt brings about biased treatment to the private players and influences non-partisanship of autonomous controllers. The issue connected with abuse sec 11, Electricity Act, 2003.

Tata Power Co. Ltd. Vs. Reliance Energy Ltd[11] stated that: "Power is definitely not an essential product inside the significance of the arrangements of the Essential Commodities Act, 1955 or some other rule. It is, in any case, hard to come by. As the quantity of customers as likewise the idea of utilization has expanded complex, the need of increasingly more age of electrical energy should be given due significance. The Preamble of the 2003 Act, in spite of the fact that discusses improvement of power industry and advancement of

[11] Tata Power Co. Ltd. Vs. Reliance Energy Ltd (2009) 16 SCC 659.

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rivalry, it doesn't talk about fair dispersion of electrical energy. The rules overseeing fundamental and different items in regard whereof the State means to practice unlimited oversight, accommodate impartial appropriation thereof among the shoppers."

Issue in connection Control in fuel supply: However, the Electricity Act, 2003, discusses the advancement of rivalry however actually, it isn't exceptionally viable and just indifferent. There is a need to support the meaning of rivalry to guarantee productivity in energy area and customer government assistance. The drive to change age fragment and to give level battleground, have been lacking by means of coal and gas area stays below predominance of administration.

Issue in connection Liberalization of Retail Supply level: The opposition in trade supply in power include the event of numerous retail wholesalers of power after whom the purchaser container pick contingent on their prerequisites. Albeit the Power Act accommodates various dissemination proprietors, the appropriation business yet it had been held as a restraining infrastructure toward keep away from repetition of resources then inefficient consumption.[12]

Bihar State Electricity Board v. Bihar State Human Rights Commission, (AIR 2013 pat 11), the court held that the power is a flat-out prerequisite of lifetime and intentional inability toward source power is infringement of common freedom cognizable through the suitable discussion under security of Human Rights Act, 1993.

Coal sector- Coal sector concerning non - employed of Coal Blocks and Mining Licenses, CIL doesn't welcome scratch-off and State-claimed undertaking getting any advantages or special treatment not accessible to different firms which seem to restrict rivalry in the coal area.

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[12] http://www.circ.in/pdf/Electricity_Sector.pdf

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According to the Section 11[13] of the *Coal-Bearing Parts (Acquisition and Development) Act, 1957,* obviously state-possessed ventures work in the business sectors, get assistances and special action not accessible toward different companies. By way of obviously for the most part the squares proposed toward secluded companies aimed at hostage removal are of low excellence and are not amiable toward financial turn of events.

There is detachment of information on extractible ember assets and deficient information then for private players then it forces the limitations scheduled the capacity of certain kinds of providers toward give a decent or else administration then companies in the marketplace experience the ill effects of the inconsistent utilization of regulations or guideline.

This area is dependent upon guidelines and approaches, that are expensive tedious, and habitually change henceforth makes level of strategy vulnerability which in indirect manner makes block rivalry.

Oil and Gas Sector- In the case of CIT V Enrol Oil and Gas India Ltd[14] "all-natural gas saves and removed items will be constrained by government up until the place of conveyance on land firm it was additionally held that force of the public authority to privatize and extricate flammable gas is dependent upon established thought and auxiliary instrument, for example, the PSC and no private understanding can encroach upon something very similar.

The issue related evaluating of gaseous petrol is worry, in the approach the opportunity to conclude costs on a cutthroat offering and a safe distance premise has been given however last endorsement from the public authority is as yet required. However, there is little flexibility to change controlled gas costs in agreement mechanical improvement and so forth This example has become very clear in the new slew of requests from RIL to raise the cost of gas from its KG-D6 block as the choice to re-examine the valuing component

[13] Power of Central Government to direct vesting of land or rights in a government company
[14] CIT V Enrol Oil and Gas India Ltd (2008) 305 ITR 75

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and costs of petroleum gas was taken and the new equation will be presented beginning April 2014.

Renewable Energy- The issues connected with Flexible Demand and Supply Resources: At present as there are no components in India to determine the quantity of adjusting assets required and how these can be acquired and dispatched. High portion of Renewable energy expect admittance to adequate adaptable assets such turbines, hydroelectricity, request reaction, gas and so on to guarantee proceeded with dependability of the framework at every second.

Issue in relation viability Gap Funding (VGF): VGF conspire regular reason of an is to further down the capital expense at venture stage bringing about diminished hazard discernment by loan specialists, bringing of taxes and advancement down to the area. As of now, practically unusual VGF conspire being presented for solar power projects, VGF instalments are spread over a time of 6 years, with a plan to inspire project execution. Hence, the plan doesn't really bring about lower forthright capital expenses, and as a rule like age-based impetus plot, with the exemption that VGF sums are chosen through a cutthroat cycle, and the instalments are not explicitly connected to measure of force create.

Atomic Energy: The nuclear power sector has stayed the selective predominance of the Government and this isn't probably going to change sooner rather than later. Atomic Power Corporation of India Ltd. (NPCIL) is the main the sole administrator of NPPs, there will be extremely less private investment as merchants, hardware providers, minority investors and workers for hire.

In present situation the job, capacities, and asset base of the Atomic Energy Regulatory Board (AERB) expected to be to be searched again for meeting the new necessities. It comes to solar power generation India is in a one-of-a-kind position, considering the quantity of radiant days it gets in a year, and still, after all that neither sun oriented nor wind or hydro can be considered

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as base burden power sources. Atomic stations don't rely upon the breeze rose designs, streams, number of bright days of the year, concerning atomic power, right now KNPP is the most serious atomic undertaking in India as far as the expense of force delivered.

VI. INTERNATIONAL PERSPECTIVE

"Any debate emerging out of or corresponding with the impact of environmental change and environmental change strategy, the United Nations Framework Convention on Climate Change ("UNFCCC") and the Paris Agreement".

India is a signatory to the United Nations Framework Convention on Climate Change (UNFCC). India tracked down it bothersome for global endeavours to lay out a universally restricting system to control fossil fuel by-products, expressing that –most emanations were delivered by created nations and that India needs monetary turn of events and industrialization. Per-capita outflows of India, only 33% of the world normal and it is around 14% of per-capita discharges of OECD part nations. India played a significant job in the G77 during the COP 15 out of 2009. In 2008, India announced its National Action Plan on Climate Change, and during COP15 in Copenhagen in 2009, India 's climate serve again affirmed its –goal to lessen fossil fuel by-products per unit of GDP by 20% to 25% under 2005.

The oil and gas sector has been an essential objective of defendants; notwithstanding, environmental change and supportability debates hazard are presently not simply an oil and gas issue - claims have been brought against an assortment of energy related organizations (specifically including sustainable power projects, however an assortment of different models are given beneath). Claims are additionally being brought against numerous different enterprises.

The Paris Agreement laid out the worldwide environment strategy targets to "hold the expansion in the worldwide normal temperature to well

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underneath 2°C above pre-modern levels and to seek after endeavours to restrict the temperature increment to 1.5°C above pre-modern levels" and "accomplish a harmony between anthropogenic discharge by sources and expulsions by sinks of ozone depleting substances in the last part of this century" (Articles 2 and 4, UNFCCC, 2015). There is a wide and developing agreement that the power area plays a fundamental part in accomplishing decarbonisation of the economy. Power generation requirements to move to low-carbon advances, depending on a different scope of mechanical arrangements (both unified and decentralized) and a change should be produced using direct petroleum derivative purposes towards greater power proficient ones. The subtleties of this 'low-carbon jolt' will contrast from one country to another contingent upon topography, assets, level of incomes and existing framework. The IEA's 2-degree viable situation (2DS) projects a 79% increment in power interest among now and 2050; the portion of power in the last energy blend would develop from 18% to 28% over that period. Power interest from transport would likewise fill fundamentally in this situation, adding up to near 7% of complete power interest by 2050.

