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EDITORIAL

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The main purpose of the journal is to encourage original research in these fields and to publish outstanding articles. It aims at providing good quality readable material to its readers and to spread knowledge in the area of science and law. The journal welcomes students, research scholars, academicians, and practitioners to present their studies on various topics acknowledged by this journal and also provide them a platform for publication of their works.

With this thought, we bring forth this journal before you.
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IDENTITY THEFT: A BYPRODUCT OF DYNAMIC TRENDS IN E-BANKING

By Aachal Sah, Apoorva R. Gokare and U Mounika
From Alliance School of Law, Alliance University

Abstract

Internet is one of the most dynamic and growing phenomena, has helped develop a humungous opportunity to enable business and transactions in futuristic and easy means. But, on the contrary, it has also facilitated technologically furthered offenders to commit cybercrimes, one of them being identity theft, where the personal data of any individual is attained illegally to incur economic advantages. This has crawled into e-banking and has resulted in huge financial losses to the victims as well as banks. The advancement of technology has made things difficult to track the person impersonating, as the internet and online transactions provide a kind of anonymity and privacy to an individual. Although laws are expected to diminish this serious crime, its regulation has been inadequate, incompetence in the imposition of liability for online impersonation and accountability of the offenders. This paper seeks to research the existing legal framework to address the crime of identity theft in e-banking and the complexities faced while imposing liability. It further suggests the passage of Personal Data Protection Bill, 2018, by discussing the result of its implementation, which will enable more security against such heinous crimes. Henceforth, this paper promotes a synergy of law and technology, to curb identity theft in e-banking and provides for effective safeguarding, restricting and resolving mechanisms.

Keywords: Identity theft, Liability, Data protection laws, E-banking, Cybercrime, Sensitive information.

Chapter – 1

1. Introduction

1.1. Background

The Internet has introduced a dynamic environment for businesses and customers to intermingle, which has escalated cheap, interactive and prompt global communications. But, on the darker side, it has also spawned numerous cybercrimes, one of them being identity theft, where the fraudster cannot be traced. Identity theft, in general, refers to “the theft of identity information such as a name, date of birth, social security number, credit card number,” or any other personal identification information to obtain “loans in the victim’s name, steal money from the victim’s bank accounts, illegally secure professional licenses, drivers licenses, and birth certificates,” or other unauthorized use of the victim’s personal information for financial or other activity. The advancement of computer technology and the development of the Internet have provided identity thieves with more options to obtain the necessary information to carry out their crime. There are various

techniques for procuring personal data from electronic devices such as Hacking, Phishing, Pharming, Skimming, Vishing, etc.

Identity theft in e-banking is the appropriation of some individual's personal information to commit fraud for financial benefits. It results in huge financial losses to the victims as well as banks. It is an unintended, but inevitable secondary results of e-banking. Phishing, one of the most popular ways through which identity theft in e-banking is possible, uses false e-mail addresses and false internet sites inciting naive customers to reveal personal information like user ID, passwords, credit card numbers, PIN codes, addresses, bank account numbers, etc. Most often, the false e-mail addresses are similar to the e-mail addresses of the banks in question and they contain a link redirecting the user to false websites, identical to the bank's site. The phisher first ‘steals’ the identity of the business it is impersonating and then acquires the personal information of the unwitting customers who fall for the impersonation. This has led commentators to refer to phishing as a ‘twofold scam’ and a ‘cybercrime double play’. Another identity theft variety is related to the use of different types of criminal software, performing actions without the knowledge of the user. It includes “Trojan horse” type viruses, worms or programs of the “keylogger” type, which self-install on the computer of the customer without his knowledge and then capture and record passwords entered by the keyboard, as well as other personal and financial data, and send them to phishing servers. Such criminal acts are labeled by the term “pharming”. Although laws are expected to diminish this serious crime, there has been lacunae in the prevailing laws, inadequacy in its regulation, incompetence in the imposition of liability for online impersonation and accountability of the offenders which have been dealt with in the further chapters.

1.2. Research problem
The paper seeks to research upon identity theft which has been identified as the most prominent cybercrime in e-banking and the legislative framework governing the same, however, several lacunae have to be bridged by adopting laws as well as creating a synchrony between legislations and technology. Hence, our study proposes to research the existing laws, investigating the lacunae and analyze the measures to fill the legislative gaps in India.

1.3. Scope of the study
This study is limited to identity theft in e-banking and does not focus on identity theft in general or any other cyber fraud.

1.4. The objective of the study
To study:
- The impact of identity theft in e-banking;
- Legislative measures to curb identity theft in e-banking;
- Allocation of liability;
- Effectiveness of Data Protection Laws to safeguard e-banking customers.
1.5. Review of literature


This article discusses the growing identity theft problem in cyberspace, focusing specifically on phishing attacks. It is divided into three parts where Part I provides an overview of identity theft, Part II provides facts and statistics on the phishing problem and Part III discusses recent developments in fighting identity theft. It concludes by demonstrating that no single crime control method alone will be enough to combat phishing. Only a combined approach, incorporating strategies from each level, will diminish the problem.


This article highlights how big the problem of identity theft is, which is made possible by the nature of modern payment systems, as sellers are willing to offer goods and services to strangers in exchange for a consideration. Thus, the paper also addresses the challenge to formulate policies that strike the right balance between allowing access to information by people who have a legitimate use for it and providing incentives to exercise care to prevent abuse.


This article discusses the increased security concerns for financial institutions and further goes on to elaborate on the concept of “phishing”. While addressing the concerns of security, it provides for measures for detection, prevention and response steps in assisting the issue of phishing. It further talks about risks inherent in financial web-linking, compliance risks to be considered when allowing another website to create a link to the website of the financial institutions for completion of transactions.


This book is a remarkable contribution to understanding the concept of bank fraud. It is a multi-professional monograph, written in non-technical language, addressed to all those who are concerned with and have to deal with bank frauds. It talks about Bank Fraud Spectrum, Bank Frauds Prevention, Fraud Prevention Strategies, etc. which gives us an insight into identity theft in e-banking and, various measures which can be taken to handle e-banking frauds.


The paper discusses how identity theft has emerged as the crime of the millennium and how such theft is committed. It further throws light on the legislative provisions governing identity theft in India and the impact of such acts on the consumer base and efficient ways to prevent such future incidences.


The Article addresses the legislative framework under the Information Technology Act, 2000 in Sections 66A-66F.
The paper also addresses the insufficiency of the law governing cybercrimes and a casewise analysis of such crimes.


**1.6. Research questions and Hypothesis**

1) Are the prevailing laws adequate to curtail the current issue of identity theft in e-banking?

2) What are the complexities of imposing liability for identity theft?

3) Whether data protection laws can provide for an effective security framework?

The study will be based on the hypothesis that the laws which deal with identity theft are not well equipped to curb the problem of identity theft.

**1.7. Research Methodology**

The methodology adopted in this paper is doctrinal research, wherein extensive interpretation of available literature has been done whereby this paper would suggest measures to curb the problem of identity theft in e-banking.

**Chapter – 2**

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**Prevailing Legislations concerning Identity Theft in India and Their Lacunae**

The Model Law on e-commerce and e-governance was enacted by the United Nations Commission on International Trade Law (UNCITRAL) in 1997. The enforcement of the Model Law was done by countries around the world and India became the 12th nation in the world to have enacted exclusive legislation on Information Technology based on UNCITRAL Model Law. Having erected a framework for comparative scrutiny of the Information Technology Act, 2000 with cybercrime legislative standards across the world, it is visible that the IT (Amendment) Act, 2008 was introduced to tackle unresolved cyberspace issues such as internet fraud, pornography, data theft, phishing, etc., that were not explicitly covered under the old legislation but are at the heart of internet activity, nevertheless. Hence, this chapter shall delve upon the legal framework regarding identity theft in India and whether the prevailing laws are adequate to curtail the current issue of identity theft in e-banking.

**2.1. Legal framework regarding identity theft in India**

**2.1.1. Information Technology Act, 2000**

Before its amendment in 2008, Section 66 of the Act only addressed hacking as a cybercrime wherein some deletion, destruction, reduction or alteration in the value of computer resources attracted penal sanctions and identity theft was not addressed separately, but it fell within the
ambit of hacking. If a person obtained personal information from the computer in a secretive manner without causing any changes in it whatsoever, this provision could not be used. However, the term identity theft itself was used for the first time in the amended version of the IT Act. Section 66 was broadened in scope and included any person who dishonestly or fraudulently, does any act referred to in Section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.14

Section 66A15 which is now held to be unconstitutional by the Supreme Court in the landmark judgment of Shreya Singhal v. Union of India,16 on account of it being violative of Fundamental Right of freedom of speech and expression, covered the crimes of Phishing. Section 66B provides for dishonestly receiving stolen computer resource or communication device.17 Section 66C provides punishment for identity theft. Whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees.18 It makes identity theft as a standalone crime.

This section also covers password theft and the offense of phishing.19 Section 66D provides punishment for cheating by personation by using computer resource. Whoever, utilizing any communication device or computer resource cheats by personation, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees.20 Hence, the aforementioned laws can be applied for punishing the offender depending upon the method using which identity theft has been committed. Though provisions of the I.T Act delves upon identity theft in general, it is pertinent to note that identity theft in e-banking shall also be governed by the same provision.

The enactment of the I.T Act brought in amendments in various other statutes, one of them being the Indian Penal Code, 1860. Since identity theft involves forgery, certain provisions of IPC like forgery,21 forgery for purpose of cheating,22 reputation,23 using as genuine a forged document,24 and possession of a document known to be forged and intending to use it as genuine,25 etc. were amended by the I.T Act to include electronic records thereby widening its scope to include computer data crimes as well.

2.1.2 Reserve Bank of India Notification on Customer Protection - Limiting Liability of Customers in Unauthorized Electronic Banking Transactions

14 Information Technology Amendment Act 2008, s 66.
15 Information Technology Amendment Act 2008, s 66 A.
16 Shreya Singhal v. Union of India (AIR 2015 SC 1523).
17 Information Technology Amendment Act 2008, s 66 B.
18 Information Technology Amendment Act 2008, s 66 C.
20 Information Technology Amendment Act 2008, s 66 D.
21 Indian Penal Code 1860, s 464.
22 Indian Penal Code 1860, s 468.
23 Indian Penal Code 1860, s 469.
24 Indian Penal Code 1860, s 471.
25 Indian Penal Code 1860, s 474.
The Reserve Bank of India (RBI), in its annual report 2017-2018, has made it clear as to who will bear the financial liability in case of an unauthorized electronic banking transaction. A framework has been established on limiting the liability of such bank customers depending upon whose fault or negligence it is in the case and accordingly, the loss will be borne either by the customer or bank. If neither customer nor bank is at fault and the fault lies within the system, the customer’s liability will be zero if he or she reports it to the bank within 3 working days of receiving the communication from the bank about the unauthorized transaction. If a customer reports it with a delay of 4-7 working days then the maximum liability of the customer ranges from ₹ 5,000 to ₹ 25,000, depending on the type of account. In case there is a delay of more than 7 working days in reporting the transaction, customers’ liability will depend on the bank’s policy.

2.2. Inadequacy of laws in India to deal with identity theft

There is no specific law for the regulation of online data in India. A bill namely Draft Personal Data Protection Bill, 2018 is under deliberation in the Parliament and has not been passed yet. However, the Information Technology Act, 2000 after its amendment in 2008, along with the I.T Rules of 2011 has succeeded in laying down the framework of regulations in cyberspace and misuse of personal data can be protected to some extent by providing criminal and civil relief for misuse of data to a large extent. It is a generic piece of legislation dealing with various issues like digital signatures, public key infrastructure, e-governance, cyber contraventions, cyber offenses, confidentiality, and privacy. Nevertheless, the prevailing laws are inadequate to curtail the current issue of identity theft and need to be discussed. With the development of e-banking, various security risks have come to the forefront. Computers today are being misused for illegal activities like e-mail espionage, credit card fraud, spams, and software piracy and so on, which invade our privacy and offend our senses. In the U.S. alone, about 15 Million residents have their identities used fraudulently every year, with a total loss of about $50 Billion. Similarly in India, as per the research finding of a company, one out of four is a victim of identity theft and such cases have risen by 13% since 2011. As per Microsoft’s Third Annual Computing Safer Index, at least

26 Nikhil Agarwal, ‘RBI fixes liability if your bank account is hacked’ (Livemint, 29 August 2018) <https://www.livemint.com/Companies/mBxEdGgNeEPTZAOMnYL1n/RBI-fxes-liability-if-your-bank-account-is-hacked.html> (accessed 22 December 2019).
27 ibid.
28 ibid.
30 Faisal Fasih, ‘Regulation of Data in The Cyberspace- Drawing Roadmap for India’ (2011-2012) 2 CNLU 100,100.
31 ibid 102.
20% of Indians have fallen prey to phishing attacks and identity theft has caused a loss of around Rs. 7500 on an average.\textsuperscript{35} The numbers shown in this Survey is quite large if we consider the fact that the total internet users in India are around 19.9% of the entire population and all these are being caused due to the lacunae in the prevailing law.\textsuperscript{36} Thus, arises the need to fill in such lacunae with stronger legal provisions which will provide for an effective regime to curb identity theft in e-banking where the stolen identity of the victim can be used to cause economic loss to the victim of such theft. While Section 66C deals with deceitful use of passwords, electronic signatures and the like, section 66D involves the use of a “communication device” or “computer resource” as a means of impersonation, which in effect, entails the use of computers, cell phones for fraudulent purposes. While the former provision includes intangible but unique identifiers and symbols attached to individuals, the latter envisages instances where the offender has physical access to someone else's devices.\textsuperscript{37} However, in the absence of a clear definition of “unique identification feature” and the advent of new forms of cybercrime such as SMS spoofing,\textsuperscript{38} there may exist grey areas relating to identity theft such as misuse of cell phone numbers, which, in the strict sense, may not be consistent with the idea of a “unique” identification feature of an individual, and not fitting the definition of “computer resource” or “communication device” under section 2(1)(K) and (ha) respectively, may lie outside the scope of both, section 66C and 66D, which is a serious concern for cybercrime officials.\textsuperscript{39} Under section 66C, the fine provided for identity theft may extend up to only rupees one lakh i.e., a minimal token fine with an upper limit has been prescribed in the Act. There should be different degrees of punishment based on the nature of the crime committed after the identity theft taking place, a provision that could have been transplanted into the Indian legislation to make it more comprehensive, instead of having a uniform punishment of three years for the crime of identity theft.\textsuperscript{40} It may also depend on the value of goods or money accumulated over a while as a result of the identity theft\textsuperscript{41} and may also vary based on the number of identifying markers stolen.\textsuperscript{42} Although according to section 75(2), this Act shall apply to an offense or contravention committed outside India by any person if the act or conduct constituting the offense or contravention involves a computer, computer system or computer network located in India,\textsuperscript{43} but the jurisdictional issues still cannot be resolved.


\textsuperscript{38} Vineeta Pandey, ‘Cell Abuse: SMS Spoofing’s Forgery’ The Times of India (India, 18 July 2004)\textsuperscript{7}
The tracking and prosecution of identity thieves who operate in a multi-jurisdictional environment are difficult and problematic. When the accused is a non-Indian citizen, the country of his citizenship has dissimilar laws about identity theft and has not signed an extradition treaty with India, the arrest of such an accused cannot be undertaken. Apart from the IT Amendment Act, being the caretaker of the Indian banking sector, RBI has the due responsibility in establishing its strong and effective control over all the banks in India to provide the citizens of this land with a transparent banking system which resulted in RBI’s notification on Customer Protection - Limiting Liability of Customers in Unauthorised Electronic Banking Transactions but there has been no proper implementation of the same.

The increased use of the internet for financial transactions has facilitated the work of identity thieves while tracking has become much more difficult or sometimes impossible. Identity theft in e-banking has an impact on the personal finances and emotional well-being of victims, and on the financial institutions and economies of countries. It presents challenges for law enforcement agencies in India as well as governments worldwide. This paper reveals that identity theft is a growing and evolving problem that requires a multifaceted and multidisciplinary approach by law enforcement agencies, financial institutions, and individuals. It is further advocated in the next chapters that apart from the need to fill in such lacunae with stronger legal provisions, financial institutions should take measures to protect personal information better and that individuals should be educated about their rights, and be vigilant and protect their personal information in cyberspace.

Chapter - 3
Complexities in Allocation of Liability

The menace of identity theft has pervaded all societies. The rapidity and anonymity of the internet have escalated the problem of detection. It has been mooted that any legislation which seeks to punish internet-related offenses or crimes needs to overcome three hurdles: the difficulty inherent in finding the perpetrator of an online crime, obtaining personal jurisdiction and enforcing the judgment. Thus, the major trouble is to find the perpetrator, where the risk of him getting caught is very low. The e-thief’s sites are generally not active for more than 54 hours, so the spoofed site will disappear before law enforcement has even received workable information on the theft.

46 F Cassim, ‘Protecting personal information in the era of identity theft: Just how safe is our personal information from identity thieves?’ (2015) 18 PELJ 69, 69.
47 ibid.
is still difficult because they use multiple IPs, redirect services, and hijacked third-party computers located in remote places of the world.\textsuperscript{50} The sophistication of computer attacks along with the complexities of the modern computer age has made it difficult to trace the offender in case of identity theft. Thus, imposing liability only on the banks or the customers itself is not appropriate, where the e-thief gets away with his crime. Law enforcement doesn’t have all the necessary resources to attend to identity theft, which are costly to investigate and prosecute. They have to conquer jurisdictional issues, which are the most difficult ones as anyone sitting in any corner of the world can be involved in the identity theft of an individual. Instead of increasing resources and training for law enforcement, legislators have chosen to focus on stiffer penalties by trying to pass more specialized laws.\textsuperscript{51} The Protection of Personal Information Act, 2013, is a legislation in South Africa enacted to protect the personal information processed by private and public bodies, which provides for the protection of the rights of persons regarding unsolicited electronic communication.\textsuperscript{52} This Act places liability on financial institutions to handle the personal information of its clients with the utmost care and responsibility, and provides penalties for its non-compliance or if made available for cloning, which may extend up to R 10 million or imprisonment of up to 10 years.\textsuperscript{53} Identity Theft Penalty Enhancement Act, 2004, a legislation in the United States of America, aimed at imposing tougher penalties on the offender of aggravated identity theft. Following this legislation, another Act came into existence in the US, called Identity Theft Enforcement and Restitution Act, 2008, which aimed at enhancing the identity theft laws. This Act applied to online identity theft too. The effect that this sought to achieve was not fulfilled as the perpetrator was almost impossible to trace. Escalating the imprisonment wouldn't even deter the criminal in committing identity theft. Thus, tougher sentencing laws would only induce "false guilty pleas" by innocent defendants who don’t want to risk trial.\textsuperscript{54} In most cases, banks compensate their clients for losses incurred as a result of the identity theft through phishing scheme when there is no negligence of the client.\textsuperscript{55} But there arises a question, whether there should be compensation for the victim's time and effort in dealing with identity theft. Some companies or financial institutions do not even report a crime of identity theft to avoid diminution in public trust and to avoid a reduction in their share pricings. Such acts of the banks should also be curbed by imposing higher penalties.

3.1. Synchonry of Law and Technology

As Nobles say, “Prevention is always better

\textsuperscript{53} Section 19, \textit{The Protection of Personal Information Act}, 2013.
than cure”, creating awareness and taking precautions to safeguard personal information by banks as well as customers, is a better way than imposing liability on banks, even when it’s not their fault. Therefore, the focus should be on the technological changes with legislations playing a supporting role. Only technology can combat technology.

Financial institutions maintain their websites, through web-linking, where payment and other transaction facilities available for their customers are directed to other websites, which might not be handled by the financial institutions itself. This increases the risk of data leakage if the third party website doesn’t adhere to compliances.

Also, there is a high risk that there might be sites with similar internet addresses that replicate the genuine look of bank sites. To mention as an example, www.citibank.com opens to the Citibank website, but then www.citbank.com, which is very similar to the original one but doesn’t have a second ‘i’, takes anyone to a website which promises an assortment of services, like mortgages, credit cards, and other financial utilities. The services rendered are quite similar to that of Citibank, it doesn’t even make an effort to clarify that it is not the Citibank’s website. There are very high chances that financial institutions’ names can be mistyped, leading the consumers to be directed to websites with either a similar or deliberately visually identical domain. This might deceptively lead to situations where customers transfer their personal information to fraudulent websites. As obtaining a domain is a cakewalk in this era, banks must be heedful in supervising their domain names.

“It’s a good news when everyone works together, they can really catch the crooks. The bad news is that the criminals are like cockroaches – you kill one and 20 pop-up”. The real problem is a lack of resources and incentives than a lack of laws. It can be seen that it is not possible to impose liability on an entity at one level. Participants at every level must put in greater efforts to inculcate new practices to inhibit the crime of identity theft. eBay's VP for Security noted – “Technology can solve 60 percent of the problem . . . [e]ducation and awareness can solve 20 percent, and no matter how good the industry is, there will be people who fall, victims, so 20 percent will have to be handled by law enforcement”.

The crime of identity theft is an evolving and escalating problem that can be combated with a multi-faceted and multi-disciplinary approach. The Information Technology Act, 2000 and the regulations given by Reserve Bank of India show that the State is making efforts to lower such crime rates, but unfortunately, haven't been able to succeed to a great extent. The Information Technology Amendment Act, 2008, allows authorized agencies broad reactive access to personal information held by the private sector for investigation purposes. However, the Indian government's access to and disclosure of private sector data has been criticized.

57 ibid.
because it does not adopt principles of natural justice and its practices are susceptible to corruption and collusion. The challenge here is to devise guidelines that strike a balance permitting reasonable admission of information to people who have legitimate use of such information, and simultaneously provide a shield to individuals. Financial institutions have to adopt improved technological measures that align with the prevailing technological environment. Such measures include the introduction of a biometric system for online transactions like iris scan, fingerprint and hand imaging for identification of individuals. Transactions should be made fool-proof with the assistance of the above-mentioned measures and verified by both the bank and the customer. Incentives must be provided to those bearing the loss so that they abandon less efficient mechanisms. The most logical candidates for the same are banks and financial institutions, who are more familiar with the industry and will be able to create new systems to prevent identity theft. The goal is to provide those, who have the greatest power to prevent identity theft and the most knowledgeable about the systems for granting credit, the incentive to thwart identity theft and allow them to come up with solutions to the said problem. If they cannot create such a solution, then they will bear the losses generated by identity theft.

Chapter – 4
Role of Data Protection Laws in Curbing Identity Theft in E-Banking in India

Data protection laws generally refer to the mechanisms adopted by the legislation to minimize the intrusion caused by the usage of personal information without the consent of the data principals. It is observed that not only is such data theft done by private entities, even the government entities are aboard in such intrusions, and the irony being these entities are known as data fiduciaries. Hence, this chapter shall delve upon how data protection law, which is to be enacted in India can prevent identity theft.


The Justice B.N. Srikrishna Committee Report on “Free and Fair Digital Economy, Protecting Privacy and Empowering Indians” and the Draft Personal Data Protection Bill, 2018 threw light on the importance of data protection in India and the need for a legal framework to protect the personal data of individuals. The foundation of the bill i.e., the Right to Privacy has been inherited from the landmark judgment of the Supreme Court in the case of Justice K.S.

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61 ibid. 302, 315.
4.2. Foundation of the Draft Personal Data Protection Bill, 2018

The Bill if enacted shall apply to any bank collecting, disclosing, sharing or otherwise processing personal data within the territory or any person or body of persons incorporated or created under Indian law shall fall within the purview of the Bill. The Bill shall also apply to the Banks which are situated out of India but are processing personal data in connection with any Indian citizen, business carried on in India or any systematic activity of offering goods or services to such data principals within the territory or in connection with any activity which involves profiling of data principals within the territory of India.

The major definitions that need to be considered when dealing with identity theft in e-banking are that of Personal Data, Personal Data Breach and Financial Data.

Upon analysis of the above definitions, it can be ascertained that identity theft is brought under the purview of the bill, as it delves upon unauthorized use, alteration or destruction which shall compromise confidentiality or integrity of the personal data i.e. any attribute that can identify an individual, to a data principal. It also deals with personal data to identify any account or card or payment instrument issued by a financial institution. Hence, formulating a legal framework for the governance of identity theft in e-banking. It is eminent to also note that certain data has been classified as Sensitive Personal Information such as financial data and official identifiers which is the data generally possessed by banks, hence, requiring data fiduciaries and data processors, collecting or processing such sensitive data to provide additional security mechanisms to protect such data.

4.3. Consent based nature of the Bill

Few of the prominent features to be considered by data fiduciaries while collecting or processing data should be analyzed for data fiduciaries to prevent identity theft in e-banking. It is to be taken into consideration that the Bill is entirely consent-based, which is to be expressly provided and, without the consent of the data principal no data can be collected by the banks, also such consent can be withdrawn at any point of time. It is also eminent to note that, such consent should be given no later than the processing of such data explicitly. In the case of sensitive private data, explicit consent has to be obtained for different purposes of processing data. Also, the banks cannot collect such personal data that is not required to provide banking services. However, when a data principal withdraws such consent he shall bear the consequences.

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67 Draft Personal Data Protection Bill, 2018 s 2(1)(b).
68 Draft Personal Data Protection Bill, 2018 s 2(2)(a).
69 Draft Personal Data Protection Bill, 2018 s 2(2)(b).
70 Draft Personal Data Protection Bill, 2018 s 2(29).
71 Draft Personal Data Protection Bill, 2018 s 2(30).
72 Draft Personal Data Protection Bill, 2018 s 2(19).
73 Draft Personal Data Protection Bill, 2018 s 2(30).
74 Draft Personal Data Protection Bill, 2018 s 2(19).
75 Draft Personal Data Protection Bill, 2018 s 18(2).
76 Draft Personal Data Protection Bill, 2018 s 12(1).
77 Draft Personal Data Protection Bill, 2018 s 18(2).
78 Draft Personal Data Protection Bill, 2018 s 12(3).
of such withdrawal.\textsuperscript{79} Concerning consent, it is pertinent to note that as compared to the General Data Protection Regulations,\textsuperscript{80} the exemption of contractual relationships has been omitted from the bill to protect the severability of consents under a contract and prevent Data Fiduciaries from bundling unrelated data processing activities in contracts.\textsuperscript{81}

4.4. Fairness and transparency
Another prominent provision in Bill deals with the mandate of notice to be provided by Data fiduciaries and, in this case, the banks. The banks are to provide fair and transparent notice to the data principals while collecting their data describing the collection, use, access, storage, disclosure, the security of the personal data along with the choice and their rights. This should be applicable to both online and offline collection modes.\textsuperscript{82}

4.5. Liability upon data fiduciaries
The New Bill also allocates the liability upon data fiduciaries in case of breach of personal data. It has entailed upon the data fiduciaries an exemplary civil punishment\textsuperscript{83} which, shall pressurize banks to improve security measures to prevent identity theft. The Bill also provides for criminal punishment of 3-5 years imprisonment for data fiduciaries who knowingly, intentionally, or recklessly obtain, disclose, transfer or sell Personal Data or Sensitive Personal Data provided that such acts result in harm to a Data Principal.\textsuperscript{84}

Thus, the Draft Personal Data Protection Bill is a welcome move to curb identity theft in e-banking and shall be an effective mechanism. Though the Draft Bill may not be 100% perfect at this stage and might need several amendments in the future it is high time India has a Data Protection Bill which shall be perfected over time. But in the face of several data and identity thefts and no legislation to cover it, there is a dire need for the Bill to come into effect. Hence, if this legislation comes into force it shall safeguard the victims from identity theft.

Chapter-5
Conclusion
Identity theft in e-banking as discussed being a major issue without an effective legislative framework preventing it is the concern of the hour as various mechanisms are being developed by i-thieves to attain personal identities which shall enable them to get the benefits of the persons’ financial accounts with the banks. As technology is developing the mechanisms have become quite innovative and the lack of law about the matter of identity theft has been a major bane in India. The Information Technology Act, 2000 only provides for punishment in case of identity theft does not curtail to the need for safeguards to prevent identity theft. As the mere provision of punishment shall only be effective if the i-thief is traced, which is the major problem in the allocation of liability. With the advancement of technology, the i-thieves have become more efficient in escaping or getting traced, because their location or identity is extremely difficult to determine, as they use multiple IP addresses.

\textsuperscript{79} Draft Personal Data Protection Bill, 2018 s 12(5).
\textsuperscript{80} General Data Protection Regulation 2016/679.
\textsuperscript{82} Draft Personal Data Protection Bill, 2018, s 8.
\textsuperscript{83} Draft Personal Data Protection Bill, 2018, s 69(2).
\textsuperscript{84} Draft Personal Data Protection Bill, 2018, ss 90, 91.
Hence, the allocation of liability is a pertinent issue that needs to be resolved by the law. As suggested in the paper, the law should incorporate the concept of prevention by a person who can last avoid such occurrence, to impose liability. Other than allocation of liability, another drawback is the lack of resources with the government to trace the offender, the government has to adopt futuristic technology in synchrony with the law to catch hold of the offender, if not, the mere law shall be an obsolete instrument. However, in India, the lack of Data Protection laws in also a major backlash. With the increase in identity thefts, there stands a pertinent need for Data Protection laws. Therefore, the passage of the Draft Personal Data Protection Bill shall be an appreciated move towards safeguarding data and the Bill also deals with identity theft as discussed in the above chapters. Hence, it can be concluded that an effective mechanism for curbing identity theft can be structured only upon synchrony of law and technology, because, only technology can tackle technology.

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ALGORITHM, LAW AND DEMOCRACY

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Abstract
The next time you hear someone talking about algorithms, replace the term with “god” and ask yourself if the meaning changes (Ian Bogost, 2015). We all use algorithms in our daily lives without even realising it: when changing a wheel, or when preparing a pancake from a recipe. These algorithms are no longer programmed line by line, but are now capable of learning, thereby continuously developing themselves (Emmanuel Letouzé, 2015). This paper will analyse how Algorithms though sounds like pinnacle of efficiency as they show us relevant content but how in turn, they are taking important decisions out of the hands of human. It will also analyse that how this process is affecting the politics in the country.

They are everywhere and yet the general public has a poor understanding about the sophisticated and insidious mechanisms used by these pre-programmed catastrophes creating system which often results in a blanket assumption that they are neutral in nature (Brey, 2005; Winner, 1980) thereby underestimating the powerful impact that they have on our lives. The two-fold aim of the paper is to right off the bat comprehend the ability of the manipulative nudging technique possessed by these algorithms to affect significant aspects of our everyday lives. Secondly to lay emphasis upon the growing need of algorithm regulation in view of the existing laws while concentrating on the impact that the European Union’s General Data Protection Regulation of 2016 has on the routine use of machine learning algorithms and their governance across the world.

Keywords: Algorithmic bias, Democracy, machine learning, Algorithmic Accountability Bill, 2019, Big-data.

“Algorithmic culture” is the use of computational processes to sort, classify, and hierarchize people, places, objects, and ideas. The era of ubiquitous computing and big data is now firmly established, with more and more aspects of our everyday lives like play, consumption, work, travel, communication, domestic tasks, security, etc. being mediated, augmented, produced and regulated by digital devices and networked systems powered by software it becomes important to understand what are algorithms and how algorithmic bias work.

What is Algorithm?
Software is fundamentally composed of algorithms – sets of defined steps structured to process instructions/data to produce an output. Machine learning algorithms are trained based on datasets that are chosen by the programmers. With this training data, they recognize and leverage patterns, associations, and correlations in the statistics. For example, an algorithm can be trained to distinguish between a horse and a donkey by being fed thousands of pictures of different horse and donkey. Classification is the easier of the tasks; researching algorithms, 20 ICS, 14–21 (2016).
applying an algorithm to a judgement call based on a human is much more multifaceted than that.

**How does algorithmic bias work?**

Now, we might think that algorithmic reasoning is rational and objective, regardless of the situation. As they record the information that we are feeding them and show us relevant results and advertisements according to our preferences and interests instead which is better than seeing something irrelevant or nothing at all. So, what us the need for us to be concerned about something which is meant to make our lives simpler? There is no denying that algorithms exercise power over us and there is general lack of understanding about how algorithms exercise their power over us. Thanks to explosion of big data\(^88\) Algorithms are harnessing volumes of macro- and micro-data to influence decisions affecting people in a range of tasks, from making movie recommendations to helping banks determine the creditworthiness of individuals. In machine learning, algorithms rely on multiple data sets, or training data, that specifies what the correct outputs are for some people or objects. From that training data, it then learns a model which can be applied to other people or objects and make predictions about what the correct outputs should be for them. Therefore, these algorithms fed by big data can also amplify existing structural discrimination in society and can even seduce an electorate into false sense of security.\(^89\)

This is precisely what happened when Amazon discovered that its internal recruiting tool was dismissing female candidates. Because it was trained on historical hiring decisions, which favoured men over women, it learned to do the same. Similarly, the types of cognitive bias that can be inadvertently applied to algorithms are stereotyping, bandwagon effects, confirmation bias, priming and selective perception.

