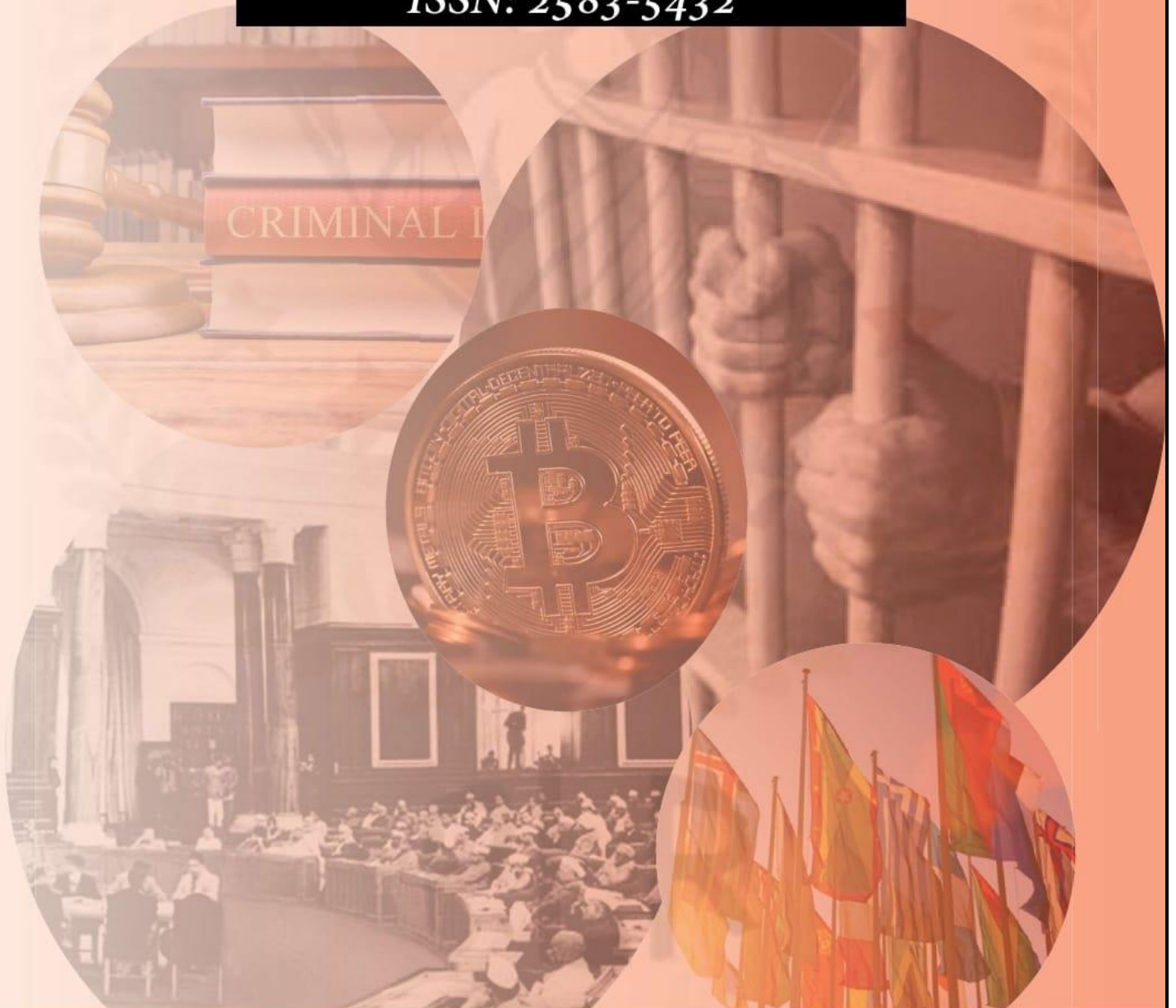




# PRAYAGRAJ LAW REVIEW

Volume 1 Issue 2: Summer Issue

ISSN: 2583-5432



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# Prayagraj Law Review

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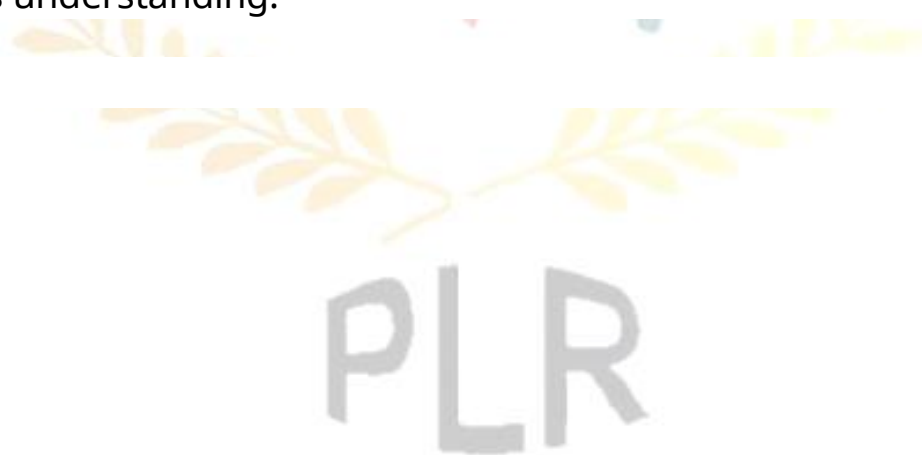
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## About the Journal

**Prayagraj Law Review (PLR)** is an open-themed, double-blind peer reviewed open access journal. It is solely dedicated to expressing opinions on the current perception of law while keeping a tab on the modern jurisprudence and socio-political thinking. It strives to give a proper platform to detailed analytical and research works on topical issues and how they will be shaping a society of liberal and responsible individuals.

PLR brings together prestigious Academicians, Lawyers, Scholars, and Law Students while focusing on the single goal of encouraging research and empirical studies on the new dimensions of law along with a fresh perspective on the classic legal and political dictums. Our team believes in providing opportunities to diverse intellectual pursuits from all the corners of the society to disperse such exchange of knowledge, assessment, and interpretations.

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## **About this Issue**

With the aim of encouraging research temperament among young minds and promoting quality research in the field of law, Prayagraj Law Review was established. Today we proudly and gladly publish this Second Issue titled Summer Issue: VOL 1 ISSUE 2 (2023).

After extensive and rigorous review process followed by our esteemed reviewers through double blind peer review process, out of huge quantity of submissions, Six submissions were able to make their way to final publication categorised under Articles and Short Articles.

First Article titled THE INDO – NEPAL TREATY OF PEACE AND FRIENDSHIP, 1950 : Revisiting the Tale of Two Nations authored by Kratika Kushwah and Abhishek Anand analyzes bilateral trade patterns and evaluates the prospect of maximum extra commerce. A wide range of tremendous bilateral trade concerns is addressed, including tariffs, the sanctions of an agricultural reform charge, the underutilization of the tariff rate quota, non-tariff measures, problems with Rules of Origin (ROO), and physical obstacles to the transportation of commodities across borders.

Second Article titled DHARMA AS LAW AND JUSTICE: RELIGIOUS CRIMES IN INDIA: Combating Hate Crimes: Religion; Yesterday, Today and Tomorrow authored by ARUNIMA PATI and RAJESWARI NANDA attempts to converse the concepts of Religion and Crime in a clear manner before moving on to the concepts in Constitution.

Third Article titled AN EMERGING NEED OF LEGISLATIVE POLICIES IN ORDER TO PROVIDE AND PROMOTE PATERNITY LEAVE BENEFITS authored by Garima Singh tries to emphasize that paternity leave matters because it promotes gender equality, strengthens family bonds, and helps both

parents balance their work and family responsibilities, ultimately creating a more inclusive and supportive society

In the category of Short Articles, First Short Article titled INCREMENTALIST MAKING OF INDIAN CONSTITUTION: A 'Behind the Scenes' Study authored by Ashutosh Mishra to understand the frame of mind of the Constitution makers and how it was dealt with.

Second Short Article titled IMPACT OF PROBATION AND PAROLE ON THE DELBILITATING CONDITIONS OF PRISON SYSTEM IN INDIA – A criminological study authored by Rohit Srivastava and Ishani Yog deals with the importance of two correctional reformatory tools which are probation and parole. It shall contain the conceptual meaning of the two terms and how they originated and became one of the most accepting measures of reformation

Third Short Article titled A COMPARATIVE REVIEW OF TAXATION POLICIES REGARDING CRYPTOCURRENCIES authored by Animesh Pratap Singh and Divyansh Shukla analyze some prominent examples and assess their effectiveness in striking a balance between fostering innovation and ensuring tax compliance.



# THE INDO – NEPAL TREATY OF PEACE AND FRIENDSHIP, 1950: Revisiting the Tale of Two Nations

Kratika Kushwah\*

Abhishek Anand\*\*

## **ABSTRACT**

The relationship between India and Nepal is very old and dates back to a long period before 1950 or the Treaty of Peace and Friendship. Nonetheless, the 1950 Treaty is a particularly important turning point in the relationship and aims to materialise a lofty ideal that has been passed down for decades. Jawaharlal Nehru, the Prime Minister, and His Majesty King Tribhuvan held this vision in the highest regard. It was a depiction of an independent, free, and sovereign Nepal and India that were still inextricably bound by unbreakable links. The India-Nepal Treaty of Peace and Friendship, signed in 1950, is a bilateral agreement between the governments of India and Nepal to forge close strategic ties between the two South Asian neighbours. On July 31, 1950, Chandreshwar Narayan Singh, then-ambassador of India to Nepal, and Mohan Shamsheer Jang Bahadur, then-prime minister of Nepal, signed the Treaty in Kathmandu. The agreement provides unrestricted travel and trade between the two nations as well as close ties and cooperation in the fields of defence and international relations. The treaty has been the subject of considerable debate within the country. A significant part of the left parties' election manifestos in Nepal have addressed this issue, and the issue has become part of bilateral discussions as well. In recognition of the unique features of the bilateral relationship, India has agreed to review, adjust, and update the treaty as appropriate. In light of the changing international environment, the paper examines the significance of the treaty and prospects for India-Nepal relations. The study analyzes bilateral trade patterns and evaluates the prospect of maximum extra commerce. A wide range of tremendous bilateral trade concerns is addressed, including tariffs, the sanctions of an agricultural reform charge, the underutilization of the tariff rate quota, non-tariff measures, problems with Rules of Origin (ROO), and physical obstacles to the transportation of commodities across borders. It also dissects the incentives and constraints for Indian investment in Nepal alongside the dynamics and varying sectoral composition of Indian investment in Nepal. The study concludes by laying forth proposals for boosting trade, removing non-tariff obstacles, upgrading infrastructure to improve connectivity, and increasing Indian FDI in Nepal as a means of advancing economic cooperation between the two nations.

**KEYWORDS:** *Nepal, India, Treaty, Profit, Security, Friendship, Borders, FDI*

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\* B.A.LLB. Amity University, Lucknow

\*\* Assistant Professor, Amity University, Lucknow

## PART I: INTRODUCTION: A CHRONOLOGICAL FRAMEWORK

India and Nepal have always maintained a special friendship and collaborative relationship. The connection that exists between individuals residing in India and Nepal is constituted by an amiable and hospitable border and is centred on historical and contemporary, cultural, linguistic, and ethical ties. Because Nepal is a priority for India under its "Neighbourhood First" strategic approach, dislodging the economic ties between the two nations has enormous significance and potential. There is little literature that examines the economic ties between India and Nepal, even though the political interactions between the two countries have been thoroughly studied. Studying this topic is crucial because India is Nepal's largest export market<sup>1</sup>, largest import source, the top investor in foreign money, and one of the main givers of foreign aid. Ties around India and Nepal have always been cordial, emphasizing the two countries' traditional, geopolitical, artistic, and intellectual ties. The foundation for the special ties between the two nations was laid with the signing of the India-Nepal Treaty of Peace and Friendship in 1950. By commemorating heritage importance and ensuring peace in the region, the treaty was signed to foster closer ties between the two nations. It served as the basis for relations between India and Nepal. Ten articles and a letter of exchange make up the pact. The geographical integrity and sovereignty of each other were acknowledged in Article 1 between the two nations. Following Article 2, they are required to communicate with one another in the event of hostilities with neighbours. Articles 5, 6, and 7 pertain <sup>2</sup>to the importation of weapons into Nepal, the national treatment of the citizens of the other country in economic affairs, and the reciprocal treatment of citizens in areas relating to immigration, protection, and trade. All previous treaties between Nepal and the British government are annulled under Article 8. Renewal and cancellation are covered in Articles 9 and 10 of the agreement. By acknowledging their shared political, economic, sociocultural, and cultural ties as well as their security needs, the contracting parties' goal in signing the treaty was to permanently foster peace and friendship between the two nations. Trade between landlocked Nepal and the rest of the globe is carried out through India. According to K.V. Rajan<sup>3</sup>, the treaty essentially provided Nepalese citizens with economic prospects in India in exchange for Nepalese guarantees that security concerns would be taken into account. When the pact was signed in the 1950s, the global and regional environments were very different from what they are present. The cold war had the world in its tatters at the time. There were three groups of countries in the world: capitalist, communist, and non-aligned. India, a recently independent nation with a feeble military and a history of domestic turbulence, was wary of Chinese adventurism in Tibet. Also, it was concerned about the Communist presence in Nepal. The Chinese assertion that Tibet is China's palm and Nepal, Bhutan, Sikkim, Ladakh, and NEFA are its five fingers infuriated India as well. The security of the other Himalayan nations was in jeopardy

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<sup>1</sup>Trade and Commerce, India- Nepal Relation, Consultant General of Nepal, <https://ccu.nepalconsulate.gov.np/trade-and-commerce/> accessed 2 April 2023.

<sup>2</sup>Treaty of Peace and Friendship Between the Government of India and Government of Nepal, Treaty No 94 UNTS 3, 31 July 1950

<sup>3</sup> K.V Rajan, 'Should the 1950 Treaty be Scrapped?', The Hindu, May 3, 2008

with the palm already in Chinese hands. The contextual relevance intensified after China annexed Tibet. That India decided to gain Nepal's trust as a means to fortify its northern boundary. "*We cannot allow anything to go wrong in Nepal or let that barrier be crossed or weakened because that would also be a risk to overall security, Prime Minister Jawahar Lal Nehru stated in expressing India's worries*".<sup>4</sup> The Chinese claim on Tibet stunned Nepal, which was vying for international recognition and was experiencing domestic unrest as a result of uprisings against the Rana rulers. The establishment and maintenance of the unique relations between the two countries were greatly aided by the external environment of the time, particularly the events in Tibet and China as well as the Chinese acceptance of the Indo-Nepalese relationships. The Ranas were seeking too though a chance to reach some sort of accord with India to stabilize the democratic movements in Nepal that had their origins in that country. Between 1947 and 1950, Rana's stance towards India was determined by his ability to win over Indian backing or deter it from aiding the democratic movements in Nepal, which had their origins in India. The treaty was signed as a result of the shared requirements and interests. The treaty addressed the socioeconomic factors influencing the relationship as a result. For instance, without any restrictions on trade, commerce, or movement within the other country, inhabitants of one country could participate in the industrial and economic developments in the other country (Clause 7)<sup>5</sup>. The provisions were advantageous to both nations, but especially to Nepal given its lack of economic growth and employment possibilities. The swapped letters also included according to the treaty's clear language, Nepalese citizens in India may need to be protected from unrestrained competition for a while (Clause 3). To safeguard Nepali interests, this was done. When it comes to natural resource development projects, Nepal also promised to provide first consideration to the Indian government or Indian citizens. When the nations-built walls to bolster their security, India and Nepal agreed through the treaty for an open border and worked to reunite their societies, cultures, and economies. The agreement may have served as a template for bilateral collaboration in which the signatories capitalised on one another's advantages, but mutual interests and concerns have evolved in both tone and cadence. Since the late 1950s, when a "secret" letter exchanged as part of the Treaty was made public, India and Nepal have been deeply divided over the 1950 Treaty of Peace and Friendship. The leader of an oligarchy, the Rana dictatorship, which was about to be ousted by a democratic movement, signed both this letter and the Treaty. In their final days of power, the Ranas were willing to cooperate with New Delhi and were in dire need of foreign aid for their survival. Political Savant Pt. Jawahar Lal Nehru<sup>6</sup> recognised the potential and scenario it presented right away. The Ranas in Nepal were completely amenable to India's security and business needs. Although that oligarchical dictatorship in Nepal quickly fell, the treaty it had signed has endured, much to Nepal's discontent. The Indo-Nepal Treaty of

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<sup>4</sup>Hari Bansh Jha, '1950 Treaty: A Visionary Approach', South Asia Analysis Group, Paper No. 3815' [2012] South Asia Analysis Group Paper No. 3815,

<sup>5</sup>Ibid

<sup>6</sup>Jawaharlal Nehru, India's Foreign Policy: Selected Speeches (Publications Division, Ministry of Information and Broadcasting Government of India, 1961)