VII. ELECTRICITY GRID

The electric grid has forever been fairly adaptable to fulfil variable power need in each moment. Be that as it may, expanding inconstancy and inclining necessities presented by a cleaner, more current power framework implies framework adaptability is ready to turn out to be increasingly significant. Luckily, there are numerous choices accessible to increment network adaptability temporarily, as well as the long term.

Transient fluctuation has been dealt with by a generally little equal market for "subordinate administrations," which ordinarily contain something like five percent the exchanges in a power market.[15] These auxiliary services advertise regularly incorporate items intended to help framework adaptability and possibilities, however the essential worry of by and large

[15] Mike Hogan, "*What Lies 'Beyond Capacity Markets*" (Brussels, Belgium: Regulatory Assistance Project, (August 14, 2012).

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power markets has been to guarantee sufficient age supply is dispatched arranged by most minimal expense to fulfil generally speaking power need. This gives next to zero spotlight on the worth of progressively matching interest to accessible stockpile, and just minor regard for choosing supply with sufficient capacities to give grid adaptability.

In changed power markets it will be essential to think about how to guarantee the market conveys sufficient adaptable limit in later years. Some changed power markets have presented limit markets close by their energy and auxiliary assistance markets to address worries over asset sufficiency.

Generally, the report observes that there are 3 key challenges that should be answered to by chiefs to construct a future matrix that conveys spotless, dependable and reasonable energy:

- Innovation and Infrastructure: There are expanded complexities and actual imperatives to the framework because of the reception of new, discontinuous advances and dispersed age. The conventional power matrix is developing into a more mind-boggling network that is turning out to be more difficult to configuration, work, and make due.

- Institutional Arrangements: The ordinary, focal utility model is being tested by reviving patterns toward conveyed, nearby, and self-generations. The unified, hierarchical way to deal with working the lattice is being tried and the job of the traditional utility is being brought into question.

- Power Pricing And Equity: Electricity valuing and value concerns are emerging, as the scale-up of new age and framework innovations, and movements toward new age models, are bringing up issues about appropriate and even-handed taxes, cross-endowment, and cost troubles.

Smart Grid Technology in India has a certain outline of changing the Indian power framework from innovation-based norm to execution-based norm.

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The Ministry of Power (MoP) took part in the SMART 2020 occasion with "The Climate Group" [16] and "The Global e-Sustainability Initiative (GeSI)" in October 2008 which intended to feature the reports pertinent to enter partners in India [17]. Tragically, the conceivable "way forward" has not yet been penetrated out and is as yet a question mark for the Government. However, to work with request side administration dispersion networks has been completely expanded and overhauled for IT empowering, which has improved the framework network with corrected client care. It is proposed that there should be more than adequate Government administrative help and strategy drives to move towards Smart Grids.

VIII. CONCLUSION

In this paper we have analysed the structure, issues and Challenges of energy sector. In India, where there is the politically awareness, so it might invest in some opportunity to develop for powerful strategies in the energy sector. As in India the interest for power is expanding step by step which requires immense speculation additionally requests better coordination between public framework and state power sheets. Further duty structure in power area needs to fill in such a way consequently it might satisfy the approaching new difficulties in the energy area. Nowadays 's prerequisite is the toward proceeds a change in outlook after source ruled way toward deal with by and large energy productivity approach which is expected to satisfy the energy interest. Thus, in such manner Energy Conservation Act is achievement which manages protection of energy as per it is fundamental that every last single of us is resolved to involve the liveliness in effective manner and not toward squander it in the parts connected with modern, rural, business or households.[18]

The decrease in line misfortunes to beat winning influence deficiencies, work on the dependability of supply, influence quality improvement and its

[16] The Climate Group http://www.theclimategroup.org
[17] Ministry of Power, Government of India, http://powermin.nic.in
[18] S L Rao Legal Summit: *'Issues in the Power & Energy Sectors –The Power Sector and Competition Law'* Indian Power Producers Association. (2008)

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administration, protecting incomes, forestalling burglary and so on Model design as well as India's Smart Grid drives taken by the public authority and numerous private bodies.

As of now energy area in India rotates around coal subsequently broadening of energy area is important to expand its modern and financial development and care for the need of natural results so it is fundamental that India ought to diminish its reliance on petroleum derivatives and it should begin its tendency towards non-customary wellspring of India as it radiates less ozone harming substances in contrast with ordinary wellspring of energy. It is relevant to take note of that India should begin utilization of manageable energy which neither hampers its financial development nor impact the climate. Along these lines, India needs to habitually haggle between diminishing its fossil fuel by-product and supported financial development. Thus, thermal power ends up being a possible option as it has a developed atomic industry and India has created atomic innovation throughout the long term. Along these lines, thermal power is a reasonable wellspring of energy assuming that it utilized in legitimate manner and would extensively diminish all out-fossil fuel by-products in India.

It is about time that structure up the strong regulative arrangements is begun that cover all the subsectors of energy including specialized, business, functional, managerial, preservation, natural, security, lawful and market related angles with generally speaking public improvement plan in centre. Energy regulations are expected to be expressed with greater clearness and centre leaving a bad situation for ambiguities in understanding. The extent of each regulation and guideline should be plainly spelt out so that normal and beneficial outcomes should be visible. The regulations should likewise fuse the arrangements for pay and lawful activities.

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TRANSGRESSION OF THE SOCIO-ECONOMIC RIGHTS OF THE DOMESTIC WORKERS IN INDIA: AN ANALYTICAL STUDY WITH SPECIAL REFERENCE TO THE PERIOD OF COVID-19 PANDEMIC

Tridipa Sehanobis Das*

ABSTRACT

The socio-economic rights, such as right to health, to right to food, to livelihood, to shelter, to social security and maternity benefit, etc. are the constitutional pre-commitments of the state to safeguard these rights. The existing literature reveal that the state faced challenges in protection of these rights, especially of the domestic work force, during the pandemic COVID-19. Loss of livelihood, consequently deprived domestic workers of their right to food, health, security, adequate housing and shelter, etc. and they had to struggle hard for sustaining their lives. The paper tries to point out the utter failure of the state in addressing their grievances in such hard times.

The paper seeks to proceeds with a humanistic approach to redress this situation by recognizing the human dignity of the domestic workers. The government must take spontaneous step to register them under the Social Security Act, 2008 as directed by the Supreme Court until the new Social Security Code is implemented, so that they can enjoy the security and the benefits under the Act. The state has the obligation to provide for a proper redressal mechanism and enable the poor housemaids to access the justice system.