Algorithms are taught to make predictions based on information fed to it and the patterns it extracts from this information. Given that humans show all types of biases, a dataset representative of the environment can learn these biases as well. In this sense, algorithms are like mirrors — the patterns they detect reflect the biases that exist in our society, both explicit and implicit.\(^90\)

Microsoft unveiled Tay, a Twitter bot\(^91\) that the company described as an experiment in "conversational understanding." The more you chat with Tay, said Microsoft, the smarter it gets, learning to engage people through "casual and playful conversation. Within 24 hours the bot started tweeting racial slurs and comments like “Hitler was right, I hate Jews”. This happened because the bot was trained to self-learn and in

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\(^88\) Big Data are extremely large data sets that may be analysed computationally to reveal patterns, trends, and associations, especially relating to human behaviour and interactions.  
\(^91\) A bot (short for "robot") is an automated program that runs over the Internet. Some bots run automatically, while others only execute commands when they receive specific input.
doing so it reflected the passive-aggressive, extremist views that exist on twitter. Let us take example of America’s criminal justice system, Judges there uses a risk assessment algorithm, which are designed to do one thing: take in the details of a defendant’s profile and spit out a recidivism score—predict the likelihood an offender will commit further crimes, their flight risk, and a handful of other factors. These data points are then used to guide them in sentencing, bail, or whether to grant (or deny) parole. The problem here is that same risk assessment tools algorithms are trained on historical crime data. Therefore, the result produced was biased towards people of low-income group and black people.

How specifically it is posing threats to democracy?

Every generation has its own vision of dystopia, ours is the idea that Algorithms are taking decision making power out of the hands of humans. Facebook counts 2 billion users, Google represents 90% of global searches, Apple’s market capitalization reached $1 trillion. With these statistics, technologies ability to diffuse key messages and propaganda by vested interests cannot be undermined. Twitter assumed centre stage in the Mexican political theatre in 2012. The failure of mainstream media to report on drug violence owing to threats from cartels had meant that Mexican citizens were already dependent on Twitter for news and updates.

The 2017 French presidential elections showed just how extensive the use of bots can be. In May 2017, the Oxford Internet Institute conducted an analysis of the #Macron Leaks hashtag, which involved a data dump of the then presidential candidate’s email correspondence. It found that 50 per cent of the Twitter content consisting of leaked documents and falsified reports was generated by only three per cent of the total number of Twitter accounts. These bot accounts were pushing out 1,500 unique tweets per hour garnering an average of 9,500 retweets. The study concluded that over 22.8 million Twitter users were exposed to this information every hour on election day in France.

All of us might be aware of the Cambridge Analytical and Facebook hiatus but it’s important to fully understand what happened. Cambridge Analytical is a political consulting firm based in the UK. According to their website they collect and connect data to strategically consult—and communicate—for and with political candidates. They stole the personal information of over 50 million Facebook users and they did this to create a system that could target US voters with political advertisements curated to their psychological profile.

What may be inferred from the above discussion is that while data-based electioneering can potentially bring new effectiveness and efficiencies to organising and campaigning, the fact that the technological platforms that define the

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95 Ibid.
public sphere today are controlled by the elite does not bear well for the system of electoral democracy as a whole. In theory, the digital intelligence extracted from data cuts down human resource intensive work, allows for grassroot organizers to optimize their canvassing and mitigate the distortion of big capital in elections by allowing candidates to reach their constituencies over social media, at literally no cost. However, if the Cambridge Analytica or the Marcon Leaks episodes shows us anything, it is that we are headed for a vastly different future, one in which voter behaviour is being manipulated towards particular outcomes that may reflect neither a democratic mandate nor an informed choice.

Existing laws with regard to algorithmic regulations
The first name that occurs at the top of any list when canvassing for algorithm regulation is that of the EU data protection law for it is a rare example of such regulation operating which is available in legislative ‘top-down’ form and has the ability to be a possible model to be emulated96. The EU law makers took up the challenge of figuring out what rules should apply to ensure a functioning data protection system and how such rules should apply to algorithmic decision-making in order to ensure the constitutional guarantees such as the prohibition of discrimination97 or the right to data protection98. In view of the same the new GDPR was framed and made applicable on member states in May 2018. The main objective was to adapt the previous data protection legislations to the challenges posed by more advanced technology, including self-learning algorithms, and harmonise the existing data protection rules all across the EU99. The General Data Protection Regulation, often described as a ‘Copernican Revolution’ in data protection law is a set of comprehensive regulations for the collection, storage and use of personal information of individuals100 which seeks to bring into focus harmonization of the law and individual empowerment.

The GDPR replaced the 1995 Data Protection Directive while bringing with it well defined explicit jurisdiction, penalties as well as rights available to individuals.

Though GDPR does not directly address the issue of algorithm and AI, outlined below are certain provisions that address automated decision making and profiling and a number of provisions that will impact companies using artificial intelligence in their business activities.

Via Article 22 paragraph 1, the GDPR gives the data subjects101 the right not to be subject to a pronouncement that is solely based on automated processing including that of personal data of an individual used to evaluate certain personal aspects of the said person, which has significant legal or similar effects on him or her. Exceptions to this provision include entering or

97 EU Charter of Fundamental Rights, art 21.
98 Perel and Koren, Black Box Tinkering, n.4 (2017)
101 See Art. 4(1) GDPR
performance of a contract or explicit consent of the data subject. Additionally, paragraph 71 of the preamble to the GDPR, which explains the rationale behind it explicitly requires data controllers to implement suitable technical and organizational measures that will help prevent, inter alia, discriminatory effects\textsuperscript{102} based on processing of sensitive data. Further, the GDPR gives a ‘right to explanation’\textsuperscript{103} to the data subjects vide Article 13-15. This right ensures that the use of automated decision making shall be communicated to the data subject, including meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject. It also attempts to ensure non-biased results via Article 9 and 22 which lay down guidelines with respect to processing of special categories of personal and sensitive data including data related to beliefs, culture, political opinions, ethnicity, gender orientation et al. racial or ethnic origin, political opinions, religious or philosophical beliefs, sexual orientation etc.

Following the footsteps of EU, countries across the globe introduced their own set of regulatory frameworks including Algorithmic Accountability Bill (Draft) in the United States of America, Lei Geral de Proteção de Dados Pessoais in Brazil\textsuperscript{104}, HKMA guidelines in Hong Kong etc. by mirroring the ideas reflected in the GDPR.

On July 27, 2018, in light of the introduction of GDPR by EU, India also published a draft bill for a new, comprehensive data protection law to be called the “Personal Data Protection Act, 2018”. The bill came into being after a nine-judge bench of Supreme Court of India in the case of Justice K. S. Puttaswamy (Retd.) v. Union of India and Others\textsuperscript{105} decided that right to privacy to protection characteristically falls under the ambit of Right to life and personal liberty as ensured by Article 21 of the Indian Constitution. The Court opined that privacy protection allows a person to lead an existence of pride, without which the right to life and individual freedom would be good for nothing.

In its present state, the bill is applicable on the organizations involved in the below mentioned activities:

- Processing the data that has been collected, disclosed or shared within the territory of India.
- Processing the personal data that has a connection with any business carried on in the territory of India or has any connection with any activity which involves the profiling of data principles within the territory of India.
- Processing of personal data if the same is undertaken by the State, any Indian company or any Indian citizen or persons incorporated under the Indian law.

\textsuperscript{102} Mario Martini, Datenschutz Grundverordnung, Bundes datenschutz gesetz (Boris P. Paal & Daniel A. Pauly, 2nd ed., C.H. Beck 2018)

\textsuperscript{103} Bryce Goodman & Seth Flaxman, European Union Regulations on algorithmic decision-making, and a right to explanation, AI MAGAZINE, at 51


\textsuperscript{105} 1 (2017) 10 SCC 1
The draft bill and associated report were given by the Justice Srikrishna Committee and it constitutes within several provisions that impact agencies employing algorithm and attempts to account for accidental consequences of such developing technologies.

The bill defines harm including those associated with algorithmic infrastructure such as loss of work opportunities, biased treatment and denial of service. Empowering the authorities to make explicit classes of huge damage could allow unexpected damages emerging out of utilization of innovation to be incorporated under the ambit of the bill. Like GDPR, it provides the individuals with a certain set of rights including the right to confirmation and access, correction, data portability, and right to be forgotten. However, at the same time the Bill is deliberately silent on the rights and commitments that have been fused into the GDPR that address mechanized decision making including: The right to object to processing, the right to opt out of automated decision making, and the obligation on the data controller to inform the individual about the use of automated decision making and basic information regarding the logic and impact of same.

Further, to forestall predisposed results and place the interest of data principle first, the bill requires that data fiduciaries take measures to guarantee that individual information that is handled is complete, precise, not misdirecting and updated as for the reasons for which it is prepared. The interest of the data principal should be represented at every stage and to ensure the same, processing of personal data should be done in a transparent, fair and reasonable manner while being in accordance with the commercially accepted or certified standards.

Globally, each and every company can be subjected to the Indian Personal Data Protection Act, the GDPR and other privacy laws, if they gather or process personal data from these countries or within these countries. The only possible way to escape the duties and liabilities imposed under such acts is to stop business in the said territories. However, keeping in mind the size of economies and abundance of market opportunities provided by the countries like India and those of Europe, it is not a viable option for most multinational companies but neither is complete abandonment of algorithmic infrastructure. Prima facie it seems that the lack of any other choice will result in multinational companies following the set regulations thereby, providing blanket protection to the consumers. However, certain inherent, unaddressed loopholes within these regulations create a black hole in the assumed blanket protection being provided thus, allowing infiltration into the rights of the people as well as the society as a whole.

The GDPR ensures transparency and accountability vis-a-vis the ‘Right to Explanation’. However, one of the major contentions to this right has been whether or not it has adequate legal backing. Goodman and Flaxman in one of their short paper in 2016, first talked about the creation of right to explanation but never did they
elaborate upon the legal basis they see for this right. Except for Recital 71, there is no explicit mention of any right to obtain explanation. Other articles of the GDPR are vague, inconclusive and unclear with respect to the extent of human participation in automated processing\(^\text{111}\). Further, a closer reading of the text along with the drafting history indicates that presently, the document does not contain such a right and that we cannot simply read it into the regulation\(^\text{112}\).

Another, contention is with respect to the extent of power gained over generation and application of algorithms vide Article 22. Article 22 much like its predecessor still involves fulfilling multiple criteria\(^\text{113}\) and massive derogation its rights which can lead to lower level of protection for individuals especially in light of banks, insurance companies, online service providers etc. Simultaneously, these exemptions open up a plausibility for noteworthy deviations between national regulatory frameworks for mechanized decision making, thus discouraging the harmonisation objectives of the regulations. Moreover, it fails to address important issues like that of opacity, data quality and learning algorithms which are factors that should have been essentially considered while evolving algorithmic governing laws. The Personal Data Protection Bill draft that has been proposed also has its own set of loopholes. The bill brings in mandatory localisation of data\(^\text{114}\) for which companies will have to shell out lump sum amount of money from their pockets for no purpose at all thus resulting in creation of a trade barrier for smaller players. Moreover, the bill grants excessive power to the centre via Section 98 along with a cart blanche right to non-consensual processing of personal information for any state function authorised by law\(^\text{115}\).

AI systems can directly abet domestic control and surveillance, helping internal security forces process massive amount of data- including information shared on social media but giving such unfettered power to government in this respect is problematic. For instance, the Chinese government has used AI in wide-scale crackdowns in regions that are home to ethnic minorities with China. Surveillance systems in Xinjiang and Tibet have been described as ‘Orwellian’. These efforts have included mandatory DNA samples, Wi-Fi network monitoring and widespread facial recognition cameras, all connected to integrated data analysis platforms. With the aid of these systems Chinese authorities have, according to the U.S State Department, “arbitrarily detained” between one and two million people.\(^\text{116}\)

Suggestions

Algorithms are the foundational blocks of any artificial intelligence-based mechanism. Regulating algorithms therefore enables us to nip problematic reflections of human biasness at the bud and ensure a transparent, just and accountable system. At present there is humungous measure of information available for use and in this way, it might appear to be

\(^{111}\) Supra 15  
\(^{112}\) Supra 15.  
\(^{113}\) Ibid.  
\(^{114}\) Chapter VIII (Transfer of Personal Data Outside India), The Personal Data Protection Bill, 2018.  
\(^{115}\) Draft privacy bill and its loophole, https://www.livemint.com/Opinion/zY8NPWoWW  
difficult to keep a check on such data circulation however, the utilization of algorithms in legal, medical, financial and other aspects make it important to have some control instrument set up.

Keeping this in mind different countries have come up with different set of rules and regulations to monitor the usage on algorithmic infrastructure within their territories. Recently, the Algorithmic Accountability Bill 2019 was sponsored in the U.S Senate which directs the Federal Trade Commission to require entities that use, store or share personal information to conduct automated decision system impact assessments and data protection impact assessments. The overall objective of the act is to directly target potential bias and discrimination in all consumer-based businesses and avert any probable harm to the privacy and security of personal data of individuals. The act calls for impact assessment of ‘high risk’ systems, to evaluate its effect on accuracy, bias, discrimination, privacy etc and check the extent of protection being given to the personal data of individuals.

- An auditing process should be established, in which third party should conduct independent evaluations of these algorithms. Algorithm auditing must be interdisciplinary in order for it to succeed. It should integrate professional scepticism with social science methodology and concepts from such fields as psychology, behavioural economics, human-centred design, and ethics. The problem is that Social Networking became too big to be regulated by a neutral third party or government. It seems that the only option we have is to trust Mark Zuckerberg, Larry page, and Segrey Brin on their good faith and intentions to process and filter information for us. In that situation the criteria given under Algorithmic Accountability Act can be followed which will tackle this problem. The regulations given under this act will apply only to the companies that make over $50 million per year, hold information on at least 1 million people or devices, or primarily act as data brokers that buy and sell consumer data.

- Now that we have made sure that algorithms themselves and the way they are coded there is nothing which perpetuates bias. To ensure that it does not reflect human bias they, the data produced by them should be checked in regular intervals by the companies, similar to internal audit.

- The creation of a grievance redressal mechanism can contribute to implementation of algorithmic infrastructure more efficient. A redressal system will enable the mechanized system to be accountable, responsive and user-friendly. The existing laws give individuals the right to access and erasure but there is an absence of a grievance addressal mechanism. The consumers are not being given an opportunity to given a feedback for their experience and usage of their data by a particular system. For example: When the risk assessment mechanism in the American Criminal System gave the result of black people having more chances of being repeated offenders over white people, there was no system in place for them to be

118 Proposed Algorithmic Accountability Act
120 See art 15 para 3 of GDPR
121 See art 17(1) of GDPR
able to challenge the said proclamation. Allowing people to give feedbacks is as important as giving them access for it will not only help increase the efficiency and accountability of the mechanized systems but will also help gain confidence of the consumers and regulate the working of self-learning algorithms by keeping a check on the way they are processing the requisite data.

Algorithms are everywhere and yet the general public has a poor understanding about the sophisticated and insidious mechanisms used by these pre-programmed catastrophes creating system which often results in a blanket assumption that they are neutral in nature thereby underestimating the powerful impact that they have on our lives. In this paper we have analysed the growing effect of algorithmic infrastructure on significant aspects of our lives especially the political bias it causes. We have highlighted features and ambiguities of the existing laws like that of General Data Protection Bill and the Personal Data Protection Bill (draft) and their impact on the mechanized systems. Further, we have given suggestions that can contribute to the creation of a more accountable and efficient algorithmic infrastructure.

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SEXUAL OFFENCES COURTS

By Advait Thatikonda and Siddhant Trivedi
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Abstract

India is a republic country and people of India has their own fundamental rights like right to live, right to freedom, right to equality and other fundamental rights. In our country there are separate courts for quick judgement and to provide justice to the victim as soon as possible. Like family Courts these courts are created for resolving short disputes between family members like domestic violence, divorce etc. Lately, the world is facing the evil of sexual offences prevailing in the society. This article talks about the ways in which this problem can be solved.

Sexual activity without Consent is identified as someone who is forced to engage in sexual activity against their will and has the right and potential to understand the meaning of the act which is defined under section 74 of Sexual Offences Act 2003. Consent to sex may be accorded in respect of sexual activity, but not in respect of other sexual activities e.g. vaginal, but not anal sex or penetration with conditions like wearing a condom. The court system must concentrate on ensuring that perpetrators are brought before the courts in order to support victims of crime. This allows survivor of rape to bear witness while receiving support during the court case. The courts where this system is followed are known as sexual offences courts. South Africa has developed the idea of sexual crimes courts. It is to set out everything that is necessary for a court to be a court of sexual offense. These courts have trained lawyers and members of court and magistrates in particular. There is a special court for sexual offenses and a testimonial room with CCTV equipment to allow children to testify and not see the suspect while explaining what happened.

www.supremoamicus.org
some of them have all the features that a court for sexual offenses should have. In 1993, the advocate general of Western Cape initiated the creation of the sexual offenses court (SOCs) at Wynberg regional court in Cape Town. This was also a new step in strengthening the adjudication of sexual offenses. In March 2003, there had been 20 sex offense tribunals set up, which rose to 47 in March 2004. There were 74 tribunals by the end of 2005, which meant that more trails were resolved, the victim’s treatment increased, the processing times improved and the conviction rates improved.

Initially, fast track tribunals for long pending cases, especially court cases in sessions, have been developed by the central government in a variety of subject areas. In 2013, in the same trend as creating special or fast track courts in other parts of the country, special quick track courts for cases of sexual assault on women were pursued at Karnataka. Again, no law had been enacted in order to implement such courts and only an order passed by Karnataka government. At least 90,000 cases involving sexual offenses against children were pending, according to government data, until 2016. The quick course court needs the back log to be transparent. Government is looking forward in creating 1023 rapid track tribunals for rape and POCSO cases and currently only 664 rapid track tribunals are in service. While some sexual Offense tribunals have been created, the law which makes this possible must still be enforced. This means that these tribunals are being established in a planted and budgeted way, as well as that we can see precisely how these tribunals will function and setup. The main objective of setting up of such courts was to adjudicate on matters relating to sexual offences.

Why do we need Sexual Offences Courts-

As we all coexist in a social system, one of the main and important functions of criminal laws and our contribution is to efficiently and effectively deal with the problems in society or the social aberrations to ensure that not only the offender is brought to justice but the victim also being compensated. The judicial system in this aspect should also be vigilant that nothing shall act as a hinderance in the process of delivering justice to anyone.

The problem of rape and sexual abuse in India is an ongoing crisis. Unfortunately there is widespread poverty due to which there are huge differences between rich and poor in our country and the victims belonging to poor families or communities are unable to seek justice in the existing court system. The victims are led to a total emotional disaster and in most cases and inflict gross physical damage which leaves them traumatized. The victims of sexual offences not only suffer from physical injury but also from emotional injury. These victims who suffer from sexual offences have special needs which need some special infrastructural requirements and those which can no longer be overlooked or ignored. In layman’s language there is a dire need for specialized courts with court personnel dedicated to the purpose and functioning of the courts which are fitted with specialized equipment. As per the latest National Crime Records Bureau data, there were 1.33 lakh rape cases and 90,205 POCSO cases pending trial at the end of 2016. The POCSO Act has provisions regarding the institution of special courts to take forward the proceedings related to sexual offences. But these sexual offences are only confined to the ambit of such offences committed against children. The conviction rate in
cases which went to trial stood at 25.5 per cent and 29.6 per cent, respectively (indiatoday.in, 2019). According to India’s National Crime Records Bureau, around 100 sexual assaults are reported to police every day. (Srinivasan, 2019) In 2016, the last year for which official statistics are available, there were 133,000 cases of sexual violence pending trial and conviction rates remain abysmally low. Considering the most recent instance of sexual offence, a veterinarian doctor in Hyderabad was gang-raped by 4 men in the wee hours after which she was set on fire and killed. The accused were nabbed within 48 hours and were put in a 14 days judicial custody while the whole nation was debating for capital punishment for such perpetrators. The people were so frustrated that the encounter which took place after a week where all the 4 rapists were shot dead was celebrated in Telangana and other parts of the country (hindu, 2019). The people were so swayed by the public sentiment that only a handful of people had questioned the happening of the encounter. This reflects on the fact that the people have lost their faith on the judicial system.

In India the justice system has always remained inaccessible to most of the survivors of these offences. Some even face greater difficulty in accessing the court system because they’re subjected to discrimination on grounds of caste, disability or the financial status of the victim. There are numerous such cases where the victims have faced barriers in even getting their cases registered with the police. Some also have inadequate legal support. Even in cases that do that make it into the criminal court system, justice for victims is often hard to obtain and are forced to wait for years until their cases are even heard. This is the sad ground reality existing in our judicial system. So, an immediate, effective and systematic change to ensure expeditious trials which can deliver speedy justice to such issues is really necessary. Hence, there is a real need for sexual offences courts in a country like India so that the high volume of sexual violence cases which are currently pending can also be handled. Moreover, since sexual violence crimes are distinctively different from other crimes, they shall be handled in a different manner.

The institution of the sexual offences under some provisions of various statutes is going to have a positive effect because it comes with various merits. First, they are those court rooms which only deal with sexual offences, have special services which reduces the trauma or stress experienced by the victim, speed up cases which help in seeking justice earlier, giving out judgements will become easier for the courts because the main subject matter of the court only deals with sexual violations and more importantly the conviction rate of the perpetrators will change. So, the better implementation of the existing laws and introductions of some procedural reforms inclined towards the setting up of sexual offences courts is the need of the hour.

**Constitutional provisions for separate courts**

Fundamental rights are not horrific delusions, but should be properly implemented. In many cases the court has now agreed to q

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ush the prosecutions to achieve redress not only for individual rights but also for social justice. It had been claimed that the right to a prompt trial is an essential element of a fundamental right to life and freedom in the case of Katar Singh v. State of Punjab.\footnote{Katar Singh v. State of Punjab, 1994 SCC (3) 569, JT 1994 (2) 423, 1994 SCALE 1} Abdul Rahman Antulay v. R.S. Nayak\footnote{Abdul Rahman Antulay v. R.S. Nayak, 1988 AIR 1531, 1988 SCR Supl. (1)1}, the bench has ruled those aspects and instructions for swift prosecution and case investigation should be focused on the nature of the case. In Article 14, Article 19 (1), (a) and Article 21, as well as in the CPC, this right is implied. The government has a constitutional duty to formulate the procedures to guarantee and execute rapid trials. As a supreme body, the Supreme Court will serve as guardian of citizens' fundamental rights.

Speedy Trial is a term that deals with case disposition as soon as possible in order to increase productivity and effectiveness in the judiciary. Although the Indian judicial system is decentralized, a trial often takes years. The Fast Track Courts were formed primarily to settle lawsuits so soon as possible, but they were also ineffective. Although no special provisions are in force for speedy prosecution, the Supreme Court ruled that Article 21 of the Constitution gives the convicted a right through judicial interpretation. The lawsuit has been solved quickly and it seems to be in everybody's favor.

The Protection of Children from Sexual Offences (Amendment) Act, 2019 was presented in Rajya Sabha by the Minister of Women and Child Development, Ms. Smriti Zubin Irani on July 18, 2019. The Bill amends the Protection of Children from Sexual Offences Act, 2012. The Act seeks to prevent offences like sexual abuse, sexual harassment and prostitution by minors. The POCSO Act 2012 is a statutory statute that guarantees that crimes of sexual assault, sexual harassment and pornography are covered by child friendly systems to track, collect information, review of and timely conviction of offenses by established Special Courts in order to protect children at any point of the legal process. The Act calls for the evidence to be reported within 30 days for swift prosecutions. The Special Court shall therefore, as far as possible, complete the trial in the span of one year (Section 35 of POCSO Act). The law provides for separate courts for the investigation of offences in compliance with the Law, with the best interest of the child at each point of the judicial process of utmost importance. The Act includes child-friendly screening practices, evidence gathering, investigation and prosecution of offences. Included:

- The filming by a woman police officer not under sub inspector status of the boy at the home or location of his choosing.
- For no excuse, no child should be kept at the police station at night.
- Policeman not to be in uniform while recording the child's argument.
- The declaration of the family that the infant talks.
- Assistance of a child-specific interpreter, interviewer or specialist.
- Additional instructor help or anyone understanding the way of communication.

As we all know in India, fast track sexual offences tribunals are the biggest necessity in order to quickly pass judgement on victims, those who are still seeking justice and cases stay in trial and there are no trials because too many cases are being heard by a single cou...
rt, and that is why most of the cases are still in the queue.

Sexual Offences Courts in other countries-

The idea of sexual offences courts was originally developed in South Africa. In 2013, a new sexual offences court model was developed. The first of such courts had been established in 1993 in cape town. But the question here is, has the introduction of such Quasi judicial courts or judicial courts served their purpose? The answer has been given by the research done by some institutions like the Child Witness Institute which had been funded by the Unisef and some other institutions conclude that although the victim satisfaction is evident, there is still some scope for improvement. Some key problems have been highlighted were the availability of intermediaries who assist the victims in giving their testimonies and the interpreters in the courts. As a country it has set a trend setting mark in this area where it has been placed as a global leader for intervention against sexual offences. 128(Pretorius, 2018)

Another such country is New Zealand which has introduced a pilot project where it has set up pilot sexual violence courts. This idea was implemented to experiment the outcome and the kind of impact these courts will have on the problem of sexual offences. There was high victim dissatisfaction experienced against the court system in New Zealand and the problem of remembering the kind of details by the complainants after long delays was also noticed. But after these courts came into being an important merit to note is that the case processing times in these pilot courts have decreased from 18 or 24 months to around 8 or nine months. It was also noticed that the lawyers were treating complainants a little more respectfully in the pilot courts with their main motive being defending their clients who deserve justice.129 (Hagen, 2018)

In countries like Guyana, under the sexual offences act, 2010 the country has been successful in setting up special courts for handling cases dealing with sexual offences. One of the first courts of such kind were introduced in December 2017. Since It was noticed that the sexual offence victims were often afraid to report to the police due to the sensitive nature of such cases and it is unknown about what makes these cases so sensitive to even be reported. However with such facilities in operation the victims are being able to seek justice and it’s also made sure that the victims are not being retraumatized by equipping the court with a traditional sexual offences court like facilities.130 In Guyana,certain cases it becomes important to protect the identity and the reputation of the victim it becomes necessary to hear cases in a closed court without any media members or anybody else except the family members to be present. However, the judgement or decision of the court can be done in public. This kind of ‘in camera hearing or trial’ has been started in Guyana when it passed the Sexual Offences Act, 2010. (news, 2018)

The concept of setting up Sexual offences courts is continuing to be a growing trend for all countries around the world to achieve a similar objective.

Conclusion-
Since Sexual offences are distinctively different from other crimes and shall be dealt with differently, there are special courts dealing with such matters called Sexual Offences courts. These courts only deal with a wide range of matters like sexual abuse, rape, sexual assaults, etc and other such offences which come under the definition of sexual offences. These special courts are known to come equipped with various victim friendly infrastructure such as separate testimony rooms for the victims so that they do not have to suffer from the trauma by giving their testimony in front of the offenders. The lawyers and the judges along with the judicial officers will have the specialized knowledge on the subject which facilitates in seeking justice to the victims. Based on all the research done, it is important to note that the institution of such courts is necessary in a country like India to handle the large number of cases pending and for expeditious trials to ensure speedy justice. India requires better implementation of the existing laws and some reforms being introduced. In some countries the laws to set up such courts have been implemented and in countries like South Africa and Guyana have started to put in such efforts at the beginning of the century and it’s important to note that the efforts have been successful.

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CHILD MARRIAGES, ROBBING THE FUTURE

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ABSTRACT
“Marriage can wait, education cannot.”
- Khaled Hosseini, A Thousand Splendid Suns
Conditions for a valid Hindu marriage is defined under section 5 of the Hindu Marriage Act, 1955 where according to clause (iii) the age of bridegroom should be not less than twenty one while bride shall be not less than 18 years, however, even after prescribing the age limit, there are cases where child marriages are still prevalent. Before Hindu Marriage Act, 1955 was enacted there were old laws governing the country that from ancient India where child marriages were permitted for instance Manu Smriti as well as other Dharma sutra writers promoted pre-puberty marriages of girls. Therefore, from ancient India this practise was prevailing which took away the freedom of girls due to their household responsibilities whereas it created burden on the boy as well to run the house for the family. This made children deprived of the most important thing for them i.e. education. The paper is dived into various chapters through which issue of child marriage is addressed. Firstly, the author has introduced about child marriages, secondly, the author has culled out judicial response to it, thirdly the author has done comparative analysis between Bangladesh, United States & India, fourthly, the author has done critical analysis on the Prohibition of Child Marriage Act, 2006, fifthly the author then tries to bring out legislations which indirectly legitimizes child marriages, then at last the author has given some recommendations and conclusion. The main aim of this paper is to explore the issue of child marriages & provide solutions for it so that future of our youth maybe saved from being destroyed.

Keywords: Child Marriage, Gender bias, Comparative analysis, Judicial response.

INTRODUCTION
Child marriage is a form of evil which destroys future of children because it hampers their chance for continuing their education which for a child is important for his growth & development. Further, the consequences of child marriages are that it gives rise to the problems of teen widows, mental health problems, isolation and abandonment. According to UNICEF, “Child Marriage is defined as a marriage of a girl or boy before the age of 18 and refers to both formal marriages and informal unions in which children under the age of 18 live with a partner as if married.” According to the same report of UNICEF, India has the largest number of brides in the world i.e. one third of global total while Bangladesh has the highest rate of child marriages in Asia (fourth highest rate in the world). Child marriage was present in the ancient India as well. Manu, the first law giver in Manu Smriti wrote, “To a distinguished, handsome suitor (of) equal (caste) should (a father) give his daughter in accordance with the prescribed rule, though she have not attained (the age of) puberty.”

131 Dr. P. Chand Basha, Child marriage: causes, consequences, & intervention programmes, 2, IJHSR, 19-24 (2016).
133 Id
Thus, it can be said that Manu was in favour of pre-puberty marriage of girls. Even other Dharma sastra writers were in support of early marriage of girls. For example, Gautama advocated for pre-puberty marriage of a girl, and if a person fails to abide by this rule, he commits a sin. He writes, “A girl should be given in marriage before puberty.”

Poverty, lack of resources is one of the reasons that many families indulge into child trafficking for large sums of money in return to run the remaining family out of the money, and other reasons have to do with lack of education, inadequate laws and gender discrimination which means neglecting the freedom of girls to make choice.

Pre-Independence Era

According to the Government of India, Census Report, 1921, half a million young widows were a dominant majority who were under 15 years of age. It was found that girls married below the age of 15 were 4,947,266 and girls who were widows below the age of 15 were 232,147. Therefore, to handle the situation of child marriage, the Sharda Act, 1929 was enacted by the British India on the first day of April 1930 which disallowed the marriage of a girl below 14 years of age with a man above 50 years of age, and marriage of a girl below eight with any man, and punishment was up to six months imprisonment or fine or both.

Post-Independence Era

In 1978, the Sharda Act of 1929 was amended into what became to be known as the Child Marriage Restraint (Amendment) Act in which child means a male below the age of 21 years and female below the age of 18 years. Though the Act was there, the practise of child marriage was not stopped. In 1975, Andhra Pradesh High Court was the first in Panchireddi v. Gadela Ganapaty to declare child marriage as void-ab-initio. The Court concluded that if the view of earlier Courts were accepted then, “it will once again throw open the flood-gate of child marriages.” Since the objective of the Child Marriage Restraint Act, 1978 was not reached, the Government enacted The Prohibition of the Child Marriage Act, 2006 which deals with the age requirement of the child and the punishments for child marriage. However, there have been cases of child marriage still prevalent in India in recent years, the Act has not made the marriage void but voidable at the option of the other party which indirectly legitimizes the child marriage because of which the practise is not stopped which was the main objective of the Government.

Another important problem which is created because of child marriages is that of domestic violence. According to the National Health & Family Research Survey of 2015-2016, it is discovered that the number of women who have experienced physical violence since the age of 15 may

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137 Tahir, Mahmood, Marriage-Age in India & Abroad – A Comparative Conspectus, 22, Indian Law Institute, 38-80.
138 Ibid.
140 Ibid at 8, pg. 7.
be due to the reason that child marriages are still prevalent in India which makes it possible for the girl child getting abused which is significant from the data that there are 20,778 women compared to 2,736 women who have experienced physical violence at the age of 15 that to being married which shows the same that child marriages are not abolished by the government. This leads to the patriarchy theory that men are dominating in society and family because they have maximum control. It is shocking that this is going on because statistically according to Agarwal, more of miscarriages, maternal deaths and other health related problems develop for young mothers which is dangerous.  

**JUDICIAL RESPONSE**

1. **Jitender Kumar Sharma v. State Another**

In the present case, the respondent i.e. Jitender Kumar Sharma, under 18 years of age, had eloped with Poonam Sharma, 16 years. The problem before the Delhi High Court was that both were minors and parents of minor girl didn’t approve the marriage and invoked Section 5 of the Hindu Marriage Act, 1955 to argue that since both are underage, the marriage shall be void and invalid. However, the Court took the view finally that the marriage of a minor child would still be valid unless it is a void marriage under the applicable personal and Court observed that marriage in contravention of Clause (iii) of Section 5 of HMA, 1955 is neither void nor voidable although it may be punishable under Section 18 of the said Act which was reinforced in the case of Ravi Kumar v. The State and in the case of Manish Singh v. State Government of NCT. Further the Court added that Section 13(2)(iv) shows that marriage of a minor girl below the age of 15 is regarded as valid and can only be dissolved on her petition which was rendered before the enactment of the Prohibition of Child Marriage Act, 2006 which deals with void and voidable marriages. Therefore, the Court held that the marriage of a minor child would still be valid unless it is a void marriage under the applicable personal law, So, a Hindu Marriage which is not void marriage under the Hindu Marriage Act would continue to be such provided the provisions of the section 12 of the Prohibition of Child Marriage Act, 2006 are not attracted. The Court observed that the Act made a specific provision for void marriages under circumstances but didn’t render all child marriages void. The Court ratioed that the two minors shall be allowed to live together in Jitender’s home provided that Jitender’s father, brother, and sister have assured this court that they will provide full support to this young couple. The Court further observed that “Child marriage is a compendious one. It includes not only those marriages where parents force their children and particularly their daughters to get married at very young ages but also those marriages which are contracted by minor or minors themselves without the consent of their parents. Are both these kinds of marriages to be treated alike? In the former kind, the parents’ consent but not the minor who is forced into matrimony whereas in the latter kind of marriage the minor of his or her own accord enters into matrimony, either by running away from home or by keeping the alliance secret. The former kind is clearly a scourge as it shuts out the development of children and is an

142 Agarwal Bina, Gender Challenges, Oxford University Press (2016).
affront to their individualities, personalities, dignity, and most of all, life and liberty.” The court said that the Government must take measures to educate the youth that getting married early places a huge burden on their development. At the same time when such marriages occur, they require a different treatment.