Peace and Friendship, which the majority of Nepalis feel to be unfair, was first brought up in public by Prime Minister Kirti Nidhi Bista in 1969, who referred to it as being out of date and outmoded.<sup>7</sup> The justification given for its revision was India's failure to abide by the treaty's corresponding provisions (Article II mandates that both governments notify one another of any serious disagreement or conflict with a neighbouring state that could jeopardise the friendly relations already existing between the two). The treaty explicitly states that the two governments must comprehend one another and come up with adequate countermeasures to combat the danger posed by a foreign invader. Despite the treaty requiring both parties to do so, India had taken two unilateral steps during its conflict with China in 1962 (along the Ladakh) and with Pakistan in 1965 (the disputed territory of Kashmir) without alerting Nepal on either occasion. Even later, in 1971, India's direct engagement in the fight for Bangladeshi independence against Pakistan without Nepal's knowledge violated a key provision of that agreement. Prime Minister Kirti Nidhi Bista claimed that developments in India's relations with the Soviet Union and the United States on the one hand and the country's violations of some treaty articles on the other. India was not informed of these events, and as a result, neither was Nepal. Therefore, anticipated and has caused Nepal to believe that a need for the dissemination of data regarding such occurrences does not exist. These opinions were published in print media but were not formally communicated to the Indian government to change or repeal the Treaty. As a consequence, the Indian government did not respond to this. The treaty became a significant election issue for some political parties in Nepal with the advent of multi-party democracy in 1990.<sup>8</sup> The first official call for the reform of this treaty was made by the Communist government of Nepal in 1994–1995 at that time. However, it was in 1996, with the beginning of the Maoist Insurgency in Nepal,<sup>9</sup> that the need for a treaty modification grew in popularity. This issue was a key component of the Communist Party of Nepal's (Maoist) 40-point demands<sup>10</sup>, which led to strong anti-India sentiments during the people's war in Nepal. In September 1997, Nepal's Foreign Minister Kamal Thapa travelled to India with a "non-paper" that for the first time outlined some suggestions for the treaty's amendment. Most recently, the CPN-Maoist pledged to annul the treaty and ensure equal space between India and China in its campaign for the 2008 Constituent Assembly elections<sup>11</sup>. The Nepali Congress (NC) manifesto, however, made no mention of the issue. Concerning the 1950 Treaty between India and Pakistan, the Communist Party of Nepal (Unified Marxist- Leninist, or CPN- UML) pledged to review "all unequal treaties." About 40 years later, in 2008, Prime Minister, Pushpa Kamal Dahal, advocated for the repeal of the Indo-Nepal 1950 Treaty, describing it as unfair from the perspective of security relations. In addition,

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<sup>7</sup>BC Upreti, India - Nepal Treaty of Peace and Friendship Nature, Problems and Question of Identity of Indian Nepalis, (Tanka Bahadur Subba (eds.), Concept Publishing House 2009)

<sup>8</sup> S Thapliyal, 'India and Nepal Treaty of 1950' (2012) 68 India Journal of International Affairs

<sup>9</sup>Sanchet Barua, 'Maoist Conflict and Impact on India' *The Navhind Times*, 13 April 2010

<sup>10</sup>'A Comparison of Election Manifestos', *The Red Star* (CPI- Maoist published magazine) Kathmandu, 1(6), March 16-31, 2008. The manifesto also promised to bring necessary changes in managing and controlling the Nepal- India border, initiation to conclude encroachment of Nepali land a the India border, the end of Gorkha recruitment centre etc

<sup>11</sup> Pandey N, "New Nepal: The Fault Lines" [2010] SAGE Publications India Pvt Ltd

he urged for revisiting and reviewing several other treaties, including the 1996 Mahakali Treaty<sup>12</sup>. The 1950 Treaty of Peace and Friendship made with India remains the main source of contention for Maoists in Nepal today.

## **TEXT OF THE TREATY**

The Treaty of Peace and Friendship was signed between the Government of India and the Government of Nepal at Kathmandu on 31 July, 1950. The text of the treaty is as follows:

### **Article 1**

There shall be everlasting peace and friendship between the Government of India and the Government of Nepal. The two Governments agree mutually to acknowledge and respect the complete sovereignty, territorial integrity and independence of each other,

### **Article 2**

The two Governments hereby undertake to inform each other of any serious friction or misunderstanding with any neighbouring State likely to cause any breach in the friendly relations subsisting between the two Governments.

### **Article 3**

To establish and maintain the relations referred to in Article 1 the two Governments agree to continue diplomatic relations with each other using representatives with such staff as is necessary for the due performance of their functions. The representatives and such of their staff, as may be agreed upon, shall enjoy such diplomatic privileges and immunities as are customarily granted by international law on a reciprocal basis: Provided that in no case shall these be less than those granted to persons of a similar status of any other State having diplomatic relations with either Government.

### **Article 4**

The two Governments agree to appoint Consuls-General, Consuls, Vice-Consuls and other consular agents, who shall reside in towns, ports and other places in each other's territory as may be agreed to. Consuls-General, Consuls, Vice-Consuls and consular agents shall be provided with exequaturs or other valid authorization of their appointment. Such exequatur or authorization is liable to be withdrawn by the country which issued it if considered necessary. The reasons for the withdrawal shall be indicated wherever possible. The persons mentioned above shall enjoy on a reciprocal basis all the rights, privileges, exemptions and immunities that are accorded to persons of the corresponding status of any other State.

### **Article 5**

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<sup>12</sup>Tuteja A, "India, Nepal to Review 1950 Treaty" The Tribune, Chandigarh, India

The Government of Nepal shall be free to import from or through the territory of India, arms, ammunition or warlike material and equipment necessary for the security of Nepal. The procedure for giving effect to this arrangement shall be worked out by the two Governments acting in consultation.

#### **Article 6**

Each Government undertakes, in token of the neighbourly friendship between India and Nepal, to give to the nationals of the other, in its territory, national treatment about participation in the industrial and economic development of such territory and to the grant of concessions and contracts, relating to such development.

#### **Article 7**

The Governments of India and Nepal agree to grant, on a reciprocal basis, to the nationals of one country in the territories of the other the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement and other privileges of a similar nature.

#### **Article 8**

So far as matters dealt with herein are concerned, this Treaty cancels all previous Treaties, agreements, and engagements entered on behalf of India between the British Government and the Government of Nepal.

#### **Article 9**

This Treaty shall come into force from the date of signature by both Governments.

#### **Article 10**

This Treaty shall remain in force until it is terminated by either party by giving one year's notice.

Done in duplicate at Kathmandu this 31st day of July 1950.

### **NEPALESE CONTEXT**

Nepal's objections to the pact are based on several concerns, from security to the freedom of border crossings:

1. The treaty was signed by a Rana Prime Minister, who was not chosen by the people and does not, therefore, represent the political consensus in Nepal, according to the first arguments made by Nepalese academics. They cite the signatories' uneven status as another illustration of the treaty's inherent injustice.
2. Second, it is believed that the pact is a product of British imperialism. After 1947, India and Nepal's relations had to be rebuilt on a new foundation of intensified democratic ideologies. Even though the two nations were prepared to determine their political future, pertinent treaties and customs that originated under British control still exist today and are not eliminated. All earlier agreements were recognised as valid by the 1949 Standstill Agreement until new agreements and treaties could be negotiated. With modifications made to fit the political climate of the time, the Treaty of Peace and Friendship of 1950 was a reflection of the Treaty of Peace and Friendship signed in 1923. Despite the passage of six decades, the Nepalese elite is still plagued by references to the British policies' continuation in the public's perspective of India-Nepal relations. Although Nepal had solid working relations with the British, it has become a benchmark to evaluate the policies with India. Left-leaning political parties in Nepal, including



the Communist Party of Nepal (Unified Marxist-Leninist), the Unified Communist Party of Nepal (Maoist), and the Nepal Workers and Peasant Party, have roundly condemned India's relations with Nepal as imperialist and hegemonistic and held it accountable for concluding unfair treaties with Nepal<sup>13</sup>. In 1975 Sikkim merged with India, this opinion was further solidified, making Nepal an accessible target for local consumption. The terms "hegemonistic" and "imperialist" are continuations of the heritage of British India, which is made worse by India's vastness relative to its small, landlocked neighbour.

3. Third, it is asserted that there are frequent deviations from this covenant of peace and friendship, making it an antiquated treaty. The moment has come to examine the treaty and replace it with a new one because both countries have contributed to many of its provisions falling obsolete over the past 50 years. Maoists contend, among other things, that New Delhi's silence during the late 1980s expulsion of Nepalese from some North-Eastern states like Assam and Meghalaya is evidence against the pact. According to one argument, India shouldn't demand that Nepal abide by a treaty to which India is unable to comply.
4. Fourth, a majority of Nepalese condemn the inflow of Indian workers into Nepal. The government of Nepal claims that it is challenging for a small nation with a headcount of 27 million to treat the Indian people, whose number is more than 1 billion, as nationals. As a corollary, Nepal has passed rules making it illegal for foreigners, especially Indians, to acquire land there.<sup>14</sup> Due to Nepal's proximity to some of India's poorest regions, workers and immigrants from India frequently enter Nepal in search of employment. As a result, Nepal is unfairly burdened and India is given an excessive amount of influence over Nepal's internal affairs. It is claimed that this pact has never been established as valid.
5. Fifth, this treaty is described not only as unequal but as an attack on Nepal's sovereignty on the ground that the circumstances in which the treaty was signed have changed and therefore, there is no relevance of this treaty anymore<sup>15</sup>.
6. Sixth, the political and strategic elements of the pact are the focus of the majority of the criticism. India is castigated for ignoring Nepal's sovereignty in favour of protecting its strategic and security interests in the Himalayas. According to Article 5 of the Treaty, the government of Nepal is free to import whatever weapons, ammunition, or other militaristic supplies and equipment it deems necessary for Nepal's security from or through India. The two governments, acting in concert, shall determine the process for putting this arrangement into effect. The letter of exchange, which was secret until 1959, also states: "Any weaponry, ammunition, or militaristic material and equipment essential for the security of Nepal."<sup>16</sup>

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<sup>13</sup>S.D. Muni., "India and Nepal: A Changing Relationship", New Delhi: Konark Publishers, 1995.

<sup>14</sup>Nihar Nayak, in "India - Nepal Peace and Friendship Treaty (1950): Does it Require Revision? Strategic Analysis, Vol.34, No.4, July 2010.

<sup>15</sup>Buddhi Narayan Shreshtha, 'Review or Abrogate 1950 Treaty,' Gorkhapatra Daily (Rising Nepal), May 8, 2008.

<sup>16</sup>Subedi SP, "India-Nepal Security Relations and the 1950 Treaty: Time for New Perspectives" (1994) 34 Asian Survey 273

7. Seventh, Nepal has concerns with clauses 6 and 7, which give citizens the right to reside, own property, engage in trade and commerce, and enjoy other privileges in each other's countries. Both clauses 6 and 7 allow citizens to participate in the industrial and national development of the other country. It is incompatible with Nepal's exercise of complete sovereignty for India to seek reciprocal "national treatment" for its residents on Nepalese territory and access to all of the country's natural resources while Nepalese citizens face discrimination when trying to buy property in India. There have been numerous occasions over the years when India has disregarded the treaty's clauses. According to Article 2 of the treaty, the two governments must notify one another of any severe disputes with any neighbouring country that could jeopardise their cordial ties. Nepalese claim that throughout the 1962 war with China and subsequent wars with Pakistan, India failed to notify or consult Nepal. India counters that the Koirala government was kept up to date on Sino-Indian relations by its Indian equivalent.

## INDIAN CONTEXT

The Indian government's defensive response to the 1950 Treaty of Peace and Friendship is a result of a more extensive strategy of preventing extra-regional forces from entering the area and keeping it out of cold war politics. India insists that Nepal fully adhere to all of the terms of the 1950 Treaty of Peace and Friendship. Yet, it became clear from deliberations during the 1989 deadlock between India and Nepal that India was also ready to engage Nepal in negotiations on the full range of their bilateral relations<sup>17</sup>, including the 1950 Treaty of Peace and Friendship. However, India was arguing that because of its "special relationship" with Nepal, it had been very kind to its neighbour in several areas, and now that Nepal intended to end this "special relationship"<sup>18</sup>, Nepal was seen by New Delhi as being just like Bangladesh and Pakistan and not deserving of its goodwill. The 1950 Treaty of Peace and Friendship with India was among the unequal treaties and arguments that the Maoist Insurgency in Nepal demanded be abolished, which gave rise to the demand for the treaty's revision<sup>19</sup>. This demand was the first in the Maoists' 40-point manifesto. India interprets Nepal's request for a modification of the pact as a sign of the country's altered relations with China. The pact has been seen as a barrier by Nepal since it has advocated for equitable relations with China and India. It is evident that Nepal and China have cordial relations, and the early 1950s conditions are no longer the norm. But, the key issue is that the pact does not obstruct stronger ties between China and Nepal. Despite the 1950 Treaty of Peace and Friendship with India, Nepal nonetheless signed a border deal with China. Moreover, Nepal received aid, imported weapons from China, and even asked China for help building roads and other infrastructure. It also forged ties with several other

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<sup>17</sup>Smruti S. Pattanaik, 'Indo - Nepal Open Border: Implications for Bilateral Relations and Security, 'Strategic Analysis, 22(3), June 1998, p.475.

<sup>18</sup> C.P Gajrue, 'No Special Relation between Nepal and India,' The Telegraph Nepal, December 25, 2008, at [http://www.telegraphnepal.com/news\\_det.php](http://www.telegraphnepal.com/news_det.php). Mr Gajurel is a CPI Maoist central committee member.

<sup>19</sup> Prashant Jha makes a detailed analysis of Indian reservations on the 1950 treaty in his article, 'Revisiting 1950' Nepali Times, Kathmandu, March 5, 2010.



nations. The treaty never put Nepal in a difficult diplomatic position. The treaty has thus been seen as a barrier and a problem primarily for political reasons. The topic of the treaty's amendment was further brought to light after the Unified Communist Party of Nepal-Maoist (UCPN-Maoist) won the most votes in the elections for the Constituent Assembly and became the country's new government in 2008. Pushap Kamal Dahal (Prachanda), the then-prime minister of Nepal, also suggested changing the treaty while he was in India. Unfortunately, the matter restrained since his administration was overthrown in May 2009<sup>20</sup>. This proposed amendment addressed concerns such as resolving land encroachment by the Indian side and border management, stopping the recruitment of Gurkhas into the Indian Army, and renegotiating cooperation on water resource development. They outlined the UCPN-political Maoist platform both before and after the elections for the Constituent Assembly. Although it wasn't the main focus of its election platform, Nepal's other left-wing party, the Communist Party of Nepal - Unified Marxist- Leninist (CPN-UML), also advocated for a reworked treaty with India. The Nepali Congress (NC) has not spoken out on this matter, in contrast to the UCPN-Maoist and CPN-UML. The Madheshi sides believe that the special relationships between the inhabitants of the southern plains (Terai) and those of the Indian states of Bihar and Uttar Pradesh will be irreparably damaged by border control, which they see as an inevitable consequence of revision. Those advocating change must take into account the region's longstanding traditions surrounding roti-beti (bread and butter). Furthermore, they contend that this will have a significant effect on the Nepali Pahadi (hill) inhabitants who earn their living in various towns in India.

India has stated that it is willing to "examine" the accord. Yet, the Nepali side has been unable to present a clear example of a reformed treaty. The residents of the two nations who benefit from a variety of privileges reciprocally require a revision of the 1950 Treaty of Peace and Friendship to be realistic and practical. The lives of people on both sides of the border may be impacted by any amendment to the treaty, which is a factor that needs to be properly availed, it is impossible to disregard the long-standing relationship between India and Nepal, which is built on their shared cultural heritage. According to Nepali professionals, a revision of the treaty and demands for the shutting of borders may satisfy political elites temporarily, but they won't benefit India-Nepal relations in the long run.

Therefore, the ongoing calls for a revision of the 1950 Treaty of Peace and Friendship leave many questions unanswered, including whether a revised treaty will improve relations between India and Nepal<sup>21</sup> and resolve long-standing conflicts, or whether Indians and Nepalese will be able to agree if the treaty is revised rationally, both countries violate the treaty more often than they uphold it. Both countries have broken the treaty's terms as necessary since certain of them have become obsolete due to the shifting international landscape. The treaty remained essentially ineffective as a result on multiple fronts. As Nepal's Prime Minister Tanka Prasad argued in

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<sup>20</sup>Ibid

<sup>21</sup> Prakash A. Raj, 'Indo-Nepal Relations - Future Prospects', Institute of Foreign Affairs, Kathmandu, at <http://www.ifa.org.np/pdf/prc/prakashraj.pdf>

1956 in favour of equal distances between India and China, the first signs of disregard for the pact first surfaced. As a result of India's assistance for the democratic forces, the monarchy thereafter regarded China as its greatest enemy and turned to it as a potential saviour. The fundamental features of the treaty's strategic and socioeconomic components, as well as their innate interdependence, have all but disappeared. Nepal took the majority of the steps taken to undermine the 1950 treaty and other bilateral agreements. This treaty's erosion was caused by several circumstances, including the following: (i) Before the Sino-Indian War in 1962, Nepal looked to India as a security guarantee. India's lacklustre performance in the War of 1962 diminished its influence in the area. The adventurism of the Chinese also compelled India to urge other powerful nations to oppose the Chinese presence in Nepal. (ii) During this time, India fell short of meeting Nepal's economic and technological needs for development and modernisation. This presented a chance to broaden Nepal's contacts with other nations. The availability of another economic opportunity for young Nepalis in other nations reduced their dependence on India. Also, the development of nuclear states in Asia has altered the way we think about security. The value of Nepal as a state acting as a buffer between China and India has been impacted by this. Nepal now has fresh trading channels with China, unlike in the 1950s. Parliamentary Democracy has taken the role of the Constitutional Monarchy. On the other hand, with India becoming a key role, the current military and economic balance of power in Asia is altering. In this case, the new government in Nepal wants to keep the treaty in place with certain modifications.