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Keywords- *Domestic Workers, Exploitation, Livelihood, Human Dignity, Directive Principles of State Policy, Access to Justice, Redressal Mechanism.*

I. INTRODUCTION

Domestic work has emerged as one of the growing informal sectors in which huge number of individuals get engaged, constituting a considerable part of informal sector in India.[1] The industry consists of nearly 67 million of people across the globe.[2] Around 80% of the domestic workers are women. Such ignorance and under-protection aggravated during the COVID-19 Pandemic. The greatest drawback of the domestic work industry is that it takes place according to the terms and conditions of the employers, where the worker has negligible say. The domestic workers, have been one of the worst sufferers during the pandemic, when their employers sacked the domestic workers from their job considering them as the carriers of the virus as well as to maintain economic security of their own.[3] According to a study conducted in Maharashtra, where 5578 domestic workers were interviewed, 3475 (62%) out of them lost their jobs partly and 1349 (24%) lost their job permanently during the COVID lockdown.[4]

Ironically, this workforce has been responsible for improving the economic stability of their employer, especially the other working women, by managing the household chores. Unfortunately, in the tough situation, they had to borrow money for their survival. Hence, this led to utter violation of their human dignity, their bundles of socio-economic rights ranging from right to

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[1] Govt launches domestic workers' survey, Financial Express, (Oct. 22, 2022, 03:21 PM), https://www.financialexpress.com/economy/govt-launches-domestic-workers-survey/2374070/

[2] Who are domestic workers? International Labour Organisation, (Oct. 24, 2022, 03:41 PM), https://www.ilo.org/global/topics/domestic-workers/WCMS_209773/lang—en/index.htm

[3] India: Impact of Lockdown on the life of Domestic workers: Sample Survey Analysis and Demands for redressal from the Government, International Domestic Workers Federation, (Oct. 30, 2022, 03:21 PM). https://idwfed.org/en/updates/india-impact-of-lockdown-on-the-life-of-domestic-workers-sample-survey-analysis-and-demands-for-redressal-from-the-government?gclid=CjwKCAjwt7SWBhAnEiwAx8ZLagfVhvCZNboFcj1vMlBK5DJz_MdYA5nrAFetq_2u2urRMuodmvod4RoCC7YQAvD_BwE

[4] *Ibid.*

health, to right to food, right to work, to livelihood, to social security, to maternity benefit, and right to housing and shelter. These rights have been internationally recognized as one's human right, classified as socio-economic rights under the International Covenant of Economic, Social and Cultural Rights, 1966[5]. Many of these socio-economic rights have been recognized both as the fundamental rights as well as the directive principles of the state policy. The Supreme Court of India has also recognized these above-mentioned socio-economic rights as integral part of one's human dignity through series of cases[6], which shall be discussed below. It is the constitutional pre-commitments of the state to safeguard these rights. The state is to come up with different policies to guarantee these rights and take up positive actions to protect them. However, there has been a failure in the part of the state to protect these rights of the female domestic workers especially during the pandemic.

Hence, the paper tries to point out the utter failure of the state in addressing their grievances during pandemic. The paper seeks to proceed with a humanistic approach to redress this situation by recognizing the human dignity of the domestic workers ("DWs"). The government must take spontaneous step to register them under the Social Security Act, 2008 as directed by the Supreme Court until the new Social Security Code is implemented, so that they can enjoy the social securities and benefits under the Act. The paper further aims to focus on the redressal mechanism for the domestic workers by suggesting ways for smooth to access the justice.

II. DOMESTIC WORKERS: ONE OF THE MOST NEGLECTED WORKFORCES IN INDIA

As per the 68th round of National Sample Survey (2011-2012) there are approximately 39 lakhs people engaged as domestic workers ('DWs') by

[5] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) art. 6, 7, 9, 11, 12.

[6] Olga Tellis and Ors v. Bombay Municipal Corporation and Ors., 3 SCC, 545 (SC:1985), Peoples Union for Civil Liberties (PUCL) v. Union of India & Others, 4 SCC, 399 (SC:2003), Chameli Singh v. State of U.P., 2 SCC, 549 (SC:1996).

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private employers in household.[7] Out of them 26 lakhs (around 70%) are female Domestic Workers. Though unofficially number might range from 20 to 80 million. According to Self-Employed Workers Association (SEWA), around 4.75 million to 90 million individuals are involved in the Indian domestic work industry.[8] This depicts an underestimation of the said workforce, where exact numbers are not determined.

Considering the work description of the domestic workers, it mainly includes, laundry clothes and extending them, cleaning the table and appliances, mopping the floor, sweeping the stairs and indoor pathways. Sometimes it also includes supermarket run for elementary items, among the other parallel works.[9] Similarly, in some cases the contract of work might extend to cooking for the employer's family and even taking care of the babies or elderly, when the domestic worker is appointed on a full-time basis.

Nevertheless, there is no proper limitation to their work load nor there is a fixed hour of work. It is widely found in practice that the live-in DWs work for a minimum of 15 hours per day, without any day-off,[10] whereas the part-timers generally work in 3-5 different households for nearly 8-10 hours a day. Increasingly, even the labour laws of India provide no regulation for the domestic work industry. Thus, this leave the whole arena of the work to be regulated by the wishes and whims of the employers. They have no specified work time, week-off, breaks, suitable working condition. They don't get

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[7] About domestic work, ILO, (Sept. 19, 2022, 04:43 PM), https://www.ilo.org/newdelhi/areasofwork/WCMS_141187/lang—en/index.htm

[8] Self-Employed Women's Association ('SEWA), Domestic Workers' Laws and Legal Issues in India, Wiego Law & Informality Project, November 12, 2014, (Sept. 21 2021, 09:09 PM)., http://www.wiego.org/sites/default/files/resources/files/Domestic-Workers-Laws-and-Legal-Issues-India.pdf

[9] Cook and Maid: What's the Difference Between Roles?, Smart Helpers Centre, (Aug 28, 2022, 09:14 PM) https://smarthelperscenter.co.za/cook-and-maid-whats-the-difference-between-roles/

[10] Divyansh Hanu, Situation of Domestic Workers in India: What needs to change?, The Leaflet, (Aug 29, 2022, 09:14 PM), https://www.theleaflet.in/situation-of-domestic-workers-in-india-what-needs-to-change/

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minimum wage even, as it is not applicable to them. Rather, there is no economic valuation of the labour they contribute, as it is seldom seen as a 'real work'.[11]

Mostly, it is seen that the live-in DWs are employed from the tribal or under-developed rural zones. They are literally conditioned to adapt to unfamiliar environment and go with the elite culture.[12] They have no right to leisure. They are not allowed to use mobile frequently, thus, restricting them from socializing.

The domestic workforce is mainly characterized by the women and children who face deep poverty impact, having no education neither any skill,[13] burdened with family responsibility, being exploited at their homes even. Thus, all these factors accumulate to render the domestic workforce to become powerless and have no bargaining power. Moreover, the competing job market has further weakened their bargaining power. The poor women have no other option than domestic work, being a job of easy access, for survival.

But the irony lies here that, the employers do not realise how they are dependent upon these domestic helpers for their well-being, economic stability and to run their household.[14] DWs have become the necessity now in every house, especially, with the growing number of smart cities. The placement agencies have made their lives similar to a product. The website of "bookmybai.com" showed "Diamonds are useless! Gift your wife a maid".[15] Even the individual employers behave with them inhumanly, which can be

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[11] Uday Shankar, Entitlements of Domestic Workers in India: Welfare or Right, 20, *Recognition of the Rights of Domestic Workers in India: Challenges and the Way Forward* (Upasana Mahata and Indranath Gupta eds. 2019).