2. Lajja Devi v. State

The Court in its own motion observed the situation of child marriages in India. Here, the Court held that the object of the Prohibition of Child Marriage Act (PCM Act), 2006 was to curb the menace of child marriages but it is still prevalent in this country and mostly common in rural areas. Court realized that child marriages are in violation of human rights of the children. Further the Court discussed on the fact that if the husband is also a minor how can he be guardian of the minor girl, thereby, analysing Section 3(2) of the said Act does cause some confusion and is ambiguous. A husband under the Hindu Majority Act & Guardianship Act, 1956 is the guardian of the minor wife and obviously the husband cannot and will not act as a guardian and move a petition on behalf of his minor wife. The Court also observed that it is “distressing to note that the Indian Penal Code, 1860, acquiesces child marriages.” The exception to Section 375 specifically lays down that sexual intercourse of man with his own wife, the wife not being 15 years of age is not rape, thus allowing the possibility of marital rape when age of wife is above 15 years. The Court observed, “It is rather shocking to note the specific relaxation is given to a husband who rapes his wife, when she happens to be between 15-16 years. This provision in the Penal Code, 1860, is a specific illustration of legislative endorsement and sanction to child marriages. Thus, by keeping a lower age of consent for marital intercourse, it seems that the legislature has legitimized the concept of child marriage. The Indian Majority Act, 1875 lays down eighteen years as the age of majority but the non obstante clause (notwithstanding anything contrary) excludes marriage, divorce, dower and adoption from the operation of the Act with the result that the age of majority of an individual in these matters is governed by the personal law to which he is a subject. This saving clause silently approves of the child marriage which is in accordance with the personal law and customs of the religion. It is to be specifically noted that the other legislations like the Penal Code, 1860 and Indian Majority Act are pre independence legislations whereas the Hindu Minority and Guardianship Act is one enacted in the post independence era. Another post independent social welfare legislation, the Dowry Prohibition Act, 1961 also contains provisions which give implied validity to minor's marriages.”

3. Independent thought v. Union of India

The hon’ble Court held that exception 2 of section 375 of Indian Penal Code, is violative of Articles 14, 15 & 21 of the Constitution of India, 1950 and contrary to the constitutional morality and inconsistent with the provisions of the POSCO Act. The Court also observed that Child marriages has the effect of detrimental effect on boys who would need to shoulder the responsibility of a wife and in most cases, have to also discontinue their education the assumption that girls need more attention than boys is now being challenged.

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According to Section 9 of the PCM Act, regardless of the age of the child, he shall be punished if he marries a girl child. The Court also held that census data demonstrated an apprising of female deaths in the age group of 15-19 years. This high mortality rate could be attributed to the deaths of the teenage mothers.

4. Makemalla Sailoo v. Superintendent of Police & Ors

In the present case the question before the Court regarding the child marriage was whether a minor girl claiming to have married can be allowed to join her husband or she can be forced to go with her parents or she be put in the State home for Child Care Centre till she attains majority. The Court also took on to consider whether the marriage as claimed by the alleged detene and 3rd respondent is a valid marriage or not. This case was prior to the Prohibition of Child Marriage Act, 2006 was enacted, and therefore, the Court took the view of the Child Restraint Act, of 1929 which was later repealed by the 2006 Act. However, even in this case the Court held the marriage as valid one and not void or illegal giving same justifications that not following conditions of Section 5 of HMA, 1955 does not make the Child marriage invalid. The Court also dealt with the view of the legitimacy of children born out of such marriages to be legitimate and in later act this was made to be done so that children born out of such marriage get the rights by deserve as they are innocent.

5. Meena & Anr. v. State & Anr

In this case the before the Delhi High Court on the issue of child marriage observed that...

“Thus, even after the passing of the new Act i.e. the Prohibition of Child Marriage Act 2006, certain loopholes still remain, the legislations are weak as they do not actually prohibit child marriage. It can be said that though the practice of child marriage has been discouraged by the legislations but it has not been completely banned.”

6. State v. Raja Ram Yadav

In the Sessions Court it was held that, “Legislative endorsement and acceptance which confers validity minor's marriage in other statutes definitely destroys the very purpose and object of the PCM Act-to restrain and to prevent the solemnization of Child Marriage. These provisions contain a legal validity provide an assurance to the parents and guardians that the legal rights of the married minors are secured. The acceptance and acknowledgement of such legal rights itself and providing a validity of Child Marriage defeats the legislative intention to curb the social evil of Child Marriage... As held above, PCM Act, 2006 does not render such a marriage as void but only declares it as voidable, though it leads to an anomalous situation where on the one hand child marriage is treated as offence which is punishable under law and on the other hand, it still treats this marriage as valid, i.e., voidable till it is declared as void. We would also hasten to add that there is no challenge to the validity of the provisions and therefore, declaration by the legislature of such a marriage as voidable even when it is treated as violation of human rights and also punishable as criminal offence as proper or not, cannot be gone into in these proceedings. The remedy lies with the legislature which should take adequate

Del 5463.

149 Meena & Anr. v. State & Anr, 2012 SCC OnLine
steps by not only incorporating changes under the PCM Act, 2006 but also corresponding amendments in various other laws noted above. In this behalf, we would like to point out that the Law Commission has made certain recommendations to improve the laws related to child marriage.”

7. In Association of Social Justice & Research v. Union of India

In this case the petitioner has filed case for one girl of 11-12 years named Chandini whose parents have sold her for consideration to one Yashpal who is of 40 years of age. It was declared by the girl herself that she was of 17 years of age & had consented to such marriage without her parent’s pressure. After medical examination it was found that she was 16 to 18 years of age. The facts are as such that due to low income of the father to maintain other children, he thought to do marriage of Chandini. The Delhi High Court in this particular observed that, “Sociologists, even argue that for variety of reasons, child marriages are prevalent in many parts of this country and the reality is more complex than what it seems to be. The surprising thing is that almost all communities where this practice is prevalent are well aware of the fact that marrying child is illegal, nay, it is even punishable under the law. NGOs as well as the Government agencies have been working for decades to root out this evil. Yet, the reality is that the evil continues to survive. Again, sociologists attribute this phenomenon of child marriage to a variety of reasons. The foremost amongst these reasons are poverty, culture, tradition and values based on patriarchal norms. Other reasons are: low-level of education of girls, lower status given to the girls and considering them as financial burden and social customs and traditions. In many cases, the mixture of these causes results in the imprisonment of children in marriage without their consent.” The Court held that till Chandini attains majority she shall stay with Yashpal but their marriage should not consummate which must be ensured by Yashpal and parents of both parties and if the minor wife has objection to marriage, she shall file petition under Section 3 of the PCM, 2006. However, it is pertinent to note that even when the Court realises that such marriage does hamper the minor wife, the Court still let the marriage survive which is illegal and the purpose of PCM, 2006 is not taken into account i.e. to end child marriages.

COMPARATIVE ANALYSIS BETWEEN BANGLADESH, UNITED STATES AND INDIA.

Under the Child Marriage Restraint Act (1929), the legal marriage age in Bangladesh is 18 years for girls & 21 years for boys. Penalties for violating the rule is imprisonment for a month and a fine up to 1,00 taka. To eradicate the evil practise of Child Marriage, the government has made it compulsory to present a birth certificate at the time of marriage, and in February 2017, the government adopted the Child Marriage Restraint Act despite widespread concerns over a special provision allowing child marriage in ‘special cases,’ and this cases fear in the people that indirectly it allows statutory rape and encourage child marriage instead of the opposite expected effect. Under the leadership of the Ministry of Women and

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Children Affairs, A National Action Plan to Eliminate Child Marriage by 2015-2021 has also begun. Further till now i.e. 2019, the Bangladesh Government has come up with the Child Marriage Restraint Act, Rule of Child Marriage Restraint Act, National Action Plan to end child Marriage approved & launched by Government in August 2018, and Adolescent Health Strategy. In case of India, in the case of Lajja Devi, the Court viewed, “… registration of marriages has still not been made compulsory. Compulsory registration mandates that the age of the girl and the boy getting married have to be mentioned. If implemented properly, it would discourage parents from marrying off their minor children since a written document of their ages would prove the illegality of such marriages. This would probably be able to tackle the sensitive issue of minor marriages upheld by the personal laws.”

In the United States, Delaware, New Jersey, and Pennsylvania are the three states to outlaw marriage for anyone under the age of 18 years with no exceptions. Earlier, the current laws in Pennsylvania allowed 13 years olds to marry with parental and Court approvals. Minors aged 16 & 17 could marry just with the consent from their parents or legal guardians but now, the Pennsylvania Senate Bill, 1219 introduced in 2018 would remove all exceptions for minors and stipulate that marriage licences may only be issued to people of 18 years or older. With such measures taken by the United States, it is evident that in order to eradicate the evil practice even Indian Government must take effort to amend the Hindu Marriage Act or PCM Act to declare all marriages below 18 years are void. In India, too many a times Indian Judiciary has recommended to the Government to take steps in making the child marriage as void so that the country has better growth for the youth then dealing with young age marriage problems.

PROVISIONS OF THE PROHIBITION OF THE CHILD MARRIAGE ACT, 2006 – A Critical Analysis

The Prohibition of the Child Marriage Act, 2006 penalises only an adult male for marrying a minor girl. If the adult groom is over 21 years of age, he was liable to be punished with up to 3 months with fine and in case, he was between 18 and 21 years of age, punishment of maximum of 15 days or a fine up to Rs. 1,000 or both can be imposed to him. No, similar provision exists for a female adult who married a minor boy, possibly because of such incidents being rare. This brings forward the gender stereotype filled in the society that crime of child marriage is only directed against a female or in other words, that only a female can be a victim of child marriage and not a male. This conflict can be well explained with the interpretations of the sections 2, 3, & 9 of the PCM Act, 2006. Section 2(a) of the Act defines, “Child” to be a male who has not completed the age...
of twenty-one years and female that of eighteen years of age. Section 2(b)\(^{159}\) defines child marriage which says that it is a marriage to which either of the contracting party is a child. Secondly, the Bill doesn’t take into account the situation where both the parties can be minors and may be married. This issue was dealt in the case of Jitender Kumar Sharma v. State & Another\(^{160}\), where the Court validated the marriage because section 12\(^{161}\) of the said Act could not be attracted as both the parties had run away to be married. Hence, in this case there was no use of either force or enticement or even illegal trafficking of the minor girl. Thirdly, it can be also observed that according to section 9\(^{162}\), a male is an adult who is above 18 years of age but section 2 (a) of the Act defines the child as a male child who has not completed the age of 21 years, therefore, these two provisions are contradicting with each other so much so that these sections are presuming that a male is the criminal in every case irrespective of the fact and circumstances of each case, therefore, treating the male as an ‘adult’, and not as a ‘child’ as female minor is being treated. Adding on, section 20 of the Act has made amendment in the Hindu Marriage Act, 1955 regarding section 18 clause (a) which says that if clause (iii) of section 5 of HMA, 1955 is contravened there shall lie punishment, however, even after this judicial response has not made the child marriages as void but kept interpreting it as voidable due to other sections in the PCM Act, 2006 which indirectly legitimizes it. Therefore, fourthly, the reason child marriages are still continuing in the country irrespective of the present Act is due to Section 12 which indirectly promotes child marriage. This destroys the very purpose for which the Act i.e. to prohibit child marriages in India. According to section 3 requires that after two years of the attainment of majority, the contracting party who was a minor child at the time of

\(^{159}\) (b) “child marriage” means a marriage to which either of the contracting parties is a child.


\(^{161}\) 12. Marriage of a minor child to be void in certain circumstances.—Where a child, being a minor— (a) is taken or enticed out of the keeping of the lawful guardian; or (b) by force compelled, or by any deceitful means induced to go from any place; or (c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes, such marriage shall be null and void.

\(^{162}\) Punishment for male adult marrying a child. — Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both.

\(^{163}\) Child marriages to be voidable at the option of contracting party being a child.—(1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage: Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage: (2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer. (3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority. (4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money: Provided that no order under this section shall be passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed.
the marriage may file a petition in the Court for a decree of nullity. It is pertinent to note that while section 9 treats the male child as a major for giving punishment for marrying a minor girl, section 4 recognizes that even a male contracting partly could be minor and, therefore, lawmakers made sure in such a case the female victim is able to get sufficient maintenance when granting a decree under section 3 of the PCM Act, 2006. Also, Section 9 punishes only a male adult marrying a minor girl and also the age requirement of such male is above 18 years which is different from the age as prescribed in Section 2 (b) of the child defining child marriages which highlights the unfair and unequal treat of a male from a female. The Section 9 realizes that a male can be of 18 years and above who shall be a major. Therefore, it is evident from this section that the provision has treated the male child unfairly and only provided all the help and benefit to the minor girl presuming female to be the only victim at all costs. Therefore, it is clearly evident that from a constitutional perspective section 2, 3 & 9 violate Article 14 & 15(1) of the constitution of India, 1950. Recently, in the case of Hardev Singh v. Harpreet Kaur, the hon’ble Supreme Court has addressed this gender bias in section 9 which contradicts with other sections of the Act. In this case the victim of child marriage was a minor male child who was merely of 17 years of age. He had married an adult female. The hon’ble court held, “The 2006 Act does not make any provision for punishing a female adult who marries a male child. Hence, a literal interpretation of the above provisions of the 2006 Act would mean that if a male aged between the years of eighteen and twenty-one contracts marriage with a female above eighteen years of age, the female adult would not be punished, but it is the male who would be punished for contracting a child marriage, though he himself is a child. We are of the view that such an interpretation goes against the object of the Act as borne out in its legislative history. Undoubtedly, the Act is meant to eradicate the deplorable practice of child marriage which continues to be prevalent in many parts of our society. The Statement of Objects and Reasons declares that prohibition of child marriage is a major step towards enhancing the health of both male and female children, as well as enhancing the status of women in particular. Notably, therefore, a significant motivation behind the introduction of this legislation was to curb the disproportionate adverse impact of this practice on child brides in particular.”

**CHILD MARRIAGE ACCEPTED IN VARIOUS LEGISLATIONS IN INDIA**

The provisions of the POSCO Act, 2012 defines a child as below 18 years of age and provide better protection to the girl children and makes no discrimination among them on the basis of their marital status. Thus, age of consent is 16, age for marriage is 18, however, if married consent for sexual intercourse is deemed at 15. Under the Age of Consent Act, 1891, the age of consent for sexual intercourse for all girls, married or unmarried was raised from ten to twelve years in all jurisdictions and its violation was subject to criminal prosecution as rape. Husband of a minor girl is treated as her guardian according to the Hindu Minority

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164 14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

165 (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

and Guardianship Act, 1956 but the section doesn’t explain the consequences when her husband also happens to be a minor himself. The Dowry Prohibition Act, 1961, does recognises the happening of child marriages despite the prohibition of child marriage act, 2006. The Act provides that if dowry is received when the bride is a minor then such a dowry shall be held in trust by her guardian until the minor married girl attains the age of 18. The Code of Criminal Procedure, 1970 makes it mandatory for the father of the minor wife to provide maintenance to her in case her husband lacks sufficient resources. The Juvenile Justice (Amendment) Act, 2015, section 2(14) (xii) stipulates that a child who is at minimum risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage as a child in need of care and protection. The Majority Act, 1875 makes it clear that it doesn’t apply in case of marriages, etc.\(^{167}\)

The various provisions in different legislations in the country provide an assurance to the parents and guardians that the legal rights of the minors are secured, therefore, acknowledging such legal rights itself and leaving the validity of child marriage intact defeats the legislative desire to curb the social evil of child marriage in India.

**RECENT DEVELOPMENTS**

Karnataka is the first Indian State to declare all future child marriages void. The Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 passed in April 2017 declared all marriages between minors’ void.\(^{168}\) The Supreme Court while decriminalising martial rape, praised the Karnataka Legislature for taking cognizance of an important issue and reconciling the conflict between contesting and contradictory laws. The Act now states that every child marriage whether solemnised before or after the commencement of the Act, shall be voidable by the contracting party who was a child at the time of marriage which makes the Karnataka the first the only state to do this. The Court said, “Therefore, any marriage of a child, i.e. a female aged below 18 years and a male below 21 years is void ab initio in the state of Karnataka. This is how the law should have been throughout the country. Where the marriage is void, there cannot be a husband or a wife and I have no doubt that protection of Exception 2 to Section 375 of IPC cannot be availed of by those persons who claim to be “husband” of “child brides” pursuant to a marriage which is illegal and void,” observed Justice Lokur. The Court also recommended that all the State Legislatures adopt the route taken by Karnataka.\(^{169}\) The court wished them to declare child marriages void to ensure that sexual intercourse between a girl child and her husband is a punishable offence under The Protection of Children from Sexual Offences Act (POSCO Act), 2012 and the IPC, 1860.

UNICEF defines child marriages as marriage before the age of 18, and considers the act of child marriage as a violation of human rights. Even though the Prohibition of Child Marriage Act, 2006 makes age limit for a girl to be married to be 18 or above and boys to be 21 or above, the law has not been followed in the country. According to the report of *child marriages void*. Times Of India, October 17, 2017.

\(^{167}\) LAW COMMISSION OF INDIA, REPORT NO. 270 COMPULSORY REGISTRATION OF MARRIAGES, JULY 2017.

\(^{168}\) Arpita Raj, *Karnataka was the first one to make*

\(^{169}\) *Ibid.*
UNICEF, 47% of the girls in India are married before their 18th birthday making India global leader in child brides. Last year i.e. 2018, the Government of India has taken initiative to make the child marriages as void ab initio.\textsuperscript{170}

\textbf{CONCLUSION & RECOMMENDATIONS}

Child marriage is a major controversial issue around the whole world, India being one of the countries which has the largest number of child marriages. Since the ancient era, girls were taken to be weak and dependent on males and were accordingly married off at pre-puberty age as provided by the writers of the Dharma Shastras, and even after so long the child marriages is going on in the current India. An effort was accordingly made by the different Governments to handle the issue by enacting Sharda Act, 1929 which was further amended in post-independence era into Child Restraint Act, 1978 which now is Prohibition of the Child Marriage Act, 2006. In both 178 and 2006 Acts, the child marriage is made voidable and not void because of which it allows the child marriage with providing a safeguard of divorce if the minor child being married wants to attain it after two years of turning into majority. Therefore, for some amount of time the marriage of a minor girl and a major boy is valid until the minor girl later decides to invalidate it, hence, child marriage is not abolished which was sole aim of the Government while enacting the Prohibition of the Child Marriage Act, 2006. Further the many legislations have indirectly recognized the child marriages, therefore, making an impact in the minds of the citizens that child marriage is valid and protection to minor child is provided through various provisions of different Acts for example, Dowry Prohibition Act, 1961, Code of Criminal Procedure, 1970. The various provisions in different legislations in the country provide an assurance to the parents and guardians that the legal rights of the minors are secured, therefore, acknowledging such legal rights itself and leaving the validity of child marriage intact defeats the legislative desire to curb the social evil of child marriage in India. Therefore, to curb the child marriage in India the legislature must make the child marriage as void-ab-initio like the Karnataka Government has done in the State Act being the first state to do so. India is full of traditional values and customs, just by making the child marriage as void-ab-initio will not stop the evil practise, therefore, it is recommended that the Centre makes registration of marriages compulsory in India like done in Bangladesh which will then make sure that the ages of both the parties to a marriage is checked and by doing this child marriage can be stopped practically as well. Third suggestion would be to spread awareness of harm of child marriages through social media, newspaper, etc, and to promote education for the children, majorly for the girl child who are frequent victims of early pregnancy and health problems due to child marriages. Fourthly, the Hindu Marriage Act, 1955 should also be amended to ensure that the provisions in the said acts are the same and not contradicting the Prohibition of Child Marriage Act, 2006. Therefore, Indian Government must take steps to make child marriages void-ab-initio to wholly stop the practise legally, and must make the registration of marriage compulsory to achieve the goal.

\textsuperscript{170} Sanya Singra, \textit{Age of marriage for men could soon be reduced to 18}, The Print, October 30, 2019.
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FOOD; MEDICINE OR POISON
ROLE OF LAW IN ENSURING FOOD QUALITY, MAKING FOOD MORE OF MEDICINE AND LESS OF POISON

By Amita Vasudevan
From Sastra University

INTRODUCTION
People eat to survive but many survive to eat. It’s an age old fact from our forefathers that healthy food is the medicine for majority of diseases and enhances immunity. But the main question is whether the food available is in its purest form or is it chemicals in disguise. Earlier when subsistence farming was undertaken, food produced and prepared was a blessing in disguise but now with the growth of commercial farming, escalated demand in food products and cropping up of fast food and tinned food, it has become a recipe of disaster. Money has blinded many people urging them to adulterate food products making many food items unsafe for consumption. Adulterated Food lacks in quality as a medicine and in reality is slow poison making human body vulnerable to existing and new diseases. Hence it’s advised to have only home cooked food and not restaurant-made or packed food but can we make sure that the rice, dal, vegetables, milk, chilli-powder etc used for cooking is free from adulteration.

FOOD; CURRENT SCENARIO
Food products are either directly or indirectly reaped from plants or animals. These produce are either victims of adulteration and or improper packaging which causes various health issues.

Foods That Can Be Adulterated and Their Effects

Adulteration is the act of intentionally or deliberately adding chemicals or other unwanted substances to food products so as to enhance the appearance of the products, to increase shelf life and or to increase its quantity thus degrading its quality with the aim of earning increased profits. One of the major causes of adulteration is to increase the shelf life of food articles. Adulterants for every food item from A to Z have already been discovered and or invented. Most food items except that are grown organically in one’s house is subject to adulteration. Only a handful of producers or manufacturers with service motive provide adulteration free food to the public. Most of the food products are made available to the general public after it has crossed the stage of adulteration.

There are 3 major types of adulterants; they are intentional adulterants, incidental adulterants and metallic adulterants. Intentional adulterants are those inferior materials that are added premeditatedly to improve appearance and quantity to earn higher profits. They include sand, chalk-powder, stones etc. Incidental adulterants are added as a result of negligence, ignorance or lack of standard facilities. Some of the common incidental adulterants are pesticide residues, larvae in food etc. Whereas metallic adulterants are metallic substances like arsenic, lead from water etc. Few among the many foods that are adulterated:

Milk: milk is a storehouse of nutrients and can be consumed by anyone from just born babies to age old (senile) parents. It can be consumed by babies even before they could digest other food; hence milk is a primary source of nutrition for babies. Despite their immense importance milk is one of the most adulterated food item in this world. Milk instead of being a chest of nutrients...
like calcium, protein, fat, carbohydrate, mineral it has become a casket of chemicals. In 1850 swill milk scandal occurred at New York which recorded the death of nearly 8000 infants in a year as a result of adulterated milk. Some of the chemicals used as milk adulterants are water, melamine, urea, caustic soda, formalin, ammonium sulphate, boric acid, benzoic acid, salicylic acid, hydrogen peroxide, sugar and maltodextrin.

- Melamine: when milk is adulterated with water to increase its quantity, the natural protein level in milk reduces. Thus melamine, a chemical is added to increase the protein count. In 2008 china witnessed a major milk scandal where an estimate of 300,000 became victims due to adulteration of milk by melamine.
- Formalin: it is a chemical which is 37% aqueous solution of pungent gas formaldehyde. Formalin is used in mortuaries to preserve dead bodies and a major cancer causing agent when consumed. Such a dangerous chemical that causes various health problems when inhaled or comes in contact with human body is extensively used in food industry to preserve perishable goods i.e. increase the shelf life of such goods.
- Urea and ammonium sulphate: urea is added to increase SNF value in synthetic milk and ammonium sulphate is added to milk to increase the lactometer reading by maintaining the density of milk as milk loses its density with dilution using water. The maximum limit of urea approved by FSSAI in India is 70mg/100ml as urea is a natural constituent of raw milk but this level is mostly exceeded by adding commercial urea so as to increase non-protein nitrogen content.
- Water: milk is diluted using water thus reducing the nutrient content in milk. Moreover when milk is diluted using unhygienic or polluted water it further makes human body prone to various diseases.
- Acids: acids like boric acid, benzoic acid, salicylic acid, hydrogen peroxide are used as preservatives.
- Caustic soda: caustic soda is used in the manufacture of soaps and detergents. It’s used in milk to create a foamy texture. As fat in milk is expensive, it is removed and compensated by adding non milk vegetable fat and oil. Detergents perform the function of emulsification and dissolving the oil in water resulting in a frothy solution.
- Maltodextrin: is used to improve the taste, flavor, solubility and dispersibility of dairy products.

Health issues: adulterated milk can impair the normal working of various organs in the body making way for cancer, heart problems and even death. Some of the health issues caused by various adulterants are: formalin is a deadly weapon that causes various health complications like biological mutation and reproduction complication, tumors, CNS disorders etc. High intakes of formalin leads to fatal diseases like cancer and may even lead to coma. Excessive urea may cause nausea, vomiting, headache, redness in skin or eye, respiratory and kidney problems such as asthma, cough, and other lung damage, etc. melamine may cause renal failure and death in infants. Detergents and peroxides in milk may lead to gastro-intestinal complications. Hydrogen peroxide (H2O2) may even lead to damage of DNA cells leading to premature aging etc.

Vegetables and fruits: Glossy polished vegetables and fruits have been flooding the markets in the recent times. To bring out the shiny effect they are smeared with either wax or malachite green or rhodamine B or copper sulphate. Further vegetables and fruits become prey of oxytocin hormone and calcium carbide.
Malachite green: C$_{23}$H$_{25}$N$_2$, chemical dye used as dying agent for paper, leather and silk is widely used to dye green vegetables and fruits such as peas, gourds etc. Malachite green is known to have carcinogenic properties i.e. likely to cause cancer.

Oxytocin: It is a reproductive hormone found in mammals that is injected into the roots of plants so as to produce bigger fruits and vegetables and also to increase their production. Oxytocin taken via vegetables and fruits are known to have inverse and irreparable damage on human body.

Copper sulphate: This blue coloured chemical is used on green vegetables like green peas, gourds and cucumber to give a fresh green look. According to FIDTRC, copper sulphate results in severe gastrointestinal infections. The use of copper sulphate is regulated by the Insecticides Act,1968 as copper sulphate comes under the ambit of the definition of insecticides.

Wax: Natural wax in fruits and vegetables are removed by washing and artificial wax is applied so as to prevent enormous loss of moisture content in fruits and vegetables as water is a major constituent in fruits and vegetables and also to prevent bruising and decay to lengthen its shelf life. This process is called fruit waxing.

Calcium carbide: Farmers harvest fruits and vegetables before they ripen so as to facilitate long distance transportation as they would get spoilt if they are harvested in a ripe stage and transported. Fruits produce ethylene to ripen. Calcium carbide is a chemical used in the production of calcium cyanamide for fertilizers. Calcium carbide produces acetylene when it comes in contact with moisture or water. Acetylene functions similar to ethylene and hastens ripening of several fruits. It results in mouth ulcers, gastric problems, diarrhea and onset of cancer, heart diseases, stroke, arthritis and causes miscarriage or developmental abnormalities when consumed by pregnant women. Moreover industrial grade calcium-carbide has traces of toxic chemicals like arsenic and phosphorus which causes various health issues.

Oil: Oil is a major component of cooking and of a balanced diet. Due to their nutritional values and great demand in both national and international markets they become a potential point of adulteration. Oil can be obtained from different sources such as from coconut, sesame, olives, mustard, and sunflower. Two major types of edible oil adulteration are mixing cold-press oil with refined oil and substitution of expensive oil by cheaper ones. Demand for cold press oil is on the rise as it simply involves extracting of oil by cold pressing and simple filtration without any refining using chemicals. Since cold-press oil is expensive, dishonest traders mix it with refined oil so as to increase profits by increasing quantity. Another type is replacing expensive oil by cheaper oil. For example: edible oil is adulterated with argemone oil(leads to loss of eyesight, heart diseases, tumor), mineral oil(damage to liver, carcinogenic effects), karanja oil(heart problems, liver damage), castor oil(stomach problems). But the ‘never use oil’ is refined oil; oil that is ‘purified’ by chemicals. Chemicals used in the oil treatment do no good to human body but on the other hand reduces the life span of a

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171The Insecticides Act, 1968. sec 3 e
"Insecticide" means i. any substance specified in the schedule
human. One of the most dangerous products in the market is partially hydrogenated oil that is made by forcing hydrogen gas into oil at high pressure due to which healthy fats are converted into trans-fat that has highly adverse effects on humans.

### Honey

Honey is a natural sweet mixture produced by bees from the nectar of flowers. Honey is used as sweeteners and is used extensively in Ayurveda. Due to its unparalleled taste and medicinal advantages, honey is always on demand. This makes honey one of the most adulterated foods in this world. Honey can be either directly or indirectly adulterated. Direct adulteration is by adding sulphite-ammonia caramel, corn sugar or cane sugar or rice syrup or molasses sugar or other sugars directly to the honey whereas indirect adulteration is when honeybees are fed with industrial sugars at the stage when broods become naturally available. Such adulteration causes various stomach and blood related disorders.

### Coffee and tea

Tea is adulterated with used tea leaves that are processed and coloured which causes liver problems. Whereas coffee with byproducts of coffee processing such as coffee husks, sticks. Also it is masked with brown sugar, tamarind seeds, date seed powder which leads to diarrhea. Coffee is mainly adulterated with chicory which causes stomach disorder, giddiness and joint pains.

### Wheat and other food granules

Wheat is commonly adulterated with ergot which is a poisonous fungus that grows on rye and other grasses. Ergot is highly poisonous and may be lethal. Symptoms of early stages of poisoning are vomiting, nausea, muscle pain, numbness, itching, rapid or slow heartbeat and may progress to gangrene, vision problems, confusions, convulsions, unconsciousness and death.

### Dal

Bengal gram dhal & thoor dhal are adulterated with kesari dhal which leads to lathyrism and Arhar dal with metanil yellow that is highly carcinogenic.

### Spices & condiments

The distinctive feature in Indian cuisine is spices. Nearly all the spices available in this world have their respective adulterants. For example:

**Turmeric:** A miracle spice of India is adulterated by adding non-permitted colorants like metanil yellow and other yellow aniline dyes that is highly carcinogenic and lead chromate which impairs neuro-developmental growth in children and exposes one to heart and brain impairment.

**Chili powder:** Brick powder, sawdust that causes stomach problems and artificial colours that causes cancer are used.

**Black pepper:** Papaya seeds, light black berries which causes stomach and liver problems are used as an alternate for black pepper.

**Common salt:** Chalk powder is used that causes stomach ailments.

**Clove:** Exhausted cloves i.e. have most of the oil removed are substituted with fresh cloves.

**Cinnamon:** Adulterated using cassia barks that when consumed in large quantities can be fatal and may lead to liver disorders.

**Mustard seeds:** Argemone seeds are used that causes epidemic dropsy and glaucoma.

**Saffron:** World’s most expensive spice is replaced by coloured tendrils of maize cob.

### Fish

Formalin, a lethal cancer causing weapon is injected to fish so as to preserve fish and increase shelf life as fishes are highly perishable in nature and get spoilt if
it isn’t maintained at a temperature of 5°C. Fishes are laced with formalin mainly when the point of sale is far from the point of catch. Moreover Ammonium is mixed with the water that gets converted to ice and used to preserve fish so as to keep the fish fresh.

**Packaging risks:** Food articles are packed in various materials like aluminium, tin, paper, plastics and glasses. But aluminium reacts with heat. So when hot foods are packed in aluminium foils it tends to react and aluminium seeks to seep into the food. Excessive intake of aluminium may result in Alzheimer’s. Glass is comparatively better material for packaging but is generally avoided as glass tends to break easily and moreover aluminium and tin have become costlier. Hence cheaper materials are adopted for packaging such as papers, waxed paper cartons, cardboards etc. But ink in newspapers and recycled paper cartons react with the food that is packed and is highly toxic when that food is consumed. Moreover conventional packaging techniques such as plastics that are synthetically produced have emerged. Some of the plastics used for packaging are polystyrene, polyvinyls, polyvinylidines and derivatives, vinyl acetate, poly ethylene, polypropylene and polyesters. But these plastics also react with food which when consumed causes irreparable damage to human health.