## **OVERVIEW OF FEMA AND ACQUISITION OF IMMOVABLE PROPERTY IN INDIA BY NON-RESIDENT (NRs)**

The Reserve Bank is empowered by the Foreign Exchange Management Act, of 1999 to create legislation that forbids, restricts, or regulates NRIs from purchasing or selling real estate in India<sup>22</sup>. The FEMA prohibits foreign nationals from purchasing or transferring real estate in India. It states: “*Immovable property cannot be acquired or transferred in India by a citizen of China, Pakistan, Nepal, Bangladesh, Sri Lanka, Afghanistan, Iran, or Bhutan without the Reserve Bank of India's prior approval*”<sup>23</sup>.

The purchase of assets by People of Indian Origin (PIO), Non-Resident Indians (NRI), and Foreign Nationals/Citizens are overseen by FEMA<sup>24</sup>.

### **Citizens' Conceptual Model**

NON-RESIDENT INDIAN - A resident of India with an Indian passport who has temporarily emigrated to another nation for at least six months for a job, residence, or any other reason is known as an NRI (Non-Resident

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<sup>22</sup>Foreign Exchange Management Act, of 1999, s 31.

<sup>23</sup>Ibid.

<sup>24</sup> cf. 22

Indian).PIO - According to the Indian Constitution or the Citizenship Act of 1955, a person is considered of Indian origin (PIO) if they have ever carried an Indian passport or if their father, grandpa, mother, or grandmother once happened to have been a citizen of India. FOREIGN NATIONALS - A person is a foreign national to India if they reside outside of the country and are not Indian citizens.

### **Guidelines for Purchasing Real Estate in India:**

According to Section 6(4) of the FEMA<sup>25</sup>, an individual who resides outside of India is permitted to hold, own, transfer, or invest in any immovable property located in India if the property was acquired, maintained, or owned by the individual while he or she was a resident of India or was passed down to the individual from a resident of India.

#### **1. NON-RESIDENT INDIAN (NRI)**

- An NRI doesn't need any special authorization to purchase.
- An NRI may acquire any movable property in India, excluding farmland, plantation land, and farmhouses.
- Any immovable property in India may be transferred by her/him to a resident of India, a resident of another country, or a person of Indian ancestry living abroad.

#### **2. PERSON OF INDIAN ORIGIN (PIO)**

- A PIO does not need specific authorization to buy real estate in India, except for farmland, farmhouses, and plantation properties.
- A PIO may purchase an immovable property in India that is not farmland, a farm residence, or a plantation property. Yet, it may come as a gift from an Indian citizen who lives outside of India or from an Indian citizen who lives inside of India.
- Any property in India may be sold by a PIO to a resident Indian, except farmland, farmhouses, and plantation areas.
- To an Indian citizen residing in India, a PIO may grant or sell agricultural land, farmhouses, plantation estates, and any other type of residential or commercial property in India through a donation to a person inside or outside of India.

#### **3. FOREIGN NATIONALS**

- A foreign national who resides outside of India is not permitted to purchase real estate in India.
- Also, one cannot acquire any immovable property unless one inherits it from someone who was formerly a resident of India. He may, however, purchase or transfer real estate in India under a contract lasting no more than five years without first receiving approval from the Reserve Bank of India.

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<sup>25</sup>Foreign Exchange Management Act, of 1999

- Apart from citizens of China, Pakistan, Bangladesh, Nepal, Sri Lanka, Afghanistan, Iran, and Bhutan, foreign nationals who become "residents in India" are entitled to buy immovable property in India without needing to seek previous RBI approval.
- Foreign nationals who have acquired or purchased real estate in India through inheritance with the permission of the Reserve Bank of India are not permitted to transfer such property without the Reserve Bank of India's prior consent.

## **REPATRIATION OF IMMOVABLE PROPERTY SALE PROCEEDS**

(a) The sale proceeds of a property that was acquired under Section 6(5) of the FEMA, or by his successor, cannot be repatriated without RBI authorization.

(b) According to the Foreign Exchange Management (Remittance of Assets) Regulations, 2016, NRIs, PIOs, and foreign nationals (aside from Nepalis and Bhutanese) who have (i) inherited from someone listed in section 6(5) of the FEMA, (ii) retired from employment in India, or (iii) are non-resident widows or widowers who have inherited assets from their deceased spouses who were Indian citizens may repatriate up to USD 1 million per financial year is permitted.

c) Under the following circumstances, NRIs and PIOs may transfer the proceeds of the sale of immovable property in India (other than farmland, a farmhouse, or plantation property):

The purchase of the real estate complied with the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations 2018 or the terms of the foreign exchange law in effect at the time of the purchase;

Payment for the purchase of the property was made in foreign currency obtained through banking channels, with resources from a non-resident foreign currency account, or with funds from an external non-resident account.

## **BILATERAL BELIEF: INDIA AND NEPAL**

### **1. Defence and Security Cooperation:**

India and Nepal have a long history of mutually beneficial defence and security cooperation. The forces have historically enjoyed excellent and peaceful relations, and since 1950, India and Nepal have given their respective army chiefs the honorary rank of general. Both countries' security organisations work closely together and exchange information. In institutionalised bilateral arrangements, law enforcement agencies hold frequent bilateral meetings at various levels to discuss security matters of shared interest, such as border management. The 14th round of the Bilateral Consultative Group on Security Issues (BCGSI) was held on October 28, 2021,

in Bengaluru, and covered topics such as shared security concerns, the defence forces of Nepal's needs for training and capacity building, and the exchange of high-level and functional-level visits.

## 2. Operation Maitri and aid with post-earthquake reconstruction:

India was the first to respond to the 2015 Nepal earthquake and launched its largest-ever international disaster relief campaign (Operation Maitri)<sup>26</sup>. India increased USD 1 billion in Nepal as part of its long-term aid for the restoration of the housing, healthcare, education, and cultural heritage sectors following the earthquake. On September 30, 2021, in Kathmandu, the Joint Project Monitoring Committee examined rehabilitation projects in the fields of housing, education, and health. On November 15, 2021, with the aid of \$150 million, the Commission successfully handed over all 50,000 rebuilt homes in Nepal's Gorkha and Nuwakot districts. Moreover, 14 higher secondary schools have been finished and were only recently inaugurated. In Nepal, there are various levels of execution for the reconstruction of more than 130 hospitals and health facilities as well as 28 cultural heritage sites.

## 3. Trade and economic ties:

With bilateral trade exceeding US\$ 7 billion in FY 2019–20, India remained Nepal's top trading partner. India serves as a transit country for practically all trade with foreign countries. In the last ten years, exports from Nepal have nearly doubled while those from India have increased by over 8 times. India made sure that trade and supplies to Nepal continued uninterrupted despite the challenges caused by the pandemic<sup>27</sup>.

Up from 28th in 2014, Nepal is now India's 11th-largest export destination. It made up 2.34% of India's exports in FY 2021–22. In reality, about 22% of Nepal's GDP comes from exports to India. Petroleum goods, iron and steel, cereals, vehicles and components, and machinery parts are Nepal's key imports from India. Soybean is one of Nepal's main exports. Spices, Jute fibre & products, synthetic yarn and tea<sup>28</sup>. India and Nepal concluded a Memorandum of Understanding (MoU) for a long-term supply of Urea and DAP fertilizers from India to Nepal under a G2G arrangement on 28 February 2022.

Indian firms are among the largest investors in Nepal, accounting for more than 33% of the total FDI stock in Nepal, worth nearly USD 500 million. About 150 Indian ventures are operating in Nepal engaged in manufacturing, services (banking, insurance, dry port, education and telecom), power sector and tourism industries. India and Nepal also signed the Double Taxation Avoidance Agreement (DTAA) in November 2011.

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<sup>26</sup> “India's Humanitarian Assistance and Disaster Relief Effort in Nepal”, India's Humanitarian Assistance and Disaster Relief Effort in Nepal, Manohar Parrikar Institute for Defence Studies and Analysis May 18, 2015 accessed April 3, 2023

<sup>27</sup> Nepal - India Trade Beyond the Surge', New Business Age, Nepalnews.com, September 2001,

<sup>28</sup>“India-Nepal Bilateral Relations - Ministry of External Affairs” accessed April 2,2023

The bilateral remittance flow is estimated at approximately \$ 3 billion (Nepal to India) and \$ 1 billion (India to Nepal)<sup>29</sup>.

#### 4. Diplomatic Missions:

The government of India has its Embassy in Kathmandu and a Consulate General in Birgunj (south-central part of Nepal). The government of Nepal has its Embassy in New Delhi and a Consulate General in Kolkata.

### CONCLUSION AND SUGGESTION

The 1950 India-Nepal Treaty of Peace and Friendship is the cornerstone of the unique ties between the two countries. Nepal hasn't withdrawn from the treaty despite having certain doubts about it and engaging in political posturing. Many times, in the past, Nepal has taken action to counteract India's stifling influence. It has balanced India using the China card. In breach of the spirit of the treaty, it implemented a work permit system for Indian labourers in 1988 and numerous other forms of discrimination against Indians. India has used a variety of tactics to achieve Nepali compliance on this aspect, which the Nepalese have criticised as coercive and heavy-handed. The treaty's continued existence is remarkable given the disagreements between the two nations on a few key points. Furthermore, there is a current agreement that the treaty needs to be updated to reflect the shifting international and regional environment. Given its geographical location, Nepal will unavoidably remain dependent on India. India would also need to appreciate Nepal's historical ties and the strategic value of forging a broad alliance in the coming years. To address new threats from non-state actors, India must take a liberal stance when offering Nepal trade and transit options and closely coordinate its security policy. The borders should ideally be kept open with cooperative regulatory mechanisms given the tight socio-cultural ties and inclination of the residents of the bordering regions to connect. All of these viewpoints must be taken into account in the new treaty to establish fresh cooperation between the two nations.

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<sup>29</sup>Ibid.

# DHARMA AS LAW AND JUSTICE: RELIGIOUS CRIMES IN INDIA: Combating Hate Crimes: Religion; Yesterday, Today and Tomorrow

ARUNIMA PATI\*

RAJESHWARI NANDA\*\*

## ABSTRACT

Religion in India has always been a topic very sensitive to deal with but religious crimes have never stopped increasing in any way rather keep on spreading their forms and unreasonable biases over the nation. Minorities have always been targeted, and the situation is similar throughout the world. Hindus outside face Hindu-phobia, the minorities in our Nation face what we call as hate crimes. While the whole world stays in abeyance due to wars and epidemics, India is struggling internally with issues that are predominantly created by misconceptions of dharma, religion, justice and the like. This seems like no big deal, but these do lay the foundation stones to understand bigger concepts of Secularism, Uniform Civil Code and certainly to combat the hate crimes that are spreading like fire in dry in the namesake of upholding religious sanctity and what not. This short article thus attempts to converse the concepts in a clear manner before moving on to the concepts in Constitution. The paper also subtly addresses the issues at hand both in practical and visionary approach and urges the start of something new.

*KEY WORDS: Dharma, Religion, Justice, Secularism, Uniform Civil Code, Hate Crimes.*

## PART I: INTRODUCTION

### 1. CONVERSING CONCEPTS

The theme entwines between the prominent concepts of *Dharma*, Law, Justice as well as Religion. Hindu legal theory, is one of the most ancient legal theories originated and developed in India, and when 'Law' is discussed in Hindu legal works, '*Dharma*' is treated as word-equivalent of the same. In Jamini's view, '*Dharma* is that object of welfare which indicates by an injunction.'<sup>1</sup>*Dharma* includes law, but its ambit is very wide.<sup>2</sup>*Dharma*; though have been given a variety of meanings in various

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\* Advocate, Dhenkanal District Bar

\*\* Advocate, Dhenkanal District Bar

<sup>1</sup>Mimansa, Chapter II, Dr. B.N .Mani Tripathi, Jurisprudence Legal Theory ( 12<sup>th</sup> edn., Allahabad Law Agency 1990) 70

<sup>2</sup>Dr. B.N .Mani Tripathi, Jurisprudence Legal Theory ( 12<sup>th</sup> edn., Allahabad Law Agency 1990) 70



Vedic Literature and *Dharmashastras*, since the ancient times, it has been concluded to mean and refer to ‘all the works of right conduct, observance of which was considered necessary for the welfare of individual and society’<sup>3</sup>. India has seen a number of epic battles for re-instatement of *Dharma* when things went wrong; ‘The Mahabharata Epic’; as well known to be written by Vyasa Muni, is the most significant of them. Thus, *Dharma* is semantic equivalent to the Greek word ‘ethos’<sup>4</sup> and the eternal source of Law. Now, coming to what is ‘Law’, Jurisprudence provides us with the three broad schools, that have tried to define Law as was relevant in that period, they are- the idealistic, positivistic and sociological schools respectively concluding it as, ‘The body of binding rules and regulations, customs and standards established in a community by its legislative and judicial authorities’<sup>5</sup>, absence of which leads to chaos and anarchy. Therefore, both law and order are essential to be maintained within a nation or state and society, which are done through the administration of justice, by protecting and enforcing the rights and duties according to the law. ‘Justice is the exercise of authority or power in maintenance of right; vindication of right by assignment of reward or punishment; administration of law of the form and processes attending it; just conduct’<sup>6</sup>. Hence, the conception of Justice can be understood as ‘the reasonable and fair treatment of people.’<sup>7</sup> Coming to Religion, which is widely accepted as the ‘belief in a god or gods and the activities connected with this’<sup>8</sup> or ‘the human beings’ relation to that which they regard as holy, sacred, absolute, spiritual, divine, or worthy of especial reverence’<sup>9</sup>. We say that, India is a ‘sovereign, socialist, secular, democratic republic’<sup>10</sup>, and intends to provide all its citizens; Justice (social, economic and political), Liberty (of thought, expression, belief, faith and worship), Equality (of status and opportunity) in a fraternizing way to assure the dignity of an individual, as well as keep nation’s unity and integrity intact. Here religion is not seen as a line that divide; rather it is the dot that connects to divinity. Since there is no ‘Just’ to the way a religion works, only the Constitutional goal to treat all the religions equally leads the secular part of our country. India’s secularism does not mean absence of religion, rather the equal treatment of all religions by the state.

Like every other dimension, religion has its own share in crimes that are happening around us, mainly termed as ‘crime in the name of religion’ or ‘Religious Crimes’. Adding to that, the biggest part in this vicious circle is occupied by ‘Hate crimes’ that are ever increasing each passing day. An accepted conceptual meaning of Religious Hate Crimes could be, ‘any incident, which is perceived to be based

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<sup>3</sup>Ibid.

<sup>4</sup> Brereton, Joel P., Dhárman in the R̥igveda (Journal of Indian Philosophy 2004) 32: 449–89.

<sup>5</sup>Oxford English Dictionary (2<sup>nd</sup> edn. Oxford University Press 2004)

<sup>6</sup>R.K. Agrawal, Agrawala’s Legal Dictionary (21<sup>st</sup> edn. Pioneer Printers, Agra 2010) I-113

<sup>7</sup> ‘Justice’ Oxford English Dictionary (7<sup>th</sup> edn. Oxford University Press 2013)

<sup>8</sup> Ibid.

<sup>9</sup> ‘Religion’, Britannica Encyclopedia <<https://www.britannica.com/topic/religion>> accessed 11<sup>th</sup> March 2023.

<sup>10</sup>Preamble, Constitution of India Act, 1950.



upon prejudice towards or hatred of the victim because of actual or perceived religion or belief.’<sup>11</sup> Talking about our country, ‘Religious Hate Crimes’ has risen to a decade-high level in 2018, said a report prepared by a multi-organization project led by *FactChecker.in*.<sup>12</sup> Again in 2019 an article headed, ‘What a Rising Tide of Violence Against Muslims in India Says About Modi’s Second Term’ discussed how a 24-year-old Tabrez Ansari was beaten and killed by a Hindu Mob in the eastern State of Jharkhand.<sup>13</sup> Then again ‘The Kerela Story’, exodus of Kashmiri Pandits, Kathua Rape case, etc. There are n - number of instances where violence has taken ‘Religion’ as its main weapon. The ongoing times have been tough for the whole world given; the Russia-Ukraine war that is not ending, civil wars in many other nations, economic crises, global pandemic, bio-wars, and no account of the unseen struggles that we might face in the future, the last thing we want is class and sect struggle in daily lives! So, it is high time that we actually understand that being unified is not a burden for our nation but a blessing for our future.