[12] *Supra* note 5.

[13] International Labour Organization's Report on "Indispensable yet unprotected: Working conditions of Indian domestic workers at home and abroad" (2015)

[14] Nitin Sinha, Between Welfare and Criminalisation: Were Domestic Servants Always Informal?, (Sept. 12, 2022, 04:12 PM), https://thewire.in/labour/domestic-servants-informal-workforce

[15] *Ibid.*

traced out from several cases in the past and even now. They easily become victims of distrust, when anything is missing at home. Consequently, they also fall pray of violence, interrogation, threats, etc. In 2017 a shocking incident did take place in Noida with one Zohra Bibi, a domestic worker. She was found in an unconscious manner in the basement of the society in which she worked. After investigation it was known that she was terribly beaten up by her employers with an allegation of stealing money. They become the victim of violence and sexual abuse easily. All these they have to face just for a livelihood, to manage their basic necessities, food and stable health.

III. POSITION OF DOMESTIC WORKERS IN INDIA DURING COVID-19 PANDEMIC

With the outbreak of the COVID-19 pandemic, the already deprived DWs' lives are at stake. The ddomestic work industry has enabled number of poor deprived women to enter the labour marketplace and secure economic stability. While the COVID-19 disease has devastatingly affected the livelihood of all the people working in the informal as well as in formal sectors, the condition of DWs has been beyond imagination.

- **Loss of Job**

As the novel coronavirus started spreading, initially a total lockdown was imposed, when many of the labour class people lost their jobs. Among these, DWs were the worst sufferer. They were sacked from the job and asked to go for unpaid leave until further notice. With the imposition of restrictions on the movement throughout the entire country, the gated societies and housing complexes barred the entry of DWs in their premises.

- **Economic Hardship**

As per a field study conducted in 3 major cities of the country (Mumbai, Kochi, Delhi), the major interim effects of the pandemic on the DWs have been the difficulty in paying rents, exhaustion of the hard-earned savings, and borrowing of loans from relatives or money lenders, while the enduring

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impact on them involves the job loss and financial uncertainty.[16] The study concerns 260 respondents. According to the data gathered from them, 10% of the families of the respondents severely suffered from debts, whereas about 11% of the families had to sell their personal resources and belongings for sustaining life.[17] Another study was conducted by an NGO in Kolkata, West Bengal, concerning the condition of the DWs during the Pandemic.[18] It was conducted between June-August, 2020. The study portrays a similar condition of the women DWs. Most of the respondents failed to secure wages after March, 2020.

After the lockdown started, they were asked to stay at home and leave the job till further notice. The domestic workers faced immense economic hardship and even the family members were in the informal sector, who also lost their job. The question of their survival came to a stand-still. Only the civil society's contribution and banks loans have been their saviours. Resultantly, they stuck in heavy dues. Owing to the deep economic crisis, their living conditions had degraded, they could not afford their children to continue the tuition classes.[19] They were heard saying, "*Didi, hum toh apni kamayi se ghar chalate the, ab lag raha hai bheek maang rahe hain* (Sister, we used to run the house with our income. But now it feels like we've been reduced to begging)".[20]

- **Overburdened and Exploited**

After the total lockdown was lifted and unlock process was initiated, the employers were still reluctant to call them back for work, subject to the reasons, like, fear of the COVID-19 disease, reduced income of the family.

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[16] B. S. Sumalatha, et. al, Impact of Covid-19 on Informal Sector: A Study of Women Domestic Workers in India, 69 (3) *TIEJ* 441, 442 (2021).

[17] *Ibid.*

[18] Parichiti, Domestic Workers' Access to Secure Livelihoods in West Bengal, The Centre for Internet & Society, (Oct. 03 2022, 05:52 PM).https://cis-india.org/raw/parichiti-domestic-workers-access-to-secure-livelihoods-west-bengal.

[19] *Ibid.*

[20] Shruti Batra, et. al, Don't neglect the domestic worker, Indian Express (Sept. 17, 2022, 08:09 PM), https://indianexpress.com/article/opinion/domestic-workers-covid-19-lockdown-7362123/

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Few of the domestic workers who were called back to join they were highly subjected to exploitation and 50.4% experienced reduced salary, augmented workload pressure and so on. An activist and also the general secretary at Shehri Mahila Kamgar Union, namely, Anita Kapoor, reported that the COVID-19 pandemic has robbed them of whatever little liberties they had before it.

A study on the domestic workers during the pandemic also revealed that the domestic workers in New Delhi were being made to work strenuously even asked for overtime duty during the pandemic, with any additional remuneration and charges.[21] They were deprived of their right to leisure. These conditions were certainly termed as modern-day slavery by some specific human rights groups.

- **Discrimination, Violence and Stigmatization**

It was also found that more than half of the respondents faced stigma and discrimination at workplace as they were considered as the carrier of the virus.[22] Reportedly, the respondents faced increased domestic violence, and strain in marital relations and impairment of self-respect for their deprived economic independence. This deteriorated the DWs mental condition and rendered them helpless and frustrated.

- **Unable to Access the Basic Necessities**

According to the study, the domestic workers in Delhi, Kochi, Mumbai and Kolkata struggled to obtain the basic necessities and even the Public Distribution System was inaccessible.[23] Another study conducted by B.S. Sumalatha et. al. revealed that half of the respondents were unable to access the healthcare facilities,[24] while the respondents of Parichiti in Kolkata

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[21] How COVID-19 Worsened Hardships of India's Domestic Workers, https://thewire.in/rights/how-covid-19-has-worsened-hardships-of-indias-domestic-workers

[22] B. S. Sumalatha, et. al, Impact of Covid-19 on Informal Sector: A Study of Women Domestic Workers in India, 69 (3) *TIEJ* 441, 442 (2021).

[23] *Ibid.*

[24] *Ibid.*

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replied that the public health system were not reliable, as the resources there were inadequate to meet the basic need even.[25] Similar findings were figured out from the survey conducted by The National Domestic Workers Movement (NDWM) Maharashtra. It highlighted in its report about the non-functionality of the public transport system during the pandemic, which exaggerated the difficulties of the DWs in Maharashtra. They could not access the public health system for non-availability of transport system. Resulting into 100 per cent loss of their health security.[26]

Though they started joining back their job in June 2020, after the lockdown restrictions were relaxed, but still they faced several barriers, like, dysfunctional transport system, restrictions in complexes, etc. These DWs are being more affected by this pandemic owing to the nature of their work, that is to take place inside the house of the employer. In the second wave the matters of focus were, collapsing healthcare system and oxygen crisis, ICU and emergency cabins, plasma and crematoria. Whereas the rights and concerns of the deprived domestic workers went unnoticed.

IV. CRITICAL ANALYSIS

Before the mid-19th century, the modern constitutions basically emphasised on the civil-political rights, like, the right against exploitation and discrimination, freedom of speech and expression, association, religion, right to life and so on. These are also known as 'first generation' rights.[27] All these rights are very much integral for one's life and so is for the DWs. However, in the mid-19th century, it was realised that the first-generation rights,

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[25] Parichiti, Domestic Workers' Access to Secure Livelihoods in West Bengal, The Centre for Internet & Society, (Aug. 30 2022, 05:52 PM).https://cis-india.org/raw/parichiti-domestic-workers-access-to-secure-livelihoods-west-bengal.