**Food at restaurants:** Restaurant food is generally tasty and loved by all. But is it good to have restaurant food on a daily basis? Though some restaurants prepare food in a hygienic manner many restaurants don’t. Reusing of oil is a major drawback seen in many restaurants. Total polar compounds (TPC) are formed when oil is repeatedly used. High rates of TPC’s have negative impact on health leading to hypertension, liver diseases, cholesterol and other health problems. But FSSAI announced that restaurants will no longer be able to use cooking oil multiple times, with effect from March 3rd 2019. As notified in Food Safety and Standards ( Licensing and Registration) First Amendment Regulation, 2017 on 24th October, 2017 the maximum limit for TPC is 25% beyond which vegetable oil is not fit for consumption. Last but not the least, many restaurants add monosodium glutamate to enhance taste of food but it is said to have inverse effects on human body as it is associated with various forms of toxicity. Another problem faced by restaurants is storage as rodents and other insects like cockroaches feed on the food if stored improperly.

**ADULTERATION IN INDIA**
India has witnessed various adulteration scandals and cases in the recent times. According to a report by Times of India dated September 17 2019 ten most commonly adulterated foods in India are

- milk
- tea/coffee
- wheat and other grains
- vegetables
- sweets
- honey
- dal
- spices
- butter and cream
- ice cream.

**Some of the major adulteration cases in India are:**
1. In 1998 Delhi witnessed death of nearly 60 people and illness of more than 3000 as a result of edible mustard oil adulteration with white oil, a petroleum product.
2. In kollam district on june 2018 Nearly 9600kg of formalin laced fishes were confiscated as a part of operation sagar.
rani out of which 7000 kg were prawns and 2600 kg of other species.

3. On Dec 10, 2019, 30000 kg of fake cumin seeds made out of coconut broom bits, molasses, grass and stone powder which was mixed with original cumin seeds were recovered by the police in Rea Bareli, Uttar Pradesh.

FOOD LAWS IN INDIA:
Food industry commonly known as sunrise industry in India comes under the purview of concurrent list (Schedule 7 list III) as item No.18\(^{172}\) and No.33 (b)\(^{173}\). Prior to 2006 the core act that regulates all food related activities in India was Prevention of Food Adulteration Act, 1954 but it was repealed and replaced by Food Safety and Standards Act 2006 (hereafter referred to as FSS Act) under the Ministry of Health and Family Welfare, Govt. of India. Eight legislations namely

- The Prevention of Food Adulteration Act, 1954
- The Fruit Products Order, 1955
- The Meat Food Products Order, 1973
- The Vegetable Oil Products (Control) Order, 1947
- The Edible Oils Packaging (Regulation) Order, 1998
- The Solvent Extracted Oil, De oiled Meal, and Edible Flour (Control) Order, 1967
- The Milk and Milk Products Order, 1992
- Essential Commodities Act, 1955 (related to food)

were in force prior to the FSS Act which was repealed and replaced. There was a need to consolidate all acts and orders so as to facilitate easy legislation in the field of food. FSS Act provides for regulation regarding manufacture, storage, distribution, sale and import, lays scientific standards for food articles to ensure availability of safe and wholesome food for human consumption.

**Registration and licensing:**
Compulsory registration and licensing of food business is a method by which food safety is ensured and regulated legally.

Sec 31(1) of FSS Act states that “No person shall commence or carry on any food business except under a license” and 31(2) states that 31(1) shall not apply to a petty manufacturer who manufactures and sells food articles himself, hawkers, itinerant vendor or small scale or temporary stall holder or cottage or other small food business operators but its mandatory for them to register with such authority and manner as specified by regulations.

FSS Act makes it compulsory for food business to acquire license/register as prescribed by law to commence their business thus ensuring quality of food in India. Registration is for food business with a turnover of not more than ₹12 lakh and business which exceeds that limit must take a license. Registration and licensing in India is regulated by Food Safety and Standards (Licensing and Registration of Food Business) Regulations, 2011. The registration and licensing procedure is as follows:

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\(^{172}\) Adulteration of foodstuffs and other goods

\(^{173}\) Trade and commerce in, and the production, supply and distribution of foodstuffs, including edible oilseeds and oils.
State license can be acquired by food business with an annual turnover of between ₹12lakh to ₹20lakh or all grain, cereal and pulses milling units irrespective of turnover. Whereas central license can be acquired when the annual turnover exceeds ₹20lakh or the firm operates in two or more states or Food business covered under Schedule 1 of FSS (Licensing and Registration of Food Businesses) Regulations.

174 Registration process
175 Licensing procedure
Food Safety & Standards Authority of India:
Food Safety & Standards Authority of India is a statutory authority which ensures that the food produced, manufactured, sold or distributed is free from adulteration.

Sec 4 of FSS Act provides for the establishment of Food Safety and Standards Authority of India with its headquarters at Delhi to perform functions specified in Sec 16 of the Act.

Sec 16: duties and functions of FSSAI are:
1. To regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure safe and wholesome food.

2. FSSAI by regulations specify the:
   a. standards and guidelines in relation to food articles.
   b. limitation for use of chemicals like food additives, crop contaminated, pesticide, heavy metals etc.
   c. guidelines and mechanisms for accreditation of certification bodies engaged in certification of food safety management and of laboratories (16(2)(e)).
   d. procedure and enforcement of quality control of food items
   e. method of sampling, analysis and exchange of information between authorities
   f. Conduct survey on enforcement and administration of the act
   g. Food labeling standards
   h. Manner of risk analysis, assessment, communication and management.

Some of the other functions of FSSAI as in Sec 16(3) are: Provide scientific advice and technical support to Central and State Govt. in matters pertaining to food. Collect data regarding food consumption, contaminants in food and residues of various contaminants in food etc. Create an information network so as to provide rapid and reliable information about food safety and issues of concern to public, consumers, panchayats etc to receive. Provide training to people involved in the food business. Contribute to the progress of international technical standards for food, sanitary and phyto-sanitary standards. Improve consistency between international and domestic food standards as well as making certain that the level of protection adopted in the country isn’t reduced. And promote general awareness regarding food safety and standards.

Sec 11(1) states that FSSAI can establish a Central Advisory Committee by a notification.

Sec 12 provides the functions of the Committee which are: to ensure a close cooperation between food authority and its respective enforcement agencies and advice food authority on matters such as drawing up of proposal for the Food Authority’s work programme, prioritisation of work, identifying potential risks, pooling of knowledge, and such other functions as specified by the regulations.

Sec 13 states that Scientific Panels with independent scientific experts shall be established by the food authority such as panels for food additives, flavourings, processing aids and materials in contact with food, pesticides and antibiotics residues, genetically modified organisms and foods etc.

Sec 14 states that the food authority shall constitute a Scientific Committee responsible for providing the scientific opinions to the Food Authority and other functions as specified by the Act. These duties and functions of FSSAI along with those of Central Advisory Committee, Scientific Panel and Scientific Committee reduces the risk of adulterated, misbranded, substandard foods reaching the doorsteps of consumers.
Definition of food and adulterant as per FSS Act:

Sec 3(j)\textsuperscript{176} defines food as any substance whether partially or completely processed or unprocessed for human consumption and Sec 3(a)\textsuperscript{177} defines adulterant as any material employed for making food unsafe or sub-standard or mis-branded or containing any extraneous matter. Moreover FSS Act states various deeds related to food that cannot be undertaken and their respective penalties/punishments. Sec 19 states that unless in accordance with the provisions of this Act, no article of food shall contain any food additive or processing aid.

Sec 20 states that “no food article can contain any contaminant beyond quantities specified by the regulations, whether the contaminant is naturally occurring toxic substances, toxins, hormone or heavy metals.”

Sec 21(1) states that “no food article can contain pesticide residues or insecticides, veterinary drugs residues, solvent residues, antibiotic residues, pharmacological active substances and micro-biological counts beyond the limits specified by the regulation.

(2) states that no insecticide other than fumigants registered & approved under insecticides Act can be used directly on any food article.

Sec 22 prohibits any person to manufacture, sell, import or distribute any novel food, organic foods, genetically modified food articles, foods for special dietary uses, irradiated food, functional foods, nutraceuticals, health supplements, proprietary foods and such other articles of food which the Central Government may notify in this behalf; until and unless provided by the Act.

Sec 23 states that no person shall manufacture, distribute, sell or expose any food which is not marked and labeled as per law, to any agent or broker for the purpose or sale. Provided that the information on the label is not false or misleading.

Sec 24 provides for prohibition of unfair trade practices and lays restrictions on advertisement. (1) states that no advertisement regarding food that is misleading or deceiving or contravenes the provisions of the Act can be made. (2) states that no person shall engage in any unscrupulous trade practices for promoting sale, supply, use or consumption of that food article.

Penalties as provided in the Act are:

<table>
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<tr>
<th>Section</th>
<th>Provision</th>
<th>Punishment/ Penalty</th>
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<tbody>
<tr>
<td>50</td>
<td>Selling food not in compliance with the Act or not of the nature/substance quality demanded</td>
<td>Penalty of not exceeding ₹5,00,000 and not exceeding ₹25,000 if belong to category of persons under sec 31(2).</td>
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\textsuperscript{176} “Food” means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances.

\textsuperscript{177} “adulterant” means any material which is or could be employed for making the food unsafe or sub-standard or mis-branded or containing extraneous matter.
<table>
<thead>
<tr>
<th></th>
<th>Substandard goods</th>
<th>Penalty which may extend up to ₹5,00,000</th>
</tr>
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<tbody>
<tr>
<td>51</td>
<td>Misbranded food</td>
<td>Penalty which may extend up to ₹3,00,000</td>
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<tr>
<td>52</td>
<td>Publishing or part of publishing misleading advertisement.</td>
<td>Penalty which may extend up to ₹10,00,000</td>
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<tr>
<td>53</td>
<td>Food containing extraneous matter</td>
<td>Penalty which may extend to ₹1,00,000</td>
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<tr>
<td>54</td>
<td>Failure to comply with the directions of Food Safety Officer</td>
<td>Penalty which may extend to ₹2,00,000</td>
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<td>55</td>
<td>Unhygienic or unsanitary processing or manufacturing of food</td>
<td>Penalty which may extend to ₹1,00,000</td>
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<td>56</td>
<td>possessing adulterant</td>
<td>Adulterant is injurious to health, to a penalty not exceeding ₹2,00,000</td>
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<td>57</td>
<td>Punishment for unsafe food</td>
<td>When it results in injury: imprisonment for a term which may extend to</td>
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<td>58</td>
<td>Punishment for false information</td>
<td>six months and also with fine which may extend to ₹1,00,000</td>
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<tr>
<td>59</td>
<td>Misbranded food</td>
<td>non-grievous injury: imprisonment for a term which may extend to one year and also with fine which may extend to ₹3,00,000</td>
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<tr>
<td>60</td>
<td>Publishing or part of publishing misleading advertisement.</td>
<td>grievous injury: imprisonment for a term which may extend to six years and also with fine which may extend to ₹5,00,000</td>
</tr>
<tr>
<td>61</td>
<td>Food containing extraneous matter</td>
<td>death: imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to pay fine which shall not be less than ₹10,00,000</td>
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<td>62</td>
<td>Failure to comply with the directions of Food Safety Officer</td>
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<td>63</td>
<td>Unhygienic or unsanitary processing or manufacturing of food</td>
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<td>possessing adulterant</td>
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<tr>
<td>75</td>
<td>Punishment for false information</td>
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</table>
Punishment for carrying out a business without licence | imprisonment for a term which may extend to six months and also with a fine which may extend to ₹5,00,000

Furthermore food business firms should also be socially responsible to the general public and should withhold from indulging in unfair practices just for profits. **Sec 26** states “the responsibilities of the businesses operating in the field of food.” It states that every food business operator shall comply with the rules and regulations mentioned in the Act and doesn’t sell or manufacture or store or distribute any food that’s unsafe or misbranded or substandard or contains any extraneous matter and shall not employ any person suffering from any infectious or contagious diseases.

FSS Act also empowers consumers to analyse whether the food article is free from adulteration. As a result food firms are made accountable to the general public. Being accountable ensures food produced is safe.

**Sec 40** states that any person even if he/she isn’t a Food Safety Officer can get any food article analysed by a Food Analyst and if the food analyst finds the food not in compliance with the act shall forward the report to the designated officer as per rules mentioned in the Act.

**Regulations:**

**Sec 92(1)** of FSS Act empowers the food authority with the previous approval of Central govt. and after previous publication, to make regulations consistent with this Act and rules to carry out the provisions of the Act, by a notification.

Various food safety and standards regulations are enacted are

1. Food Safety and Standards (Licensing and Registration of Food Businesses) Regulation, 2011
2. Food Safety and Standards (Food Products Standards and Food Additives) Regulation, 2011
3. Food Safety and Standards (Prohibition and Restriction of Sales) Regulation, 2011
4. Food Safety and Standards (Packaging and Labelling) Regulation, 2011
5. Food Safety and Standards (Contaminants, Toxins and Residues) Regulation, 2011
6. Food Safety and Standards (Laboratory and Sampling Analysis) Regulation, 2011
7. Food Safety and Standards (Food or Health Supplements, Nutraceuticals, Food for Special Dietary Purpose, Functional Food and Novel Food) Regulation, 2016
8. Food Safety and Standards (Food Recall Procedure) Regulation, 2017
9. Food Safety and Standards (Import) Regulation, 2017
10. Food Safety and Standards (Approval for Non-Specific Food and Food Ingredients) Regulation, 2017
11. Food Safety and Standards (Organic Food) Regulation, 2017
12. Food Safety and Standards (Alcoholic Beverages) Regulation, 2018
13. Food Safety and Standards (Fortification of Food) Regulation, 2018
14. Food Safety and Standards (Food Safety Auditing) Regulation, 2018
15. Food Safety and Standards (Recognition and Notification of Laboratories) Regulation, 2018
16. Food Safety and Standards (Advertising and Claims) Regulation, 2018
17. Food Safety and Standards (Packaging) Regulation, 2018
18. Food Safety and Standards (Recovery and Distribution of Surplus food) Regulation, 2019

Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011\textsuperscript{178} and Food Safety and Standards (Contaminants, Toxins and Residues) Regulation, 2011 are important regulations that provide maximum limits up to which a particular additive or chemical can be present in a particular food article. With various amendments to the regulations, government is stiffening the rules and laws reducing adulterants in food to a great extent.

Various amendments were made for example 14\textsuperscript{th} amendment to Food Safety And Standards (Food Products Standards And Food Additives) Regulation, 2011, regards to standards for date paste, Fermented Soybean Paste, Cocoa mass or Cocoa/Chocolate Liquor and Cocoa Cake, Vegetable Protein Products, Thermally Processed Fruit Salad/Cocktail/Mix, Harrisa (Red Hot Pepper Paste), Cocoa Powder, Quick Frozen French Fried Potatoes, Canned Chestnuts and Canned chestnut Puree, Edible Fungus Products, Ginger (Sonth, adrak), Ginger (Sonth, adrak) Powder, Tomato Ketchup and Tomato Sauce.

**Import:**

FSS Act not only ensures that the domestically manufactured or prepared or sold food is free from adulteration but also makes sure that the food imported complies with the rules and regulations of the Act, thus providing safe imported food to the general public.

Sec 25 states that all imports related to food must comply with the rules and regulations of the Act. And no person can import any misbranded or substandard or unsafe food or food containing extraneous matter.

Some of the other laws that can be activated against food adulteration are:

A consumer of any food or allied product can also seek redressal through The Consumer Protection Act, 2019. This act provides various safeguards to protect the rights of a consumer.

**Atomic Energy (Radiation Protection) Rules, 2004**

Sec 13\textsuperscript{179} of the Act restricts the practice of deliberate addition of radioactive substances in beverages and foodstuffs which is intended for ingestion or inhalation. Sale, import or export of such products is not permitted under law.

**The Insecticides Act, 1968**

Regulates the sale and manufacture of insecticides thus in turn regulating the insecticides used on the food crops.

**Agricultural Produce (Grading and Marking) Act, 1937**

AGMARK; a certification mark for agricultural and allied products, was enforced under the Agricultural Produce (Grading and Marking) Act, 1937. AGMARK reassures that a product conforms to a set of standards approved by the Directorate of Marketing and Inspection. Nearly 205 commodities such or product intended for ingestion, inhalation or percutaneous intake by, or application to, a human being and sale, import or export of such products shall not be permitted. (2) Activation of the aforesaid products shall not be permitted.

\textsuperscript{178}https://fssai.gov.in/upload/uploadfiles/files/Compendium_Food_Additives_Regulations_29_03_2019.pdf

\textsuperscript{179}Sec 13. Restriction on certain practices: (1) Practices such as deliberate addition of radioactive substances in foodstuffs, beverages, toys, personal ornaments, and cosmetics or any other commodity
as fruits, vegetables, cereals, pulses etc is covered under the standards of AGMARK thus ensuring delivery of quality products to the consumer.

Moreover Sec 5A of the Agricultural Produce (grading and marking) Act punishes whoever sells any article under the ambit of the act which is misgraded with imprisonment for a term not exceeding 6 months and fine not exceeding ₹5,000.

INTERNATIONAL ORGANISATIONS WORKING FOR FOOD SAFETY
Some of the organizations working to ensure food safety and security are:

- World Trade Organization (WTO)
- World Health Organization (WHO)
- Food And Agriculture Organization (FAO)
- Codex Alimentarius Commission (CAC)
- International organization for standardization (ISO)
- National advisory committee for microbiological criteria for food (NACMCF)
- International commission for microbiological specification for foods (ICMSF)

Food safety legislations in other countries:

Canada: two organizations responsible for maintaining food safety in Canada are

Health Canada—enacts policies and establishes standards for the safety and to maintain nutritional quality of food sold in Canada.

Canadian Food Inspection Agency (CFIA)—is responsible for food safety inspections and related activities and administration and enforcement of 14 Acts which are Agriculture and Agri-Food Administrative Monetary Penalties Act, Appropriation Acts, Canada Agricultural Products Act, Canadian Food Inspection Agency Act, Consumer Packaging and Labelling Act (as it relates to food), Feeds Act, Fertilizers Act, Fish Inspection Act, Food and Drugs Act (as it relates to food), Health of Animals Act, Meat Inspection Act, Plant Breeders’ Rights Act, Plant Protection Act, Seeds Act.

Australia:
Food Standards Australia New Zealand (FSANZ), independent binational organization under the Australian government’s health and ageing portfolio, is responsible for maintaining food standards and developing food security in Australia and New Zealand.

United Kingdom:
Food standards agency is an independent department of Government to protect public health and consumers’ interest in food functioning across England, Wales and Northern Ireland.

Netherlands:
Food and Consumer Product Safety Authority under the ministry of agriculture, nature and food quality is a key department to monitor food and consumer products with the aim of protecting human and animal health.

Norway:
Norwegian Food Safety Authority is a governmental body with the goal to provide safe and healthy food and water to consumers.

CONCLUSION
“Food is our medicine” is an age old phrase taught to us by our forefathers but due to adulteration the true nature of food is lost. Government and various international organizations are striving to secure healthy

https://www.food.gov.uk/
https://english.nvwa.nl/
https://www.mattilsynet.no/language/english/
food and provide adulteration free food to the public. DART an official website of FSSAI provides methods of rapid detection of adulterants in various food articles such as milk, spices etc.

Not all but many people are indulged in food adulteration. People adulterate food to earn profits as adulteration enhances the look, and increases shelf life of food articles. As stated in an English proverb “Don’t judge a book by its cover” true to its meaning, we never know what is inside a shiny vegetable. Adulteration is prevalent in many parts of India despite strict laws due to corruption. Corruption is a major problem that hinders the implementation of various Acts in India.

Another reason for adulteration is unawareness of people. Many are unaware that such adulterants are toxic to human health. Moreover these adulterants are available at cheaper rates urging many manufacturers to use them. This problem of adulteration can be minimized only when people realize the implication of such adulterants on human body. Awareness about food adulteration must be promoted among people. And food business operators should be more ethical and responsible to the society. Adulteration must be controlled before it’s too long. Jai Hind.
A CONSTRUCTIVE CRITIQUE ON THE WORKING OF SIXTH SCHEDULE OF THE CONSTITUTION OF INDIA

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Asst. Professor, Dept. of Political Science, Tetso College, Dimapur

Abstract
The constitution of India is considered as the most crucial and supreme law of India. It helps the system to work in a directional and systematic manner. It provides uniformity in terms of rule within the entire country however there are certain regions that are governed by some special provisions. In this regard, constitution of India has made some special provisions for administering the tribal dominated areas especially from Northeastern States that includes Assam, Tripura, Mizoram, and Meghalaya. Based on the article number 244 as well as 6th schedule, all such areas are considered as Tribal Areas that are technically distinct from Scheduled Areas that comes under fifth schedule. Main objective of the Sixth Schedule is to provide self-rule to various tribal communities in Northeastern states of the country. It was successfully implemented in tribal areas to provide autonomy as well as to initiate or improve the growth and development opportunities in these regions. However it failed to provide institutional and structural development of regions.

The study reflected in the current article effectively identified the performance of Sixth Schedule in terms of addressing the merits and demerits attained by the tribal regions with its implementation. The impact of Sixth Schedule on Northeastern States and tribes can be determined in both positive and negative manner. In addition to this, detailed discussion on Autonomy of tribes will be followed by the discussion of Sixth Schedule implied within Northeastern States. Further the recommendations would be made on how the deficiencies in the overall functioning of the sixth scheduled could be addressed and also on how the conflicts and differences of various stakeholders in these Northeastern States can be resolved such that it will not only facilitates smooth functioning of the ADCs but also contribute towards overall development of the regions and the Constitutional Justice to the people.

KEY WORDS: CONSTITUTION OF INDIA, SIXTH SCHEDULE, TRIBAL AUTONOMY, GOVERNANCE, NORTHEAST INDIA

Introduction
The most prominent structural change required is within the administration of political autonomy within North East India. The discussion has been at the verge since the British Era, and this has led to the appointment of sub-committee to the Constituent Assembly. Recommendations of the committee were related to the setting of autonomous district councils so as to represent the tribal population at the local level (Bhuyan, 2013). This recommendation was turned out to be Sixth Schedule within the Indian Constitution. Sixth Schedule to the constitution came into existence after the number of discussion and debates held in constituent assembly in the year 1949. The provision was put forward for retaining the administrative structure of tribal areas as well as to promote the existing culture of these backward communities. The Sixth Schedule of Constitution of India supports developing autonomous districts with an interest of protecting economic and cultural
interests of the hilly tribes. Northeastern India with hilly regions has been governed and controlled by different criterions when compared to the rest of the parts of India.

Sixth Schedule of the Indian Constitution (Article 275 and Article 244(2)) supports developing provisions for tribal areas majorly in four states such as Assam, Mizoram, Tripura and Meghalaya (Jacob, 2015). Under the articles, a distinct mechanism is being provided only for tribal zones because of political significance, and this has changed largely with the changing times. In other words, it can be said that it makes special provisions related to governance, types of local bodies, financial powers, alternate judicial mechanisms, etc. In this context, the article will also highlight the importance of autonomous district according to the Sixth Schedule of the Indian Constitution. With such provisions, it has been stated that tribal areas are strictly to be administered as the autonomous district. This includes the development of the district and regional councils for exercising and implementation of judicial as well as legislative functions. The article will; therefore, support discussing the power of councils in terms of law-making related to the preservation of environmental resources, customs and rituals, etc. (Sampat, 2013). Role of government will also be discussed and its influence upon the councils.

The current article will support; concluding with benefits and disadvantages of the Sixth Council of the Indian Institution upon the growth of tribal areas. The development of autonomous councils will be discussed along with the role and benefits of each of the council that is responsible for governing the specified tribal regions. Development of tribal areas in terms of education, culture, technology and various other aspects is the main aim of formulating the Sixth Schedule. However, along with benefits number of limitations and challenges has been identified; while the functioning of autonomous councils and the same will be discussed in various sections of the articles. This will help to determine appropriate recommendations so that issues can be resolved from the roots and the development of tribal regions without the existence of conflicting situations can be done. In addition to this, implementation of Six Schedule in its true letter and spirit will not only support the development of tribal regions but will also contribute towards equal participation of all the states in the cultural and economic growth of the country.

Moreover, It is necessary to understand that, one of the foundations of Autonomy in Mizoram, Nagaland, and Arunachal Pradesh is the application of the Inner Line Permit Regime under the Bengal Eastern Frontier Regulation of 1873, by which citizens from the other parts of India have to take permits to enter these states to check influx. Outsiders cannot buy land in the Sixth Schedule and other tribal areas such as in the hills of Manipur. All these different types of special status were not conferred as a gift to the tribes and the other struggling communities, but were the result of tough debates and negotiations by the leaders of the tribes at the time of creation of the Indian nation in the Constituent Assembly - side by side with much struggle and bloodshed outside of the constitutional arenas.

Sixth Schedule
Main aim and purpose behind the formulation of Sixth Schedule is to facilitate tribal communities with the power of administration of tribal areas within Northeast. This comes under the provision
of article 244(2) and 275(1) of the Indian Constitution. Sixth Schedule provides broader framework for administering tribal areas of North-eastern States of Tripura, Meghalaya, Assam and Mizoram (Middleton, 2013). Meghalaya and Mizoram are categorized as tribal majority states and Assam and Tripura comes under tribal minority state. The regions and population under tribal areas are being governed by Autonomous Districts and Regions irrespective of less intervention of state legislatures. However Meghalaya is the state where President has declared that all the areas within the State come under Sixth Scheduled Area.

According to Middleton, (2013), Sixth Schedule supports developing a framework related to autonomous decentralized governance that includes executive and legislative powers. Such powers effectively resolves the issues related to culture, customs, water, land and soil. Councils are also provided with judicial powers so that issues related to criminal or civil cases can be resolved. Therefore it has been identified that councils within Sixth Schedule are allocated with more powers as compared to local government based on the 73rd and 74th amendment made within the country. It has been identified that autonomy paradigm has helped to maintain the equilibrium within tribal communities through dispute resolution with the help of customary laws as well as control over facilities like money lending (Sivaramakrishnan, 2013). Autonomous councils within Mizoram, Tripura, and Assam holds the power to make decisions on whether there should be involvement of State Legislations should be applied to their territories or not.

Powers under Six Schedule
Under the six schedules, powers hold by the councils is related to executive powers and functions, judicial powers, legislative powers, along with financial powers and functions (Sivaramakrishnan, 2013). Autonomous district councils possess executive power which is effective in managing the primary schools, roads, water ponds, administration of villages, forest, land revenue and many areas under the similar aspect and his clearly mentioned under the pare 6th and 8th of Sixth Schedule. Executive members are mostly selected by the Governor as well as by members of district council. Judicial powers and functions entail the council to involve district and village council courts within autonomous areas to make formal judgement over customary laws with the involvement of both the tribal parties. Regional and district council courts in this regard are considered as courts of appeal (Tiwari et.al.2013). Based on the articles and laws formulated under Sixth Schedule, it has been declared that Supreme Court and high court are the only bodies that possess jurisdiction power over suits decided by council courts.

In addition to this, legislative powers allocate powers to the district councils to create laws for the occupation, utilization of land, grazing for various purposes, regulations related to cultivation, use of water sources, money lending and many other such areas. These laws are applicable to non tribal’s that exist within autonomous districts (Goswami, 2013). Only the governor holds the power to modify the laws that are passed or agreed by the district councils however governor’s power are only applicable if laws violate the provisions stated within Sixth Schedule. Therefore according to the Sixth Schedule, only the Governor acts as the head of
autonomous district council as mentioned in Para 3 of sixth schedule. Furthermore, financial powers and functions can also be utilised by the district and regional councils for the formulation of rules for monitoring of finances that is being approved by the Governor. They have the power to collect taxes, land revenues, tolls while entering the goods into market. Leases for the mineral extraction or royalty on licenses come under the district council (Sunipun, 2017).

There are various provisions under Sixth Schedule for the Administration of Tribal Areas in North Eastern States. These provisions are the amendment of laws in 5th schedule and therefore it can be said that Sixth Schedule is more advantageous as compared to 5th Schedule (Phukan, M.D., 2013). Sixth Schedule has helped tribal communities by considering the constitutional autonomy that it offers. In addition to this, role of states and government are restricted with powers that are being developed on the local scale. Regional and district council receive grants from Consolidated Fund of India to fulfil the financing needs for development of healthcare, roadways, education and development. Regulatory powers under the State control are also effective in protecting the rights of consumers and also contribute towards economic development (Hausing, 2014). In addition to this, the functioning of autonomous district councils (ADCs) as per the Sixth Schedule has been identified to be successful to larger extent especially in Meghalaya as compared to other regions. Benefits in Meghalaya are related to protection of tribal rights, ownership of property, land tenure systems, as well as right to occupation. There has also been number of achievements in Karbi Anglong District under the district council. According to the statistical data of 2012, there has been identified 2517 schools in the district that includes 2310 of rural schools as well as 207 urban schools (Bordoloi, 2013). The council aims at development of education by focusing mainly on Lower Primary Schools that includes schools with different mediums, Upgraded EGS Schools as well as Karbi Medium Schools.

Along with this, literacy rate of Assam also improved with the efforts made by district councils. Economic condition of average tribal household is found to be similar when compared to ordinary household. As per the data of 2011, 18.6% of tribal household were identified lagged in terms of durable household assets. While making comparisons of achievements of various district councils in terms of health, education, standard of living, and development, the highest index was estimated to be of Assam (Mondal and Terangpi, 2014). However Mizoram in terms of educations was ranked at top position because of its outstanding performance but at the same time it still lack behind in other areas.

The State of Meghalaya ranked at 7th position in terms of Human Development Index among North Eastern States. As per Goswami, (2013), the Meghalaya Human Development Report 2008 indicates the sluggish development rate of the state. The main reason behind this downfall identified was related to poor health conditions of population within the State. Reasons behind such deterioration are related to mismanagement of ADCs in terms of misuse of government funds that is allocated for the development activities. Along with this there has been identified number of conflicts between state legislatures and district councils. For an example, Meghalaya was considered as whole state under the Sixth Schedule causes regular conflicts on different issues with the
State Government (McDuie-Ra and Kikon, 2016), Para 12 (A) within the Sixth Schedule states that state legislature would be prevailing in case of conflict arises between state legislature and District Council which evidently gives superior position to state legislature.

Disparity among local bodies and autonomous bodies is another demerit with the implementation of Sixth Schedule (Sen, 2013). Local bodies that were formulated by Seventy-third Amendment gains fund in more flexible manner through State Finance commissions. Conflicts are related to gaining more or less amount of fund and it becomes the issue of getting more and less favours as compared to other councils. It has often been identified that few of the functionaries within district councils as well as regional councils misuse their functions and powers without in a restrictions. In addition to this, violation of rules and laws for self motive and benefits is another issue that has been identified with the implementation of autonomous councils within tribal areas. As per (Sen, 2013) Members of the councils are often found to be indulged in activities like favouritism that lead to kill the motive of council that is being made for.

Furthermore, councils have also indulged into activities such as misuse of autonomy and financial powers by diverting government funds by violating rules and regulations as well as procedures (Goswami, 2013). This is one of the biggest demerits while implementation of Sixth Schedule as it largely affects the economic conditions of the entire state and country. There are certain regulations related to customary system of land tenure and protection of land so that economic development can be fostered however unnecessary amendments in the concern laws often drawn serious criticisms as it has been accused that the amendments in question have been used for gaining personal financial benefits.

Impact of Six Schedule on North Eastern States
There are various articles in the Indian Constitution that made provisions for customary practices, protection of lands that belong to tribes, reservation of seats within Lok Sabha and State Assemblies. Tribes and population within North-eastern States including Mizoram, Assam, Tripura, Arunachal Pradesh, Manipur, Nagaland and Meghalaya are few of the groups that collectively enjoy some special privileges in terms of protective discrimination as stated under Indian Constitution (Kolâs, 2017). The Sixth Schedule allows Autonomous District Councils (ADCs) to develop laws that forbid outsiders to buy tribal land and also restrict the entry of outsiders to conduct trade while protecting the custom of population. With the failure of fifth schedule in terms of protecting the land of Indian tribes, Sixth schedule with amended powers and schedules is considered as more effective for the development of tribal regions or areas within North-eastern states. With the latest amendments in Sixth Schedule, population of 10 million tribes is identified to exist under the umbrella of Sixth Schedule in regions across Meghalaya, Tripura, Mizoram, and Assam.

Meghalaya
Meghalaya is the part of the tribal area and therefore after number of discussions there was formulation of number of Autonomous District Councils within the district of Khasi and Jaintia Hills, Lushai Hills, North Cachar Hills, and Mikir Hills, and Garo Hills. Even after the development of District councils, development was not up to the market and therefore now Meghalaya
is the only state that is entirely governed by Autonomous District Councils (Bhuyan, 2013). As per Kolâs, (2017), there are various tribes within Meghalaya districts such as The Jaintias that exhibit developed structure in terms of political governance however tribes known as Garos are slightly less developed. In this regard it can be said that ADCs in Meghalaya have success in their mottos to larger extent while managing the rights of tribal’s. However ADCs of the state has often been indulged into conflicts with the government in terms of provision of grants. In addition to this, corruption and conflicts between has also affected the development of Meghalaya and did not meet the level of expiation in terms of health and living standard.

Assam
Considering the facts of Assam, there exist 38, 84,371 of total tribal population however state has recorded 17.4% tribal population decadal growth in the year 2001-2011 (Gassah, 2013). The Assam comprises of maximum tribes as compared to North eastern states. The overall implementation of Sixth Schedule was not appropriate for the growth of Assam tribal population in an effective manner. Inappropriate structure in terms of defining guidelines and functions led to chaos and confusions. Lack of funds was one of the major reasons that contribute towards declining downfall of tribes. The smooth functioning of autonomous district council requires effective coordination among the mechanism of central, state, and council functioning (Hausing, 2018). The Dima Hasao region of Assam faces high corruption among different government officials. In addition, there is absence of coordination among Hill area department, Department of planning and development, and the Government of Assam with the ADC represent the failure of government in developing associated tribal areas. As per Gassah (2013), considering the facts of Karbi Council, there was greater development observed in terms of education and school facilities. Overall outcomes in terms of Assam District Councils can be summarized as absence of coordination amongst various mechanisms, Security issues, lack of appropriate governance system, and likewise.