## 2. RELEVANT LEGAL REGIME

The secularism in India is a biggest flex that we portray in our constitution as well as in various national documents. Being a multi lingual country, we are taught to address and respect all the religions. As the successors of a Vedic land, it is obvious that we stress upon our customs and traditions heavily, without any questions asked. It is evident in our legal system that, the essence of law is mostly derived from customs and traditions only, that is the reason that our laws have been codified taking and keeping them in mind. A very simple example of that would be the saving clause in most statutes that save the local and special laws from the mischief of statutes. Hindu Personal Laws also provide exception in statutes if customs exist otherwise or in opposition to the said statutory provision. Now all these aspects put forward two questions before us-

- How the term ‘Secularism’ works in our common day to day life, leave alone the documents glorifying it.
- Dharma for one person may be dangerous for another, as well as suffocating their choices to conduct certain things.

Now, these are the basic challenges that we successfully choose to ignore just because, religion is a sensitive topic for us Indians. Hate crimes on a specific religion or occupation is happening every day

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<sup>11</sup> ‘Religious Hate Crimes’, Bedfordshire Police < <https://www.beds.police.uk/advice/advice-and-information/hco/hate-crime/what-is-hate-crime/#> > accessed: 11 March 2023

<sup>12</sup> ‘Religious Hate Crimes in India rose to a decade High Level in 2018’, < <https://scroll.in/latest/907238/religious-hate-crimes-in-india-rose-to-a-decade-high-level-in-2018-report> > accessed 11 March 2023

<sup>13</sup> RanaAyyub, ‘Religious Hate Crimes’, TIME, June 28, 2019 < <https://time.com/5617161/india-religious-hate-crimes-modi/> > accessed on 11 March 2023.

around us, but instead of accepting those flaws, most of us have a mentality to justify it as a correct way of conduct. ‘On Religious Hostilities, India Ranked Just Slightly Better Than Syria. India positioned fourth on the planet in 2015 after Syria, Nigeria and Iraq in social threats including religion to a great extent coordinated towards minorities.’<sup>14</sup>

The government has undoubtedly professed relevant legal regimes soothing the continuance of these atrocities, but it is hard to be termed as effective, as it should be. For crimes such as ‘Hate Speech’ towards any religion, ethnicity or culture, Indian Penal Code prescribes various regulations such as, Sections 153A<sup>15</sup>, 153B, 295A<sup>16</sup>, 298<sup>17</sup>, 505(1)<sup>18</sup> and 505(2). On a similar note, The Representation of People Act 1950, Information Technology Act 2000, Unlawful Activities (prevention) Act 1967 also contain provisions concerning hate speech and its prevention.

Regarding ‘Lynching and Mob Violence’<sup>19</sup> there are specific laws but those acts can be punished under section 223(a) of Criminal Procedure Code, 1973 for any group attack regarding the same. Similarly Sections 302, 304, 307, 323, 325 deals with the cases of hate crimes indirectly which includes attacks resulting to murder, harassment, assault, gang rape etc.

In *Jayamala v State of Kerala*,<sup>20</sup> The Hon’ble Court held that ‘Offence under Sec.295A of the IPC is punishable with imprisonment up to three years (while offence under Sec.295 of the IPC is punishable with imprisonment up to two years). Since conspiracy is alleged in the commission of offence under Sec.295A of the IPC, punishment for offence under Sec.120B must be the same.’

*Ramji Lal Modi v. State of UP*<sup>21</sup>, The Hon’ble Court held that ‘insult or attempt to insult the religion or religious belief when made with an intention, which must be deliberate or malicious, of outraging the religious feelings of a class of citizens of India, then only the provisions of Section 295A apply.’

### 3. WHERE ARE WE WRONG?

‘Most hate crimes reported in India were targeted towards Dalits and Muslims between September 2015-2019. A total of 902 crimes were reported to be because of alleged hate- varying from caste,

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<sup>14</sup>Durai, Hashika and Niranjana, K. and Niranjana, K., ‘A Study on Religious Laws and Religious Crimes in India’ (August 26, 2019). SSRN:<<https://dx.doi.org/10.2139/ssrn.3442697> > accessed 11 March 2023

<sup>15</sup>Promoting enmity between different groups on grounds of religion, race etc and doing acts prejudicial to maintenance of harmony.

<sup>16</sup>Deliberate and malicious acts, encouraging outrage of religious feelings by insulting their beliefs.

<sup>17</sup>Uttering words with deliberate intent to wound religious feelings of any person.

<sup>18</sup>Sharing any statement or rumor to incite any conflict between communities

<sup>19</sup>*Tehseen S. Poonawala v. Union of India* [2018] 9 SCC 501

<sup>20</sup>OP(Cr.) No. 1332 of [2011] (Q)

<sup>21</sup>[1957] AIR 620, [1957] SCR 860

religion, to honor killing and love jihad.’<sup>22</sup> Despite being a secular nation, the below have dismantled its unity:

- A. **Little Knowledge is a dangerous thing:** The ultimate Religion is humanity and every religion, scripture, ancient books and verses preach about the same as its original essence, but in order to prove one religion mightier or more enigmatic, followers keep on neglecting the ultimate teaching, and keep committing acts of rebellious nature.
- B. **Rigid Mentality:** As archaeological excavations at places go on and religious places of worship of two or more cultural groups somehow are found on the same place where one is already in existence, there is no need to demolish and build while we can successfully build a co-existence. After a tiring series of events of Ayodhya (Ram-JanmaBhoomi case)<sup>23</sup> there were many filings about other birthplace cases (eg. *Srikrishna Janmasthan Seva Sangh v. Shahi Masjid Eidgah*, 1967). Thus, in a knack to establish birthplace of Gods who actually reside in our heart and soul, we are posing environmental problems to Mother Earth, as well as to the people who reside in that particular area, by continuous demolition, building, etc.
- C. **Ancestral Profession:** ‘*Ab Raja ka beta raja nahin banega, wahi banega jo haqdaar hoga*’ rightly preached in the movie Super 30, also holds this secret inference that ‘*Naukar ka beta naukar nahin banega*’ ‘*pujari ka beta pujari nahin banega*’, etc. Every person has the right to choose his/her dreams and occupation, hence limiting the management of places of worship to a certain household is wrong. For e.g. Ongoing Kashi Vishwanath Case in Supreme Court, Sevayat in Odisha Sri Jagannath Temple. In the ancient rituals of ‘*Krishnadasi pratha*’, where women of a certain family were only eligible as the ‘dasi’ of lord and subsequently as holy prostitutes. These glaring examples provide a need for the correct upliftment of these rigid systems as resisting someone’s valid and legal wish of devotion is also a form of non-tolerance within sect itself.
- D. **Love Jihad:** A relatively new form of hate crime. Not all inter-religion marriages where the boy is Muslim and girl is Hindu are coming under Love Jihad, also as rightly held by Delhi High Court in *Satyaprakash Meena v. Alka Meena* case<sup>24</sup>. When an ill intention exists, even if a Hindu boy marries a Muslim girl that also comes under this new concept. Hence, the act of marriage with pre-conceived and ill intention itself should be condemned, irrespective of any religion. Many states like Uttar Pradesh, Haryana, and many more have attempted to combat this with new laws of anti-

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<sup>22</sup> Arnab Kumar Banerjee, SSRN, March 23, 2021 <: <https://www.statista.com/statistics/980033/identity-of-hate-crime-victims-india/> > accessed on 11 March 2023

<sup>23</sup> M. Siddiq(D) THR LRS vs. Mahant Suresh Das and Others, 9 Nov.[ 2019]

<sup>24</sup> [2000] 8 SCC 587

conversion, while the concept still needs to be defined clearly for proper awareness and effective results.

- E. **Discrepancy in Personal Laws:** Amir Khan getting trolled for ‘Triple Talaq’ while he remains a Muslim is the greatest example of how discrepancy exists. The Youth who forms the majority in Indian population calls out wrong as a wrong, without giving colorable religious-shield, hence it is high time we bring Article 44<sup>25</sup> of Constitution to life, because social hate stigmatizing personal aspects is still a form of hate. Facets need coordination, because along with us, society is also moving forward and the discrepancies in personal laws is what keeping the nation from unifying against the actual problems that exist.

#### 4. WHAT CAN BE DONE?

- I. For issues contained in A, B, C and D above, a ‘Regulatory Statute’ might come in handy to tackle hate crimes. Since, we have come across many types hate crimes after independence, it wouldn’t hurt to get a codified statute that would exhaustively mention the kinds of activities that amount to the same, providing punishment accordingly and thus forming a middle ground between the non-ending conflicts of religious freedom and reasonable restrictions provided as per the Constitution.
- II. A body to regulate and supervise the functioning and execution of the same may be instituted having members from different region and communities per se, which in order would aware people around the country about the rules that exist and need be followed.
- III. For the issues in E and F above, ‘Uniform Civil Code’ would be an exemplary and effective step. But since this is very sensitive, we can start with making it voluntary up to a certain period as a soft law like International Law, which can be reviewed by the Apex Court through a committee and then further proceedings could be directed down the road. If people welcome it then UCC might become a part of our Legal System and if not, then amendments are always an option. But it’s better to start somewhere than never, as time and again being held by the courts addressing the related issues( eg. *Meena v. Meena* case (supra), *Tripple Talaq Judgment*, *Mohd. Ahmed Khan v Shah Bano Begum*<sup>26</sup>, *Sarala Mudgal v. Union of India*<sup>27</sup>, *Lily Thomas v. Union of India*<sup>28</sup> etc).

#### 5. A VISION OF UNIFORM CIVIL CODE (UCC) IN INDIA

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<sup>25</sup> Uniform Civil Code for the Citizens.

<sup>26</sup> [1985] (1) SCALE 767; [1985] (2) SCC 556 AIR [1985].

<sup>27</sup> AIR [1995] , SC 1531.

<sup>28</sup> [2000] (6), SCC 224.

As on date 12<sup>th</sup> Feb 2023 UCC is listed as Bill attracting debates as the parliament is testing waters on the issue before putting legs inside literally. Some of the states have begun the process of developing their own UCCs like Uttarakhand, Himanchal Pradesh, Gujarat siding Article 44<sup>29</sup> of Constitution of India. When the bill was introduced in Budget Session in the current year 63 supported while 23 still stood against the idea. The suggestions made in the bill include the following- ban on polyandry and polygamy, restriction on family size, rights of children from live in relationships (succession and inheritance), 21yrs as the minimum age to get married for both men and women, and finally considering codification of rest of the personal laws meanwhile removing the discriminatory practices for the purpose of resolving the conflict between personal laws and fundamental rights as well as reforming the redundant justification of social evils as religious customs. As of today, India finally has started moving towards the trail that was laid back in 1940 by the National Planning Commission regarding uniting India through UCC. It needs to be clarified that UCC does not *per se* denote equality in personal rights, rather a uniformity that does not disregard any custom that prevails in the country, because every statute conveys how special and local laws and customs always have a higher say even in courts; consequently, resulting in a convergence of personal laws and customs but in a harmonious way while tackling the social evils in an effective manner.

## 6. IMAGINING INDIA AFTER 5 YEARS OF PREVALENCE OF UCC

This might come as a surprise or confirm what the paper suggests; that 5 years down the line after implementation of UCC apart from the names in dictionary, all religions would stand on equal footing with all their essential religious practices intact. As a result, crimes against humanity, *in* the name of religion would come to a stand-still. The future in short would be a reflection of our golden past where people of all communities together fought the British away, only this time, with a better and evolved mindset, so there would not be any Gandhi and Jinnah or India and Pakistan in future.

## CONCLUSION

An idealistic standpoint is always treated a luxury, but ‘Rome wasn’t built in a day’. We Indians proudly portray our unity in diversity in front of others, so it’s high time we start to clear our own trash. The nation is already fighting with many unseen viruses and diseases, as well as our trouble making typical neighbours. So, evidently, we cannot afford losing to another stride of wave that breaks the unity we ought to have. Even if we can’t build a utopia, at least we can knock its door today.

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<sup>29</sup> Entry 5 of List III (Concurrent List), Constitution of India Act, 1950.

# AN EMERGING NEED OF LEGISLATIVE POLICIES IN ORDER TO PROVIDE AND PROMOTE PATERNITY LEAVE BENEFITS

Garima Singh\*

## ABSTRACT

In older times, the men earned more in the household doing jobs whereas women stayed home and managed everything. But these days men & women are literate & economically independent with similar traits. In acknowledging her place as a mother, a core aspect of what makes the female unique lies within this divine calling. The role of the father is equal to the role of the mother in order to bring up a child in a healthy environment and to fulfil the concern comes the role of Paternity Leave which acts as an aid in fulfilling the said objective by giving an opportunity equally to both the parents to fulfil their responsibilities and also to giving a child environment of nourishment and bonding with parents. In a patriarchal society where motherhood is equated with raising a child solely by the mother sharing responsibility equally by the father acts as a hammer to the patriarchal mindset. Giving more time to women to work and take up the role of breadwinner brings them out of the idea of motherhood equated with raising a child as a responsibility solely of a mother. In order to incorporate the idea of Paternity leave to fulfil the above-mentioned objective now Judiciary as well as the legislature are considering the concept to be incorporated in our society slowly and steadily. With the state now recognizing Paternity leave in all sectors increasing the time period has opened a window for it to be recognized in Indian society.

**Keywords:** *Paternity Leave, Patriarchy, Indian Society, Matriarchy.*

## INTRODUCTION

In the past, men were the primary breadwinners, going outside for work while women managed households within. But now educated and self-sufficient alike, men and women share similar attributes. Acknowledging the natural role of women as mothers, an essential part of their divinity lies within. Demanding emotional and physical support for their children, motherhood requires. Keeping this in mind by the government, the Maternity Benefit Act was implemented in 1961 as a result of recognition. It is to be noted that playing a crucial role, fathers are also responsible for childbirth although women are those who typically give birth. But it cannot be denied that emotional and physical supports are expected of fathers during both pregnancy phases, for the mother as well as child.

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\* Research Scholar, Faculty of law, University of Lucknow

Earnings and domestic duties alike are shedding their old constraints in the face of change. Maternity leave is now interchangeable with Paternity leave. Women continue to battle work-life balance independently, despite societal push for gender equality. A gender-inclusive society lies ahead with paternity leave as a key factor.

## WHAT IS PATERNITY

Paid or unpaid time off from work, paternity leave allows new fathers to assist with caring for their infant children. Motherly traditions are standardized, whereas paternity leave has a newer history in most societies. As fathers participate more actively in child-rearing, particularly during the newborn phase, paid family leave is gaining acceptance.

With the rise of nuclear families and dual-income households, the importance of paternity leave has increased. Raising children requires equal responsibility from both parents. Fathers, children, and the wage inequality that women encounter after maternity leave all stands to gain from paternity leave.

Merriam-Webster has defined Paternity in its dictionary as “the quality or state of being a father”.

## DEVELOPMENT IN INDIAN SOCIETY

The absence of dedicated, solitary laws has paternity leave in India in a bind. As revealed by Union Minister Jitendra Singh, unmarried male government employees can now avail themselves of financial assistance to the parents or guardians of a minor child for up to two years. The Maternity Benefit Act of 1961 was modified and titled **THE MATERNITY BENEFIT (AMENDMENT) ACT, 2017 No.6 OF 2017 [27 March 2017]**. Section 5 of the said act provides female employees the privilege of taking 26 weeks of paid leave, with the option to use up to eight weeks beforehand. The Central Civil Services (Leave) Rules of 1972, 15 days of paternity leave is granted to male government employees either pre or post the birth of their child. Primarily benefiting a particular group of people, this approach to paternity leave in India has restricted applicability. It is widely accepted that motherhood equates to the majority of childcare responsibilities, additionally. Equal care giving status calls for a re-evaluation of women as breadwinners.

## LEGAL DEVELOPMENT

A remarkable decision concerning paternity leave was made by the New Delhi High Court in 2009, even though no specific laws existed at the time. The court's recognition of paternity leave resulted in the teacher having his salary reimbursed in the case of **Chandramohan Jain v. N.K. Bagrodia School W.P. (C) No. 8104 of 2009, High Court of Delhi**. Turning point in the private school sector, this ruling demonstrates a milestone in establishing and securing paternity leave rights. Importance of paternity leave was confirmed by the court, not necessarily due to any laws in place. Following the enactment of the 2017 Maternity Benefits (Amendment) Act, 2017, another significant development took place. The new bill, known as the Paternity Benefits Bill, was introduced in the Lok Sabha in September by Maharashtra legislator Rajiv Satva. This Act aimed at providing benefits to newborn's fathers and proposed to grant employees in the



private unorganized sector, fifteen days paternity leave, which could be extended up to three months. The Act greatly emphasized to provide parents with equal benefits for both mothers and fathers.<sup>1</sup>

In the recent case of **B. Saravanan v Deputy Inspector General of Police**,<sup>2</sup> before the Madras High Court, a writ petition became filed against the desertion order issued by using the Deputy Inspector General of Police (DIG). The petitioner sought to have this order invalidated and requested the courtroom to order the respondents to reinstate the petitioner as an Inspector of Police at Kadayam Police Station.

In the above mentioned case **L. Victoria Gowri, J.** has held that the action of the respondents cancelling and refusing paternity leave to the petitioner would amount to violation of the Constitution of India under Article 21.