[26] India: Impact of Lockdown on the life of Domestic workers: Sample Survey Analysis and Demands for redressal from the Government, International Domestic Workers Federation, (Oct. 30, 2022, 03:21 PM), https://idwfed.org/en/updates/india-impact-of-lockdown-on-the-life-of-domestic-workers-sample-survey-analysis-and-demands-for-redressal-from-the-government?gclid=CjwKCAjwt7SWBhAnEiwAx8ZLagfVhvCZNboFcj1vMlBK5DJz_MdYA5nrAFetq_2u2urRMu0dmv0d4RoCC7YQAvD_BwE

[27] Spasimir Domaradzki, et. al, Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse, 20 Hum. Rights Rev., 423, 424 (2019).

fundamentally guaranteeing individualistic freedom, turns out a blind eye to the social and economic justice. Consequently, the ordinary people's lives may be dulled by long stretch of working hours, meagre wages, workplace harassment and exploitation, inhumane and arbitrary terms of working condition, job insecurity, uninformed dismissal and employment crisis, lack of housing and access to education and healthcare system.[28] Therefore, since the late 19th century, the democratic constitutions also put similar emphasis on the positive entitlements of the people, which would save the workers from the harassment and exploitation of the employers and make ways for access to elementary education, food, adequate shelter, healthcare facilities and opportunities for earning livelihood. These positive entitlements are recognized as the 'socio-economic rights' or the 'second-generation rights', where state is a duty-holder. [29] After the Second World War, international conventions, like, the Universal Declaration of Human Rights (UDHR), 1948 and the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 gradually initiated to integrate socio-economic rights.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965 and the Convention on the Rights of the Child (CRC), 1989. Particularly, Hours of Work (Industry) Convention, 1919; Forced Labour Convention, 1930 along with its Protocol of 2014; Abolition of Forced Labour Convention, 1957; Equal Remuneration Convention, 1951; Discrimination (Employment and Occupation) Convention, 1958, Minimum Age Convention, 1973; Worst Forms of Child Labour Convention, 1999 have by and large incorporated different provisions relating to socio-economic rights and paved way for labour rights protection. India has ratified all of these conventions, thus, under an obligation to safeguard the socio-economic rights of the all workers.

The Constitution of India has guaranteed the civil and political rights in the form of fundamental rights, which are justiciable. It includes most significant

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[28] Social and Economic Rights, IDEA, (Sept. 25, 2021, 11:19 PM, https://www.idea.int/sites/default/files/publications/social-and-economic-rights-primer.pdf.

[29] *Supra* note 18.

right to life[30], which includes almost all the socio-economic rights in its ambit, right against exploitation[31] and discrimination[32], right to equality[33] and so on.

Besides the constitution has also guaranteed the socio-economic rights in the form of Directive Principles of State Policies (DPSPs).[34] The preface of the constitution, that is the Preamble seeks to thrive for socio-economic justice. The significant provisions in part IV of the constitution that safeguard the workers are, ensuring of socio-economic and political justice and welfare state,[35] right to adequate livelihood,[36] right to equal pay for equal work,[37] right to protection of strength,[38] maternity benefit,[39]right to work and public assistance,[40] public health and safety,[41] participation in the industrial management,[42] etc. Though these DPSPs are not enforceable in the court of law but the government has to keep these in mind while framing the policies.

The state has given effect to these socio-economic rights through various legislations like, the Minimum Wages Act, 1948; the Employees Compensation Act, 1923; the Employees State Insurance Act, 1948; the Maternity Benefit Act, 1961 the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and so on. But unfortunately, the domestic workers have not been covered under any of these legislations and are excluded from all of these protections and benefits. These raises a question about the socio-economic rights of the domestic workers.

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[30] The Constitution of India, art. 21
[31] Id. At art. 23 and 24.
[32] Id. At art. 15.
[33] Id. At art. 14.
[34] Id. At Part IV.
[35] Id. At art. 38.
[36] Id. At art. 39 (a).
[37] Id. At art. 39 (d).
[38] Id. At art. 39 (e).
[39] Id. At art. 42.
[40] Id. At art. 41.
[41] Id. At art. 47.
[42] Id. At art. 43-A.

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However, only two acts have recognized the domestic workers upholding their rights and interest to some extent. Those are namely, the Unorganized Workers' Social Security Act, 2008 (UWSSA) and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

The UWSSA, 2008 basically included DWs as home-based workers.[43] It envisions establishment of Social Security Boards at both National and State level to recommend suitable welfare schemes for the workers in unorganized sector. But on the other hand, the Act provides that only after payment of the requisite amount by the worker, the latter can access the benefit under that scheme. This means contribution by beneficiary himself made obligatory.[44] Moreover the act prescribes no penalty for the exploitation and abuse of the unorganized workers.

The implementation of the act is abysmal as discussed by the Apex court in *Shramjeevi Mahila Samiti* v. *State of NCT of Delhi*[45]. Initially, the National Social Security Board was not established and only after 9 years of the enforcement of the Act i.e., in 2017 the Government of India has constituted the same. The Supreme Court in this case directed the NCT of Delhi to take up a pilot project to ensure that all domestic workers be registered so that they can avail all the benefits as enumerated in the Act including issuance of identity cards. But still no such implementation has been observed. As per a pilot study in the researcher's hometown Siliguri, located in West Bengal, no DW knows about such registration process or about the board.

Nonetheless, according to reports, the States of Andhra Pradesh, Jharkhand, Karnataka, Kerela, Odisha, Rajasthan, Tamil Nadu, Haryana, Tripura and Punjab have involved DWs in the schedule of Minimum Wages Act.[46] Besides, the workers are also enabled to file a suit before the authority concerned in matter of any grievance. In 2019, the Ministry of Labour and

[43] The Unorganized Workers Social Security Act, 2008, s. 2(m).
[44] Id. At s. 10(4).
[45] Shramjeevi Mahila Samiti v. State of NCT of Delhi, SCC OnLine 3680 (SC:2018).
[46] National Policy for Domestic Workers, PIB, (Oct. 24, 2021, 09:10 AM), https://pib.gov.in/PressReleasePage.aspx?PRID=1564261.

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Employment, proposed of considering policy for DW to include them under the National Labour legislation.[47] And as far as the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 it theoretically provides protection to the DWs against sexual assault and exploitation but what about is practical implementation with regard to DWs, is still a question.

We know our constitution guarantees every individual, including the DWs, the equality rights, right to non-discrimination and exploitation, right to life and personal liberty, right to dignified life and admittance to justice system as fundamental rights. But it has not been implemented and extended in case of DWs. On what ground they have been excluded from the protection of those laws? Is there any reasonable classification standard followed for the same? It is very much evident from above, that the DWs are deprived of all the said fundamental rights. This can rightly be said that because of the exclusion from the social welfare legislation like Maternity Benefit Act, Minimum Wages Act, etc. they are also unable to enjoy their fundamental rights.

Concomitantly, fundamental rights have to be channelized through the means of DPSP. As right held by Justice Mathew in his dissent in *Bennett Coleman Co. v. Union of India,*[48] that the concept of equality envisages to minimize the disparities in income and eradicating differences in status, opportunities and facilities not among the individuals only but also among the groups of individuals by guaranteeing satisfactory means of livelihood, endorsing the educational and economic interests of the weaker sections of the society. Particularly, the backward classes like, SCs and STs should be secured against the whims of social discrimination and injustice and other forms of like discriminations.