Mizoram
Mizoram’s districts are also governed by Autonomous councils and after the amendments of Sixth Schedule, districts face issues of shortage of funds or insufficient funds allocated by State governments (Prasad, 2013). Even after such difficulties, Councils managed to facilitate the State with appropriate educational facilities and therefore it is ranked at top position amongst all the North Eastern States. In this context, members of the council urged for allocating the funds direct to the village councils instead of district councils so that development procedures can be undertaken from the roots.

Therefore it can be concluded that the provisions under Sixth Schedule of the Indian Constitution can be considered as an effective tool in terms of governance of tribal regions and can put positive impact over preventing the cultural rights along with economic and social development. Therefore it is important to implement the provisions to gain maximum benefits in terms of various aspects. In this regard it is important for district and village councils to gain financial support from the government for their development in better manner (Goswami, 2013). Tribes in other parts of India are also facing serious issues pertaining to effective self-governance and development and therefore Autonomous Council Models are essentially to be
introduced in varied backward and tribal regions of the country.

Autonomy of tribes
Introduction
The federal practices of India have unparalleled varieties which are evolved due to colonial practices. However, the clarity in the constitutional provisions regarding the power distribution on different subject matters as defined in three lists: State, Centre, and concurrent lists. However, due to constitutional layers in India, there are many cases in which the state ignores the centre or centre ignores state even of the well-established provisions are stated in the constitution. Therefore, for the effective development of some of the dominated areas in the Indian North-Eastern region, a special provision was amended in the constitution with the sixth schedule provisions (Middleton, 2013). The schedule has prescribed separate administration provisions for the tribal areas in Mizoram, Tripura, Assam, and Meghalaya. The prime goal of the sixth schedule is to help tribal areas in establishing their exclusive and distinct identity of tribes and their cultures.

The Indian constitution makes special administrative provisions for the tribal-dominated areas of the North-eastern region, which includes, Tripura, Meghalaya, Assam, and Mizoram (L.S Gassah, 2019). The special provisions for different tribal areas are presumably due to backwardness of people in such north-eastern areas. There are different tribal communities in India which have their own different traditional governance system which is hard to understand by the government. Hence, the Indian government has given autonomy in the administrative activities of the people comes under schedule VI of the constitution. As per (Middleton, 2013), In the constitution, the sixth schedule is amended with the recommendation of Bordoloi committee and North Eastern Frontiers (Hausing, 2014). Hence, considering the recommendations, a new administrative body is established considering the regional autonomy in relation to the matters of inheritance laws, customs, forest, justice administration, etc.

As per Patnaik, (2013), the government of India has taken the initiative of granting self-governing powers to the local body of North eastern areas of India so that different affairs of tribal communities can be effectively managed along with the consideration, and protection of their unique cultural identity. However, the main critical issue in autonomous governance is how the autonomous council can contribute to the autonomy of tribal states.

Therefore, the government has made some amendments in the provisions of the sixth schedule in relation to effective autonomous regulations and its management (L.S Gassah, 2019). According to the amendment in the constitution governor of the North-Eastern states: Assam, Tripura, Mizoram and Meghalaya are provided with the power of declaring some of the tribal district and regional areas as the autonomous districts by order. In addition, article 244 and 275 in the constitution of India are amended to create regional and district councils. Such councils are the administrative bodies that are empowered to manage and administer the areas covered under their jurisdiction. The district councils are set up in accordance with the status of the government (Patnaik, 2013). The central and state government both have the power to establish Autonomous District Council (ADC); however, ADCs by state legislature does not have the privilege of enjoying
 benefits under the sixth schedule of the constitution.

The autonomous council established by the state legislature is termed as Statutory Autonomous council. For example, the North-eastern states of Manipur and Assam have the statutory ADC. In Assam, there are three governing authorities that regulate and govern its statutory ADC: council, Panchayati raj institution, and State Department.

Structure of the Autonomous council
The autonomous councils of districts are constituted with the structure of village council at the bottom, and a general and executive council above it. The members in the General council consist of 40 members and its term period is of five years. The 36 members out of 40 are appointed by people elections residing in the areas of the council established while other four members get the nomination from the government (Functioning of Autonomous Councils in Sixth Schedule Areas of North-Eastern States, 2016). At the other side, the executive council is the autonomous body liable to execute all the functionary elements of a general council. The members in the executive council consist of executive councillors and chief executive councillor, the elections of which are done by the General council. The structure of the last Grass root level village council consists of only ten members of whom election is done by the people residing within the autonomous council.

Table 1: Current list of councils in North Eastern region

<table>
<thead>
<tr>
<th>State</th>
<th>Autonomous Councils at district level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Meghalaya</td>
<td>Khasi Hills ADC</td>
</tr>
<tr>
<td></td>
<td>Jaintia Hills ADC</td>
</tr>
<tr>
<td></td>
<td>Garo Hills ADC</td>
</tr>
<tr>
<td>Assam</td>
<td>Karbi Anglong Autonomous Council</td>
</tr>
<tr>
<td></td>
<td>Dima Hasao District Autonomous Council</td>
</tr>
<tr>
<td></td>
<td>Bodoland Territorial Council</td>
</tr>
<tr>
<td>Tripura</td>
<td>Tripura Tribal Areas ADC</td>
</tr>
<tr>
<td>Mizoram</td>
<td>Chakma ADC</td>
</tr>
<tr>
<td></td>
<td>Lai ADC</td>
</tr>
<tr>
<td></td>
<td>Mara ADC</td>
</tr>
</tbody>
</table>

Table 2: Administrative operational structure in other north eastern areas having majority population of tribes

<table>
<thead>
<tr>
<th>State</th>
<th>Administrative operational structure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manipur</td>
<td>Hill Village Authority Act and Manipur Hill Areas District Council</td>
</tr>
<tr>
<td>Arunachal Pradesh</td>
<td>Panchayati Raj Institutions</td>
</tr>
<tr>
<td>Nagaland</td>
<td>Local Village Councils</td>
</tr>
</tbody>
</table>

Table 3: List of Statutory Autonomous councils
<table>
<thead>
<tr>
<th>State</th>
<th>Statutory Autonomous Councils</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manipur</td>
<td>Chandel ADC, Sadar Hills ADC, Kangpokpi, Churachandpur ADC, Manipur North ADC, Senapati, Ukhrul ADC, Tamenglong ADC</td>
</tr>
<tr>
<td>Assam</td>
<td>Deori Autonomous Council (TKHAC), Thengal Kachori Hill Autonomous Council, Sonowal Kachari AC, Missing AC, Lalung Autonomous Council, Rabha Hasong AC</td>
</tr>
</tbody>
</table>

Legislative powers of the councils
The councils at regional and District level are granted with some special powers of making laws on some local matters which are of high importance. However, formation and implementation of such laws in the jurisdiction areas of autonomous councils require the approval of the governor of the particular state in concern. Also, the governor can take considerations of the president for some of the specific laws (Kshetri, 2013). Following is the list of important subjects and areas on which autonomous councils can make laws: flood control, fisheries, modes of transport, like, roads, ferries, bridges, etc. education at primary and secondary level, agricultural education and research, animal husbandry, and relevant training, employment, entertainment areas, social insurance and security, public health, dispensaries, hospitals, and sanitation, trade and commerce, land alienation, monuments, museums, etc. and minor irrigation. In addition, to this, Bodoland Territorial Council has some more powers to improve the subject areas of local interest (Sixth Schedule, 2016).

Judicial powers
The judicial provisions stated under the sixth schedule of legislation state that if any state legislature has made any laws pertaining to any subject matter, must act within the council’s jurisdictional areas, and cannot extend its regulatory laws within such jurisdiction unit the council make public notifications relevant to it (Gassah, 2013). The sixth schedule for the autonomous tribe administration has also specified that if the central act or state act is formed and implemented, then the president or the governor respectively have the power to make non-applicable provisions of such laws or applicable with some modifications as they feel required. The sixth schedule has also endowed the councils with wide judicial powers in terms of civil and criminal aspects. However, such jurisdictions of councils require judicial assent of the concerned state high court.

**Conclusion and Recommendations**
In India, the administration of tribal areas is always the focal point of the government while making policies at the central level (Actionaid India 2016). In India, Tribal
areas are bifurcated into two sections, in which the tribal autonomy administration power has been given to the section of schedule VI while others are included in Schedule V and are still struggling for such autonomy. In the past decade, the sixth schedule has shown success to a certain level in preserving and protecting the identities of tribes. It has also supported those tribes who struggled for their separate existence in the form of state in the Northeastern Indian region.

Although there are various pitfalls in the clauses of a sixth schedule pertaining to the autonomous council, it has delivered various benefits to the tribal communities and allowed them to regulate their jurisdictional areas beyond their villages (Verghese, 2013). The autonomous council provisions under the sixth constitutional schedule are effective tools for efficient governance in specified areas of the tribe. Such a tool has a major significance in the Northeastern part of India with the potential of safeguarding the unique cultural identity of the diverse group of tribes along with economic and social development. The administrative structure and system of autonomous bodies argued in the report established at District, regional, and village level.

The report has presented an overview of specific ADCs functions and its legislative and jurisdictional powers for better governance system in the areas of Assam, Tripura, Mizoram, and Meghalaya (Aniruddh Kumar Baro, 2017). In addition, the remarkable achievements are also identified in relation to the Autonomous councils that has made prolific improvement in the political and economic changes in their specific areas of the tribe. Although the people of areas specified under the sixth schedule enjoy autonomy in relation to governance and administration (Sixth Schedule, 2014). There are some key challenges too that makes the customary laws and provisions complicated for the specified tribal groups. Hence, in the present context, it is essential to enhance the scope of the sixth schedule in accordance with the new mechanism regime and expectations of local communities.

The establishment of autonomous councils for the regional and District areas also creates difficulty due to the difference in the ground realities and the provisions. For example, autonomous councils have regular complaints regarding deprivation of their functions and powers by the state legislature under the jurisdiction. On the other side, the partial power to the state is based on the lacking competence and skills of the autonomous council in managing their jurisdiction departments. Hence, it is recommended that government must develop specific provisions in relation to the powers that can be fully transferred, not transferred, and partially transferred for the welfare of the people of tribal areas under schedule sixth.

Government is required to give immediate attention to the clarity of different functions of ADCs along with the mapping up of all the activities of ADC at different levels of Panchayati Raj system. It will facilitate in identifying the major initiative taken by ADCs in favor of the tribal areas, and every lacking area can be effectively monitored (Functioning of Autonomous Councils in Sixth Schedule Areas of North-Eastern States, 2016). The sixth schedule in its Para 4 has clearly provided that ADCs must constitute District and village council in their respective jurisdiction areas to manage affairs regarding customary laws. However, in Tripura, TTAADC failed to establish
such a judiciary system. Thus it is recommended that TTAADC must take essential steps of creating courts at village and district levels to ensure better regulations in tribal societies of Tripura.

It is essential for the central government to take effective measures for the elimination of disparity among council, state, and central functions so that the provisions established for the Tribal people in the sixth schedule can be effectively implemented for their better future. There is a need for a monitoring committee and a team that can reduce the corruption issues in the tribal areas of Assam (Sixth Schedule, 2019). Also, the committee must ensure that coordination among different officials in Assam as well as other tribal-dominated states in India for effective management and administration. In addition, there must be trained members elected in ADCs to ensure healthy governance system with more responsible officials. There is a need for insertion of provisions in the sixth schedule to make ADCs more accountable towards their functioning. The provisions and clause must mandate the ADCs to make village councils to establish effective interaction at field level.

It is identified that local council bodies established under the 73rd amendment have more powers in access to financial assistance with the support of State financial commission. However, the issues that tribal areas of Northeastern regions are facing in relation to the unequal financial assistance must be resolved with the effective measures (The Statesman, 2019). The government can establish a body or committee that can monitor all the budget allocation activities in different areas specified under schedule so that such areas can get equal opportunities for growth and development. The people living in the districts and regions of ADCs must be aware of their rights, and the basic reason for the insertion of the sixth schedule in the constitution to enhance its significance among them. Also, such awareness is essential to reduce the impact of ethnic disturbances and instability among the political forces, and thus help in producing positive results in the long term.

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**Online**


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ATTEMPT UNDER PENAL CODE: A CRITICAL ANALYSIS

By Barun Garg
From Symbiosis Law School, Hyderabad

INTRODUCTION

“Injustice Anywhere is a threat to justice everywhere” – Martin Luther King, Jr.

A. Brief History Of Inchoate Crimes
The Mohamedan Law had been governing the subjects of India in the East-India Company’s Administration. Necessary modifications were brought up according to the people of different territories of India. There was a witness of significant rise in power of the different Provincial Governments in 1813 which was also responsible for the growth of heterogenous system of laws in India. It had become a necessity to have a unified law for all the territories of the country. Hence, Law Commission in India was established. The Indian Law Commission with T.B Macaulay, J.M. Macleod, G.W. Anderson and F. Millet as Commissioners, submitted the draft of Penal Code to the Governor General in Council. This Penal Code was the brainchild of Thomas Babington Macaulay who had drafted the code during his time in Bengal in 1830s. It was returned to the Commission in order to be printed under the superintendence.183 Back in time, there was a belief among judicial circles that every crime necessarily entails criminal liability for attempting it.184 The English Jurists conjectured that in order to prevent gross violations of law, there was a need for adoption of a sterner approach. They included incomplete offences under the ambit of law which means that a person could be prosecuted who took a step towards the commission of the offence.

There are 3 types of inchoate offences which have been codified under Indian Penal Code which are as following:

1. **Attempt**: An effort or endeavour to accomplish a crime, amounting to more than mere preparation or planning for it, and which, if not prevented, would have resulted in the full consummation of the acts attempted, but which, in fact, does not bring pass the party’s ultimate design.185

2. **Solicitation**: Solicitation is the inchoate offence of offering money to someone with the specific intent of inducing that person to commit a crime.186

3. **Conspiracy**: A combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is innocent in itself, but becomes unlawful when done by the concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful.187

183 Officiating Director J.P. Grant’s letter to the Commission, dated Legislative Dept., the 5th June 1837, National Archives of India, Legislative Department Act of 1860, No. XLV, Part I.
185 Black Law’s Dictionary. Definition of “Attempt”. Available at: https://thelawdictionary.org/attempt/ (Visited on August 18, 2018)
186 Wex Law Dictionary. Definition of “Solicitation”. Available at: https://www.law.cornell.edu/wex/solicitation (Visited on August 18, 2018)
187 Black Law’s Dictionary. Definition of “Conspiracy”. Available at: https://thelawdictionary.org/conspiracy/ (Visited on August 18, 2018)
Here is a graphical representation of Inchoate Crimes to understand the flow of these terms:

From the above flowchart it becomes clear that Inchoate Crimes is the genus and Attempt, Solicitation and Conspiracy are the species.

B. Attempt: A Form Of Inchoate Crimes

The commission of a crime goes through three processes which are:

1. Conceiving an intention to commit a crime;
2. Preparation for its commission;
3. And an attempt to commit it.

There has been no punishment assigned for the initial 2 stages for the crime (subject to certain exceptions) but once the act commences to the stage of attempt, the liability arises and the person can be prosecuted.\(^\text{188}\)

There was a significant attempt by a 2-Judge Bench comprising of Justice R.S Sarkaria and Justice O. Chinnappa Reddy in the case of State of Maharashtra v. Mohd. Yakub\(^\text{189}\) and others to define attempt. An excerpt from the observation of Justice Sarkaria states as follows:

“What constitutes an attempt is a mixed question of law and fact depending largely upon the circumstances of a particular case. "Attempt" defies a precise and exact definition. Broadly speaking all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage he makes preparation to commit it. The third stage is reached when the culprit takes deliberate overt act or step to commit the offence. Such overt act or step in order to be 'criminal' need not be the penultimate act towards the commission of the offence. It is sufficient if such acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence.”

Justice O. Chinnappa Reddy also observed the proceedings and concluded with stating the definition of attempt as follows:

“In order to constitute an 'attempt' first, there must be an intention to commit a particular offence, second, some act must have been done which would necessarily have to be done towards the commission of the offence and, third, such act must be proximate to the intended result. The measure of proximity is not in relation to time and place but in relation to intention.”

It appears that Justice Chinappa Reddy's explanation goes well with the underlying philosophy of punishment for attempt. He


rightly gives emphasis on intention rather than physical proximity of the act to the commission of the crime. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice.\textsuperscript{190}

But still there are certain questions which are answered and unanswered by the Legislature and Judiciary with all due respect. There have been numerous precedents which discuss the concept of “criminal attempt”. Various tests and theories have been prescribed by the Supreme Court of India as a remedy to determine attempt in a certain case.

Indian Penal Code deals with Attempts of offences in four different ways:

1. Attempt to commit offences in general under Section 511.
2. Attempt to commit capital offences under Section 307 and 308.
3. Attempt to commit suicide under Section 309. (De-criminalised)
4. Attempt to commit offences against the State.

There are various sections also which deal with Attempts and are stated through the following flowchart:

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\textsuperscript{190} Harikishan v. Sukhbir Singh. (AIR 1988 2127)

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LITERATURE REVIEW

Keedy, Edwin R. (Criminal Attempts at Common Law)\(^{191}\): This research article suggests that much has been written on the law of attempts to commit crimes and much more will be written for this is one of the most interesting and difficult problems of the criminal law. In many discussions of criminal attempts decisions dealing with common law attempts, statutory attempts and aggravated assaults, such as assaults with intent to murder or to rob, are grouped indiscriminately. It may be stated that, when it has been established there was the intent to commit a specific crime and to carry out this intent an act or acts were committed, which caused damage or sufficient danger of damage, the fact that for some reason it is impossible to complete the intended crime should not be, and is generally held not to be, a defence to a prosecution for the attempt.

Enker N., Arnold (Mens Rea and Criminal Attempt)\(^{192}\): The author defines attempt to commit a crime as “engaging in conduct with the specific intention to produce forbidden consequences while aware of the possibility that the circumstances that render such consequences criminal may exist.” The author develops and defends the thesis that inchoate crime is more than merely anticipatory guilt. Mens rea in inchoate offenses is not merely a condition of fault-it is a component of the danger of criminal harm that determines the need for forceful intervention.

Pillai. N. K. (Criminal: Attempt)\(^{193}\): The author of this research article talks about the problems involved in the law of criminal attempt which are intricate. The confusion arises, because courts are doing inconsistent things with similar fact situations and also because courts are attempting to apply the same rule to utterly dissimilar situations. The problem has eluded solution so far. Perhaps the principal reason for this is that its history has been neglected. A brief historical survey of the law of criminal attempt may thus be useful in the formulation of this problem. A careful examination of these problems may help in the formulation of distinctive criteria governing criminal attempts.

Thurman W. Arnold (Criminal Attempts: The Rise and Fall of an Abstraction)\(^{194}\): This research article speaks that the law of criminal attempts usually commences with the statement that the problems involved are intricate and difficult to solve and that the cases are hopelessly confused. Legal problems are spoken of as confused under two different sets of circumstances. Most aspects of the problem of dealing with crime are necessarily for the legislature. But it is not too much to expect that courts will, without legislative assistance, at least free themselves, from useless abstractions too complicated for the legislature to understand. In this direction the help of the legal theorist is much needed, whether or not his conclusions add to the dream of predictability in the administration of the criminal law.

Lawrence C. Becker (Criminal Attempts and Theory of Law of Crime)\(^{195}\): The

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\(^{195}\) Lawrence C. Becker, “Criminal Attempts and Theory of Law of Crime”, Philosophy & Public
fundamental problem addressed in this paper is that of getting an adequate rational justification for the distinction the law draws between criminal and noncriminal wrongs. But because theorizing about the law is not only vacuous but likely to be positively misguided apart from a consideration of concrete issues in the law. The analogous extensions of these reforms will, of course, have to be subjected to further study.

Jerome Hall (Criminal Attempt – A Study of Foundation of Criminal Liability)\textsuperscript{196}: The foundation of this research paper involves the very foundations of criminal liability of Attempt. Before one can conclude even a preliminary analysis, an appraising eye must be cast over almost the entire penal law - the definitions, the types of crime, the nature of "the act," the sanctions - in order to unravel any thread of reason that can be discovered in the apparently unreasoned conglomeration of case and statute law, and exhibited doctrine. There is no more fruitful field for investigation in all of these concerns than that of criminal attempt and the problems it raises. No theory which grapples with such fundamental issues will endure very long, but the deeper insight into and the fuller understanding of our institutions thus achieved may surely encourage us to hope for recurrent studies of these problems.

Kramer Samuel (An Economic Analysis of Criminal Attempt: Marginal Deterrence and the Optimal Structure of Sanctions): This research paper has been used to discuss the quantitative research of attempts. Although the economic literature on crime abounds with analyses of the incentives to commit crimes, few critics notice that such incentives surface within the crimes themselves. Marginal deterrence not only is indicated by the level of societal harm, but also, as I will argue, by the level of individual utility of the criminal actor. Criminal attempts are punishable traditionally under the common law. The severity and timing of the sanctioning of an attempt are, however, debatable. Punishing attempts as severely as completed offenses incurs high social costs and ignores the potential reductions in harm due to marginal deterrence.

Columbia Law Review Association (Criminal Law, Attempt to Murder and the Line between Preparation and Attempt)\textsuperscript{197}: This research paper dictates that the courts have enunciated various tests marking the line between preparation and attempt. Some are poetic but indefinite, requiring "an appreciable fragment of the crime itself, the commencement of the consummation thereof etc. Others are explicit but too severe, or too lenient, for general application. The courts cite indiscriminately cases involving attempts to commit different crimes with unrelated factual background.

Ranjan. Rajeev, Kumar. Saurabh, Pattanayak. Deep Raman, Dhawan. Anju (De-criminalisation of attempted suicide in India)\textsuperscript{198}: Attempted suicide is a serious problem requiring mental health interventions, but it continues to be treated as a criminal offence under the section 309 of Indian Penal Code. The article reviews


the international legal perspective across various regions of the world, discusses the unintended consequences of section 309 IPC and highlights the need for decriminalization of attempted suicide in India. The Mental Health Care Bill, 2013, still under consideration in the Rajya Sabha (upper house), has proposed that attempted suicide should not be criminally prosecuted. Decriminalization of suicidal attempt will serve to cut down the undue stigma and avoid punishment in the aftermath of incident, and lead to a more accurate collection of suicide-related statistics. From a policy perspective, it will further emphasize the urgent need to develop a framework to deliver mental health services to all those who attempt suicide.

DISCUSSING THE ATTEMPTED CRIMES AND SECTIONS

A. Attempt to Murder (Section 307).

Section 307 reads as following: Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned. Attempted by life convicts.—When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned. Attempts by life convicts.—When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death.\textsuperscript{199}

The main ingredients under section 307 are

1. The act attempted should be of such a nature that if not prevented or intercepted, it would lead to the death of the victim.\textsuperscript{200}
2. The intention or mens rea to kill is need to be proved clearly without doubt, for this purpose the prosecution can make use of the circumstances like attack by dangerous weapons on vital parts of the body however the intention to kill cannot be gauged simply by the seriousness of the injury caused.\textsuperscript{201}
3. The intention and the knowledge of the result of the act being done is the main thing that is needed to be proved for conviction under section 307.

The first requisite of a criminal attempt is the intent to commit a specific crime.\textsuperscript{202} If one man with the intent to kill another man shoots him but fails to kill him this is an attempt to murder. Also if with the same intent he shoots at, but just misses, the other man, who is unaware of the shooting, this is likewise an attempt to murder. In the first case there is damage, while in the second there is the danger of damage. Where the door of a building was broken, but there was no evidence of an entry, it was held that the defendant was guilty of an attempt to commit burglar.\textsuperscript{203}

There are various cases by which we can understand Attempt to Murder in-depth:

- It has been suggested that if B stabs the dead body of A, without being aware that A is dead, B may be guilty of an

\textsuperscript{199} S. 307 of Indian Penal Code.
\textsuperscript{200} Ratanlal & Dheerajal, \textit{Indian Penal Code}.
\textsuperscript{201} Hari Kishan v. Sukhbir Singh, \textit{AIR} 1988 SC.
\textsuperscript{202} Regina v. Doody, 6 Cox C.C 463.
\textsuperscript{203} State v. Carr, 146 Mo, 1, 47 S.W. 790. (1898).
attempt to murder A.\textsuperscript{204} Further, it seems to be incorrect and a question arises as to whether a person can be held liable to stab a corpse of a person who no longer exists.

- If a man mistakes a stump for his enemy and shoots at it, notwithstanding his desire and expectation to shoot his enemy, his intent is to shoot the object aimed at, which is the stump.\textsuperscript{205}
- If a person with the intent to kill another invokes witchcraft, charms, incantations\textsuperscript{206}, maledictions, hexing\textsuperscript{207} or voodoo\textsuperscript{208} this cannot constitute an attempt to murder since the means employed are not in any way adapted to accomplish the intended result.
- In the much discussed case of State v. Clarissa\textsuperscript{209} it was held that administering a harmless substance thought to be poisonous cannot constitute an attempt to murder. Thus for an attempt to murder A there must be the intent to murder A and for an attempt to steal the coat of A it is necessary that there be the intent to steal the coat of A. While the completed crime of the murder of A may be committed without the intent to murder A.\textsuperscript{210} Courts agree that if there is nothing more than preparation for the commission of the crime intended an attempt has not been committed.\textsuperscript{211} It is likewise well settled at common law that there can be no conviction for an attempt if the intended crime has been consummated.\textsuperscript{212} So basically if the intention or necessary knowledge to cause death as envisaged by section 300 IPC which defines murder is there, then it is immaterial to whether or not any hurt was caused to the victim by the accused.\textsuperscript{213}

B. Attempt to Commit Suicide (309)
Suicide is a permanent solution to a temporary problem. Suicide attempt can be defined as a non-fatal self-directed potentially injurious behavior with an intent to die.\textsuperscript{214} More than one lakh persons (135,445) in India lost their lives by committing suicide in the year 2012 alone. The number of suicides in the country during the decade (2002-2012) has recorded an increase of 22.7% (135,445 in 2012 from 110,417 in 2002).\textsuperscript{215} If a person is sad for more than 2 weeks, then it can lead to depression” - said by Dr. Solanki.\textsuperscript{216} Attempt to Suicide is not a crime as it has been stated in the ‘The Mental Healthcare Act, 2017’ which moves its motion towards the decriminalization of attempt to suicide.\textsuperscript{217} The Supreme Court in Rathinam

\textsuperscript{204} Turner, \textit{Attempts to Commit Crimes}, 5 CAMB. L.J. 230 (1934).
\textsuperscript{205} Beale, \textit{Criminal Attempts}, 16 HARV. L. REV. 491 (1903).
\textsuperscript{206} Attorney Gen. v. Sillem, 2 H. & C. 43
\textsuperscript{207} Commonwealth v. Johnson, 312 Pa. 140
\textsuperscript{208} Id.
\textsuperscript{209} State v. Leveille, 34 S.C. 120.
\textsuperscript{210} Kenny, \textit{Outlines Of Criminal Law} 80 (1902).
\textsuperscript{211} Regina v. Nicholls, 2 Cox C.C. 182 (1847); Commonwealth v. Eagan, 190 Pa. 10, 42 Atl. 374 (1899); Graham v. People, 181 Ill. 477, 55 N.E. 179 (1899).
\textsuperscript{212} Ratanlal and Dheerajal, \textit{The India Penal Code} (32\textsuperscript{nd} edn, Lexis Nexis Butterworths, 2010) 1753-83.
\textsuperscript{213} S. 115 of The Mental Healthcare Act, 2017.
case, not only declared Section 309 of Indian Penal Code as being violative of Article 21 and thus unconstitutional but also conceded constitutional right to die. In doing so, the Supreme Court seemed to have relied heavily on the Bombay High Court decision in Dubal case. The Bombay High Court argument was plain: the right to one's life also includes the right to take it away.

The Constitution has emphasised that no person shall be deprived of his/her right to life except the procedure which has been established by law. But it has been overruled by the Supreme Court that the Right to Life does not include right to die or right to be killed.

In 210th Law Commission Report which laid emphasis on Humanisation and Decriminalisation of Attempt to Suicide, it was stated that the individuals who attempt suicide do it because of a mental disease which is deserving of treatment and care rather than punishment for the offense.

An interesting case which came in the purview of Court was to understand whether hunger strike came under the purview of committing suicide. In this case, a poet was on a hunger strike after which she was arrested on the charges of S. 309 of Indian Penal Code. It was laid down by the Court that the hunger strike was because of a cause and not to kill herself. Hence, she should be provided with aid rather than punishment for suicide.

C. Attempt to Commit Robbery (S. 397 & 398)

Attempted Robbery is defined by the Black’s Law Dictionary the term used to describe the preparations and planning in an attempt to commit a robbery that failed.

Section 397 reads as following: Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

And;

Section 398 reads as following: If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

The difference between both the Sections is that in Section 397, there is no presence of a deadly weapon. Whereas, in Section 398 there should be a presence of deadly weapon with the person who is attempting the crime.

D. Section 511

The principle laid down in Section 511 reads as following: Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.—Whoever attempts to commit an offence punishable by this Code with imprisonment for life or

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218 P. Rathinam v. Union of India, 1994 SCC (3) 394.
220 Art. 21 of Constitution of India.
222 210th Law Commission Report.
225 S. 397 of Indian Penal Code.
226 S. 398 of Indian Penal Code.
imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.

The accused in Abhyanand Mishra v. State of Bihar applied to the University for Admission to appear at the M.A. examination as a private candidate representing that he was a graduate and that he had been teaching in a certain school. In support of his application he attached certain certificates purporting to be from the head master of the school and Inspector of Schools. The university authorities accepted the accused’s statements and he was permitted to appear in the examination. Subsequently, on receiving information and enquiry thereafter the university found out that accused was neither a graduate nor a teacher. Thereupon, he was held to be guilty under S. 429 read with S. 511, IPC.

According to the Allahabad High Court, S. 511 does not apply to attempts to commit murder which are fully and exclusively provided for by S. 307. The Bombay High Court has, however, held otherwise in a case which has been doubted in a later case.

The court observed that the very policy underlying S. 511 seems to be for providing it as a residuary provision. The corollary, therefore, is that once an act is expressly made punishable by the Code it stands lifted out of the purview of S. 511.

The Law Commission of India, proposed deletion of S. 511 and insertion of a new Chapter VB entitled 'Of Attempt' consisting of the two Ss. 120C and 120D after Chapter VA dealing with 'Criminal Conspiracy' with a view to group inchoate crimes together.

CONCLUSION

In conclusion, I would like to dictate that the submission which is being made is not exhaustive and consists of explanations of other sections also which come under the purview of Penal Code classified as attempt. The theoretical formation responsibility for attempt is provided by Prof. Glanville Williams thus:

“The actus reus of attempt is of a most peculiar kind. Most crimes specify their actus reus directly, they tell us what it is that we must do or not to do. Criminal attempt is different; it specifies the actus reus chiefly by reference to the crime attempted. It tells us that we must not seek to trace a certain distance towards the commission of the actus reus of some other crime. If the defendant is under some serious mistake, no part of what he does may be the actus reus of another crime. So it may seem plausible to say that his criminality exists only in his own mind. However, this conclusion, overlooks the special features of criminal attempt. In an

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227 AIR 1961 SC 1698.
228 R. v. Niddha, (1892) 14 All. 38.
229 Vasudeo Balwant Gogte v. Emperor, (1932) 34 Bom. L.
attempt, by hypothesis, the full crime has not been committed, or need not be proved to have been committed. So, by hypothesis, there need be no full actus reus of the complete crime. The actus reus is that of the attempt, it is forbidden by reason of the law of attempt, and not by reason of any other penal law.”

Attempt under Indian Penal Code has been rightly prescribed as a Punishable offence. It is very important to understand that there are certain crimes such as murder whose mere attempt is a heinous offence. Such offences should be punishable. Whereas certain cases such as Sec. 309 of IPC where attempt to suicide was made an offence is not morally correct. Every human goes through a time where a person goes through depression or stress which leads to resorting to suicide. This is not morale but such people can be helped. It is very certain to note that punishing such people is just adding more to their existing misery.

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PLEA OF INSANITY AS A DEFENCE

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ABSTRACT

The incentive of this research paper is to divulge both, the substance and the procedure, of insanity as a defense and the most common exhortation for its abolition or reform. Defence of Insanity has been in existence since many centuries; however, it took a legal position only since the last three centuries. We surmise that insanity as a defense ought to be perpetuated the reason being that it is basically just and that fair and sensible reforms can ameliorate most of the plight's kindred with it. Our chore as a society is to set one's sight on whether "the insanity defense is morally vital". If we emphasize on the facet that it is morally vital, then furthermore we will have to clinch that insanity defense trials are orchestrated rationally, dubious verdicts are curtailed, and that the disposition of those acquitted by reason of insanity leads to the protection of society and the bona fide treatment of persons acquitted.

This paper addresses the origin of the defense and briefs the statistical analysis of this defense throughout the country. It considers an array of criticisms that are often made, but that are insubstantial. It cites few watersheds of the defense and winds up the paper by reaching on an apropos termination.

KEYWORDS: McNaughton Rule; Insanity as Defence; Indian Penal Code-Section 84; Legal Insanity; Criminal Liability

INTRODUCTION

"I think insanity is the hardest thing to play."