Consequently, the Court invalidated the challenged desertion order issued by way of the DIG and informed the DIG to reconsider the order. This directive covered granting the petitioner from the date of receiving a copy of the courtroom's order an additional 15 days to provide a cause of his unauthorized absence.

The Court said that though paternity/paternal leave are a kind of labor law benefit, the same has stemmed up from the right of a child to be protected under Articles 14, 15(3) and 21 of the Constitution of India. The Constitution provides with specific provisions in Chapter III and IV under Fundamental Rights and Directive Principles of State Policy respectively, recognizing the significance of child welfare, protection and development. Furthermore, Article 39(f) directs the State to ensure that children have the rights and resources necessary to grow up in healthy conditions, enjoy their rights in freedom and dignity, free from use, moral choice, and neglect in childhood and youth. The Court said that the survival of a child vests with the joint responsibility of the family. Since the days of joint family system have almost diminished and when the challenges of nuclear families are unprecedented in India, it is high time for the policy makers to recognize right to paternity leave/parental leave to the biological/adoptive parents, as the basic human right of the respective prenatal/post-natal child.

Judge L. Victoria Gowri quoting ethics once stated: "People who impart knowledge, initiate, transmit, nurture and protect from fear - these five are regarded as fathers."

Emphasizing the importance of the role of father in the upbringing of children, Justice Gauri emphasized that father and mother are important partners in parenting. In India, there is currently no statutory requirement for paternity leave for fathers working in the private sector. However, the Central Civil Service (Leave) Rules of 1972 contain provisions for paternity leave. It is important to note that many Indian states including Tamil Nadu do not offer this welfare benefit. This highlights the need for mandatory paternity leave in India. In a related case, the State of Himachal Pradesh (aka 'State-petitioner') filed a writ petition challenging the decision

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<sup>1</sup> 678LS.p65, (July 22, 2017), <http://164.100.47.4/billtexts/lbills/asintroduced/678LS%20AS.pdf>.

<sup>2</sup> W.P. (MD). No.19561 of 2023



of the Himachal Pradesh Administrative Tribunal ('under consideration') in the State's case in **H.P. V. Sita Devi**<sup>3</sup>. The Court had granted the respondent Sita Devi the benefit of reckoning maternity leave followed by the consequential benefit of supervised employment on completion of 8 years of service the Tarlok Singh Chauhan and Virendra Singh J.J. The State's request was denied and it was held that maternity leave was a fundamental right of the petitioners and could not be denied. In this case, the Court had issued an order that the maternity leave be used as a continuing service to the Plaintiff, pursuant to Section 25(b) (1) of the Industrial Disputes Act. The court emphasized that India is a signatory to several international treaties and conventions, such as the Universal Declaration of Human Rights, which was adopted by the UN on December 10, 1948. The Declaration took effect upon its ratification throughout the world that rights are paramount and must be pursued in on all circumstances. In addition, the court looked at issues related to the issues of the year internationally, such as the CEDAW, the treaty to eliminate all forms of discrimination against women and children, etc. which culminated in the Maternity Benefit came into existence Act, 1961 Furthermore, the court emphasized that every female and male employee, irrespective of their employment status (permanent, contractual, temporary, seasonal/temporary), has a fundamental right to maternity leave if appropriate, and paternity leave and childcare also cease (CCL). These rights aim to promote and protect motherhood and child rearing under Article 21 of the Constitution of India, and Article 42 of the Constitution.

The Court cited the case of Municipal Corporation of Delhi v. The Women Workers (Muster Roll)<sup>4</sup> case said, where the Supreme Court ruled that the provisions of the Maternity Benefit Act, 1961 extended maternity leave entitlement to women working casually or daily wage accumulation on an oral basis, and is not restricted to regular employees. Furthermore, the court emphasized that the purpose of maternity leave is to protect the dignity of motherhood by ensuring the welfare of women and children Maternity leave fulfills the broader objective of achieving social justice for women by seeking special attention on the discovery of mothers and childhood. The Court found that the respondent in the present case was a daily wage worker during her advanced pregnancy and would not have been forced to do hard labor not only her health and safety but also her child's welfare and development will be compromised. The court strongly emphasized that maternity leave is a fundamental right of the defendant and cannot be denied by the state. The court therefore concluded that the actions of the appellant State violated Articles 29 and 39-d of the Constitution. Consequently, the court denied the petition.

## **SEVERAL REASONS REMARKING THE SIGNIFICANCE OF PATERNITY LEAVE**

### **1. Balancing Parental Responsibilities:**

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<sup>3</sup> H.P. v. Sita Devi CWP No. 647of 2020.

<sup>4</sup>Municipal Corporation Of Delhi Vs. Female Workers (Muster Roll) 2000 (2) SCR 171

Without paternity leave, new fathers often miss out on the opportunity to actively participate in caring for their newborn child. This leaves the bulk of childcare responsibilities on mothers, which can be overwhelming.

2. Strengthening Family Bonds:

Paternity leave allows fathers to bond with their newborns from the very beginning. Building this early connection is crucial for a child's emotional development and helps create stronger family bonds.

3. Gender Equality:

Lack of paternity leave can perpetuate traditional gender roles where women are primarily responsible for childcare and homemaking. It's important to recognize and promote the idea that both parents should share these responsibilities equally.

4. Work-Life Balance:

Paternity leave supports work-life balance for both parents. It enables fathers to manage their work commitments while also being present for their family during a crucial period.

5. Career Impact:

Without paternity leave, new mothers often face difficult choices, potentially leading to career interruptions or exits. This can contribute to gender disparities in the workplace and limit women's career opportunities.

### Top Companies with The Best Paternity Leave Policies<sup>5</sup>

Company	Vacation Time	Sick Leave	Parental Leave
Google	20 days	Unlimited	12 weeks
Facebook	21 days	14 days	4 months
Amazon	10 days	6 days	Up to 20 weeks
Microsoft	15 days	10 days	Up to 22 weeks
Apple	Up to 3 weeks	6 days	Up to 16 weeks
Airbnb	Unlimited	Unlimited	18 weeks
Netflix	Unlimited	Unlimited	52 weeks
Salesforce	15 days	5 days	Up to 26 weeks
Uber	15 days	Unlimited	18 weeks
LinkedIn	15 days	10 days	12 weeks
Twitter	20 days	Unlimited	20 weeks
Adobe	17 days	10 days	Up to 16 weeks
IBM	15 days	5 days	Up to 20 weeks

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<sup>5</sup>Devender Saini, Paternity Leaves Rules/Policy in India for Private Companies, <https://www.pacclatestnews.com/paternity-leaves-rules-in-india-for-private-companies>.

<b>Intel</b>	15 days	10 days	Up to 12 weeks
<b>Tesla</b>	Unlimited	Unlimited	Up to 16 weeks

## A BENEFIT OF PATERNITY LEAVE INCLUDES

### 1. Increased and retained job satisfaction:

By offering paternity leave, companies demonstrate a commitment to balancing employee well-being with work-life balance. This can increase job satisfaction and reduce turnover, ultimately saving recruitment and training costs.

### 2. Improved productivity and engagement:

Fathers who take paternity leave return to work engaged and productive. Feeling supported and less stressed in the early stages of parenthood can have a positive effect on performance.

### 3. Improved work-life balance:

Paternity leave allows new fathers to spend vital time with their newborns and support their partners, leading to better mental health and reduced stress. This improved balance allows them to function better once they return to work.

### 4. Positive Company Culture:

Offering paternity leave shows that the company values fathers and mothers sharing childcare responsibilities. This creates an inclusive and positive company culture and attracts top talent.

### 5. Compliance:

Many states have legal requirements for paternity leave. Providing this benefit ensures that companies comply with local laws, avoiding potential lawsuits and penalties. In summary, providing paid paternity leave not only helps employees in their personal lives but also has long-term benefits for businesses, including improved productivity, productivity and company culture, while ensuring compliance. It's a win-win situation for employees and employers.

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Indian paternity leave policies, as described, do lag behind those of several other countries in terms of duration and benefits. Here's a comparison with the policies of some other nations:<sup>6</sup>

- **India:** - Duration: 15 days

Benefits: Pay during paternity leave

Availability: Limited to government employees; not mandated for private sector.

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<sup>6</sup>Paternity Leave by Country, available at <https://www.safeguardglobal.com/resources/blog/paternity-leave-by-country> accessed on 23/09/2023.

- **Lithuania:** - Duration: 30 days  
Benefits: Paid at 77.58% of regular earnings  
Additional Shared Parental Leave: Up to 36 months
- **Japan:** - Duration: One full year  
Benefits: 67% of regular salary for the first half (180 days), 50% for the remainder - Separate from maternal leave.
- **Sweden:** - Duration: 480 days of shared leave.  
Benefits: Paid at varying levels, starting at 80% of regular salary - Encourages parents to split leave days.
- **Estonia:** - Duration: Two weeks of paid paternity leave at 100%  
Additional Shared Parental Leave: 435 days.
- **Iceland:** - Duration: 12 months of combined maternity and paternity leave (six months each)  
Transferable: Up to one month can be transferred between parents - Paid at 80% of annual salary.
- **Germany** (Unpaid leave mentioned): - Duration: 12 months paid leave, with an option for an additional 24 months unpaid as seen from this comparison,

India's paternity leave policy is notably shorter in duration compared to several other countries. Moreover, some countries provide more generous benefits, such as a higher percentage of salary paid during leave. Global trends in paternity leave are indeed moving towards longer durations and more gender-neutral policies, aiming to support greater gender equality in parental responsibilities.

**Table Format of Paternity Leave Allowance of Different Countries<sup>7</sup>**

Country	Paternity leave allowance
South Korea	548 days
Japan	365 days
Norway	365 days
Germany	365 days

<sup>7</sup> [https://www.oecd.org/els/soc/PF2\\_1\\_Parental\\_leave\\_systems.pdf](https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf), accessed on 24/09/2023.

Country	Paternity leave allowance
Sweden	240 days
Iceland	183 days
Denmark	168 days
Finland	160 days
Spain	112 days

## CONCLUSION

In summary, paternity leave matters because it promotes gender equality, strengthens family bonds, and helps both parents balance their work and family responsibilities, ultimately creating a more inclusive and supportive society. Providing paternity leave benefits in India is not only progressive but also necessary for several reasons:

### 1. Gender Equality:

Paternity leave policies promote gender equality by recognizing that fathers, like mothers, have an important role in childcare. It challenges traditional gender roles and promotes shared responsibility within families.

### 2. Family Friendly Workplace:

Providing paternity leave creates a family-friendly work environment that supports employee well-being. It helps them balance their professional and personal lives, reduces stress and increases job satisfaction.

### 3. Talent Attraction and Retention:

Competitive paternalistic leave policies can attract and retain top talent. Prospective employees often consider work-life balance and family support when choosing their employers.

### 4. Inclusivity:

A robust paternity leave policy means a commitment to inclusion, which takes into account a variety of family structures and individual circumstances. This inclusiveness contributes to a diverse and welcoming workplace culture.

5. Employee Empowerment:

Paternity leave empowers working parents to be actively involved in raising their children without sacrificing their jobs. It supports their physical and emotional well-being, benefiting employees and their families.

6. Compliance:

In many countries, including India, paternity leave is mandated or encouraged by law as a best practice. It is important for companies to comply with these rules to avoid lawsuits. Overall, paternity leave policies contribute to an equitable, inclusive, and supportive work environment. Companies that recognize these benefits and implement effective paternity leave policies are likely to see better results.

# INCREMENTALIST MAKING OF INDIAN CONSTITUTION: A ‘BEHIND THE SCENES’ STUDY

ASHUTOSH MISHRA\*

## Abstract

### INTRODUCTION: APPROACH TO MAKING CONSTITUTION IN A DIVIDED SOCIETY

*“Behind the scenes, lie the struggles of a having a flawless onstage”*

The making of the Constitution within a period of three years after establishment of the Constituent Assembly is perhaps one of the greatest achievements of India post-independence. However, the making of the Constitution was in itself a humongous and challenging task taking into account the size, diversity, and the complex problems that this newly formed nation presented. In fact, it is quite often said that what is done by the political leaders behind the scenes has more significance than what comes out in front of the public. This is true for the process of making of the Constitution of India as well. While the making of the Indian Constitution can and has been studied from many perspectives, including the rationale of different philosophies, the developed Jurisprudential aspects of societies inculcated in the different Constitutions or the presence of diverse portfolios in the Constituent Assembly and its impact on the final draft etc. Such studies are even conducted today. For example, a recent study<sup>1</sup> tried to decipher as the process of the making of the Constitution by analysing the assembly debate from various data heads such as which member spoke the most or which spoke the least and if the person who spoke the least, were its ideas presented in the Constitution. Also, what was the frequency of usage of certain words such as ‘religion’, ‘education’, ‘health’, ‘language’ etc. The purpose of such studies is to understand the frame of mind of the Constitution makers and how it was dealt with.

One of the major challenges before the Constituent Assembly was also to form a unified nation which presented its own difficulties. The draft of the Constitution was being prepared at a time when the nation had gained independence recently after centuries of colonial rule which was in fact preceded by autocracy. Furthermore, there was the issue of partition of the country which had seeds of communal disharmony and society divided on the factors such as religion, language, caste etc. Naturally, given the uncertainty, no one group was willing to compromise and had its own set of fears. It is quite apparent that even in the 21<sup>st</sup> century, the issues of religion or caste or language still trouble the Indian society. The examples of the Constitutional Amendment

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\* Legal Consultant, Mumbai

Act, 2019 (CAA)<sup>1</sup> and protest or the division of the State of Andhra Pradesh into Telangana substantiate this argument. Therefore, at such times where the emotions were at an all-time high, even the Constitution makers understood that an attempt to promote a homogenous national identity could be a very fragile and risky business.<sup>2</sup>In such a situation, what approach would have been the best to overcome such difficulties and still lay the foundations of a democratic and unified nation that stands the tests of time?

Historically speaking, constitution makers in many multi-ethnic and multi-cultural societies have tackled the challenge of fostering constitutional unity amidst religious, linguistic or ethnic differences<sup>2</sup>vide varied alternative means such as different forms of federalism, power sharing, special group rights etc<sup>3</sup>and in fact been proved useful. However, such solutions are also applicable and successful based on a particular facts and circumstances, either geographical or societal circumstances and is primarily based on the idea of equal distribution of resources. Herein, also lies a drawback that such solutions fail to address divisions over the shared vision of a State as a whole.<sup>3</sup>Thus, it can be seen as a temporary effective tool but there no lies no guarantee that it would promote unity in the long run. The conflict in the Indian society lied in the fundamental norms and values that were to guide State policies for the entire population as a whole. The conditions in India at that time were so unstable that rigid decisions<sup>4</sup> could even have led to violent conflicts. The effects of partition of India substantiate this claim.

Based on the above premise, the author intends to explore the incrementalist approach of the Constitution makers based on creative usage of constitutional language which was adopted by the Constitution makers in light of the deep disagreements that existed over the vision of a unified States and in various debates related to ideology, the framers refrained from making unequivocal choices.

## **B. CONSTITUTIONAL INCREMENTALISM: A STUDY THROUGH THE ASSEMBLY DEBATES**

Incrementalism can be defined as an approach wherein the amendments made are gradual and transitional instead of revolutionary given the needs and demands of the society. Leaders who adopt such an approach do not consider the enactment of the Constitution as revolutionary but as a transitional process that would gradually change the dynamics of the society as whole.<sup>4</sup>It is a beginning of a long journey and not the entire journey itself. In the Indian scenario, the constitutional incrementalism allowed the Assembly to circumvent potential explosive conflicts and shifted the burden of resolution of such debates to the future. The purpose of the approach was to allow a greater flexibility for future decisions about controversial questions

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<sup>1</sup> Shivkumar Jolad and Yugank Goyal, 'What our Constituent Assembly debates reveal of a vital process' (Mint, 25 Nov 2021) < <https://www.livemint.com/opinion/online-views/what-our-constituent-assembly-debates-reveal-of-a-vital-process-11637857451306.html>> accessed 24 June 2023

<sup>2</sup> Hari P. Bhattarai and Jhalak Subedi, *Democratic Constitution Making*, (1<sup>st</sup> edn, Nepal South Asia Centre, 2007)

<sup>3</sup> Hanna Lerner, 'Constitution-writing in deeply divided societies: the incrementalist approach', (2010) 16(1) Nations and Nationalism 68

<sup>4</sup> Ibid 77



accommodation of competing views of the people, which is the premise of this approach promotes a consensual democracy.

This part will now discuss three incrementalist strategies adopted by the Constitutional makers concerning India's religious and linguistic identity as well as State's economic policy.