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[47] Ibid.

[48] Bennett Coleman Co. v. Union of India, SCR (2) 757 (SC:1973).

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In *Keshavananda Bharati* v. *State of Kerala*[49], it was held by the Apex Court that the status of the Directive Principles under Part IV of the Constitution as being supplementary and complementary to the Fundamental Rights under Part III. Further it was observed that the condition for exercising the fundamental rights by the individuals cannot be ensured unless and until the directives are implemented. Hence referring this mechanism, it can rightly be said that, right to work, social safety, social justice, right to equal pay for equal work, humane condition of work, right to rest, leisure and maternity benefit, food, public assistance, early childhood care, promotion of economic and educational interest of the backward classes, etc. that are provided as DPSP under Part IV should be implemented by the state. This is to ensure that the DWs who are neglected in all level, are guaranteed the condition to enjoy their basic fundamental rights like right to human dignity, equality, liberty, health and so on, which they are denied by their employers.

Beside state, the obligation of respecting these rights is also on the employers and other private individuals. They deny the DWs most of the Socio-economic rights resulting into discrimination, exploitation, violation of dignity and equality principles. But this amounts to breach of the constitutional values, as fundamental rights are applicable horizontally as well.

V. RIGHT TO HUMAN DIGNITY AND ACCESS TO JUSTICE AS PROTECTIVE SHIELD

As discussed in the preceding section that exercise of the fundamental rights is vigorously dependent on the acknowledgment of the socio-economic rights. Similarly, the enjoyment of the socio-economic rights can be assured when the fundamental rights of the individual is recognised. In this respect the right to human dignity stands as the most significant one. If the employers and the state respect the dignity of the DWs, the formers inevitably will have to give effect. There are ample number of supreme court judgments which held the principle human dignity is a compact ideal,

[49] Keshavananda Bharati v. State of Kerala, 4SCC 225(SC:1973).

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embracing in itself almost all the whittles of socio-economic rights. Right to human dignity or live a dignified life undoubtedly forms the integral part of right to life under Article 21 of the Constitution.[50]

In *Bandhua Mukti Morcha* v. *Union of India*[51] it was held by the Apex Court that

> *"This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clause (e) and (f) of Article 39 and Arts. 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief."*

In *Chameli Singh* v. *State of U.P.*[52] the Supreme court recognised right to shelter as a part of dignified life. It held the following:

> *"The ultimate object of making a man equipped with a right to dignity of person and equality of status is to enable him to develop himself into a cultured being. Want of decent residence, therefore, frustrates the very object of the constitutional animation of right to equality, economic justice, fundamental right to residence, dignity of person and right to live itself."*

In *Peoples Union for Civil Liberties (PUCL)* v. *Union of India & Others*[53], the Supreme Court upheld right to food as a fundamental life and is a part of dignified life.

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[50] Francis Coralie Mullin v. Union Territory of Delhi, 1 SCC 608 (SC:1981).
[51] Bandhua Mukti Morcha v. Union of India, 3 SCC 161 (SC:1984).
[52] Chameli Singh v. State of U.P., 2 SCC 549 (SC:1996).
[53] Peoples Union for Civil Liberties (PUCL) v. Union of India & Others, 4 SCC, 399 (SC:2003),

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> *"In our opinion, what is of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them."*

With respect to the condition of the DWs in general and during the pandemic in particular, it has been observed that they are severely struggling for food, adequate shelter, healthy working conditions, healthcare access and so on. This tends to deprive them from a dignified life. Hence qualifying their right to human dignity can improve their lives.

Another indispensable right inevitable to protect their socio-economic entitlements is the right to access to justice. Without access to justice system every right of the individual becomes meaningless. In this regard the provision of free legal aid under the constitution is worthwhile to mention. For the enforcement of the rights of DWs the redressal mechanism should be adequate with the mandatory provision of the free legal aid service. In in *Menaka Gandhi* v. *Union of India*[54], the Supreme Court pronounced that if any 'procedure established by law' does not offer for 'free legal aid' for underprivileged and uneducated individuals to guarantee fair depiction before court, it cannot be regarded as just, fair and reasonable procedure. The Apex Court expanded Article 21 to include free legal aid provision in its ambit.

The Boards under Unorganised Workers Social Security Act, 2008 are near to inoperative. No data regarding its working and initiatives are available, neither the DWs knows about any such board. Thus, an utter failure, where the beneficiary is unknown about its existence.

VI. CONCLUSION AND WAY FORWARD

The Constitutional promises socio-economic advancement and securing of justice is to every Indians. But in practice, it has evidently become very

[54] Menaka Gandhi v. Union of India, AIR 597 (SC:1978).

difficult pledge to fulfil as we see the condition of different deprived class and the DWs here. The DWs' socio-economic rights has totally remained unnoticed and even in the pandemic they were not extended any benefits either. How the state is turning a blind eye to their grievance is a serious question. The state should take adequate steps to extend the benefits of the welfare state to the DWs as well. The new Social Security Code, 2020 has also included the DWs in its ambit for being the beneficiary under the code but the provisions look quite similar to the existing Unorganised Workers Social Security Act, 2008 (UWSSA).

Hence again it comes to the extent of implementation. In this case it is suggestive that, when state is theoretically willing to go for an inclusive welfare of all the classes of workers, it should make it possible in practicality as well. The state must initiate to register the all the DWs so that they can obtain the benefits under the UWSSA. This can be possible through an independent implementation body. As well as a widespread awareness about the Act and the schemes should be there, so that the actually beneficiary are not deprived of it.

Besides, the total domestic work industry should be regulated as the other industries are done. The contract of the employment of the DWs should be a registered one as per the rules of the government that will prescribe for maximum hours of work a day, weekly day-off, minimum wages, medical benefits, maternity benefits and hygienic condition of work. This will profoundly safeguard the socio-economic rights of the DWs.

Over the past few decades, it is observed that the Supreme Court of India has played a pivotal role either through idiosyncratic brand of public interest litigation (PIL) or by suo-moto action or otherwise to crucially protect and recognise the rights of the workers especially of the unorganised sector as discussed above. In COVID-19 pandemic too the court has deliberately taken positive actions to protect the rights of the individuals. In *Reepak Kansal* v. *Union of India & Ors*,[55] the Apex Court of India ordered the National

[55] Reepak Kansal v. Union of India & Ors., (Civ.) No. 554 of 2021 (SC:2021).

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Management Authority to frame guidelines for compensatory assistance to the distressed families who lost their family member due to the COVID-19 pandemic as per the mandate under Section 12(iii) of Disaster Management Act, 2005. This particular provision of the said act provides for minimum relief to the people who are affected by disaster or pandemic. But if only one wing of the state works actively and the other remains disinterested, all the efforts of the former will go in vain. So, the executive and legislative bodies along with the judiciary have to take active steps to collaboratively upheld the rights of the DWs. The DWs right to access to justice and human dignity have to be strengthened initially in this regard.

The outcome of the study 'Remunerated Domestic Workers in Latin America and the Caribbean and the COVID-19 crisis' can be considered for the purpose of the study. The points that were highlighted in the study to alleviate the socio-economic and health predicaments triggered by the pandemic on domestic workers are as under:[56]

- Promoting measures to ensure the continuation of employment of the domestic workers.
- Expansion and promotion of benefits for the domestic workers in case of loss of job.
- Development of health and security rules particularly for the domestic work sector.
- Encourage the formalization and ratification of the domestic work sector.
- Development of an all-inclusive social security and protection schemes.
- Endorse the right to collective bargaining and social dialogue.
- Initiate digital exercise and the monetary inclusion of domestic workers.