Richard C. Armitage

Plea of Insanity as a defense lays its fundamentals on the assumption that the defendant is suffering from a mental illness which makes him incapacitated of discerning the depth of the crime or differentiating right out of wrong, therefore holding him legally not accountable for crime. It being a legal concept, chiefly used in criminal cases, merely suffering from insanity is not enough, you are required to prove it via a "preponderance of the evidence", which is pretty hard to determine as well as defense.

The first known recognition of insanity as a defense to criminal charges was recorded in a 1581 English legal treatise stating that, "If a madman or a natural fool, or a lunatic in the time of his lunacy" kills someone, they can't be held accountable. British courts came up with the "wild beast" test in the 18th Century, in which defendants were not to be convicted if they understood the crime no better than "an infant, a brute, or a wild beast." Besides the fact that courts no longer use the terms "lunatic" or "wild beast," current laws allowing for the insanity defense follow a similar logic. The legal basis for insanity was codified into British law in the mid-19th Century with the McNaughton Rule, which is used in a majority of U.S. states and other jurisdictions around the world today.

The Supreme court of India provides a number of judgements decipher the scope

233 https://criminal.findlaw.com/criminal-procedure/insanity-defense.html (last visited}
of “Unsoundness of mind under” under section 84 of the Indian Penal Code. To forestall false acquittals and convictions the burden of proving the commission of an offence beyond reasonable doubt is without exception on the prosecution. Withal, the burden to prove the existence of insanity would be on the accused. He has to prove by presenting material in front of the court which may include expert evidence, oral and other documentary evidence, presumptions, admissions or even the prosecution evidence that would satisfy that he was incompetent of knowing the nature of the act committed or having knowledge that it was contrary to law. Insanity defense remains a vexed affair though is rarely invoked in criminal trials. The use of insanity defense by John Hinckley after shooting President Ronald Reagan only to impress his then girlfriend and actress Jodie Foster, caused a public outcry. Legal and medical commentators have divided opinions about the need for the insanity defense.

GENESIS

March 1995: Colin Ferguson, convicted for crimes cognate with a massacre in Long Island, New York, December 7, 1993. Killing six persons and injuring nineteen by opening fire with an automatic pistol on a crowded commuter train was the crime committed by him. Ferguson’s trial was marked with controversy. He was licensed by the judge to act as his own attorney, the reason being him discharging his court appointed attorneys, who believed him to be mentally incompetent to stand a trial. Ferguson repudiated insanity defense concocted by his attorneys and argued on the fact that another enigmatic gunman had committed the shootings. His outlandish behavior in the court room appeared to gainsay the judge’s coda that Ferguson was competent to stand trial. He also asserted during his trial that he had been charged with ninety-three counts only because the crime occurred in 1993. William M. Kunstler and Ronald L. Kuby, Ferguson’s attorneys whom he discharged, had asked the judge before the trial to find that Ferguson’s paranoia and delusional state made him mentally incompetent to stand trial. But Ferguson resisted to be examined by prosecution or defense psychiatrists, weening he was not insane. Though the judge sanctioned him to stand trial, reckoning that he could decipher the nature of charges laid against him and succor in his own defense.

By 1840, most jurisdictions had refined the wild beast test to cognitive insanity and supplemented that with irresistible impulse insanity. However, in 1843, a well-publicized assassination attempt in England caused Parliament to eliminate the irresistible impulse defense. Daniel M’Naghten, operating under the delusion that Prime Minister Robert Peel wanted to kill him, tried to shoot Peel but shot and killed Peel’s secretary instead. Medical testimony indicated that M’Naghten was psychotic, and the court acquitted him by reason of insanity (M’Naghten's Case, 8 Eng. Rep. 718 [1843]). In response to a public furor that followed the decision, the House of Lords ordered the Lords of Justice of the Queen's Bench to craft a new rule for insanity in the Criminal Law. What emerged became known as the M’Naghten Rule. This rule migrated to the United States within a decade of its conception, and it stood for the better part of the next century. The intent of the M’Naghten rule was to abolish the irresistible-impulse defense and to limit the insanity defense to
cognitive insanity. Under the M’Naghten rule, insanity was a defense if at the time of the committing of the act, the party accused was laboring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. Through the first half of the twentieth century, the insanity defense was expanded again. Courts began to accept the theories of psychoanalysts, many of whom encouraged recognition of the irresistible-impulse defense. Many states enacted a combination of the M’Naghten rule supplemented with an irresistible-impulse defense, thereby covering both cognitive and volitional insanity. The insanity defense reached its most permissive standard in Durham v. United States, 214 F. 2d 862 (D.C. Cir. 1954). The Durham rule excused a defendant "if his unlawful act was the product of mental disease or mental defect." The Durham rule was lauded by the mental health community as progressive because it allowed psychologists and psychiatrists to contribute to the judicial understanding of insanity. But it was also criticized for placing too much trust in the opinions of mental health professionals. Within seven years of its creation, the rule had been explicitly rejected in 22 states. It is used only in New Hampshire.

HISTORICAL DEVELOPMENT OF INSANITY DEFENSE IN INDIA

In ancient India, legal and moral derelictions were intermixed. The Hindu philosophy expounds that the consequences of the violation of a duty are to be borne by the person guilty of such violation. Whether the action be voluntary or involuntary, the perpetrator has to reap the consequences of his deeds without exception. The Order of Nature is self-operative against every breach or violation. Thus, whether the wrong is done in sanity or insanity, by an adult or an infant, in normal or abnormal circumstances, the perpetrator has to suffer for it. Further, one may suffer for his misdeeds either in the current life or in subsequent lives as his fate decrees. The complicated theories of fate, karma (action), regeneration and samskara, it appears, played an important role in the formulation of the theory of absolute liability. However, we find that one could amend his misdeeds by undergoing proper atonement or penance known as prayaschitta. In case where a wrong has been committed by a child who is unable to know the nature of his act and also too young to undergo any penance, the duty of atonement is cast upon his parents or guardians.

Therefore, the available literature in ancient Indian law does not make clear whether or not the insane person is fully absolved of his criminal liability. It appears that the concept of sin and the theory of absolute liability of each individual for acts committed by him did not admit of such exception. However, it is apparent that great consideration is shown in the ancient literature for the purposes of allotment of danda (punishment) or prayaschitta (penance) to an insane violator of social or moral order.

In Muhammadan law no responsibility appears to be attached to insane or imbecilic persons. Their Insanity in Muhammadan Law legal capacity, except as to acts done


235 Defense of Insanity in Indian criminal law, K.M. Sharma; The Indian Law Institute
in lucid intervals, is affected in the same way as that of an infant without determination.\textsuperscript{236} The law holds such persons to be incapable of understanding and so it gives them an exemption from liability. As in the case of minority, insanity also should be pleaded on the same day; otherwise there will be no favorable presumption. This is subject to conditions that the criminal should take an oath, and his real mental state should not be incompatible with his notorious madness. Abu Yusuf taking into consideration such lack of understanding said that “the had cannot be imposed on the accused after his confession, unless it is made clear that he is not insane, or mentally troubled .. If he is free from such deficiency, he should then be submitted to the legal punishment.”\textsuperscript{237} It was himself of the sanity of the criminal before pronouncing judgment.

In 1971, there was an attempt by the Law Commission of India to revisit the Section 84 in their 42\textsuperscript{nd} report, but no changes were made. Section 84 of IPC deals with the “act of a person of unsound mind.”\textsuperscript{238} “Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.” On analysis of the Section 84 IPC, the following essential ingredients can be listed. For the sake of easy understanding, the Section 84 IPC can be divided into two broad categories of, major criteria (medical requirement of mental illness) and minor criteria (loss of reasoning requirement). Major criteria (mental illness requirement) mean the person must be suffering from mental illness during the commission of act. Minor criteria (loss of reasoning requirement) mean the person is: Incapable of knowing the nature of the act or Incapable of knowing his act is wrong or Incapable of knowing it is contrary to law. Both major (mental illness) and minor (loss of reasoning) criteria constitute legal insanity. Section 84 IPC, clearly embodies a fundamental maxim of criminal jurisprudence that is, (a) “Actus nonfacit reum nisi mens sit rea” (an act does not constitute guilt unless done with a guilty intention) and (b) “Furiosi nulla voluntas est” (a person with mental illness has no free will).\textsuperscript{239} This implies that an act does not constitute a crime unless it is done with a guilty intention i.e. “mens rea.”

Hence, Section 84 IPC fastens no culpability on persons with mental illness because they can have no rational thinking or the necessary guilty intent.\textsuperscript{240}

### STATISTICAL ANALYSIS

The data was collected from the websites of 23 High Courts of India from the official link http://indiancourts.nic.in/. The information was collected only from those High Courts which offered an option of free text search in their websites. The websites were searched using the keywords 'mental illness' and 'insanity', and the judgments delivered between 1.1.2007 and 31.08.17 were retrieved. Judgments delivered for

\textsuperscript{236} Abdur Rahim, Muhammadan Jurisprudence 244 (1958)
\textsuperscript{237} Abu Yusuf, Al-igrar; quoted in Qadri, Islamic Jurisprudence in the Modern World 270 (1963)
\textsuperscript{239} Bapu @ Gajraj Singh vs State of Rajasthan. Appeal (crl.) 1313 of 2006. Date of Judgement on 4 June, 2007.
\textsuperscript{240} https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4676201/#ref15 (last visited 10/10/2019, 5:50 pm)
criminal cases were reviewed in detail to check of its eligibility for inclusion in this study. All judgments where the perpetrator was alleged to have mental illness, and insanity defense was raised were included. Only the final judgments were included. Interim orders and bail appeals were excluded from this study. A semi-structured pro forma was used to gather details regarding the nature of the crime, diagnosis provided by the psychiatrist as an expert witness, documents used to prove mental illness, and the judgment pronounced by the High Court. In addition, information pertaining to the gender of the accused, the relationship of the victim to the accused, the duration between the crime and the psychiatric evaluation, and the duration between the crime and the judgment were also retrieved. Statistical analysis was done using Statistical Package for Social Sciences (SPSS) version 20 (IBM Corp, Armonk, NY, USA). Categorical data were summarized in terms of frequencies and percentages. The verdict of the lower court, availability of documentary evidence of mental illness in the accused prior to the crime, and psychiatrists' opinion were considered to be factors that could influence the decision of the High Court. Chi-square test of independence and Fisher's exact test were performed between each of the above factors and the verdict of the High Court to assess the relationship between these variables. Out of the 23 High Courts in India, data was available for recovery from the websites of 13 High Courts. The information about a total of 102 cases which fulfilled the inclusion criteria were retrieved for detailed analysis. Kerala (31), Madras (15) and Himachal Pradesh (20) High Courts contributed 66 out of the 102 cases (approximately 65%), retrieved for evaluation. Rajasthan and Karnataka High Courts contributed nine cases each. Madhya Pradesh (Seven cases), Delhi (Five cases), Punjab (Three cases), Chhattisgarh (Two cases) and Andhra Pradesh (One case) contributed the remaining 18 cases (17% of the cases). No cases in the Hyderabad, Jammu and Kashmir or Orissa High Courts were retrieved in which the insanity plea was raised in the preceding ten years. The option of free text search for judgments was not available for Allahabad, Bombay, Calcutta, Guwahati, Gujarat, Jharkhand, Manipur, Meghalaya, Sikkim, and Uttarakhand High Courts.241

THE INSANITY DEFENSE PRODUCES "WRONG" VERDICTS

Unlike many other criteria for criminal liability, the insanity defense tests do not raise strictly factual questions. Rather, the judgment made about the defendant's mental state at the time of the crime is primarily a legal, moral, and social judgment. For example, whether the defendant fired the fatal bullet and intended to kill the victim, thus satisfying the elements of murder, are factual questions with determinate, albeit often difficult to determine, answers. By contrast, the insanity defense tests ask indeterminate questions, such as how much lack of knowledge of right and wrong or how much lack of capacity to conform one's conduct to the law a defendant must have in order to be acquitted. Of course, the legal judgment must be based on facts, but the legal test is not itself factual. The insanity defense tests prescribe the relevant behavioral continuum, but drawing the line between guilt and innocence is the task of the factfinder as the moral representative of the

241 http://www.ijpm.info/article.asp?issn=02537176; year=2019;volume=41;issue=2;spage=150;epage=1
community. Except at the extremes, there are rarely determinate answers to such moral questions. If there is no substantial error in the presentation of the evidence or the instructions to the jury, most insanity verdicts are presumptively reasonable. The question is one of applying community standards in light of legal precedents and there are few determinate, objectively correct, clear cases that reach the jury. The factfinder can be swayed by prejudice, or might willfully refuse to apply the test properly in the rare clear case, however this is possible with all indeterminate, morally-based criteria, and there is no reason to believe it happens disproportionately typically in insanity defense cases. Moreover, even if it could be said that an insanity verdict is wrong in some ultimate, objective sense, "wrong" verdicts are possible in all areas of law, but they do not always lead to intemperate attempts to change fundamentally just laws. For instance, juries must occasionally acquit defendants claiming the indeterminate justification of self-defense because jurors wrongly accept the defendants' false claims that they honestly and reasonably believed their lives were in danger, yet no one consequently calls for the abolition of self-defense as a defense. The wrong or unpopular verdict argument is far too weak conceptually and proves far too much to be a legitimate reason for abolishing the insanity defense.

Some critics try to demonstrate that the insanity defense is an historical accident and thus does not deserve the veneration it receives. Although the historical evidence supports retention of the defense, its history is irrelevant in determining if the defense is morally necessary and practically workable: only ethical and sensible counterarguments can the arguments for the existence of the defense. The place of insanity and its manner of adjudication in the past criminal process is not dispositive of what its place should be and whether it can be workable today.

There are number of objections to defense of insanity which are raised frequently, (1) it produces "wrong" verdicts; (2) defendants use it to "beat the rap"; (3) it deflects attention and resources from the treatment needs of the disordered persons in jail and prison who did not raise or failed with the defense; (4) it is a historical accident; (5) it is a "rich person's defense"; (6) it is used too infreqently to justify retaining it; and (7) it requires an assessment of the defendant's past mental state, a task that is too difficult. However these objections are insubstantial. That is, either they are based on false empirical assumptions and incorrect logic or they prove too much and thus fail to provide objections specific to the insanity defense.

**BURDEN OF PROOF**

Devidas Loka Rathod v. State of Maharashtra, The Supreme Court of India, in this neoteric case, ventilated the law pertaining to plea of insanity under section 84 of the Indian Penal Code, furthermore mentioned some germane judgements accentuating the law. Under section 302 and 324 of the Indian Penal Code the appellant assailed his conviction, whereby his defense was rejected by the trial court that he was of unsound mind, bringing up skimpy evidence relying on the evidence of Dr. Sagar Srikant Chiddalwar, that the appellant wasn’t mentally sick and fit to face trial. The two-judge bench of the supreme court, in notion of the facts and circumstances of the case, ruled that the appellant was enfranchised to the benefit of the exception under section 84 of the Indian Penal Code in view of the fact of the
preponderance of his medical condition at the time of occurrence. “An act will not be an offence, if done by a person, who at the time of doing the same, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or what he is doing is either wrong or contrary to law.”242 Carves out as an exception under section 84 of the Indian Penal Code.

**Doctrine of burden of proof in the context of the plea of insanity**– That the law undoubtedly presumes that every person committing an offence is sane and liable for his acts, though in specified circumstances it may be rebuttable. While elaborating on the doctrine of burden of proof in the context of the plea of insanity, the Apex Court made reference to the case of *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat*243, in which the court observed that there is a rebuttable presumption that the accused was not of unsound mind, when he committed the crime, in the sense laid down by Section 84 of the IPC: the accused may rebut it by placing before the court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings244. That the onus of proof is on the accused, under Section 105 of the Evidence Act and it is not as stringent as on the prosecution to be established beyond all reasonable doubts. The accused has only to establish his defense on a preponderance of probability, after which the onus shall shift on the prosecution to establish the inapplicability of the exception.

*Test to be Legal Insanity and not Medical Insanity*– Legal insanity equips a good ground of defence from criminal liability while medical insanity does not. In order to establish legal insanity, the necessary elements as provided by section 84 of the Indian Penal Code must be proved. If there are sufficient medical grounds to hold that a person is suffering from insanity, it is a case of medical insanity. Legal insanity (unsoundness of mind) for the purposes of section 84, Indian Penal Code means that the defence must prove that at the time of commission of crime with which the accused is charged, because of unsoundness of mind, he did not know the nature of his act or that he was doing what was either wrong or contrary to law. The incapacity of the accused must be caused by some disease of mind and must exist at the time of commission of crime. Medically a person may be certified sane or insane as the case may be, but legally he will be held insane (of unsound mind) only if he successfully proves the requirements of the law under section 84, Indian Penal Code which will entitle him to be acquitted of the charge. If he fails to prove that, the law presumes him sane at the time of commission of the crime by him, even though medically he may have been insane at that time.245 The irresistible impulse test is used to establish whether, as an outcome of a mental disease or defect, the defendant was unable to control or resist his or her own impulses, thus leading to a criminal act. If so, the defendant is not guilty because of insanity. Criminal Law

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243 1964 AIR 1563
245 SN Mishra Prof.; Indian Penal Code; Central Law Publication; 20th Edition; 2016; 200
only punishes a man for his fault not for his misfortunes.

The Courts of India has provided many judgements explaining the scope of Unsoundness of mind according to section 84. There were various controversies regarding the ambit of defence of insanity and Courts from Time to Time have tried to interpret it.

Baswantrao Bajirao vs Emperor on 1 April, 1947

“All this evidence is, therefore, only relevant (if it at all suffices) to prove a mild case of medical insanity but the law makes a distinction between medical and legal insanity. In Section 84, which summarizes the law on the subject as found in India "nothing is an offence" which is done by a person, who at the time of doing it, "by reason of unsoundness of mind, is incapable of knowing" the nature of the act, or that he is doing what is either "wrong or contrary to law." The accused has to prove this fact under Section 108, Evidence Act and the burden is on him of proving that he did not know the nature of his act or that the action which he did was wrong or contrary to law. According to Mayne by the first is meant the prisoner's consciousness of the bearing of his act on those affected by it and by the second the prisoner's consciousness, in relation to himself. It is an admirable summary of the tests to be applied in cases of insanity. In connection with cases of homicide the special relevance of these two tests are brought out by Mayne thus: In dealing with cases involving a defense of this kind distinction must be made between cases in which insanity is more or less proved and the question is only as to the degree of irresponsibility and cases in which insanity is sought to be proved in respect of a person who for all intents and purposes appears sane. In all cases where previous insanity is proved or admitted certain considerations have to be borne in mind. Mayne summarizes them as follows: Whether there was deliberation and preparation for the act; whether it was done in a manner which showed a desire to concealment; whether, after the crime, the offender showed consciousness of guilt, and made efforts to avoid detection; whether, after his arrest, he offered false excuses and made false statements. All facts of this sort are material, as bearing on the test which Bramwell, B. submitted to a jury in such a case: "would the prisoner have committed the act if there had been a policeman at his elbow?" It is to be remembered that these tests are good for cases in which previous insanity is more or less established.”

Kamala Singh v State on December, 1954

"M'Naughton's case, stands by itself. It is the famous pronouncement on the law bearing on the question of insanity in cases of murder. It is quite exceptional and has nothing to do with the present circumstances. In 'M'Naughton's case, the onus is definitely and exceptionally placed upon the accused to establish such a defense. See -- 'Rex v. Oliver Smith', (1910) 6 Cr App R 19 (F), where it is stated the only general rule that can be laid down as to the evidence in such a case is that insanity, if relied upon as a defense, must be established by the defendant. But it was added that all the Judges had met and resolved that it was not proper for the Crown to call evidence of insanity, but that

246 1949 CriLJ 181

247 AIR 1955 Pat 209, 1955 CriLJ 825

www.supremoamicus.org
88
any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if bethought fit”.

- **Hari Singh Gond v. State of Madhya Pradesh**<sup>248</sup>

The Supreme Court observed that Section 84 sets out the legal test of responsibility in cases of alleged mental insanity. There is no definition of ‘mind soundness’ in IPC. However, the courts have mainly treated this expression as equivalent to insanity. But the term ‘insanity’ itself does not have a precise definition. It is a term used to describe various degrees of mental disorder. So, every mentally ill person is not ipso facto exempt from criminal responsibility. A distinction must be made between legal insanity and medical insanity. A court is concerned with legal insanity, not medical insanity.

- **Surendra Mishra v. State of Jharkhand**<sup>249</sup>

“Every person suffering from mental illness is not ipso facto exempt from criminal liability.” was highlighted.

- **Shrikant Anandrao Bhosale v. State of Maharashtra**<sup>250</sup>

In determining the offence under section 84 of the Indian Penal Code, the Supreme Court held that, “it is the totality of the circumstances seen in the light of the recorded evidence’ that would prove that the offence was committed”. Also “the unsoundness of mind before and after the incident is a relevant fact” was added. At the time of the commission of the crime unsoundness of mind must exist. The foremost thing that the court should consider is the fact that while the crime was being committed the accused was of unsound mind and it is the duty of the accused to establish it. Section 84 of the Indian Penal Code does not use the word “insanity”.

- **Rattan Lal v. State of M. P**<sup>251</sup>

It was well established by the court that the crucial point of time at which the unsound mind should be established is the time when the crime is actually committed and whether the accused was in such a state of mind as to be entitled to benefit from Section 84 can only be determined from the circumstances that preceded, attended and followed the crime. In other words, it is the behavior precedent, attendant and subsequent to the event that may be relevant in determining the mental condition of the accused at the time of the commission of the offense but not those remote in time.

- **Kamala Bhuniya v. West Bengal State**<sup>252</sup>

The accused was tried for her husband’s murder with an axis. A suit was filed against the accused, she alleged to be insane at the time of the incident, the investigating officer recorded at the initial stage about the accused’s mental insanity. The prosecution’s duty was to arrange for the accused’s medical examination, it was held that there was no motive for murder. The accused made no attempt to flee, nor made any attempt to remove the incriminating weapon Failure on the part of the prosecution was to discharge his initial responsibility for the presence of mens-rea in the accused at the time of the commission of the offence. The accused was entitled to benefit from Section 84. And hence accused was proved insane at the time of the commission of the offence and was held

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248 AIR 2009 SC 31
249 (2011) 11 SCC 495
250 26 September, 2002

251 1971 AIR 778, 1971 SCR (3) 251
252 2006 (1) CHN 439, 2006 CriLJ 998

www.supremoamicus.org
guilty of Culpable Homicide and not of Murder.

CONCLUSION

Plea of insanity has always been a part of the fabric of criminal law. It is sporadically used, but success is even more rare, and its victorious use predominantly brings with it, obtrusive costs to the pleader, both in terms of stigma and length of institutional stay. Insanity defense still remains a prisoner both behavioral as well as empirical myth, albeit these myths bear virtually no resemblance to reality these exemplify the publics perception of the defense as well as the plea. As of now it is pretty dithering if any other area of criminal law is more abysmally understood.

If we hate and fear crazy criminals too much and mistrust the release decisions of both mental health professionals and lay factfinders, we might decide to abolish the insanity defense or never to release those judged insane because we cannot be sure they are no longer disordered or dangerous (assuming the constitutionality of such a practice). If so, let us openly confront the injustice of the convictions or of the unnecessary and massive preventive detention of individuals wrongly held that will inevitably occur. If the real reason we do not wish to release those judged insane is an underlying desire to punish them, let us confront our hypocrisy and abolish the defense.

The cost to our society of valuing liberty so highly is that it increases the danger to us all, but we believe that the benefits of our freedom are worth the costs. Some released insanity acquitters’, like many released convicts, will commit awful crimes again, but the number of the former will be small and their recidivism often will not be linked to mental disorder. We do not mean to minimize the difficulties in deciding whom to acquit or release, or the outrages that may be perpetrated by some released insanity acquitters. But the insanity defense is not responsible for the ghastly crime rate in our society, and, as a group, released insanity acquitters probably are not a substantial danger to society. Convicting and imprisoning not responsible, insane persons, or keeping all persons acquitted by reason of insanity incapacitated for life, will not make anyone appreciably safer. Societal safety will be enhanced far more if a higher percentage of those convicted of serious crimes serve the prison time that they deserve. Unlike insanity acquitters’, these dangerous criminals account for a very high proportion of social danger, which their increased incapacitation would substantially reduce.

We should not abolish the insanity defense unless we truly believe that every perpetrator of a criminal act deserves to be punished, no matter how crazy. If we do not believe this, and we do not see how we can, then we must retain the defense.
We all recognise the importance of IT. Association with IT infrastructure for all working parts of an organisation has become mandatory in the 21st century in order to get connected to the rest of the world. The Indian Judicial System faces a major challenge of over 33 million cases, and it is estimated that it will take 360 years to overcome the backlog in the present pace with no new cases getting registered. The shortage of IT resources is one of the main reasons behind the inefficiencies of the judicial system. IT infrastructure will undoubtedly help to reduce the backlog to a significant extent.

In this manuscript, the author addresses the move from print to digital legal information within the Indian judicial system and the impact of cybernation of the judiciary. He briefly discusses the historical development of the legal system and the enormous backlog of cases pending throughout the court structure, before reflecting on the role of ICTs and reviewing the pace of process that theoretically started in 2010 and still after 10 years haven’t reached the saturation point. The researcher uses specific international benchmarks to show that the computerisation of the courts results in shortening of case handling time with concomitantly better access to courts. He then gives and the ongoing steps to establish a more effective digital administration for the judiciary in India. The researcher then shifts his focus onto the concerns that will creep in with the usher of the digital age in the Indian judicial mechanisms and addresses the maladies that may arise due to the digitalisation and provide remedies to them.

The objectives of the researcher are to introspect the introduction of ICTs in the judicial mechanism, explore the benefits that the move of automation will bring with it, while also commending the reforms introduced into the judicial mechanism ensuing the wave of judicial cybernation which help in negating the effects of judicial delays by giving an account of all the primary indicators such as the eCourt Services, Operationalisation of videoconferencing facilities, the implementation of the National Judicial Data Grid (NJDG), its benefits and how it made judiciary consistent in itself. Thenceforth, he briefs the readers with the current ongoing reforms that are trying to be implemented such as District Facilitation Centers & Nyaya Mitra, Mainstreaming Legal Aid through Common Service Centre, Access to Justice for tribal communities, Socio-legal cells, zero pendency court projects, and proposes remedies or other innovative ways like National Arrears Grid, National Court Management Authority, to speed up the judicial process.

Keywords: Information Communication Technology (ICT); National Judicial Data Grid (NJDG); e-courts; court administration; legal systems; India; digitalisation; maladies; remedies; reforms

Background
The famous quote goes, “Delay of justice is injustice”. The quote rightly says that there is no point in administering justice after it has breached its befitting timings in society. India is one of the countries with a massive backlog of cases and more piling over as it
takes strides of development forward into time. The 21st century held as the era of Digitisation did not leave the judiciary unaffected and cybernation had been rolled out to every nook-and-corner of the judicial system, but vain. The systems again got clogged up and Indian Judiciary is in no better position than it was before the wave of cybernation hit the already struggling for air Judiciary. According to the World Bank, Indian Judiciary is “notoriously inefficient”\textsuperscript{253}. The implementation of computers in the judiciary was a kind and brilliant move by the government, it will certainly help in reducing the backlog of cases and make the judiciary move forward, but it can only be achieved with proper measures and precautions.

**Brief Historical Development of Judiciary**

The Indian Judiciary was set up during the reign of the East India Company. The present law prevalent in India is a result of varying layers of influences both domestic & foreign and complexities. Like every other society at its dawn, courts were absent in India and the only form of the justice system in the society was of revenge. Roughly 2000 years ago, rulers of the Vedic and pre-Mauryan origins ruled over India, they established the first law courts and presided over them providing justice, deciding cases according to the law codes or smritis(law codes of Hindus) of that time. At the village level, the writings of Manu, Indian jurists can be held evidence of the presence of peoples’ courts there. During that time, to allow the legal system to properly function, code for the conduct of judges, procedures for administering justice were in place. Justice was dispensed based on norms laid down in the scriptures in the Vedas, Dharma sutras, Vedangas, Purans as well as the customs and usage of communities. The Mughals along with their Islamic religion, brought with them the Islamic jurisprudence which was laid down by the Quran. In the period of Mughal rule, there were mainly 3 types of courts:

1. Court of religious law
2. Court of secular cases
3. Court for political cases

With the end of the Mughal rule, came in the foreign powers, i.e., the British. It is during this time that, the power to administer justice rested with the East India Company at first and subsequently to the English common law. In the early period of their rule, the East India Company was solely responsible for the judicial system. The company was granted a charter by King George I in 1726 to establish ‘Mayor’s Courts’ in three metropolitan cities—Madras, Bombay and Calcutta—and the functions of the company increased considerably after the victory in the Battle of Plassey in 1757. After that, the courts expanded to other parts of the country. After 1857, the power of the company’s territories in India passed to the British Crown. Subsequently, the Supreme Courts were established and these courts were transformed to the first High Courts by the Indian High Courts Act passed by the British Parliament in 1862. In the same year the Law Commission, under the chairmanship of Thomas Babington Macaulay, prepared the Indian Penal Code (the main criminal code of India) which was subsequently enacted into force.

\textsuperscript{253} Refworld | India: Independence of and corruption within the judicial system (2007 - April 2009), Refworld,
After 73 years of Independence, the Republic of India is now governed or more precisely speaking, guided by the Constitution of India including matters of the nature that require a judicial solution and legislature activities. The country is divided into states having their own legislative and executive branches and Union Territories governed by the Central government, just like its superior, the central branch of legislative and executive. The law enforced or enacted by the Union is binding on all the states and the union territories. India has a bicameral Parliamentary system, which consists of an upper house called the Rajya Sabha(Council of States) and a lower house called the Lok Sabha(House of People). The judiciary is independent of the executive and the other parts of government in the country.

The number of court complexes is 2,500. India has a Supreme Court at the centre also known as the Apex Court of Justice and twenty-five High Courts in various states some with jurisdiction extending to more than 1 states. Currently, the Supreme Court has 3, the total number of judges in the high courts as sanctioned by the government of India is 1079 out of which 772 are permanent and the remaining 308 sanctioned judges are additional judges, the subordinate judiciary including the district courts have a working strength of 6,693 judges. As of 11 December 2019, about 37% seats in high courts roughly amounting to 398 are presently vacant. Although the Union Government has accentuated on the process of increasing the judge count to 37,000 in the half-decade to ensure the delivery of justice with more efficiency and accuracy that will eventually help in speedy disposal of pending cases in the lower as well as, the higher judiciary.

Judicial Backlog

The Indian Judicial System has an excess of more than 3.3 Crores cases pending before it. Of these, 86% of the backlog can be accredited to the subordinate courts, followed by 13.8% in the High Courts (excluding the newly establish Telangana High Court), the remaining 0.2% of the cases are pending in the supreme court. Like the Delhi High Court has a backlog of 466 years according to its chief justice. It took two decades to solve an unemployment dispute case that to simple, the Uttam Nakate case. According to official data, between 2006 & 2018, a sharp rise in the pendency of cases have been noticed, 86% increase in the Supreme Court, 17% increase in the High Courts, 7% in the subordinate courts amounting to a total of 86% increase. It is often acknowledged that on an average, the time length of a case from the date of filing to the final disposal crosses the life span of the litigant; and in common folklore, it is asserted that litigations in India are handed down from one generation to another as part of their heirloom. It should be remembered, though, that the concept of backlogs does not explain the real reason for the pile-up of court cases. Alternatively, the phrase "backlog" has been misused and the expression "pendency" is the right word to describe today's large number of court cases. As could be noted, the vast number of cases that are currently pending in the Indian courts are minor cases involving motor vehicles, small crimes such as theft, assault, taunt, slap. It is an established fact that the Indian government

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recognises a 40% shortage of judicial human resources.
On January 12, 2012, a Supreme Court bench said that people’s faith in the judiciary was decreasing at an alarming rate, posing a grave threat to constitutional and democratic governance of the country.

It sincerely acknowledged a few of the serious problems such as –
1. A large number of vacancies in trial courts,
2. The unwillingness of lawyers to become judges,
3. Failure of the apex judiciary in filling vacant HC judges posts.

Consequences of malfunctioning Indian Courts

According to DAKSH data of 15 February 2016, selected High courts where data was available to be analysed and sorted into five-year buckets, it was found that the vast majority of cases, 88.26 %, took 10-15 years to decide. As per National Judicial Data Grid (NJDG) data 2018, the number of cases being instituted per year is 1,48,55,296 and the number of cases being disposed of is 1,32,47,672 thus leading us to a deficit of 16,07,624 cases that do not get disposed of every year and thus add to the backlog of cases. The pendency of the Indian Judiciary is not decreasing but is increasing by as much as 16 lakh cases per year.

The slow progress of Indian courts and cases have significant and eminent adverse consequences on the democracy of Indian and subsequently on its economy. Essential questions of constitutional validity are left unanswered for a very long time frame because of the inability of the Courts to constitute for the demands. A prominent example can be seen as slow enforcement of contracts could encourage bad behaviour by borrowers who may detrimentally affect the markets. The implication is that there may be a multitude of arrangements that could result in huge rewards but are not entered into due to lack of confidence in the state judiciary’s enforcement mechanisms. Such defeats can have a huge impact on the state’s economy.