## **1. DEFERRAL OF CONTROVERSIAL DECISIONS ABOUT NATIONAL LANGUAGE**

One of the most controversial issues before the Constitution makers was *vis-à-vis* the national language of the Union. As later history tells us, many of the Indian states such as Punjab, Haryana, Gujarat, Tamil Nadu etc. have been formed on a linguistic basis.<sup>5</sup> Thus, there is no denial of the fact that language was an issue close to the hearts of the public. This complexity also stems from the fact that at the time of independence nearly twenty major languages were spoken in India.<sup>5</sup> In fact, Hindi which was the widest spread language amongst the public was spoken by less than 40 percent of the entire population. While the official language of the State had been English which was not acceptable by the Constitution makers.<sup>6</sup>

### **a) Constitutional Assembly Debates**

#### *i. In favour of Hindi:*

The Hindi speaking representative demanded the declaration of Hindi as a national language as replacement of the English Language and that a nation with one language and one script should be formed and there should not be a multiplicity of cultures.<sup>7</sup> It was argued that the adoption of Hindi language could be decided by the vote of majority.<sup>8</sup>

#### *ii. Against Hindi:*

The other faction contested the necessity of linguistic homogeneity and propagated the idea of unity in diversity.<sup>9</sup> This faction also opposed the adoption of the national language through majority vote as it would effectively be coercion.<sup>10</sup>

#### *iii. English as the de facto official language:*

While the Constitutional makers understand the practical difficulties of implementing Hindi as the national language of the Union, the role of English as the de facto language of law and government was stressed upon. This is due to the fact that it was already in usage<sup>6</sup> and a national language can be adopted by the entire nation only when it evolves into the society and accepted by all. Thus, it was argued that national language evolution

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<sup>5</sup> Mridula Chari, 'How the map of India was redrawn on the lines of language' (*Scroll.in*, 1 Nov 2016) <

<https://scroll.in/article/820359/how-the-map-india-was-redrawn-on-the-lines-of-language>> accessed 24 June 2023

<sup>6</sup> Jason Baldridge, 'Reconciling Linguistic Diversity: The History and the Future of Language Policy in India' (August 1996) <

<https://www.ling.upenn.edu/~jason2/papers/natlang.htm>> accessed 24 June 2023

should follow its own course.<sup>11</sup>

## **b) Final Draft**

The final solution that was arrived by the Assembly was the adoption of Hindi as an official language and a national language. Further, English was to continue to be used for all official purposes. It was initially decided that such an arrangement would be for a period of 15 years and a parliamentary committee would be responsible for future course of action on the same.<sup>12</sup> Further, Schedule VIII of the Constitution recognized 14 other languages (at present 22) for official use. In this manner, the Assembly sustained the balance between its nationalist aspirations and their pragmatic realization.<sup>13</sup> It was realized that a fundamental choice regarding the identity of the State cannot be made through a constitutional provision but has to evolve over a period of time. In fact, English de facto remains the formal language of India till date.<sup>14</sup>

## **2. USE OF AMBIGUOUS AND VAGUE CONSTITUTIONAL FORMULATIONS CONCERNING PERSONAL LAWS**

One of the most intense debates in the Indian history i.e., the religious debate was settled by formulating provisions relating to the same which were apparently vague. The debates ranged from the fact whether India has a religious identity and whether State can interfere in religious matters. Personal laws also became a focal point in this debate and so was the application of the Uniform Civil Code (UCC).

### **a) Constitutional Assembly Debates**

#### *i. In favour of UCC:*

One faction of the assembly argued to use legal power and status of the Constitution to modify religious customs and advance secularization<sup>15</sup> while also calling for restriction of religion to the private sphere and the promotion of unity and societal integration on the basis of civic national identity.<sup>16</sup>

#### *ii. Against UCC:*

The other faction vehemently opposed the secularization of personal laws<sup>17</sup> and propagated the idea that the constitution should reflect the spirit of the nation and should not impose deep cultural and social changes.<sup>18</sup>

#### *iii. Gradual changes*

Some of the members of the Assembly expressed the view that over-night changes in religious beliefs will not be possible as it is an inherent characteristic of the society that existed at that time and while the goal should be towards a Uniform Civil Code, it should be gradual and with the consent of the people.<sup>19</sup>

## **b) Final Draft**

The final solution that was arrived by the Assembly was that instead of dealing with personal laws in the Constitution, it was transferred to be a statutory legislation<sup>20</sup>. With regards to the Uniform Civil Code, it was included as a Directive Principles of State Policy (DPSP) which are non-justiciable.<sup>21</sup> Once again, the decision made was not a clear-cut decision but left at the whims of the future leader and to decide upon the same when the time was ripe.

### **3. NON-JUSTICIABLE DIRECTIVE PRINCIPLES OF STATE POLICY**

This feature is one of the most innovative aspects of the Constitution which has been borrowed from the Irish Constitution.

#### **c) Constitutional Assembly Debates**

##### *iv. Against DPSPs:*

One faction of the Assemble vehemently criticized the Directive Principles of State Policy as mere pious expressions<sup>22</sup> and were too vague<sup>23</sup> and abstract<sup>24</sup> and being inoperative<sup>25</sup>, meaningless due to the unbinding character<sup>26</sup>.

##### *v. In favour of DPSPs:*

The other faction of the Assembly believed such provisions to be the essence of the Constitution<sup>27</sup> and as guide for governance.<sup>28</sup> It was argued that it was adopted because it has value to the State.<sup>29</sup> It was also propagated that the Constitution also wishes to lay down an

ideal before those who would be forming the government and hence, the directives are a necessary inclusion.<sup>30</sup>

### **C. AUTHOR'S COMMENTS ON THE INCREMENTALIST APPROACH: TOO LITTLE, TOO LATE?**

Author Amish Tripathi in his fictional Shiva trilogy has propagated an idea that anything in this universe has its utility for good for a limited time span and when it passes that time span, it then turns into bad. As discussed above through the concepts of incrementalist approach and the constitutional assemble debates, the purpose of adopting such an approach was to delay societal imbalance at the time of independence and move toward forming a cohesive society in a gradual manner which had to be worked out by future governments. Incremental constitutional change is better for deeply divided nations such as India as it seeks to protect the interests of contrasting ideologies and gradually seek to promote oneness among the citizens. It minimizes friction by focusing on evolution rather than a revolution. It deems Constitution as a start of a long journey and rather than its end. That even after approximately seventy years of independence, the Indian society still remains intact is a testament to the fact that the incrementalist approach has worked to keep the nation together

as one democratic one.

Constitutional arrangements have been adopted even at an international scale. The Constitution of Indonesia, included a religious permissive formula which defined the religious identity of the State in vague terms. Ambiguous constitutional arrangements were adopted concerning issues of religious identity and gender equality in the new Constitution of Tunisia. For deeply divided societies, incrementalist approach serves as an alternative towards the liberal constitutional mechanisms.

However, the purpose that one sought to achieve through this approach is to avoid intense conflicts based on factors such as religion, language, caste etc. This approach made sense at that time but has it finally outdone its utility. The CAA protests in recent times have shown that factors such as religion still haunt the Indian society. Even after so many years, the leaders have just delayed the implementation of fundamental policies and efforts to bring about a change have not been very effective. In the age of social media, where one tweet can create havoc in the entire society, it seems unlikely that any fundamental ideology change or the gradual change or evolution of thoughts as the Constitution makers sought to achieve, can now be done. This is where the fundamental fallacy of the incrementalist approach lies. This approach has a tendency to perpetuate rather than mitigate. Conflicts over issues of religion and secularism, or a uniform language or caste still exist and look unlikely to be resolved unless a fundamental change in policy is brought about. It has ultimately resulted in overburdening India's political and judicial institutions and serves no other purpose. While the conflict may have been avoided then, the Constitution and the society still remains at a standstill as there not have been may efforts for a resolution. But it is also a fact that such an arrangement has worked as Indian still remains the world's largest democracy. But can it sustain or is it too little, too late to avoid the inevitable?

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<sup>4</sup> Ugo M Amoretti and Nancy Bermeo, *Federalism and Territorial Cleavages* (Johns Hopkins University Press, 2004)

<sup>5</sup> Constituent Assembly Deb 13 September 1949, vol 9 (Lok Sabha Secretariat 1986) 1410

<sup>6</sup> Constituent Assembly Deb 12 September 1949, vol 9 (Lok Sabha Secretariat 1986) 1328

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<sup>8</sup> Constituent Assembly Deb 14 September 1949, vol 9 (Lok Sabha Secretariat 1986) 1433,

<sup>9</sup> Constituent Assembly Deb 13 September 1949, vol 9 (Lok Sabha Secretariat 1986) 1389

<sup>10</sup> Constituent Assembly Deb 14 September 1949, vol 9 (Lok Sabha Secretariat 1986) 1457

<sup>11</sup> Constitution of India 1950, art 343

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# IMPACT OF PROBATION AND PAROLE ON THE DEBILITATING CONDITIONS OF PRISON SYSTEM IN INDIA A CRIMINOLOGICAL STUDY

ROHIT SRIVASTAVA\*

ISHANI YOG\*\*

## ABSTRACT

This paper shall deal with the importance of two correctional reformatory tools which are probation and parole. It shall contain the conceptual meaning of the two terms and how they originated and became one of the most accepting measures of reformation. Moreover, the facts and data are presented to depict the present situation of prisons leading to the violation of human rights of the prisoners. At the end, the conclusion is presented to provide the entire crux of the study and the suggestions which should be implemented for the betterment of the prisoners and protection of their human rights.

KEY WORDS - Probation, Parole, Prisoner's Human Rights.

## INTRODUCTION

*"Society must strongly condemn crime through punishment, but brutal deterrence is fiendish folly and is a kind of crime by punishment. It frightens, never refines; it wounds never heals."* ~ Justice **Krishna Iyer**<sup>1</sup>

The subject of criminology, penology and victimology deals with the core study of criminal behavior and their psychology which gives the answer to a lot of questions like why criminals become criminals? Are biological factors responsible for the acts of horrendous crimes like rape, arson, murder etc.? Do economic factors also make a person criminal? Moreover, this subject is moulded in such a way that it gives the perception of the psychology of victims. All this leads to the conclusion and gives a larger perspective to various aspects of crime.

We can see that there is a trend depicting a pattern of crime. As society is advancing in technological terms and the concept of social justice is decreasing. The economy is getting affected due to which the capacity of each person is to hold money is getting debilitated. It means that the rich are becoming richer, and the poor are

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\* Jamia Millia Islamia, New Delhi

\*\* Amity University, Noida

<sup>1</sup>VR Krishna Iyer, 'Justice in Prison: Remedial Jurisprudence and Versatile Criminology' in Rani Dhavan Shankardass, Punishment and the Prison: Indian and International Perspectives' [2000] Sage Publications, New Delhi) 58

becoming poorer, which is directly affecting the mental health of the major portion of society resulting in the increase in number of crimes. Hence, if we were able to catch the root cause of crime and criminal behavior, we would be able to find numerous ways through which we can tackle and decrease the growing number of crimes.

There are so many ways to curb crime like incarceration, imposing fine etc. Which are given to the one who is convicted according to the procedure established by law.

In India and according to Indian laws and modern jurisprudence, we follow the system of reformatory form of punishment according to which, 'Nobody is born as a criminal and there will always be a hope that one day his act of crime would make him feel his repentance due to which he could be a responsible individual and could work for the betterment of the society'. It is based on the principle of human rights that even if an offender commits a crime, he does not cease to be a human being.

In case 1, the apex court observed:

*"Modern Criminal Jurisprudence recognizes that no one is born a criminal & that good many crimes are the result of the socio-economic milieu. Although not much can be done for hardened criminals, yet a considerable emphasis has been laid on bringing about reform of juveniles who are not guilty of very serious offenses by preventing their association with mature criminals."*<sup>2</sup>

This article will look upon and try to find a road ahead which must be followed to bring down gruesomeness and the increasing number of crimes.

Various criminologists have shown that there is a direct connection between crime and punishment resulting in an increasing or decreasing number of prisoners. Therefore, it is necessary to look for ways through which the entire prison system could be better leading to the betterment of society. One such way to achieve that goal is to closely examine the two correctional devices that are "Parole and Probation" and look upon their impacts in contemporary times and how various measures can be taken to improve it

## **MEANING OF PROBATION AND PAROLE**

The word probation has come from a Latin word '*probare*' which means 'proved' or 'tested'. According to Black's Law Dictionary, Probation means "the evidence which proves a thing; the act of proving; proof."<sup>3</sup> It connotes a meaning that "I prove my worth".

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<sup>2</sup> AIR 1963 SC 1088

<sup>3</sup> Black's Law Dictionary, (4th edn, 1968)

The other definition of probation is, “Probation is a method of treating (correcting) suitably selected offender by releasing him into the community upon certain conditions prescribed by the court on conviction, before sentencing (offender) generally upon supervision of Probation Officer”<sup>4</sup>

By examining the meaning of parole, it may be said that there is a minute difference in the meaning of parole and probation. The word parole has originated from a French phrase ‘*de jone ma parole*’ which means that ‘I give my word’. According to Ballentine’s Law Dictionary, Parole is not an act of clemency, but a penological measure for the disciplinary treatment of prisoners who seem capable of rehabilitation outside of prison walls.<sup>5</sup> Parole is a form of conditional release granted to the prisoners after they have served a portion of their sentences. The conditional release involves a service which includes the control, assistance, and guidance of the offenders need as they serve the remainder of their sentences within the free community.<sup>6</sup>

Probation is granted when there is a release of a prisoner before custodial sentence and parole is granted when the prisoner has just been released from custody.

## **HISTORY OF PROBATION AND PAROLE**

In U.S.A, John Augustus was a cobbler who was designated as the first probation officer. He is also known as the “Father of Probation”. As he was a cobbler around the premises of the court, he used to view the court proceedings and became thoughtful about the prisoners and started thinking about the alternative method from which he could make the lives of prisoners much easier by creating a correctional method which could reform the prisoner to rehabilitate them into the society.<sup>7</sup>

He thought of an experiment and appealed in courts to keep prisoners out of jail under his watch after serving some time in jail to see whether they could again be a part of society or not. The prisoners showed signs of reform and then he started advocating more about this idea of reformation of prisoners and laid down the foot in western society. Slowly this idea started flourishing all around the globe and different countries began to experiment with it and later developed this idea according to their own culture and customs to codify this idea as part of law in their criminal justice system<sup>8</sup>.

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<sup>4</sup> Dr. Hira Singh, Social Defence (Vision 2020): [http://www.planning commission.nic.in/reports/genrep/bkpap2020/21\\_bg2020.doc](http://www.planning commission.nic.in/reports/genrep/bkpap2020/21_bg2020.doc). accessed 16 September 2022.

<sup>5</sup> BALLENTINE’S LAW DICTIONARY, P.no 1872 Lawyers Co-Op Pub Co, (3<sup>rd</sup> edition 1969)

<sup>6</sup> Chakrabarti, Nirmal Kanti, Probation Services in the Administration of Criminal Justice, P.No.126 (Deep & Deep Publication Pvt. Ltd, New Delhi, 1<sup>st</sup>edn)

<sup>7</sup> Ibid.

<sup>8</sup> Ahmad Sidique, “Criminology and perspective”, P.g 206 ( Eastern Book Company, India)



In India, this idea of probation got molded in such a way that it aligns to the basic principles of the Constitution of India and all the decision-making power related to probation is in the hands of the judiciary. Under article 226 of the constitution of India the probationary orders can be subject to judicial review.<sup>9</sup>

The idea of “parole” was coined by the Scottish Geographer Alexander Moconochi in 1840, he was later designated as superintendent of British penal colonies. He wanted to give prisoners a punishment through which they would suffer for the deeds that they have done but he also held the view they still have a future, and they still could be a part of society. This mindset made him develop a strategy which was divided into three parts. The first two parts focused on the examining of their behavior and labor. And the last part focused on whether they could be free as a normal citizen with the condition that they would follow certain rules. If they do not abide by the rules they would again be sent back to prison. This system led to the establishment of first Parole system in the world.<sup>10</sup>

## LEGAL ASPECT

On 18 November 1957, a bill on Probation of Offenders was introduced in Lok Sabha. A joint sitting was committed to form the Act's provisions; it described how the ACT shall function and what will be the ingredients appropriate for the prisoners to get reformed by this tool of institutional method of correction. After the diligent efforts of the parliament this act known as “Probation of offenders Act” was passed on May 16<sup>th</sup>, 1958<sup>11</sup>.

Section 360 of CrPc,1973 also states the condition on which prisoners may get the order to be released on account of good conduct or after admonition.”<sup>12</sup>This section mentions the conditions in which the court may think that the behavior is in consonance with the “good conduct” in the eyes of law and may get the order of probation after entering in a bond or without sureties.<sup>13</sup>

There are certain laws which were enacted under the Prison Act of 1984 and the Prison Act of 1900 according to which the orders related to parole are given in India. There is no specific statutory legislation for the regulation of laws related to parole for whole India. Whereas, each state has its own set of parole guidelines, which differ slightly from one another.<sup>14</sup>

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> N.V Paranjpe, Criminology and Penology with Victimology, P.NO- 552( Central Law Publications, Allahabad, 15<sup>th</sup> edition)

<sup>12</sup> The Code of Criminal Procedure,1973, s.360

<sup>13</sup> Chapter XXVII, SECTION 360 Of CrPC, *available at*:

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<sup>14</sup> Ms. Kishita Gupta, Laws related to parole. *available at*:<https://blog.ipleaders.in/parole-india-laws-related/> accessed on 16 March, 2023

## IMPACT ON PRISON SYSTEM AND REFORMS IN NEED

The present scenario of Prison system in India is quite complex to understand. There is a massive problem of overcrowding of convicts in Prisons. This overcrowding is the major reason other problems like food shortage, health issues, corruption, torture, and fights take place regularly.