[56] UN urges protection of domestic workers' rights during COVID-19 pandemic, United Nations (Nov. 24, 2022, 09:10 AM) https://www.un.org/en/un-urges-protection-domestic-workers%E2%80%99-rights-during-covid-19-pandemic

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- Guarantee them with access to information and legal aid and conduct awareness programmes.

Last but not the least, according to the researcher, the employers should also become an agent of positive transformation and ensure the domestic workers with dignified working conditions. If the employers do not take optimistic action in individual level ensuring minimum wages for DWs, week-off, health insurance scheme, sick or maternity leave, the state alone by making laws and rules cannot guarantee the DWs their socio-economic and political rights as well. Besides, the DWs should have a say in their own sphere of work, which will help in balancing the interest of the workers, employers and the state.

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CASE COMMENT:

MSRTC V. DILIP UTTAM JAYABHAY (CITATION: (2022) 2 SCC 696)

Krishna Prasad B.*

I. INTRODUCTION

The most important asset of a company is its workers. They are the ones who contribute the most to the economic growth and development of the country. They, in turn, receive wages and remuneration for their work done in the company. In order to work efficiently, workers need to avoid conflicts from their employers in order to maintain peace in the company and to achieve the overall goals of the company. Unfair labour laws take into account when employers' actions violate Section 8 of the *National Labour Relations Act ,1935*. The NLRA investigates such acts in order to provide employees with the opportunity to improve their working conditions with their employers by forming unions. The NLRA also establishes rules for union elections, collective bargaining, and other activities. They also prohibit employers from interfering with employee rights in order to achieve balance between unions and employers. Such actions are referred to as unfair labour practices. In order to prevent such conflicts between employees and employers and because employees, labourers, workmen were dominated by employers, several acts through legislation came into existence. Some of such acts include, Industrial Disputes Act,1947, Minimum Wages Act,1948, The Factories Act 1948 and so on. In layman's terms, unfair labour practises are

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deceptive practises used by either employers or labourers to obtain profits that are illegal under the law.

Unfair labour practises are defined in the 5th Schedule, Section 2(ra) of the ***Industrial Disputes (Amendment) Act of 1982***. This Act's 5th Schedule listed certain practises that constituted unfair labour practices, and Sections 25-T and 25-U made provisions for them. Section 25-T addresses illegal unfair labour practices. It states that an employer or worker may not engage in activities that are detrimental to the welfare and peace of the employers and workers. This Section also covers the registration and deregistration of trade unions. Unfair trade practises are punishable by imprisonment, fine, or both under Section 25-U. The Maharashtra Recognition of Trade Unions(MRTU) and Prevention of Unfair Labour Practices(PULP) Act was enacted during 1971 and took effect in September 1975. The Indian government agreed to regulate some businesses in order to achieve the desired level of empathy between employees and employers. The goals of this Act are to give recognition to-

1. The labour unions
2. Encourage collective bargaining
3. Protect workers from unfair labour practices.

Similarly, *Prevention of Unfair Labour Practices (PULP) Act enacted in the year 1971* was sanctioned by the Indian government for industry regulations in the country to achieve the goal of empathy between employee and employer This act takes into account the frequency of strike, lockout, illegally declared, economizing, and terminating a worker. In such cases, the Industrial Act and other issues between employee and employer can be closely related. The objectives of this act include:

- To Provide rights for trade unions
- To put an end to labour disputes

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- To protect against specific ULPs
- To provide notification of lockouts and strikes
- To grant authority to unrecognised unions
- To provide unions with protection
- To give trade unions consensus recognition
- To put this act into effect

Apart from the conflicts, sometimes employers might get greedy and try to exploit the employees by using unfair labour practices. In the instant case, Dilip Uttam, a driver at Maharashtra State Road Transport Corporation (MSRTC) was accused of driving negligently and rashly. He was booked under sections 279 and 304A of Indian Penal code and was also subjected to disciplinary enquiry by the board of MSRTC. While the criminal proceedings were pending before the trial the disciplinary enquiry got concluded and he was dismissed from the service because of this incident. When the order of dismissal was challenged in the Labour court, the court upheld the order of dismissal. Not all cases amount to unfair labour practices, let us now analyse the judgements given by the High Court and Supreme Court.

II. HISTORICAL BACKGROUND AND FACTS:

The respondent, a bus driver for the MSRTC, was involved in a collision with a jeep that was traveling in the other direction on October 23, 1992, while operating a bus. The respondent-driver was accused of taking the bus far to the right of where it should have been going, which caused the jeep and bus to collide. Four passengers died immediately as a result of the collision, while six others suffered critical injuries. The collision's force was so great that the jeep was thrown back nearly 25 feet. Injuries were also sustained by the jeep's driver. The respondent driver was booked for rash and negligent driving under IPC and the case was pending before the trial court. By the time, he was dismissed from service after the disciplinary enquiry concluded. When he challenged the order of dismissal the Labour court upheld the

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dismissal order. Later he was acquitted for the charges under IPC and was held innocent since prosecution cannot prove him guilty. In a revision request, the Industrial Tribunal exercised its authority under item 1(g) of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, and determined that the dismissal order was excessive given the misconduct that had been established and that the respondent had been found not guilty in criminal proceedings. As a result, the Tribunal mandated the respondent's reinstatement with no back pay but with continued employment. The appellant-MSRTC contested the Tribunal's ruling in front of the High Court. By the contested decision and judgment, the High Court not only dismissed the appeal but also ordered the appellant to pay the respondent's back earnings with effect from January 1, 2003, until May 31, 2018, or the day of his superannuation. The respondent should also be eligible for retirement benefits based on continuity of employment; the High Court further ordered. In the case of *Samar Bahadur Singh Vs. State of U.P.& Ors*[1]. The court held that the facts of the departmental procedures shall not be affected or related to by the criminal case's acquittal because the burden of proof in the two cases is entirely different. In contrast to departmental processes, where the department simply needs to prove the preponderance of the evidence, criminal cases require the prosecution to prove their case beyond all reasonable doubt. In this instance, we discover that the department was successful in establishing its case by a preponderance of the evidence.

III. ISSUE

Is dismissal from service in and of itself an unfair labour practice because it is disproportionate to the misconduct proven?

IV. JUDGEMENT

The instant case took a span of over 30 years having seen the footsteps of different courts of laws including the Hon'ble Industrial Tribunal, the

[1] Samar Bahadur Singh vs. State of U.P.& Ors., (2011) 9 SCC 94.

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Hon'ble Trial Court, the Hon'ble High Court of Bombay, and the Hon'ble Supreme Court of the country.

Industrial Tribunal

The Industrial Tribunal observed for the reasons that the respondent driver drove the vehicle rashly and negligently, it upheld the order of dismissal by the disciplinary enquiry. Subsequently a revision petition was filed, for the reason that the accused being acquitted for all the charges that he was booked under IPC before the trial court, the Labour court reversed the award given by the industrial tribunal and declared that order of dismissal is void and the driver should get reinstatement without back wages but with continuity of service.