According to the Report on Ease of Doing Business, 2016 by the World Bank that specifically measures judicial performance for investors to look into amongst other parameters, ranked India 12 position above the lowest rank, of 190 countries listed in the survey, India was placed at 178. Countries and our neighbours like landlocked Nepal, economically unstable Pakistan, and even the war-torn Afganistan have been ranked above us. Malfunctioning Indian courts is now not only a domestic problem but have now become an international menace and caused embarrassment to the country.

Nevertheless, no matter how much backlog, how much cases there is at present pending at the Indian courts, the condition can always be improved with the help of Information and Communication Technologies.

Introduction, roles and benefits of ICTs

Introduction

No matter how much backlog, how much cases there is at present pending at the Indian courts, the condition can always be improved with the help of ICT and IT services supporting the administrative

functions of the judicial process. The Judicial Process can be broadly divided into two parts: a) the Judicial function b) the Administrative function

Judicial Function- A judge's primary function is to assign, list, and decide cases. Judges are required to perform these functions in a time-limited manner and in accordance with the relevant procedures. Judicial time is valuable and the emphasis should be on the success of the central judicial role.

Administrative Function- Courts need professional management to ensure procedures are implemented, records are submitted and stored, services are preserved, and human resources are handled for successful operation. The administration of the court must effectively support the judges in carrying out their core judicial function. Efficient administration is a prerequisite for effective judicial function.

India, too, must distinguish the legal roles of its courts and tribunals from its administrative functions, such as those of other nations such as the United Kingdom, the United States, Canada, Australia which will eventually lead to the freeing up of judicial time, which can be used to cover for the first-hand delay caused by the combining of roles.

Role

In 2009, Mr C. P. Gurnani, Tech Mahindra's Chairman, said India's problem of judicial backlog could be reduced to three years with the help of information and communication technologies. Malik (2002) stated that the objectives of the ICT models were to provide integrated support for judicial and administrative functions, to establish interconnections between internal and external judicial institutions, and to develop a means of monitoring and controlling legal services. In a more recent study, L. Philemon found that there was a significant discrepancy between the ICTs and the nature of legal services. This was caused by a lack of knowledge about the use of information technology in legal systems. ICTs enable the judges work more efficiently without worrying about the administrative functions, where the judges can with the help of technologies such as dictating the judgements to a computer screen and it translating the speech of the judges into text and simultaneously publishing it to relevant websites and making available the judgement instantly to the general public or parties concerned.

There is no question that the method of dispensing justice can be made easier, more efficient, more reliable, less time-consuming, less costly requiring fewer manual labour with the aid of Information Technology. In addition to minimising the flow of data and documents attended by accountability in the justice system, the implementation of computer technology in court administration has often made it easier to speed up the delivery of justice.

Benefits of Automation

There are many benefits of automation or the cybernation of judiciary. Benefits range from the crucial aspects of negating the effects of backlogs, pendency, helping the economy to the tiniest benefits such as taking the workload off the shoulders of the already overburdened judges and court official thus streamlining the court management process. The move of automation has brought with it a wave of education and awareness educating the official how to handle complex court servers, how to operate them, how to maintain them and how to work with computers in a workplace where papers were the norm.

Automation means upgradation of the general public, people not only the aggrieved parties but also persons such as researchers, students, scholars advocates.
can now have access to the up to date judgements within seconds of it being awarded, with the aid of internet, the court proceedings can be used for a subsequent case as a precedent in a lower court that might have relevance in a case that it might be dealing in with right at that moment, thus upholding the notions of *stare decisis*. Benefits are the part of the whole package that will be delivered or are getting delivered by the move of automation for the judiciary, the basic principle of the judiciary is providing fair and timely justice to the public whose constitutional or fundamental rights have been breached. Alongside benefits, cybernation brings with it a competitive edge amongst the individual judicial parts like the high courts, the supreme court, the subordinate court, are now trying to complete cases as soon as possible because their data can now be seen throughout the country from an average person at a local train to the PM can follow their proceedings and conducts and thus have turned up many folds the transparency of the court management, they are therefore extra careful and which in turn have reduced their discrepancies and have enhanced the decision making process. Technology's most significant impact on the judicial process has been in the area of proceedings. Increasingly, investigative entities have come to rely on forensic methods such as fingerprint processing, speech, signature, handwriting, blood samples, DNA, and other body substances to gather evidence. Technology is also used to recreate the suspect's photographs to support the investigation. Other benefits include making the speciality more accessible to both rural and urban areas, reducing prohibitive travel and related costs for litigants, opening up new opportunities for continuing education for isolated or rural legal practitioners, and reducing legal care costs for rural practitioners.

**National Action Plan for ICT implementation in Indian Judiciary**

Back in the mid-2000s, a proposal was sent to the Ministry of Law and Justice for the creation of an e-committee to formulate a national computerisation strategy for the Indian Judiciary and to advise the judiciary on technical, technological, communication and management changes. Under the chairmanship of Dr Justice G.C. Bharuka, a retired judge of the Karnataka High Court, the Union Cabinet approved the creation of an E-Committee with three other expert members. Hence came to be the Supreme Court of India's E-Committee which drafted and released a national policy in 2005.

ICT implementation was aimed at increasing legal productiveness, both qualitatively and quantitatively, and at enhancing the affordability, cost-effectiveness, accessibility, accountability and transparency of the justice system.

The action plan is has been categorized into three phases:
(i) Initiation of the ICT Implementation;
(ii) Coordination of ICT infrastructure;
(iii) ICT coverage of the judicial process as well as other functions of administration.

The E-Committee is the central ICT enforcement body. A national advisory group was formed, consisting of representatives of the NIC, the Indian Institute of Technology, the Indian Science Institute (IISc), the judiciary and the ICT industry.

The main project of the e-committee is the E-COURTS PROJECT which entered into phase 2 of its process and implementation on 8th January 2014. In its phase 1, it computerised 14,249 district & subordinate
Courts with a total budget of 935 crores. In phase 2, it is to further enhance the ICTs in courts by computerising more than 8000 new courts, judicial academies, legal service authority offices, connecting all courts with the NJDG through wide area network, enabling citizen eccentric facilities, introducing mobile apps and e-processes such as e-filling.  

**Reviewing the pace of Digitisation**

Digitisation of the Indian Judiciary has come a long way; it is a slow process, yes, but that of tremendous benefits. From typing the whole judgements of thousand of pages on manual typewriters and then keeping it in courtroom records to entering it into keyboards by trained professional and uploading it within the blink of an eye, the judiciary has come a long way in the decade. The pace of digitisation in a country which have the world’s largest illiterate population of adults, amounting upto a total of 287 million people, we can proudly say that the results of almost a decade long struggle now have shown some significant progress and is continuing to show encouraging results. The pace of digitisation can be reviewed by using some eminent indicators of the judicial system, like:

i. Increase in number of computerised courts

ii. Successful roll-out of the National Judicial Data Grid (NJDG)- opened for public access in September 2015 now it has 7 crores pending and disposed cases and more than 4 crore judgments/orders.  

iii. Roll out of e-court services

iv. Records of electronic transactions for e-courts- As on January 2014, there were around 2 crore transactions, it jumped to 1 Arab transaction (1,83,66,17,941) crores electronic transactions in 2019, and have been hailed as one of the topmost accessed services of the government.

While the Information Revolution arrived in India some years ago, automation has not transformed all facets of life in equal measure. It has not permeated to the Subordinate judiciary, in particular, resulting in old work methods based on manual systems being continued even now. The enormous problems being faced by the judiciary due to arrears, backlogs, and delays can be partly resolved by the introduction of automation in subordinate courts. The problems faced by the courts, the judiciary and the people seeking justice are well recognized in terms of backlogs, delays and expenditures. While these issues have many dimensions, improvements in operational efficiency, coordination, accessibility, and speed that IT could bring about can make a significant contribution to improving and mitigating difficulties. The current pace of development, however, is too slow, especially at the subordinate court level, and is unlikely to have the desired impact in the near future.

**International benchmarks**

The Indian Judiciary is no the only judiciary in the world which have embraced the concept of cybernation, many developing nations, as well as the first world countries, have adopted the notion of taking help from the machines to improve efficiency and

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reduce overall workloads of the judiciary in their own countries.
Some countries have outperformed every other nation out there in implementing cybernation throughout their judiciary and thus have in the process set certain benchmarks which could be compared to the Indian context. Some of the countries and their widely recognised international benchmarks are discussed under.

- **SINGAPORE**
  a. Began court automation in 1990
  b. All the features of the eCourts Project of India
  c. e-Litigation in its Supreme Court, whereby lawyers can access court files and file documents online
  d. 14 September 2008, Political and Economic Risk Consultancy (PERC), conducted a survey and reported that Singapore along with Hong Kong, had the best judicial systems in Asia.258
  e. In 2010, Singapore was ranked number 1 in the Rule of Law Index by the World Justice Project for access to civil justice in the high-income countries group.

- **LUXEMBOURG**
  a. started computerising courts and public prosecutor’s office in 1985, called “criminal chain.”
  b. Computerisation in civil and administrative matters started in 1998

- **ICELAND**
  a. promoted significant increases in productivity in the court system and a substantial shortening of case handling time since 1992, with concomitantly better access to courts.

- **SOUTH KOREA**

- **AUSTRIA**
  a. judicial automation application in 1986 and re-designed and improved it further in the late 1990s among other things to enable internet access of data.

Although India also started automating its judiciary and judicial processes in the 1990s, it still have not reached the same level as other countries have, it lags behind the countries with fewer resources and opportunities, the process of digitisation have not been upto the mark in Indian Judiciary and thus have to lead it into a position no better than it previously was.

**Reform & Plaudit**

In order to strengthen the judiciary with ICT and IT services for a more effective digital administration, many reforms have been introduced some of them have been successfully implemented and completed while some of them are ingoing endeavours.

Most eminent projects and reforms that are in process and have been already established into the daily routines of the judiciary are:-

1. **e-Courts Mission Mode Project**
In order to enable courts to reform the Indian judiciary by means of the ICT, the e-courts project was conceptualised in line with the "National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the Indian Judiciary" put forward by the Supreme Court of India's e-Committee. The e-Courts Mission Mode Project is a pan-India project that is managed and funded across the world by the Government of room/political-economic-risk-consultancy (last visited Dec 8, 2019).
India, Department of Justice alongside Ministry of Law and Justice, for District Courts. The e-Court Project's main goals are to provide effective and prompt citizen-centric service delivery, Developing, integrating and executing court decision support systems, automating systems to provide its customers with access to information accountability and to increase the effectiveness of the judiciary qualitatively and quantitatively, to make the system of provision of justice available, open, cost-effective and transparent.

2. Integrated Case Management Information System (ICMIS) - Integrated case management information system for case-related information acts as a public archive. This digital filing system will allow India's Supreme Court (SCI) to go paperless. The duties include e-filing cases, reviewing listing times, case status, and electronic notice / summons service, office records, and overall surveillance of a case filed with the supreme court registry.

3. E-Causelists

4. Interoperable Criminal Justice System (iCJS) - The Interoperable Criminal Justice System (iCJS) was established to promote data exchange between the courts, police / prosecution, prisons, and forensic laboratories for the purpose of speedy justice. NIC has developed a Case Information System, e-Prisons and Kanoon Vyavastha program (based on CIPA software), for the Cover Court, Prisons and Police Stations of the District. NIC Himachal Pradesh has developed the eFSL framework, using online data exchange, for a workflow-based interface between police stations and state forensic laboratories.

5. National Judicial Data Grid - A part of the ongoing e-Courts Integrated Mission Mode Project is the National Judicial Data Grid (NJDG). NJDG will function as a monitoring tool for identifying, managing and reducing case pendency. Dr. Ashwani Kumar, Law & Justice Minister, told in a written reply to the Rajya Sabha that it would also help provide timely feedback for policy decisions to minimize delays and systemic bottlenecks, facilitate better tracking of court results and systemic bottlenecks, and thus facilitate better use of resources. The NJDG must cover all types of cases, including those related to the field of juvenile justice.

6. E-Filing

7. Video Conferencing Facility - Video conferencing is one of the most beneficial products of this technological age that has allowed audio and visual contact between two or more people at different locations. The use of the Indian Court video conferences decreases researchers' and judges' workload and also serves as an affordable solution for witnesses who have to come to court from elsewhere from a city. Proof may be provided by video conferencing and other electronic means before the courts.

Reforms vis-à-vis Maladies due to digitisation
There are two major concerns of the ushering of information technology into the judiciary. One is very basic, the significant problem gendering the growth of India, the Digital Divide, and the most deep-rooted maladies of the 21st century in regards to Information Technology, The Privacy Concern.

The Digital Divide

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The fundamental concern when enabling the judiciary with technology is whether the general public of the country is educated enough to understand the complexity of the system that is placed to make their life easier. It again boils down to the basic illiteracy rate as well as the gap between the literate and the technologically literate people. Yes, the technologically literate people, as the state of Indian judiciary is these days, as stated earlier, cases tend to go on a long way in time often throughout the lifespan of the litigant thus making it technologically outdated and unable the person to understand advanced technologies without help. Not only elderly become helpless when it comes to services such as e-causelist or e-filings, but many youths of today also get into trouble, not all youth of India or the so-called younger generation are convent or cbse educated. According to data available at Ministry of Statistics & Programme Implementation, IN URBAN AREAS only 32.4% persons can operate a computer, 37.1% were able to use the internet and only a mere 33.8% had used internet for the last 30 days of the observation period. IN RURAL AREAS, 9.9% were able to operate a computer, 13% were able to use the internet, and 10.8% used the internet during the last 30 days of the observation period.

Only implementing a range of technological advancements into the system will not help, it will only help when the consumers and the customers on the receiving end of the facilities will be able to operate and navigate through them, without any assistance and in a country like India where 37% of the world’s illiterate mass resides, it will be a huge step. It needs to be planned and rolled out in phases by the Union Government in conjunction with the State Governments with projects and action plans elaborate enough to reach to everyone who can, is or wants to avail the services of the judiciary.

The Privacy Concern

As of January 2019, 57% of the world population have access to the internet and gazillion information available on it. Being connected to the most extensive information database of the world, however, comes with a price of its own, the privacy concern. This is not something new that the 21st-century millennial generation is not aware of. Today our shopping preferences are used to show us ads on other websites, google statistics tracks your activities on third party websites to increase your browsing experiences by preloading webpages, and then there are the mainstream data and privacy breach concerns and invasions. Day in day out we hear news about some new models of phones getting leaked, or a celebrity’s personal data getting dumped into public image domains. Indian Judiciary is also vulnerable to privacy attacks, with its digital infrastructure still at a nascent stage it can be observed that it will not be too difficult for businesses to use the data available online from the courts to their benefits. Although website such as the e-courts websites, high court websites and all other National Informatics Centre(NIC) launched websites, do come with SSL protections that make privacy breach a tough job. But functions such as independently developed district court websites, servers without protection services, untrained employees can be a threat to privacy. Not only is digital privacy is of concerning nature in this aspect, but privacy in regards to discrimination is also at large in the Judiciary these days. Many a time court management staff and non-judicial staff such as counter clerks who first-hand use services like e-filing discriminate the
aggrieved parties from day 1 and make opinions about them, often in the course of litigation influencing other court officials in behaving in a prejudiced manner. Sometimes, case data can be used to pressurise people into contracts that they are unwilling to uptake or defame the person by indicating that he has a case going on in the court.

This type of discrimination can be prevented if lawyers are issued unique id and access codes and so are the parties or if account creation is required for viewing the details of a case, or it can be done so by the linking of mobile number that one will be able to see only his or her case and no other. A complaint cell or a redressal agency should also be setup so that concerned and aggrieved persons can file a complaint which could then be resolved.

From my personal experience, while searching the NJDG website for an email address to contact them, I was unable to find it indicated anywhere in the whole website which I could have used to request for some information that would have further substantiated my arguments and my knowledge.

**Recommendations**

A number of judicial reforms are urgently needed in our country. It is crucial not only for social welfare but also for economic welfare as a sound and effective dispute resolution and justice system would attract more foreign investors. It is time for the judiciary to take some strong steps to ensure that the system as a whole works quickly, such as reducing vacations to a week in subordinate courts and higher courts. There is a need to increase the court’s daily work time by at least half an hour. To avoid unnecessary delay, adjournments must be given solely in accordance with the provisions of ‘Order 17 of the Code of Civil Procedure.’ About judicial reforms, the recommendations of the Report of the 230th and 245th Law Commission also need to be implemented. It is also crucial for the courts to realise that certain types of cases are to be tried as soon as possible, as in cases of rape, the victim must not wait for justice for 10-20 years, in cases of terrorism where the chances of prosecuting innocent people are high due to police pressure to act quickly, the courts must prosecute those cases as soon as possible so that the State itself does not give birth to victims.

Some other ideas or projects that the Government could take up and implement are:

1. **The Courtroom 21 Project**
2. Increasing the budget given to the judiciary by their respective governments, as of now, the average national spending on judiciary is 0.08% of the GDP, except Delhi which spends 1% of its budget on judiciary. Due to this India loses around 0.5% of its GDP annually (Rs. 50,387 crores).

**CONCLUSION**

The independence of its judiciary is one of the great strengths of the Indian state. When such acts were in violation of the Constitution, the judges have generally not hesitated to take action by the executive or the legislature. The Indian liberal democracy has accomplished impressive accomplishments.

However, there are also significant problems in the judiciary. Tribunals are obstructed by huge backlogs and cases take very long from beginning to end. There are major negative effects for Indian democracy and economy on the slow progress of court cases. Citizens lose faith in the activity of key state institutions; people and companies are
confident in their contract renegade because the execution of contracts is weak. Worse, there is a strong motivation to refuse, provided that only long and slow litigation costs are to be expended, which is also to be conducted by the counterpart.

The problem can not simply be solved by changes in law; good laws can not replace poor systems of justice. The vacancies in the courts are one big problem. But it is not a solution to name additional judges. Judges must increase their effectiveness. In doing so, the administrative roles of courts should be segregated from their legal duties and these administrative functions should be transferred into a separate entity.

The size and complexity of the court system in India, and the many alleged inefficiencies associated with it, have centred the government on financing vast improvements in the legal administrative court structure. The implementation of information and technology and the attention given to a number of initiatives, many of which have been mentioned previously, have begun to rebuild and re-shape the efficiency and complexity of the legal landscape in India which have a long complicating history. However, the size of the task is significant and it will take time.

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AAEC INVESTIGATIONS AND THE CCI

By Devesh Kapoor
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ABSTRACT
The following paper talks about and briefly explains the landmark 16th October, 2019 judgement of the Bombay High Court to adjudicate a jurisdiction matter between Star and Sony on one side and the CCI (Competition Commission of India) and Noida Software Technology Park Ltd. on the other. The crux of the matter revolved around 2 Investigation Orders that the CCI had issued against Sony and Star for probable AAEC (Appreciable Adverse Effect on Competition) and whether they had fit grounds for the same.

BACKGROUND
The issue between NSTPL (Noida Software Technology Park Limited) and Sony Pictures Network India Pvt. Ltd. and Star India Pvt. Ltd. stemmed from the contention that a HITS (Head-end In The Sky) distributor, such as the NSTPL, is similar to DTH (Direct-To-Home) operators and pan-India MSOs, and thus, should not be offered rates less favorable that those by Media Pro Enterprises India Private Limited (Content Aggregator for Star) and MSM Discovery Pvt. Ltd. (Content Aggregator for Sony) to MSOs and DTH operators.

After NSTPL entered into RIO (Reference Interconnect Offer) Agreements with Sony and Star, TRAI published new guidelines which dis-allowed content aggregators (incl. Media Pro and MSM) from TV channel distribution. So, NSTPL entered into new RIO Agreements with Sony and Star. But, owing to non-payment of dues, Sony and Sony discontinued signals to NSTPL.

NTSPL filed information under Section 19(1) against IBF (Indian Broadcasting Foundation) and Star and Sony in the CCI alleging collusion between Broadcasters which was in violation of Section 3(3), pertaining to price discrimination vis-à-vis other MSOs (Multi-System Operators) and anti-competitive practices.

The CCI passed 2 orders for investigation under Section 26(1) of the Competition Act to inquire possible contravention of Section 3(4) of the Competition Act. Ad-interim relief restrained CCI from taking coercive steps against Star and Sony.

ISSUE
Whether the 7th December 2015 Order decided necessary jurisdictional facts, which enabled CCI to pass the Investigation Orders?

ARGUMENTS SUBMITTED BY PETITIONERS
Star
1. As per CCI v. Bharti Airtel259, the CCI was beyond jurisdiction in passing those orders, as they could have only exercised their jurisdiction post the TRAI/TDSAT found that the parties have indulged in any anti-competitive practices.

2. CCI disregarded the pending adjudication of the price determination issue before the TDSAT.

3. The issues raised in the 2nd TDSAT Petition are jurisdiction facts which only expert regulatory bodies (such as the TRAI/TDSAT) are equipped to adjudicate upon, creating a sine non qua for the exercise of power, as per S.K. Maini v.

259 (2019) 2 SCC 521
Carona Sahu & Ors.\textsuperscript{260} and Arun Kumar & Ors. v. Union of India & Ors \textsuperscript{261}.

4. CCI must form a \textit{prima facie} view with reasons before passing an order under Section 26(1), which is also a \textit{sine non qua} for exercise of power.

5. CCI had not satisfied the ingredients of Section 3(4): \textit{Prima facie} finding of: (i) existence of agreement refusing to deal and (ii) agreement causes/likely to cause AAEC.

6. CCI could not have formed any \textit{prima facie} view without having undertaken of factors under Section 19(3).

7. A direction to the Director General to investigate will stai Star with a stigma.

Sony
Excluding repeated submissions: Sony submitted that the Order ignored false statements and suppression by NTSPL to protect themselves from defaults.

ARGUMENTS SUBMITTES BY CCI
1. CCI v. Bharti Airtel did not lay down the standard as crusaded by the Petitioners.

2. TRAI has conclusively ruled that anti-competitive behavior exists in relevant market under its Order.

3. 2 Forms of abuses exist in Section 3(4), “tie-in-arrangement” and “refusal to deal”, which are present and relevant to this case and provide exercise of power to the CCI under Section 18 (Competition Act).

4. The Order formed a \textit{prima facie} rationale and confirmed violative conduct.

5. The proceedings subsequent to passing of the December 7, 2015 Order were ‘\textit{in personam}’ disputes between parties and are not relevant to the Competition Act issue pertaining to mandate.

6. The conduct of the NTSPL is irrelevant for the issue of investigation under the Competition Act, as they were mere informants.

7. The decision to investigate is a \textit{prima facie} view taken in administrative capacity, as per CCI v. SAIL \textsuperscript{262}.

8. The 7\textsuperscript{th} Dec, 2015 Order was not a ‘general’ order. Disputes between NSTPL and the Petitioners are \textit{in personam} whereas anti-competitive behavior and market abuse are matters \textit{in rem}. The latter has been conclusively determined by the TDSAT.

9. The CCI does not have jurisdiction to grant party-specific relief, but that rests with the NCLAT. Also, CCI v. Bharti Airtel did not deal with similar facts to this case, with the exception of market abuse in the telecom sector.

10. “Refusal to Deal” and “Refusal to Supply” were ascertained a meaning by 2 documents on EU Competition Law.

HELD
Writ Petitions against the Impugned Order are maintainable and Investigation Orders passed under Section 26(1) quashed and set aside.

ANALYSIS
The 7\textsuperscript{th} December 2015 Order does not consider whether NSTPL is “similarly placed” with other distributors and that Order was a ‘general order’. The issues framed in the 1\textsuperscript{st} TDSAT Petition were ‘industry-wide’. The Order adjudicates

\textsuperscript{260} (1994) 3 SCC 510
\textsuperscript{261} (2007) 1 SCC 732
\textsuperscript{262} (2010) 10 SCC 744
general issues and none of the NSTPL allegations have been settled by that Order. The 7th December 2915 Order was, thus, not an Order dealing with ‘in personam’ issues.

Petitioners and CCI were ad idem to the onus on CCI under Section 26(1). Thus, a prima facie finding AAEC would be needed before CCI could investigate, which the Investigation Orders did not have. Forming an opinion was ruled sine qua non for CCI to exercise jurisdiction.

While CCI did establish that Sony and Star held a dominant market position, they failed to provide likelihood of AAEC under Section 19(3) while passing the Investigation Orders under Section 3(4). This was based on Shri Sitaram Sugar Co. Ltd. v. Union of India 263.

To hold a prima facie contravention, CCI needs to form a prima facie view that an agreement exists between Star/Sony and NSTPL providing for refusal to produce, supply, distribute, store or trade in goods and provision of services with/to NSTPL and that such an agreement causes AAEC. CCI failed to reach such a finding, which formed the mandatory jurisdictional prerequisite of a prima facie view of contravention of Section 3(4).

The factors to arrive at such prima facie view, as under Section 19(3), were not even considered.

As TDSAT ruled that in personam disputes survived despite the 7th December 2015 Order, a change of stance of Star India with respect to the same is irrelevant.

As TDSAT did not accept the contention that NSTPL signed RIOs in protest, the High Court also followed.

263 (1990) 3 SCC 223

As the ‘price discrimination’ allegation is yet to be adjudicated in the 2nd TDSAT Petition, the Court cannot adjudicate the same, as the issue is pending adjudication in TDSAT and in accordance with CCI v. Bharti Airtel, the Court cannot go into the merits of the case.

Thus, essentially, the 7th December 2015 Order was a general order and did not address the needed jurisdictional facts to allow CCI to pass a valid Investigation Order.
FINANCIAL CREDITOR, OPERATIONAL CREDITOR AND AN OVERVIEW ON HOME-BUYERS UNDER INDIAN BANKRUPTCY CODE

By Hariharan V
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1. Introduction
The terms insolvency and bankruptcy are used with reference to the financial position of a person and a corporation or a company. The term Insolvency is a state whereas Bankruptcy is the effect of that act. In legal terms, insolvency is a state where the liabilities of an individual or an organization exceeds its asset and that entity is unable to raise enough cash to meet its obligations or debts as they become due for payment. When an individual is unable to pay off his liabilities and debts then he generally files for bankruptcy. Here is asks for help from government to pay off his debts to his creditors.

There are two personal insolvency acts in India, Presidency Town Insolvency Act, 1902 covering Kolkata, Chennai, Mumbai and the Provincial Insolvency Act, 1920 applicable to other part of India. Which being amended from time to time since being under List II of Schedule VII under Article 246 of the Constitution. Both the statutes govern about the procedure as to petition, adjudication, administration of properties and discharge of the insolvent, also attach criminal liability and other offences for certain acts of the debtor. The Section 8 of PIA and Section 107 PTIA, explicitly provides with an exception, by barring the right to initiate insolvency proceedings against corporations. Various other options to recovery of money was also available to the Debtors were also available under Section 13 of The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act). The Insolvency and Bankruptcy Code, 2016, has the provisions related to Individual Insolvency process, but it has not been officially enforced by the Government, whereby the Chairman of Insolvency and Bankruptcy Board of India has assured for the commencement of IBC for individuals soon, thereby repealing the earlier acts on individual insolvency process. On December 1, 2019, the Notification No. S.O. 4126(E) enforced the Insolvency & Bankruptcy (Application to Adjudicating Authority for IRP for Personal Guarantors to Corporate Debtor) Rules, 2019 as passed by IBBI, opening the scope of liability to the Personal Guarantor for a corporate debtor, thereby opening the scope for individuals under the IBC.

The Corporate insolvency law was passed for the first time by the British Parliament as Joint Stock Companies Act, 1844, and other enactments of 1848 and 1849 acts, whereby the bankruptcy and winding procedure was separated exclusively. Prior to the IBC, The Companies Act, 1956 and Sick Industrial Companies (Special Provisions) Act, 2003 governed the rights so the Creditors and the Debtor Companies, still greatly mis-used. IBC was notified as on 28th My, 2016 and the repeal of SICA came into full effect from December 1, 2016. Mistakes of the past were rectified and IBC opened a wide scope and aimed to resolve issue through more effective

provisions. The code established three new institutions such as Insolvency and Bankruptcy Board of India (IBBI), Insolvency Professional Agencies (IPA) and Insolvency Professional to regulate and render services as to the insolvency process.

2. **Financial Creditor and Operational Creditor**

The term ‘creditor’ as introduced in Companies Act, 2013 has now been expanded to two new distinct concepts of ‘Financial Creditor’ and ‘Operational Creditor’. The Section 5(7) of IBC defines Financial Creditor as, “A person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred”. For a person to be deemed to be a financial creditor the debt owed by him must be within the ambit of the term ‘Financial Debt’ as under Section 5(80) of IBC. Section 5(80) states that “A debt along with interest, if any, which is disbursed against the consideration for time value of money and includes-

a. Money borrowed against payment of interest;
b. Any amount raised by acceptance under any acceptance credit facility or its dematerialized equivalent;
c. Any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
d. The amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;


e. Receivable sold or discounted other than any receivable sold on non-recourse basis;
f. Any amount raised under any other transaction, including, any forward sale or purchase agreement, having the commercial effect of borrowing;
g. Any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
h. The amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause”

Likewise, Section 5(20) of IBC defines the term ‘Operational Creditor’ as, “Any person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.” For a person to be deemed to be an operational creditor the debt owed by him must be within the ambit of the term ‘Operational Debt’ as under Section 5(21) of IBC. Section 5(21) states that, "A claim in respect of the provisions of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority”.

The Final Report of the Bankruptcy Law Reforms Committee, 265 has observed that “Operational Creditors are those whose liability from the entity comes from a transaction on operations. Thus, the wholesale vendor of spare parts whose spark plugs are kept in inventory by car mechanics and who gets paid only after the

(Last visited on Nov 28, 2019; 11:15AM).
spark plugs are sold is an operational creditor. Similarly, the lessor that the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three-year lease.”

2.1. Constitutional Validity of Differential treatment to Operational Creditor and Financial Creditor in the Code

The preliminary difference of OC and FC was given in the case of Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors. where the constitutional validity of Section 7, 8 and 9 of the IBC was challenged on the grounds that Article 14 is violated due to the differential treatment given to the Financial and Operational Creditors in the Code. The major question of law involved are,

1. Both the Financial and Operational Creditors has no difference since the debtor is to pay the outstanding dues to both, thus lacks intelligible differentia.

2. The Operational Creditor has to give a notice to the debtor before initiating any proceeding under the Code, whereas the Financial Creditors are not required to give any such notice and can directly initiate the resolution proceedings by mere default in payment by the debtor.

3. The Operational Creditors are excluded from the Committee of creditors, and are eligible only if the debt amount is 10% of total debts owed by the Debtor.

The Court answered that the Financial Creditors are usually the banks and other financial institution where the debt owed are usually secured and involve a huge amount of money. Operational creditors are the suppliers of goods and services that are required in the normal course of business like that of a trade debts and wage or salary claims where the debt owed are unsecured and small amount of money. The Court held that “preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.”

Regarding the notice under Section 8 of the Code, in the operational debts, non-delivery of goods or deficiency in services can be the matter of adjudication and also the number of operational creditors is more and which might arise false claims thereby affecting the legislative intent of the Code. But the financial debt or the loan agreement already has a pre-determined clause for the repayment if the debt amount which cannot be disputed, since the debtor is well aware of his obligations under the agreement. The Court also stated that for a financial creditor, it is enough to prove the default in payment, but the operational creditor must have the right to claim and then only he is obliged to show the default.

The Committee of Creditors (CoC) as under Section 21, is constituted as a body for financial creditors since the they are bound to evaluate the resolution plan on basis of feasibility and viability. The Court held that Financial Creditors are better equipped to determine the viability of the Corporate Debtor and financial reconstructing, while the Operational Creditors are concerned with the payments for the goods or service provided to the Debtor. As under the Section 30(2)(b) read with Section 31 the operational creditor shall receive not less than liquidation value under the proposed

266 Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors., Writ Petition (Civil) No. 99 of 2018.

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resolution plan. Regulation 38 of the regulations framed under the Insolvency and Bankruptcy Code was even amended in October 2018 to state that, “The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.” The Court clearly showed the reasonable treatment that is given to the operational creditors by the Code, in no way does the Code undermine the rights of the operational creditors.

The opinion of the Court in regards to the banking and other financial institution whereby they have secured their debt to the Corporate debtor can be accepted but when moving on to the any unsecured debtor will have the same legal stand of the Operational Creditors, though the amount due owed may be huge, still it can be disputed by the Debtor and which has to be adjudicated by any other Adjudicating Authority to provide them with the legal right to claim the debt. Thus, classification as Financial and Operational debtor still stands unclear in the view of law.

3. Powers of HC over NCLAT when the NCLT order is out of Jurisdiction

Though following the stand taken as to the difference between the Operational and Financial creditor is valid in law by the SC, in the case of M/s. CloudWalker Streaming Technologies Pvt. Ltd. vs M/s. Flipkart India Pvt. Ltd., the National Company Law Tribunal, Bengaluru Bench since the ‘deficiency of the goods’ was disputed by the Flipkart in any court before the IP was filed by the CloudWalker, and also did not respond to the demand notice issued to them under Section 8 of the Code. Thus, the NCLT imposed moratorium as under Section 14 of the IBC and also appointed an Interim Resolution Professional for conducting the Corporate Insolvency Resolution Process (CIRP) for an outstanding amount of Rs. 26.95 Crores. Which was latter stayed by the Karnataka High Court as the Order passed by NCLT was beyond its jurisdiction.