The United Nations General Assembly passed a resolution on the Basic Treatment of Prisoners, which was adopted on 14 December 1990, stated that “All prisoners should be treated with respect due to their inherent dignity and values as a human being.”<sup>15</sup> This instrument further protects other human rights violations by restricting the unequal treatment which may take place because of one’s race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>16</sup> However, there are numerous cases happening regularly in which gross violation of this resolution occurs.

The vulnerable group which includes children, women and elderly persons are the one who are most affected. Among them too, children are the ones who get most affected. Due to their immaturity, they do not know what to think. How to think. And what is right and what is wrong. They absorb and learn from their surroundings. When they see darkness in prison, they start liking the dark. When they see violence, they begin to think violence is correct. Similarly, when they see police brutality against their parents, they begin to think that the entire prison and justice system is acting against their parents, and they are the one responsible for all the wrongful condition which they go through in prison. Their surroundings develop their thinking. And this sort of thinking develops a criminal mindset. However, this can be safeguarded by realizing the importance of Parole and probation as it gives an opportunity to the prisoners to live again a respectful life as a normal individual. In the case *Budhi Prakash Swarnkar vs State of Rajasthan*,<sup>17</sup> the honorable court emphasized the significance of parole and the requirement to give inmates opportunity for social reintegration. The court decided that to ensure inmates' successful reintegration into society and lower the likelihood of recidivism, parole should be granted to them, subject to reasonable conditions. In the case of *Delhi Administration v. Sunil Batra*,<sup>18</sup> the Supreme Court of India acknowledged the value of parole as a strategy for prisoner rehabilitation and reintegration. The court determined that parole should be granted to qualified inmates because it acts as a transition between prison life and free life, allowing inmates to progressively adapt and adjust. Further in the case *Charanjit Lal vs State and Ors*<sup>19</sup> it was observed that it is crucial to consider the regular release from

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<sup>15</sup> UN General Assembly, “Basic Principles for the Treatment of Prisoners”, GA reso. 45/111, UNHRC, 14 December 1990, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-treatment-prisoners> accessed on 29 September, 2022

<sup>16</sup> Ibid.

<sup>17</sup> RLW 2006 (1) Raj 118

<sup>18</sup> 1980 SCR (2) 557

<sup>19</sup> 1985 CriLJ 1541

custody of life offenders, giving them the chance to handle personal and family difficulties and keep ties to society. By giving them brief opportunities to breathe fresh air, as long as they behave well and show a willingness to change and become productive members of society, their rehabilitation and redemption become key factors to consider while serving their time in prison. This approach not only serves the benefit of the inmates but also to society at large. While looking at the specific group of juvenile offenders in the case of *Miller vs. Alabama*, it was held that, “age of the offender to be taken into consideration before sentencing him or her to life without parole”.<sup>20</sup> Thus, shedding a light on the fact that consideration of the rights of juvenile offenders should be taken with utmost seriousness as they have more tendency to reform easily. In the situation of emergency like that of covid, prisoners can also be removed on parole to decongest the prisons as it was done by the supreme court when the virus was rising at a rapid pace.<sup>21</sup> The whole purpose of these correctional tools is to improve the condition of the entire prison system. According to the National Crime Records Bureau (NCRB) 2005, prison administrations in India spent an average of US\$ 333 (INR 10 474) per prisoner per year in 2005, divided among the categories of food, clothes, medical costs, vocational & educational costs, welfare programmes, and others. In contrast, the average annual operational cost for a state prisoner in the US in 2001 was \$22,650 (the latter figure likely includes staff compensation).<sup>22</sup>

Recently the prison statistics in India shows that the budget allocated for the functioning of prison institute in the year 2020-21 has gradually decreased from Rs. 6740.6 crores to 2.9% that is 6943.3 crores as compared to the budget sanctioned in 2019-2020.<sup>23</sup> Funds which are needed for the basic needs like food preparation, health, legal aid, infrastructure have declined. Due to which the situation of convicts has become more debilitating

## CONCLUSION

From the above deliberation, we can conclude that this reformatory tool of Probation and Parole plays a crucial role in the preservation and protection of prisoners leading to the betterment of entire prison system.

In the beginning it originated as an idea and later became a part of the law. The hardened criminal gets the chance for the rectification of their past deeds. It now acts as a deterring factor for the improvement of the prison system. But there are umpteen number of lacunae in the present structure. There is a need to bring a

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<sup>20</sup>Miller vs. Alabama (2012), 567 U. S.

<sup>21</sup> Prachi Bharadwaj, Release of prisoners during covid, SCC blog, March 27, 2023 available at:

<https://www.scconline.com/blog/post/2023/03/27/covid-19-parole-ends-prisoners-return-to-jail-overcrowded-prisons-undertrial-convicts-supreme-court-pandemic-legal-updates-news-research/>

<sup>22</sup> Shubham Kashyap, “Major problems of prison system in India”, available at:

<https://timesofindia.indiatimes.com/readersblog/shubham-kashyap/major-problems-of-prison-system-in-india-40079/> accessed on 23 June, 2023

<sup>23</sup>Prison Statistics in India 2020, ‘ National Crime Record bureau’, (Ministry Of Home Affairs) available at:

[https://ncrb.gov.in/sites/default/files/PSI\\_2020\\_as\\_on\\_27-12-2021\\_0.pdf](https://ncrb.gov.in/sites/default/files/PSI_2020_as_on_27-12-2021_0.pdf) accessed on 25 September 2022)

more liberal perspective to make the stringent existing laws a little fragile. This will help to increase the pace of taking judicial decisions.

Both probation and parole create fluctuation in prisons because of which the space which was occupied by someone gets empty and gets occupied by someone else. This fluctuation helps in releasing the congestion in jails acting as major solution to the problem of overcrowding of prisons.

Probation and Parole are similar in many ways, but there is uniqueness in both their respective characters. It can be drawn from comparative analysis that due to the codification of probationary laws there is a clarity of its usage. Laws for parole also need to be codified to prevent ambiguity.

According to the data presented by Prison Statistics India, there are 1,342 prisoners released on parole have absconded.<sup>24</sup> This is one of the major problems in the implementation of parole. This problem can be tackled by creating a separate vigilant group which would especially keep an eye on the prisoners who are susceptible to breaking the rules.

Funds sanctioned by the government are the basis on which the entire prison system's infrastructure is standing. Appropriate funds are needed for the implementation of the plans to improve the current situation. A separate committee should be formed to allocate appropriate amounts of funds needed for the betterment of prisoners.

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<sup>24</sup>Id. at 167.

# A COMPARATIVE REVIEW OF TAXATION POLICIES CONCERNING CRYPTOCURRENCIES

ANIMESH PRATAP SINGH\*

DIVYANSH SHUKLA\*\*

## ABSTRACT

Cryptocurrencies have emerged as a transformative force in the digital currency era, capturing the attention of investors, technologists, and policymakers worldwide. However, the taxation of cryptocurrencies presents a complex challenge for governments due to their decentralized nature and inherent anonymity. This article explores the evolving landscape of taxation policies for cryptocurrencies, examining how jurisdictions classify these assets and the implications for tax treatment. The article delves into the taxation practices of major economies, including the United States, the United Kingdom, Australia, Canada, Germany, Japan, China, and India.

Each country takes a unique approach to taxing cryptocurrencies, considering them as currencies, commodities, or assets. The United States treats cryptocurrencies as property, subjecting them to income tax and capital gains tax. The United Kingdom evaluates tax treatment on a case-by-case basis, while Australia applies capital gains tax to disposal of cryptocurrencies and income tax to exchange services and mining activities. Germany recognizes cryptocurrencies as financial instruments but recently ruled that crypto profits are taxable. Japan recognizes bitcoin as a digital payment method and taxes various crypto-related activities as miscellaneous income. China has banned initial coin offerings and cryptocurrency-related services but taxes profits from crypto investments. India imposes a flat income tax rate and a 1% TDS tax on cryptocurrency asset sales.

As the cryptocurrency market evolves, governments are working towards comprehensive taxation policies that balance innovation and regulation. Individuals and businesses must stay informed about tax regulations in their jurisdictions to ensure compliance and make informed financial decisions.

**Keywords:** Digital currency, Cryptocurrency, Bitcoin, Crypto assets, taxation, financial regulators.

## Introduction

As the world delves deeper into the digital currency era, cryptocurrencies have emerged as a groundbreaking and transformative force. Bitcoin, Ethereum, and many other cryptocurrencies have captured the imagination of investors, technologists, and policymakers alike. However, as these digital assets continue to gain popularity and reshape traditional financial systems, governments around the globe are grappling with the complex issue concerning the taxation policies for such assets. Cryptocurrencies, with their decentralized nature and inherent anonymity, present a unique challenge for taxation authorities worldwide. This article intends to explore the evolving landscape of taxation policies concerning cryptocurrencies, seeking to shed light on the key considerations and approaches taken by various jurisdictions.

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\* Research Scholar, Ram Manohar Lohia National Law University (RMLNLU)

\*\* Asst. Professor, ABVSLs, CSJM University

The article will examine the fundamental question of how cryptocurrencies are classified for taxation purposes. Are they be treated as currencies, commodities, or securities? The answer to this question has significant implications for the tax treatment of transactions involving cryptocurrencies, including income tax, capital gains tax, and sales tax. The decentralized nature of blockchain technology and the pseudo-anonymity of crypto transactions create hurdles in effectively tracking and taxing cryptocurrency-related activities.

As cryptocurrencies continue to revolutionise the financial landscape, governments are under increasing pressure to develop comprehensive taxation policies that accommodate this rapidly evolving sector. By understanding the nuances of tax policies surrounding cryptocurrencies, individuals and businesses can navigate this complex terrain with clarity and confidence. The article looks into the taxation practices of major economies.

### **Taxation Practices Adopted in Major Economies**

In order to build a system that can govern cryptocurrencies, various laws have been adopted by major states worldwide. Multiple countries have adopted opposing positions, with some considering bitcoins as 'money' and thereby exempting tax charges, while others as 'asset' and 'capital property', Thereby charging capital gains tax. This section discusses practices adopted by prominent states.

#### **United States**

In the **United States**, the I.R.S. (Internal Revenue System), in its notice regarding the tax treatment of transactions involving cryptocurrency, notified that for federal tax purposes, virtual currency is treated as property which is similar to saying that it is treated like a stock and not as a currency that could generate foreign currency gain or loss.<sup>1</sup> If an individual pays for services provided in crypto-currency, then the payment is subject to US income tax.<sup>2</sup> Noticeably, cryptocurrency obtained through mining is also considered to be income<sup>3</sup>. The IRS confirmed that new cryptocurrency received due to a hard fork, a permanent change to the rules of a digital currency's blockchain, is ordinary, taxable income.<sup>4</sup> In other words, if an individual receives new cryptocurrency coins due to a hard fork, the I.R.S. treats the value of those coins as regular income subject to taxation. If a taxpayer acquires cryptocurrency, the basis of the cryptocurrency is the price at which both transacting parties are willing to proceed with the transaction when it occurs.<sup>5</sup>

The I.R.S. has been diligently trying to find new ways to tax cryptocurrencies. It has asked Congress for additional statutory authority to examine cryptocurrency transactions for taxation purposes.<sup>6</sup> The I.R.S. has

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<sup>1</sup> IRS, 'Revenue Procedure 2014-21' (Internal Revenue Service, 31 March 2014) <https://www.irs.gov/pub/irs-drop/N-14-21.pdf>. accessed 28 June 2023.

<sup>2</sup> Internal Revenue Service, 'Frequently Asked Questions on Virtual Currency Transactions' (IRS, 2022) <<https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions>> accessed 30 June 2023.

<sup>3</sup> Washington State Department of Revenue, 'Interim Statement Regarding Bitcoin Payments, Mining, and Investment Income' (DOR, 2015) <<https://dor.wa.gov/interim-statement-regarding-bitcoin-payments-mining-and-investment-income>> accessed 30 June 2023.

<sup>4</sup> Internal Revenue Service (n 2)

<sup>5</sup> Corporate Finance Institute. "Fair Market Value." Corporate Finance Institute, 2022, <<https://corporatefinanceinstitute.com/resources/knowledge/accounting/fair-market-value/>>. Accessed 30 June 2023.

<sup>6</sup> Carla Mozée "IRS Chief Asks Congress for More Authority to Regulate the Crypto Industry." (*Business Insider India*, 7 June 2021) <<https://www.businessinsider.in/cryptocurrency/news/irs-chief-asks-congress-for-more-authority-to-regulate-the-crypto-industry/articleshow/83353090.cms>>. Accessed 30 June 2023.



also opted for the route of courts for getting orders to uncover the identities of parties involved in high-value cryptocurrency transactions. A federal court had authorised the Internal Revenue Service (IRS) to issue a "John Doe Summons" on Kraken, a cryptocurrency exchange. This summons aimed to obtain the identities of U.S. taxpayers who have utilised cryptocurrency. Specifically, the IRS was interested in gathering information regarding taxpayers who had engaged in cryptocurrency transactions amounting to a minimum of \$20,000 between the years 2016 and 2020.<sup>7</sup>

The taxation regime in U.S. for cryptocurrencies is in an evolutionary stage. The present administration intends to frame a statutory policy for the taxation of crypto assets; however, its attempts have not yet succeeded. Due to a lack of support in Congress, the Biden administration could not pass a regulation taxing cryptocurrency asset at a rate of 20%.<sup>8</sup> It is highly likely that the US will be able to develop a regulatory framework in the near future as consensus regarding taxation policy begins to grow.

**United Kingdom** In the **United Kingdom**, the His Majesty's Revenue & Customs (HMRC) has issued guidance on the U.K. taxation of cryptocurrency, asserting that the sector is "fast-moving and developing all the time."<sup>9</sup> This can be interpreted as saying that the tax treatment will vary with the volatility in the usage of cryptocurrencies. The HMRC will not be tied to any pre-set view of the required tax treatment and instead, be evaluated on a case-by-case basis.

According to HMRC's notice, the tax treatment for individuals and corporations will be different.<sup>10</sup> For businesses, since cryptocurrencies are not considered to be actual currencies, the corporate tax will not be applied to their exchanges.<sup>11</sup> Furthermore, the gains from a trading operation in exchange tokens would be part of its taxable trading income, as specified in the latest HMRC guidance.<sup>12</sup> The services rendered by cryptocurrency exchanges shall not be subjected to VAT, as it does not constitute an economic activity for the purposes of VAT, and there is no direct customer in the mining operation.<sup>13</sup> For individuals, two potential treatments for profits or dividends made on cryptocurrencies are noted in the guidance. According to that, trading profits will be subjected to income tax, and capital gains will be subjected to CGT. It should be noted that the guidance of HMRC is focused on its understanding of current tax laws that have not been built for crypto assets. Thus, the tax laws might evolve over time as crypto-asset tax disputes are tested in the courts of law.<sup>14</sup>

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<sup>7</sup>Reuters "U.S. Court Authorizes IRS to Seek Identities of Taxpayers Who Have Used Cryptocurrency." (*Reuters*, 5 May 2021), <<https://www.reuters.com/world/us/us-court-authorizes-irs-seek-identities-taxpayers-who-have-used-cryptocurrency-2021-05-05/>>. Accessed 30 June 2023.

<sup>8</sup> Sander Lutz. "White House Tells Congress to Regulate Crypto." (*Decrypt*, 24 June 2021), <<https://decrypt.co/120153/white-house-congress-crypto-regulations>>. Accessed 30 June 2023.

<sup>9</sup> HM Revenue & Customs. "Cryptoassets for Individuals." (GOV.UK, 19 March 2021), <<https://www.gov.uk/government/publications/tax-on-cryptoassets/cryptoassets-for-individuals>>. Accessed 30 June 2023.

<sup>10</sup> Ibid

<sup>11</sup> HM Revenue & Customs. "Cryptoassets Tax for Businesses." (GOV.UK, 19 March 2021), <<https://www.gov.uk/government/publications/tax-on-cryptoassets/cryptoassets-tax-for-businesses>>. Accessed 30 June 2023.

<sup>12</sup> HM Revenue & Customs. "Cryptoassets Manual." (GOV.UK, 19 March 2021), <<https://www.gov.uk/hmrc-internal-manuals/cryptoassets-manual/crypto20250>>. Accessed 30 June 2023.

<sup>13</sup> BDO. "How Cryptoassets Are Treated for Business Tax Purposes." (BDO United Kingdom, 2021), <<https://www.bdo.co.uk/en-gb/insights/tax/corporate-tax/how-cryptoassets-are-treated-for-business-tax-purposes>>. Accessed 30 June 2023.

<sup>14</sup> BDO. "How Cryptocurrencies Are Taxed for Individuals." (BDO United Kingdom, 2021), <<https://www.bdo.co.uk/en-gb/insights/tax/private-client/how-cryptocurrencies-are-taxed-for-individuals>>. Accessed 30 June 2023.