Trial Court

Dilip was booked under sections 279 and 304A of IPC, for rash and negligent driving the vehicle thereby, causing an accident which resulted in death of 4 persons and several injuries to 6 others. The Trial Court held that the accused driver Dilip was innocent because prosecution did not have enough evidence to prove him guilty.

High Court

The appellant chose to appeal the industrial tribunal's decision to the Hon'ble High Court of Bombay. The Hon'ble High Court not only dismissed the petition, but also ordered MSRTC to pay back wages from 01.11.2003 to 31.05.2018, the date of his superannuation. In addition, the Hon'ble High Court ordered that the respondent be entitled to retiral benefits based on continuity of service from the date of his dismissal until his superannuation.

Supreme Court

The Hon'ble Supreme Court in the instant case quashed the orders and judgements given in the revision petition by the Industrial Tribunal and also the writ petition filed before the Hon'ble High Court of Bombay. According

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to the Hon'ble Supreme Court, "Because the standard of proof in both cases is different, and the proceedings operate in different fields and with different objectives, an acquittal in a criminal trial has no bearing or relevance on disciplinary proceedings". The Hon'ble Supreme Court further took reference to the case of *Union of India & Ors. vs. Sitaram Mishra & And*[2], in which the Hon'ble Delhi High Court dismissed a petition filed by the respondent, who was acquitted in the criminal trial but was still dismissed by the disciplinary inquiry.

V. ANALYSIS

Upon the analysis of the judgment given by the Hon'ble Supreme Court, there are multiple observations that can be derived based on this instant case. The Industrial Tribunal and Hon'ble High Court observed that the respondent driver in the instant case was not guilty of offenses he was booked under taking into consideration the findings of the trial court. The Trial Court acquitted the respondent driver because the prosecution was not able to prove the respondent driver guilty. The above courts observed that a person is considered to be innocent until proven guilty and hence found that the driver was not responsible for the accident caused. They observed that the disciplinary enquiry dismissed him because they thought that he was liable for the accident caused. But upon his acquittal in the Trial Court both the above-mentioned courts felt that the driver was totally innocent and ordering an innocent who was not the reason to cause death of 4 persons to dismiss from the service is disproportionate. Disproportionate in the sense that even after he was pleaded innocent by the trial court removing him from the service is something that would amount to unfair labour practice. Item No.1 (g) of Schedule IV of the *Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act,1971 (MRTU & PULP)* states that:

[2] Union of India & Ors. vs. Sitaram Mishra & Anr., (2019) 20 SCC 588.

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1. To discharge or dismiss employees –

(g) for misconduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past record of service of the employee so as to amount to a shockingly disproportionate punishment.

The High Court and Industrial Tribunal observed that the dismissal order amounted to unfair labour practice under Schedule IV item 1 (g) of MRTU & PULP 1971 and held that order of dismissal is disproportionate to the misconduct proved.

On the other hand, the views of the Supreme Court were different. The Supreme Court relied upon various precedents like *Samar Bahadur Singh Vs. State of U.P. & Ors*[3]., and *Union of India & Ors. Vs. Sitaram Mishra & Anr.*[4], where the court ruled that acquittal in a criminal case has no bearing or relevance on the facts of the departmental proceedings because the standard of proof in both cases is completely different. The Supreme court observed that the prosecution's duty is to prove the criminal guilty beyond all reasonable doubt, but in the case of departmental proceedings, only the preponderance of possibilities is important. The Supreme court also felt that both Industrial Tribunal and High Court have laid more stress on acquittal of the respondent rather than the misconduct that has been proved in the departmental proceedings. So even after getting acquitted from a criminal case the disciplinary committee has the power to dismiss a person if the misconduct is proved, and that by itself is essential to dismiss a person from service and such dismissal would not amount to unfair dismissal. In the instant case Schedule IV Item 1 (g) cannot be applied for the reason that the respondent - worker - was found guilty of a specific charge and specific misconduct. The Industrial Court did not even consider the respondent's previous record of service. According to the case of the appellant - MSRTC, the respondent - workman was in service for three years and was punished

[3] Samar Bahadur Singh vs. State of U.P.& Ors., (2011) 9 SCC 94.
[4] Union of India & Ors. vs. Sitaram Mishra & Anr., (2019) 20 SCC 588.

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four times during that time. As a result, it cannot be claimed that the dismissal order was made without regard for the respondent's previous record of service. As a result, the Industrial Court incorrectly invoked clause No.1 (g) of Schedule IV of the MRTU & PULP Act, 1971 with respect to the facts and circumstances of the instant case. The Supreme Court also observed that it is not shockingly misappropriate because every aspect has been considered in the departmental proceedings. Even at the risk of repetition, it is worth noting that the Industrial Court did not overturn the findings of the enquiry officer in the departmental proceedings. As a result, in the facts and circumstances of the case, the Industrial Court committed a grave error and exceeded its jurisdiction by interfering with the disciplinary authority's order of dismissal, which was not challenged by the Labour Court.

VI. CONCLUSION

Unfair labour practices are a common concept in the industrial community, but despite the existence of a wide range of practices that constitute unfair labour practices by an employee, it is important to note that not all actions constitute unfair labour practices by the employer. The instant case is about interpreting Schedule IV of the MRTU and the PULP Act, 1971. Even if it was specifically found in the departmental investigation that the accident occurred due to rash and negligent driving on the part of the driver - respondent, when the punishment of dismissal is imposed, it cannot be said to be shockingly disproportionate punishment. In the departmental proceedings, every aspect 16 has been considered. Even at the risk of repetition, the Industrial Court has not intervened in the findings recorded by the enquiry officer in the departmental proceedings. As a result, in the facts and circumstances of the case, the Industrial Court committed a grave error and exceeded its jurisdiction by interfering with the disciplinary authority's order of dismissal, which was not challenged by the Labour Court. In light of the foregoing, the Bench concluded that the Industrial Court committed a serious error and exceeded its jurisdiction by interfering

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with the disciplinary authority's dismissal order. Similarly, the impugned High Court decision ordering the appellant to pay wages to the respondent could not have been rendered in the appellant's petition. The Bench explained that the relief granted was outside the scope and ambit of the High Court's jurisdiction because it was not a petition filed by the worker. The contested order and judgment were overturned, and the Labour Court's decision and award were reinstated. The dismissal order of the disciplinary authority was upheld.

To conclude an acquittal in the trial proceedings, has no relevance to disciplinary proceedings conducted by MSRTC. One major suggestion is that, in these types of labour disputes High Courts must consider that standard of proof in such cases differ. Trial Proceedings and disciplinary enquiry conducted by MSRTC are two different scenarios. A person acquitted from a criminal case because of lack of evidence does not mean that he has not committed such an act at all. In this present case, the driver had previous cases of driving negligently, so it is the duty of the Courts to see the prospective effect when such a negligent driver is set free. Proof of such an act is irrelevant because it is a well-known fact that the driver has caused death to 4 people and injuries to 6 others. So, if that is the case the Courts must not only look into the decision of trial proceedings but also to look into the enquiry conducted by the respective companies. In these kinds of disputes, it is the enquiry conducted by the companies that have more value over the trial proceedings. To conclude, a disciplinary enquiry will include very particular reasons to dismiss an employee than a trial proceeding. Trial Proceedings cannot be accurate as the standard of proof is difficult to collect. In such circumstances Courts should look into the enquiries conducted to decide upon such labour disputes.

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