UK is proactive in its approach towards figuring out more proper ways of taxing cryptocurrencies. Recently, A UK panel has recommended treating cryptocurrency trading like gambling, suggesting steep taxes on profits. The proposal aims to address the regulatory challenges posed by cryptocurrencies and bring them under existing gambling laws.<sup>15</sup>

## Australia

Similar to the U.K. and USA, considers cryptocurrency to be an asset rather than a currency.<sup>16</sup> Australia equates cryptocurrency transactions to an exchange of digital tokens, and thus they have similar tax consequences.<sup>17</sup> For individuals that pay for products or services in bitcoin, there would be no income tax or GST implications.<sup>18</sup> However, a capital gains tax (CGT) event may occur in case an individual is using bitcoin for investment business purposes and then disposes it, which shall be taxed accordingly.<sup>19</sup> In case of businesses, income tax would be charged on earnings from those businesses that offer an exchange service, purchase and sell digital currency or mine Bitcoin.<sup>20</sup> Businesses paying in Bitcoin would have the amount in assessable business revenue priced in Australian currency. Everyone trading for profit in digital currencies would also be expected to include earnings as part of their observable profits. When they supply digital currency, companies will charge GST and when they purchase digital currency, they will pay GST.<sup>21</sup>

Australia has been cautious in their approach in regulating cryptocurrency. Recently, a new crypto regulation bill was tabled in the Parliament called The Digital Assets and Products Bill. The bill sought to establish clear guidelines and regulations for digital asset exchanges, custody providers, and stablecoin issuance in the country.<sup>22</sup> As discussions advance, Australia might see a comprehensive framework in the future.

## Canada

In terms of tax treatment of cryptocurrencies, **Canada** has given guidelines that are along similar lines as Australia. Canada recognises digital currencies as a commodity for the purposes of income tax. As a

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<sup>15</sup>Bloomberg feed. "Steep Taxes for Cryptocurrency Trading? UK Panel Recommends Treating It like Gambling." (*Livemint*, 28 December 2021), <<https://www.livemint.com/market/cryptocurrency/steep-taxes-for-cryptocurrency-trading-uk-panel-recommends-treating-it-like-gambling-11684284460883.html>>. Accessed 30 June 2023.

<sup>16</sup> Australian Taxation Office. "What Are Crypto Assets?" (AUSTRALIAN TAXATION OFFICE, 2021), <<https://www.ato.gov.au/individuals/Investments-and-assets/crypto-asset-investments/what-are-crypto-assets/>>. Accessed 30 June 2023.

<sup>17</sup> Reserve Bank of Australia. "Cryptocurrencies." (RESERVE BANK OF AUSTRALIA, 2021), <<https://www.rba.gov.au/education/resources/explainers/cryptocurrencies.html>>. Accessed 30 June 2023.

<sup>18</sup> Australian Taxation Office. "GST and Digital Currency." (AUSTRALIAN TAXATION OFFICE, 2021), <<https://www.ato.gov.au/Business/GST/In-detail/Your-industry/Financial-services-and-insurance/GST-and-digital-currency/>>. Accessed 30 June 2023.

<sup>19</sup> Australian Taxation Office. "Tax Treatment of Crypto-Currencies in Australia - Specifically Bitcoin." AUSTRALIAN TAXATION OFFICE, 2021), <<https://www.ato.gov.au/general/gen/tax-treatment-of-crypto-currencies-in-australia---specifically-bitcoin/?anchor=Transactingwithcryptocurrency#Transactingwithcryptocurrency>>. Accessed 30 June 2023.

<sup>20</sup> Ibid

<sup>21</sup> ATO (n 18)

<sup>22</sup> Australian Parliament. "Treasury Laws Amendment (2021 Measures No. 2) Bill 2021." (AUSTRALIAN PARLIAMENT, 2021), <[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=s1376](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1376)>. Accessed 30 June 2023.



consequence, the same rules as to digital token transactions apply to bitcoin transactions, akin to Australia.<sup>23</sup> Therefore, the seller pays income tax on the value of the products or services at the price it would have paid a third party when receiving cryptocurrency as a payment for goods or services in the usual course of business.<sup>24</sup> Similar to Australia, the tax consequences occur during the time of disposition of cryptocurrency. The income generated from disposing of cryptocurrency may be considered a capital gain or business income.<sup>25</sup>

## Germany

One of the nations that is most supportive of cryptocurrencies is Germany. In **Germany**, the Bitcoin virtual currency has been recognised as a 'unit of account' by the German Ministry of Finance, meaning that it can be used in the country for tax and trade purposes.<sup>26</sup> The Federal Financial Supervisory Authority of Germany had issued a guidance emphasizing that Bitcoin is a financial instrument, thereby qualifying crypto custodians as financial institutions.<sup>27</sup> Later, the German Federal Authority published its decision not to subject Bitcoin and other cryptocurrency purchases to taxes, citing the 2015 decision of the Court of Justice of the European Union,<sup>28</sup> which set a precedent for all members of the European Union.<sup>29</sup> Guidance on the value-added-tax (VAT) treatment of Bitcoin and other virtual currencies was been issued by the German Federal Ministry of Finance in 2018, determining that conventional currency exchange transactions for Bitcoin or other virtual currencies, and vice versa, constitute taxable supplies of other services for consideration but fall within the limits of the VAT exemption.<sup>30</sup> Bitcoin transactions are not subject to capital gains tax; however, German income taxes apply if the investment is kept for less than one year.<sup>31</sup> However recently, The German Federal

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<sup>23</sup> Canada Revenue Agency. "Guide for Cryptocurrency Users and Tax Professionals." (CRA,2021)

<<https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/digital-currency/cryptocurrency-guide.html>>. Accessed 30 June 2023.

<sup>24</sup> Bruce Ball. "Taxing Cryptocurrencies." (CPA Canada, 2019), <<https://www.cpacanada.ca/en/business-and-accounting-resources/taxation/blog/2019/october/taxing-cryptocurrencies>>. Accessed 30 June 2023.

<sup>25</sup> Canada Revenue Agency. "Guide for Cryptocurrency Users and Tax Professionals." Canada Revenue Agency, 2021, <<https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/digital-currency/cryptocurrency-guide.html>>. Accessed 30 June 2023.

<sup>26</sup> Matt Clinch. "Bitcoin Tax Guide: An Introduction." (CNBC, 2014), <<https://www.cnbc.com/id/100971898>>. Accessed 30 June 2023.

<sup>27</sup> Federal Financial Supervisory Authority. "Crypto Custody Business." (FEDERAL FINANCIAL SUPERVISORY AUTHORITY, 2021), <[https://www.bafin.de/EN/Aufsicht/BankenFinanzdienstleister/Markteintritt/Kryptoverwahrgeschaef/kryptoverwahrgeschaef\\_node\\_en.html](https://www.bafin.de/EN/Aufsicht/BankenFinanzdienstleister/Markteintritt/Kryptoverwahrgeschaef/kryptoverwahrgeschaef_node_en.html)>. Accessed 30 June 2023.

<sup>28</sup> Court of Justice of the European Union. "Judgment of the Court (Fourth Chamber) of 22 October 2015." (CJEU, 2015), <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150128en.pdf>>. Accessed 30 June 2023.

<sup>29</sup> Veronika Rinecker. "Germany Won't Tax Cryptocurrencies Used to Make Purchases." (*Cointelegraph*, 2021), <<https://cointelegraph.com/news/germany-wont-tax-cryptocurrencies-used-to-make-purchases>>. Accessed 30 June 2023.

<sup>30</sup> Global Legal Monitor. (2018). Germany: Federal Ministry of Finance Publishes Guidance on VAT Treatment of Virtual Currencies. [online] Available at: <<https://www.loc.gov/item/global-legal-monitor/2018-03-13/germany-federal-ministry-of-finance-publishes-guidance-on-vat-treatment-of-virtual-currencies>>/ Accessed 30 June. 2023.

<sup>31</sup> Law Library Of Congress, U.S., Global Legal Research Directorate. Regulation of Cryptocurrency Around the World. (Washington, DC: The Law Library of Congress, Global Legal Research Center, 2018) Pdf. <<https://hdl.loc.gov/loc.law/llglrd.2018298387>> (accessed 30 June 2023).

Fiscal Court has ruled that *crypto profits* are subject to taxation. The court's decision established that cryptocurrencies should be treated as financial assets, making gains from their sale taxable.<sup>32</sup>

## Japan

**Japan**, on the other hand, has adopted a revolutionary approach towards the taxation of cryptocurrencies. Japan is the first country to recognise bitcoin as a digital payment method.<sup>33</sup> The Japanese National Tax Agency (NTA) has also declared that gains made through the selling or use of Virtual Currency are regarded as 'miscellaneous profits' where the taxpayer cannot use losses to cover the gains made through the selling or use of virtual currency elsewhere.<sup>34</sup> All activities, such as cryptocurrency trading, mining, lending and other income, is classified as miscellaneous income. In addition, inheritance tax would be levied on the estate of a deceased person with regard to the virtual currency owned by that person.<sup>35</sup> All activities, such as cryptocurrency trading, mining, lending and other income, is classified as miscellaneous income.

For corporate entities, there is a 30% corporate tax on profits from digital currencies ownership.<sup>36</sup> However, recently cryptocurrency issuers in Japan have received tax relief measures as unrealised gains from crypto assets issued by companies will no longer be subject to the existing 30% corporate tax.<sup>37</sup>

## China

**China**, taking a step apart from these countries has banned Initial Coin Offerings (ICO) in September, 2017.<sup>38</sup> After the crackdown on ICO, exchange platforms which traded cryptocurrencies or provided facilitation services, were also ordered to be closed.<sup>39</sup> However, interestingly, China has not put a ban on the possession of cryptocurrencies. Beijing Arbitration Commission in an article, said that while it does not recognise bitcoin

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<sup>32</sup> Bundesfinanzhof. Urteil vom 23.10.2013 - II R 37/10. <<https://www.bundesfinanzhof.de/de/entscheidung/entscheidungen-online/detail/STRE202310057/>> accessed 30 June 2023.

<sup>33</sup> Jonathan Garber. "Bitcoin spikes after Japan says it's a legal payment method." (*Business Insider* 3 April 2017). <<https://www.businessinsider.in/bitcoin-spikes-after-japan-says-its-a-legal-payment-method/articleshow/57990540.cms>> accessed 30 June 2023.

<sup>34</sup> Mainichi. "Japan's Cabinet approves amendment to allow more foreign workers." (*Mainichi*, 4 December 2018). <<https://mainichi.jp/english/articles/20181204/p2a/00m/0na/010000c>> accessed 30 June 2023.

<sup>35</sup> Insights. "Blockchain & Cryptocurrency Regulation 2022 - Japan." (*Global legal insights* 2022). <<https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/japan#chaptercontent6>> accessed 30 June 2023.

<sup>36</sup> Takashi Nakamichi and Nao Sano, "Japan Moves Closer to Easing Tax on Corporate Crypto Holdings." (*Bloomberg* 15 December 2022). <https://www.bloomberg.com/news/articles/2022-12-15/japan-moves-closer-to-easing-tax-on-corporate-crypto-holdings> (accessed 30 June 2023).

<sup>37</sup> Shashank Bhardwaj, "Japan exempts token issuers from the 30% crypto tax on paper gains." *Forbes India* 27 June 2023. <<https://www.forbesindia.com/article/cryptocurrency/japan-exempts-token-issuers-from-the-30-crypto-tax-on-paper-gains/86153/1>> (accessed 30 June 2023).

<sup>38</sup> "Weese, Leonhard. "China's Central Bank Rules Initial Coin Offerings Are Illegal, Orders Return Of Funds." (*Forbes* 4 September 2017). <<https://www.forbes.com/sites/leonhardweese/2017/09/04/chinas-central-bank-rules-initial-coin-offerings-are-illegal-orders-return-of-funds/?sh=30226f29f216>> accessed 30 June 2023.

<sup>39</sup> Reuters. "Explainer: China's bitcoin mining crackdown." 25 May 2021. <<https://www.reuters.com/article/us-crypto-currency-china-explainer-idCAKCN2D00NA>> (accessed 30 June 2023).

as “virtual currency,” it does recognize it “as a virtual commodity.”<sup>40</sup> Cryptocurrencies are in a peculiar situation, as cryptocurrency-related services are banned from being provided by banks and financial institutions, and cryptocurrency exchanges are also prohibited however, local authorities are taxing profits made by crypto investments at the rate of 20% in the form of income taxes.<sup>41</sup>

## India

The regulation, and more importantly, the taxation of cryptocurrency in **India**, has seen consistent addresses from policymakers. The RBI, in 2018 announced that the cryptocurrency is not a legal tender and all the entities regulated by it shall not deal in virtual currencies or provide services in that regard, which was later rejected by the Indian Supreme Court in March 2020.<sup>42</sup> Before 2022, from the two points of view, income and expenses, any transaction involving bitcoins could be evaluated, It could be taxable under the Income Tax Act, 1961 ('ITA') (in the case of income), or the Central Goods and Services Tax Act, 2017 and other laws (in the case of expenditure) depending on the type and parties to the transaction. However, in 2022, Finance Ministry imposed taxes on profits from transferring cryptocurrencies are now taxed at a 30% flat income tax rate in India.<sup>43</sup> This tax is effective from April 1, 2022. In addition, there is a 1% TDS tax on any cryptocurrency asset sales exceeding ₹50,000 in a single fiscal year.<sup>44</sup>

## CONCLUSION

The taxation of cryptocurrencies remains a complex and evolving subject across various jurisdictions. Governments worldwide are grappling with the challenge of classifying cryptocurrencies and determining the appropriate tax treatment. Different countries have adopted different approaches, with some considering cryptocurrencies as currencies, commodities, or assets for taxation purposes.

The United States treats virtual currencies as property for federal tax purposes, subjecting them to income tax and capital gains tax. The Internal Revenue Service (IRS) is actively seeking ways to enforce tax compliance in the cryptocurrency space. In the United Kingdom, the tax treatment of cryptocurrencies is evaluated on a case-by-case basis, with trading profits subject to income tax and capital gains tax under specific guidelines. Australia considers cryptocurrencies as assets, subjecting them to capital gains tax upon disposal. Businesses providing exchange services or mining activities are also subject to income tax. Canada follows a similar

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<sup>40</sup>Kevin Helms, “China Never Banned Bitcoin as Commodity, Beijing Arbitration Commission Explains.” (Bitcoin News 14 October 2019). <https://news.bitcoin.com/china-never-banned-bitcoin-commodity-beijing-arbitration-commission/> accessed 30 June 2023.

<sup>41</sup> Paul Godwin, China’s Crypto Tax Provides Clear Regulatory Frameworks For Investors And Businesses.” ( *Tekedia*, Jan 30, 2023. <[<sup>42</sup>ETmarkets.com “SC allows trade in cryptocurrency, quashes RBI curb on use.” \(\*The Economic Times\* 4 March 2020\). <https://economictimes.indiatimes.com/markets/stocks/news/sc-allows-trade-in-cryptocurrency-quashes-rbi-curb-on-use/articleshow/74470078.cms> \(accessed 30 June 2023\).](https://www.tekedia.com/chinas-crypto-tax-provides-clear-regulatory-frameworks-for-investors-and-businesses/#:~:text=Local%20Tax%20Authorities%20in%20China,regulations%20on%20illegal%20financial%20activities>https://www.tekedia.com/chinas-crypto-tax-provides-clear-regulatory-frameworks-for-investors-and-businesses/#:~:text=Local%20Tax%20Authorities%20in%20China,regulations%20on%20illegal%20financial%20activities>”. accessed 30 June 2023.</p></div><div data-bbox=)

<sup>43</sup> Vikram Subburaj. “Navigating the complexities of crypto taxation in India.” (*HT Livemint*, 10 January 2022). <https://www.livemint.com/market/cryptocurrency/navigating-the-complexities-of-crypto-taxation-in-india-11679764005839.html> (accessed 30 June 2023).

<sup>44</sup> Abhinav Kaul, Mint. “Tax department issues clarifications on 1% TDS on crypto transactions.” (*Livemint* 28 June 2022). <https://www.livemint.com/market/cryptocurrency/tax-department-issues-clarifications-on-1-tds-on-crypto-transactions-11655913125595.html> (accessed 30 June 2023).

approach, treating cryptocurrencies as commodities and applying income tax or capital gains tax depending on the circumstances.

Germany has taken a supportive stance toward cryptocurrencies, recognizing Bitcoin as a financial instrument and exempting it from VAT. However, the German Federal Fiscal Court has recently ruled that crypto profits are taxable, treating cryptocurrencies as financial assets. Japan has adopted a progressive approach, recognizing Bitcoin as a digital payment method and applying miscellaneous income tax to various crypto-related activities. The recent tax relief measures for cryptocurrency issuers in Japan exempt gains from corporate tax, providing a boost to the industry. China has adopted an ambiguous approach, whereas India has made cryptocurrencies taxable.

Overall, as the cryptocurrency market continues to evolve, governments are striving to develop comprehensive taxation policies that balance innovation and regulatory oversight. The approaches taken by different countries reflect the ongoing effort to adapt existing tax frameworks to the unique characteristics of cryptocurrencies. It is important for individuals and businesses to stay informed about the tax regulations in their respective jurisdictions to ensure compliance and make informed financial decisions.

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