On an analysis of order passed by the NCLT, as stated by the SC in Swiss Ribbons Case (Supra.), the CloudWalker is an operational creditor, therefore the first question of the Right to Claim has not yet been adjudicated by any adjudicating authority since there exists Question of Facts and enquiry as to ‘Deficiency of goods’. Thereby the NCLT cannot be the competent authority to adjudicate the dispute on claim, the Civil Courts are entitled to do. The CIPR initiated by NCLT without the answer to the legal question on right to claim being not adjudicated by the Civil Court, is arbitrary and the Karnataka HC has upheld the Rule of Law by staying it. The question on trespass of law as to the Right to appeal against the Order of NCLT lies in NCLAT, has been affirmative from the Stay Order of the HC that Article 226 can be invoked when the Order passed by the Authority is without jurisdiction.

In the latest case of M/s Embassy Property Development Pvt. Ltd. v. State of Karnataka, where the Division Bench observed that the distinction between the lack of jurisdiction and the wrongful


exercise of the available jurisdiction, should certainly be taken into account by High Courts, when Article 226 is sought to be invoked bypassing a statutory alternative remedy provided by a special statute. The Court also held that NCLT is not even a civil Court, which has jurisdiction by virtue if Section 9 of the Code of Civil Procedure to try all suits of a civil nature expecting suits, of which their cognizance is either expressly or impliedly barred. Therefore, NCLT can exercise only such powers within the contours of jurisdiction as prescribed by the statute, the law in respect of which it is called upon to administer. These two judgements thus crystallise the extent of jurisdiction of the NCLT and NCLAT. The resolution professionals, resolution applicants as well as other concerned parties can now explore the possibility of approaching the high courts with regard to issues which relate to public law, albeit in relation to corporate debtors undergoing CIRP.

4. Constitution of CoC – Inclusion of a member from OC

Further to uphold the rights of the Operational Creditors, in the case of SBI v. Bhushan Steel, Operational Creditors interest were protected by the Court. The general rule is that the Operational Creditors do not form a part of Committee of Creditor unless they represent 10% or more of the aggregated debt, therefore the haircut of 37% on their debts, as proposed by Tata Steel is much more than Financial Creditors as they are ones voting for the acceptance of the resolution plan. This is turning into a cyclic process which if not rectified immediately will end up damaging the economy of the country as operational creditors are usually Small and Mid-size Enterprises which provide a huge employment to the society. The first step can be mandatorily involving at least one member in CoC representing Operational Creditors interest.

5. Home Buyer’s position in IBC

In the case of Col. Vinod Awasthy v. AMR Infrastructure Ltd., the NCLT classified Flat Purchaser as neither Financial Creditor or Operational Creditor. The Hon'ble Tribunal observed that the framers of the IBC had not intended to include within the expression of an 'operation debt' a debt other than a financial debt. Therefore, an operational debt would be confined only to four categories as specified in Section 5(21) of the IBC like goods, services, employment and Government dues. The Tribunal held that the debt owed to the flat purchaser had not arisen from any goods, services, employment or dues which were payable under any statute to the Centre / State Government or local bodies. Rather, the refund sought to be recovered by the Petitioner was associated with the possession of immovable property. It also emphasised that the petitioner had neither supplied goods nor had rendered any services to acquire the status of an ‘Operational Creditor’. It also held that it was not possible to construe Section 9 read with Section 5(20) and Section 5(21) of IBC so widely to include within its scope since the petitioner had alternate remedy available under the Consumer Protection Act and the General Law of the land. The Hon'ble Tribunal has also in subsequent cases before it, namely, Mukesh Kumar v. AMR Infrastructure Ltd and Pawan Ltd., C.P. No. (IB) 10 (PB) of 2017.

Dubey v. J.B.K. Developers Pvt. Ltd. passed similar orders. The NCLT bench of Allahabad, in the case of IBDI Bank Ltd. v. Jaypee Infratech. Ltd., where the court differed from all the other previous judgements and answered the question as to the classification of the home buyers or the allottees under Financial Creditor or Operation Creditor. The court held that the amount paid to the builder by the Buyer is the amount that funds the Builders to complete the construction work, thereby the amount is within the ambit of the Financial Debt, that finances the construction of the work, so they are financial creditors.

The Supreme Court made a precedential judgement in the case of Pioneer Urban Land and Infrastructure Ltd. v. Union of India, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 which amended the IBC, following the under Real Estate (Regulations and Development) Act, 2016 (RERA) which gave status of financial creditor to the home buyers and allottees under IBC, was challenged before the Supreme Court. Section 18 of RERA gave the allottees the right demand refund of the entire amount paid by the allottees, along with the interest and interest to be claimed for any delayed possession, which was in accordance with the IBC’s classification of Financial Creditor, but the defect in the RERA was that the interpretation of the provision lead to a confusion as to whether the allottees are Secured/Unsecured Financial Creditors or an Operational Creditor, thus ended in a conflict to with the IBC.

After a detailed analysis of the relevant definitions, the Supreme Court observed that the sale agreement between developer and home buyer would have the 'commercial effect' of a borrowing, which means that money is paid in advance for temporary use so that a flat/apartment is given back to the home buyer. Further, the Supreme Court clarified that both parties have 'commercial' interests in the same – the real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by such sale of the apartment. The Supreme Court thus came to the conclusion that the amounts raised from the home buyers under real estate agreements, with profit as the main aim, are, in fact, subsumed within the definition of 'financial debt' under Section 5(8)(f) of the IBC, even without adventing to the explanation introduced by the Amendment Act.

The Supreme Court has taken a significant leap in holding that the IBC is a 'beneficial legislation' that can be invoked by unsecured financial creditors like home buyers. Keeping in mind that time is of the essence under the IBC, the Court has also reminded the Government that it must provide adequate infrastructure to the NCLTs and the National Company Law Appellate Tribunal (NCLAT) for expeditious disposal of applications filed by home buyers under the IBC. It has also asked the Government to appoint permanent adjudicating officers, real estate regulatory authority and its Appellate Tribunal within three months from the date of the Pioneer Judgment.

In essence, the judgment re-affirms the rights of home buyers as financial creditors under the IBC. While this is a landmark judgment for genuine home buyers, there is a long battle in store for the real estate industry, which is already reeling from

275 Pioneer Urban Land and Infrastructure Ltd. v. Union of India, Writ Petition (Civil) No. 43 of 2019.
severe liquidity issues and other operational hurdles. The Supreme Court also held that the RERA has to be read harmoniously with the IBC and, in the event of a conflict, the IBC will prevail over the RERA.

Thus, the confusing classification as to deciding upon the classification of the Home Buyers was put to an end by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, which finally put them within the ambit of Financial Creditors.

5.1. Other conditions laid down by the Courts

Various Courts of the land laid down certain conditions to make the home buyers fall within the ambit of the IBC, such as,

- In the Case of *Nikhil Mehta & Sons v. AMR Infra. Ltd.*, the NCLT held that if there exists an agreement between the Buyer and the Builder, in which a clause explicitly states about the return of money, then the buyers are classified under Financial Creditors, which was also supplemented by *Anil Mohndroo v. Earth Organics Infra.*

- In the case of *Anil Kumar Tulsiani v. Rakesh Kumar Gupta*, the NCLT held that when the allottee is already in default of payment of the full amount to the builder, then there is no right to claim and cannot initiate any proceedings under IBC.

- In the case of *Ajay Walia v. M/s Sunworld Residency Pvt. Ltd.*, the NCLT held that when the buyer has entered into an tripartite agreement with the Builder and the Bank on loan, thereby the Buyer subrogates the rights to he bank and thus he does not have the right to claim, which exists in the hands of the Bank. Thus, the person neither a financial creditor or a operational creditor, so he cannot initiate any proceedings under IBC.

5.2. Other judgements to provide with justice

The SC rather than deciding upon the classification of the Home Buyers it went to the real question of giving a proper remedy to the Home Buyers.

- In the case of *Chitra Sharma v. Union of India*, the Apex Court decided to allow the Home Buyers to participate in the CoC, and provide with their grievance. Thus, not explicitly stating if they were a financial creditor or a operational creditor with more than 10% of the total debt to be allowed to participate in the CoC.

- In the case of *Bikram Chatterji v. Union of India*, the Court went to an extent of ordering the Builder to complete the construction of homes and protected the interest of the home buyers.

5.3. Misuse of law

After prima facie default is made out on an application under section 7 of the Code, the burden shifts on the promoter/real estate developer to point out that the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment, as stated in the Pioneer Judgement by the Supreme Court.

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278 Anil Kumar Tulsiani v. Rakesh Kumar Gupta, Company Appeal (AT) (Insolvency) No. 35 of 2019.
It is found that unscrupulous or speculative homebuyers are trying to disrupt a well-running real estate company thereby misusing the laws. “There have been complaints that a single homebuyer, who could be a speculative buyer, is trying to dislocate otherwise well-run real estate companies. In Mumbai, many such cases have been admitted. As a result, half of the cause list (in National Company Law Tribunal) comprises real estate companies,” Injeti Srinivas said in a conference organised by the Insolvency and Bankruptcy Board of India (IBBI). He also stated that “One or two homebuyers should not be able to drag a full project comprising of hundreds of homebuyers into insolvency.” And also said that “While the developer must be penalised for the delay but the solution is not IBC”. It was also proposed by him that, the insolvency law committee would look into the issue adding that the companies act already provided for a 5% threshold for the initiation of a class action lawsuit and a threshold of 20% of shareholding for the initiation of a case of mismanagement or oppression of minority shareholders and that these thresholds may be used as a guide. And said, “We may look at a threshold to build in those checks and balances by way of regulations or if necessary, by way of amendment”. The Supreme Court has taken a significant leap in holding that the IBC is a 'beneficial legislation' that can be invoked by unsecured financial creditors like home buyers. Keeping in mind that time is of the essence under the IBC, the Court has also reminded the Government that it must provide adequate infrastructure to the NCLTs and the National Company Law Appellate Tribunal (NCLAT) for expeditious disposal of applications filed by home buyers under the IBC.

6. Conclusion
The Supreme Court has taken a significant leap in holding that the IBC is a 'beneficial legislation' that can be invoked by unsecured financial creditors like home buyers. Keeping in mind that time is of the essence under the IBC, the Court has also reminded the Government that it must provide adequate infrastructure to the NCLTs and the National Company Law Appellate Tribunal (NCLAT) for expeditious disposal of applications filed by home buyers under the IBC.

It has also asked the Government to appoint permanent adjudicating officers, real estate regulatory authority and its Appellate Tribunal within three months from the date of the Pioneer Judgment. In essence, the judgment re-affirms the rights of home buyers as financial creditors under the IBC. While this is a landmark judgment for genuine home buyers, there is a long battle in store for the real estate industry, which is already reeling from severe liquidity issues and other operational hurdles.

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Homebuyers have filed more than 1,800 cases against builders under the Insolvency and Bankruptcy Code (IBC) since June 2018, the government told the Lok Sabha on Monday. These are the number of cases pending before the National Company Law Tribunal (NCLT) as on September 30. Citing the information received from NCLT, Minister of State for Corporate Affairs Anurag Singh Thakur said that a total 1,821 cases have been filed by homebuyers against builders since June 2018 under the Code. “The matter is under consideration of this (corporate affairs) ministry,” he stated.

The Government is acting upon the Judgement of the Supreme Court and will soon constitute the aforementioned authorities to achieve the intent of the Code and protect the rights on the Home Buyers.

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TRIAL BY MEDIA UNDER CONTEMPT OF COURT ACT, 1971

By Ishaan Behal
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Introduction

The Indian media has been provided with a lot of liberty in terms of Legal limitations. Article 19(1) incorporated in the Constitution of India provides Freedom of Speech and Expression, however it is liable to certain restrictions as given in Article 19(2). Many a times the media is successful in avoiding these restrictions by entering into the loop holes present in the legal framework. This freedom, if left unbridled, tends to turn into an uncontrolled permit which results in anarchy and disorder. Media has now resurrected itself into an 'open court' and has begun indulging into court procedures. It totally disregards the essential gap between a blamed and a convict. With the instance of Sheena Bohra murder, the media penetrated the personal dealings of the primary charged Indrani Mukherjee which has kicked in a new discussion on the issue of media trial of the denounced. Each part of her own life and character which have nothing to do legitimatly with the examination of the killing are under open focal point of investigation by means of the media. Due to such acts of media, the public and sometimes even judges are forced to believe the accused as guilty even though according to law he should be assumed innocent until proven guilty. If this unwanted publicity in media about an accused leads to labelling of a person as guilty amounts to unfair interference of “administration of justice”, which further leads to proceedings for contempt of court against media.

Free Speech vs. Fair Trial

In the criminal justice system, the guilt is to be proved outside the legitimate doubt and wherein the law is subjugated by senses and not by emotions. While portraying emotions, the media and the masses overlook the deafening pressure it puts on the judge presiding handling the case. A person is supposed to be lawful and innocent unless he is held guilty and convicted by the competent court, but here the aim is to validate a person guilty at the time of arrest. The media helps in reporting facts or news and raise public issues; it is not there to pass judgments. The print and electronic media have gone into fierce competition, as we aim to call them ‘aggressive journalism’ that a number of cameras are flashed at the accused and the police are not even allowed to take the accused from their transport vehicles to the courts or the other way round. The Press Council of India issues guidelines timely also in some cases, it takes action. But, even though ‘apologies’ are aimed to be published; they are published in a certain way that either they are not apologies or the apologies are published in the papers at places which are not very prominent. The most deplorable part, and afflicted too, of the recently actual role of media is that the Broadcasting of a conspicuous crime and its carrying off ‘evidence’ begins very early even Before the person who will gradually head over the trial even takes knowledge of the Offence, and secondly that the media is not restricted by the accustomed rules of evidence which classify what material can, and cannot be used to condemn an accused.

In reality, the Right to Justice of a victim can often be conciliated in other ways also, supremely in Rape and Sexual Assault cases, in which, the past sexual history of a
prosecutor may find its way into the newspapers. The media treats even skilful criminal and the ordinary one, at times even the innocents, alike without any rational discrimination. They are moreover treated like a ‘television item’ risking the reputation and image. Even though they are let off by the court on the basis of proof beyond reasonable doubt, they cannot exhilarate their previous image. Exposure such as that provided to them is more likely to compromise all these supported rights accompanying liberty.

Earlier, journalism was not impelled to push up TRP ratings or sales. So the journalists did their work with a deliberate intent and confidence, with courage and integrity. They did not declare people guilty without making a serious trial to study the charges, consider them, and come to their own independent conclusion. They did not indiscriminately print what law enforcers postulated, what the bureaucracy said or what politicians planted on to them. But now we are facing a very different self-acquired role of media in the form of ‘media trial’. Everyone scammed the media to serve their own interests or to hurt their own rivals. The problem is not in the media’s exposing the layoff of a bad investigation by the police, or mal-performance of the duties commanded to the civil servants but the eye-brows start to raise when the media ultra vires its appropriate prerogative and does what it must not do. Be it bringing into the limelight the sub-judice issues into public risking the sanctity of judicial customs and ‘right to life with dignity’ of accused and suspects. The media trial has now moved on to media verdict and media punishment that is no doubt an invalid use of freedom and violating the prudent delimitation of legal boundaries. It is necessary to analyze prejudicial publicity of the subject matter awaiting before a court. It should be legally permitted to pass restraint order on the media.

Right to a Fair Trial

It is an absolute right of an individual not outside the territorial limits of India vide articles 14 and 20, 21 and 22 of the Constitution. Right to a fair trial is more considerable as it is a supreme right that flows from Article 21 of the constitution to be construed with Article 14. Freedom of speech and expression integrated under Article 19 (1)(a) is penned under ‘reasonable restriction’ subject to Article 19 (2) and Section 2 (c) of the Contempt of Court Act. One’s life with dignity is always given the first concern as compared with one’s right to freedom of speech and expression. Media should also speculate these facts. Fair trial is not elusively private profit for an accused – the public’s confidence in the rectitude of the justice system is decisively. The right to a fair trial is at the core of the Indian criminal justice system. It encircles distinct other rights including the right to be assumed innocent unless and until proven guilty, the right not to be constrained to be a witness across oneself, the right to a public trial, the right to legal delegation, the right to speedy trial, the right to be present throughout the trial and reconnoiter witnesses.

In the case of Zahira Habibullah Sheikh v. State of Gujarat, the Supreme Court explained that a “fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the

286 Gisborne Herald Co. Ltd. V. Solicitor General, 1995 (3) NZLR 563 (CA)
witnesses, or the cause which is being tried is eliminated.

Right to be legally represented

Through media trail, we have started pressurizing the lawyers even not to take up cases of those subjected to accusation, thereby forcing them to go to trial without any aid or propagation. Everyone has a right to get themselves represented by a lawyer of their cull and put their point before the court that decides and no one has the right to preclude themselves from doing so. The media has to apprehend their limit before it gets too late. Suspects and accused apart, also the victims and witnesses go through the intemperate publicity and intrusion of their privacy rights. Police are shown in the poor light by the media and their disposition too suffers. When the report of crime is published; media shows ‘Police have no clue’. Then, whatever rumors the media collects about the line of Analysis of the case by the official agencies, it gives such advertising with respect to the information that the person who has committed the particular crime, can easily locate to safer places.

For example, when the prominent lawyer Ram Jethmalani chose to defend Manu Sharma, the prime accused in “Jessica Lal murder case”, he was subject to public derision. A senior editor of the television news channel CNN-IBN called the decision to represent Sharma an attempt to “defend the indefensible”. This was only one example of the media controlled campaign against the accused. Constrained to say something to protect their reputation. Under such pressure, police, not many times, come up with a story which says they have captured the suspect and that he has confessed, wherein a few in the media appear to know that under the law, confession to police is not allowed in a criminal trial. Once the confession is announced by both the police and the media, the suspect’s future is finished. When he pulls back from the confession in front of the Magistrate, the public presumes that the person is a liar. The media also creates other complications for the witnesses. If the identity of witnesses is announced, the witnesses might come under pressure from the accused or his associates and as well as the police. Witness protection then becomes a serious casualty. This leads to the question about the expediency of belligerent witness evidence and if the law should be revised to stop the witnesses from changing their statements. Also, if the suspect’s photographs are shown in the media, problems could arise anytime throughout ‘identification parades’ directed under the Code of Criminal Procedure for identifying the accused.

Effect on judges

Another stressing component and one of the significant charges upon 'media trials' is prejudicing the judges upon some specific case. The American view states that Jurors and Judges are not at risk to be effected by media influence, while the British view is that Judges, may at present be subliminally accessed on 10th June 2008.

http://www.hrdc.net/sahrdc/hrfeatures/HRF164.htm
(however not intentionally) impacted and public may feel that Judges are affected by such distributions under such a circumstance. Lord Denning stated in the Court of Appeal that Judges will not be influenced by the media publicity. However, Hon'ble Justice D. M. Dharmadhikari, Chairman, M. P. Human Rights Commission likewise stated that there is constantly an opportunity that judges get impacted by the streaming demeanor of comments made upon a specific contention. The media exhibits the case in such a way to the open that if a judge passes a request against the "media decision", the individual is regarded either as corrupt or biased.

**Innocent publication and distribution of matter**

According to section 3 of the Contempt of Court Act, 1971, Innocent publication and distribution of matter doesn’t amount to contempt.

Section 3 states that -

(1) A person shall not be guilty of contempt of court on the ground that he has published (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) any matter which interferes or tends to interfere with, or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding pending at that time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.

(2) Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, the publication of any such matter as is mentioned in sub-section (1) in connection with any civil or criminal proceeding which is not pending at the time of publication shall not be deemed to constitute contempt of court.

(3) A person shall not be guilty of contempt of court on the ground that he has distributed a publication containing any such matter as is mentioned in sub-section (1), if at the time of distribution he had no reasonable grounds for believing that it contained or was likely to contain any such matter as aforesaid.

**Justification by media**

The right to speak freely plays in important role in the formation of general opinion on social, political and monetary issues. Additionally, the people in power ought to have the option to keep the individuals educated about their approaches and ventures, in this manner, it can be said that freedom of speech and expression is the mother of every other freedom.

Expressing a similar view, Justice Venkataramiah, J. of the Supreme Court of India in Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India[12] has stated:

“Freedom of press is the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and non-formal education possible in a large scale particularly in the developing world, where television and other kinds of modern communication are not still available for all sections of society. The purpose of the press is to advance the public interest by publishing facts and
opinions without which a democratic electorate Government cannot make responsible judgments. Newspapers being purveyors of news and views having a bearing on public administration very often carry material which would not be palatable to Governments and other authorities”

We have a rich custom of free news-casting. Truth be told, all the huge tricks were busted by the press. The law masters just tailed them up. The ineffectively paid writer must be credited for discovering the information which looked difficult to reach, even for the top vigilance teams of the nation. This is the means by which HDW(Howaldswerske) marine case and Bofors hit the news. This is the means by which we discovered that Narasinha Rao had bribed the Jharkhand Mukti Morcha MPs and Satish Sharma and Buta Singh had handled the arrangement. The media made us proud at each point of such political junctures

Supreme Court of India has held that freedom of the press extends to engaging in uninhabited debate about the involvement of public figures in public issues and events. But, as regards their private life, a proper balancing of freedom of the press as well as the right of privacy and maintained defamation has to be performed in terms of the democratic way of life laid down in the Constitution.290

Accordingly, in perspective on the perceptions made by the Supreme Court in different decisions and the perspectives communicated by different law specialists, it is perfectly clear that the freedom of the press streams from the freedom of expression which is ensured to all natives by Article 19(1)(a). Press remains on no higher balance than any other native and can't guarantee any benefit (except if given explicitly by law), in that capacity. The press can't be exposed to any exceptional limitations which couldn't be forced on any resident of the country

Law Commission’s 200th Report

The most reckoning look into on the positive and negative parts of media preliminary has been expounded in 200th report of the Law Commission entitled Trial by Media: Free Speech versus Reasonable Trial Under Criminal Procedure (Amendments to the Contempt of Court Act, 1971). The report has made suggestions to address the harming impact of sensationalized news writes about the organization of equity. While the report still can't seem to be made open, news reports show that the Commission has prescribed forbidding distribution of anything that is biased towards the blamed — a confinement that will work from the hour of capture. It likewise allegedly suggests that the High Court be enabled to coordinate deferment of distribution or broadcast in criminal cases. The report noticed that at present, under Section 3 (2) of the Contempt of Court Act, such distributions would be scorn just if a charge sheet had been recorded in a criminal case. The Commission has proposed that the beginning stage of a criminal case ought to be from the hour of capture of a blamed and not from the time the charge sheet had been filed. In the impression of the Commission such a revision would keep the media from prejudging or prejudicing the case. Another disputable proposal recommended was to enable the High Court to coordinate a print or an electronic media to delay production

290 Rajgopal vs. State of Tamil Nadu (SC)
or broadcast relating to a criminal case and to control the media from falling back on such distribution or broadcast. The 17th Law Commission has made suggestions to the Center to order a law to keep the media from detailing anything biased to the privileges of the accused in criminal cases from the hour of capture, during examination and preliminary.

Conclusion

Any organization, be it a governing body, legal executive or administration, is obligated to be manhandled on the off chance that it surpasses its genuine purview and capacities. Be that as it may, once in a while these ultra vires activities are surprisingly positive development just like the instance of legal activism. Media trial is likewise a calculable exertion alongside the progressive sting tasks as it keeps a nearby watch over the examinations and exercises of police organizations and government officials. Be that as it may, there must be a sensible self-restriction over its field and due priority ought to be given to the free trial and court strategies. Media ought to recognize that whatever they distribute has an incredible effect over the public and even the judges. In this way, it is the ethical obligation of media is to demonstrate reality and that too at the perfect time. While the print media has come to at a point where it knows about lawful rules and moral points of confinement yet the electronic media is testing and is depending upon 'experimentation' strategy for what to show and all the more significantly what not to. The time will come when electronic media will also be well restricted by self-controlled guidelines and we shall retain a ‘completely free press’, the dream of our first Prime Minister, Jawahar Lal Nehru and that too without any fear involved.

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IMPLEMENTATION OF THE MARRAKESH TREATY, 2014 IN INDIA AND AUSTRALIA- A COMPARATIVE STUDY

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INTRODUCTION
Copyright offers an effective incentive for the creator of copyrighted works thereby promoting creation of knowledge and dissemination of knowledge, thereby creating a sound viable knowledge-based economy as well as society across the borders. However, the same has created a huge gap between the haves and have nots across the world. Here, we are referring the term haves and have not’s not in terms of economy but in terms of accessibility and affordability of copyrighted works to the person who are visually impaired, blind and other disability. It should be remembered that the copyrighted products are market driven. The international community did not worry about the digitally accessible deficit existing between the person who are print disabled and print non-disabled. The TRIPS agreement of WTO has provided three-step test as a measure of uniform protection for all IP products throughout the global. The international community has taken tireless efforts to strike a balance to achieve the objectives of UNCRPD and that of the TRIPS agreement of the WTO.

Finally, they found the way to break the deadlock and to work out a pragmatic solution to fulfill the aspirations of millions of visually impaired in the form of MARRAKESH Treaty 2014, and the same as come into operation on 30th September 2016 without violating the TRIPS agreement of WTO. This treaty is hailed by the international community as the best treaty strengthening the aspects of IP as well as human rights. In this context, the researcher would like to analyze the methods/ modality and mechanism pertaining to the implementation of the MARRAKESH Treaty in India and Australia. It should be remembered that both the countries are having quite similarities and dissimilarities. For example, both of them happened to be members of TRIPS agreement of WTO and WIPO and CRPD. In addition to this, they are following the common law systems. On the other hand, India is a developing country whereas Australia is a developed country. In this context, the topic assumes more importance. For the convenience of the reader, the paper has been divided into following parts
a. International law related to copyright including VIP treaty
b. International law relating to disability rights
c. National regime on copyrights as well as disability rights

It compares the relationship between Australian and Indian law. Conclusions and suggestions which focus on the lessons that can be learned by both the countries based on the mutual supportive cooperation and implementation of the MARRAKESH treaty.

INTERNATIONAL LAW RELATING TO PERSONS WITH DISABILITIES:
The UN has adopted several international instruments for the purpose of protecting human rights in general, which includes the protection of the rights of the PWDs. However, it has rightly recognized that the afore stated instruments have not provided the adequate and appropriate protection and necessary safeguards for the protection of
the rights and interests of PWDs. Therefore, the UN has rightly framed and adopted a specific and comprehensive instrument known as CRPD. In addition to the Convention, it has also adopted the Protocol for the aforesaid purpose. A few years later, one of the specialized agencies of the UN namely, the WIPO has adopted a specific instrument for the purpose of protecting the rights and the interests of persons who are visually challenged and affected by other print disabilities. In this part, let us analyse that how far the aforesaid instruments have contributed to the promotion of accessibility of PWDs.

SALIENT FEATURES OF THE CRPD:

The CRPD consists of a Preamble and 50 Articles. It lays down the substantial and procedural aspects including the organizational setup.

OBJECTS OF THE CONVENTION:

The Convention does not contain an object clause. However, the objects of the Convention can be inferred from the language used in the Convention viz., it provides guarantee to all PWDs to the full enjoyment of all the human rights and the fundamental freedoms guaranteed in the various international instruments such as the UN Charter, UDHR, CRC, CEDAW and other international human rights instruments. Secondly, the interrelationship of general human rights and that of the PWDs has been recognized by the Convention. Thirdly, it recognizes the importance of the special measures guaranteed by the various international instruments relating to the PWDs adopted by the UN. Fourthly, the Convention recognizes the specific and different needs of the PWDs depending upon the nature of the disability. To put it differently, it recognizes the diversity among the PWDs as the part of the human diversity. Fifthly, it provides special and additional protection to the PWDs in need of intensive care and protection, women and girls with disabilities, children with disabilities and others. Sixthly, it recognizes the potentialities and the contribution made by the PWDs to the development of the community and the society, as part of the sustainable development. Seventhly, the Convention recognizes the specific and active role to be played by various entities such as individuals, family, community, society and the state in the process of empowering the PWDs to take part in the decision making process. It also guarantees the access to the health, employment and education so that it will enable the PWDs to take part in all the walks of life such as the civil, political, economic, cultural spheres in the developing countries as well as developed countries. The Convention aims to protect, promote and to ensure that all the human rights and fundamental freedoms are fully and effectively enjoyed by the PWDs.

DEFINITIONS:

The Convention defines the following terms such as, “persons with disability”, “language”, “communication”, “discrimination”, “reasonable accommodation” and “universal design”.

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291 Refer Para (e) of the Preamble of the CRPD.
292 Refer Para (y) ibid.
293 Refer Para (a) to (d) ibid.
294 Refer Para (h) ibid.
295 Refer Para (e) to (k) ibid.
296 Refer Para (k) ibid.
297 Refer Para (p) to (t) ibid.
298 Refer Para (i) and (g) ibid.
299 Refer Para (s) to (y) ibid.
300 Refer Art 1 ibid.
301 Refer Art 1 ibid.
302 Refer Art 2 ibid.
defined in the CRPD in the RPD Act, 2016.303

**GENERAL PRINCIPLES:**

The Convention prescribes certain fundamental principles to be followed by all the member countries in the process of empowering the PWDs.304 Firstly, it mandates the member countries to respect the inherent dignity of the PWDs and to ensure that they make their own choices with greater autonomy and independence.305 Secondly, it mandates the member countries to accept the PWDs as part of humanity and human diversity and to respect their difference.306 Thirdly, it mandates the member countries to ensure the full and effective participation of the PWDs in the decision making process including the issues concerning them in the process of making programmes and policy decisions of the state.307 Fourthly, the Convention lays down the following principles such as accessibility, non-discrimination,308 and equality of opportunity for all the PWDs, including the women and children with disability.309

**GENERAL OBLIGATIONS:**

The Convention also imposes certain general obligations upon the State, individuals, families, community, public institutions, authorities, and other sections of the society for the purpose of implementing the Convention and to empower the PWDs. Firstly, it mandates the member countries to bring the necessary and appropriate legislations, regulations and administrative measures for the purpose of implementing the rights embodied in the CRPD.310 Secondly, the states have been mandated to abolish the existing practices, customs, legislations, regulations, and others acts which constitute discrimination against the PWDs through appropriate actions.311 Thirdly, it mandates the member countries to take into account the human rights of the PWDs in the decision making process including the issues concerning them in the process of making programmes and policy decisions of the state.312 Fourthly, the Convention mandates the public institutions/authorities, individuals and families to act in conformity of the provisions of the Convention. Fifthly, it mandates the states to provide the mobility aids and universally designed goods and services to the PWDs at the lesser cost. In addition to this, it also mandates the states to take appropriate measures for the purpose of carrying the research and development so as to improve the quality, availability, accessibility of the aforesaid goods and services which are useful to the PWDs through technology development and to train the personnel involved in the of empowering the PWDs.313 Fifthly, it also mandates the member countries to implement the provisions of the Convention in all the territories of the federal states.314

**RIGHTS AND FREEDOMS GUARANTEED BY THE CONVENTION:**

The Convention mandates the all the states to guarantee the following rights and freedoms to all the PWDs viz., the right to equality before the law,315 the right to equal

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303 Refer the 2012 Draft Bill relating to the Rights of the PWDs.
304 Refer Art 3 (a) to (h) of the CRPD.
305 Refer Art 3 (a) ibid.
306 Refer Art 3 (d) ibid.
307 Refer Art 3 (c) ibid.
308 Refer Art 3 (f) ibid.
309 Refer Art 3 (b) ibid.
310 Refer Art 3 (e), (g) and (h) ibid.
311 Refer Art 4 (1) (a) ibid.
312 Refer Art 4 (1) (b) ibid.
313 Refer Art 4(1) (c) ibid.
314 Refer Art 4 (1) (d) to (h) ibid.
315 Refer Art 4 (5) ibid.
316 Refer Art 5 to 8 of the CRPD.
recognition before the law as persons, the right to exercise the legal capacity, right to life, right to property, right to privacy, right against exploitation and torture, right to education, right to health and others.

The Right to Equality before the Law and Equal Recognition before the Law:

The Convention mandates the state parties to respect and to guarantee to all the PWDs the right to equality before the law and to ensure that the PWDs are entitled to get the “equal protection” and “equal benefit of the law”. The states have been clearly and strongly mandated to take the appropriate and the necessary measures for the purpose of promoting the right to equality and eliminating the discrimination against the PWDs on all grounds. The Convention makes it very clear that the special and the specific measures taken by the states parties for the purpose of achieving the de facto equality should not be treated as discrimination. The Convention mandates the state parties to incorporate the principle of reasonable accommodation for the purpose of achieving the right to equality for PWDs. Apart from this; the Convention provides the right to equal recognition of the PWDs as persons before the law. The member countries have been mandated to take appropriate steps to ensure that the PWDs exercise their legal capacities effectively and provide the necessary safeguards for the aforementioned purpose. The PWDs have been guaranteed the right to own and to inherit the property on an equal basis with others; to enjoy the access to the bank loans and other financial facilities. The Convention clearly mandates the member countries not to deprive the aforesaid right arbitrarily against the PWDs.

Freedom of Expression, Opinion and Access to Information:

The freedom of expression has been guaranteed by the Constitution of India to all persons generally. Whereas, the CRPD guarantees this right to the PWDs in the specific manner which is accessible and usable by the PWDs in a disability friendly environment by appropriate technological measures to be adopted by the states parties, the mass media and the internet service providers. The Convention mandates the state parties to provide information, which is intended to be provided to the general public on an equal basis to the PWDs in accessible formats in a timely manner and without additional costs. It also mandates the member countries to recognize and use the Braille system, sign language and other forms of communication in the official interaction with the PWDs. It is highly appreciable that this mandate of the Convention has been carried out by the Government of India by incorporating a specific provision in the Right To Information Act (RTI) Act in the process of providing the information in the accessible format. However, the Act does not mandate the competent authorities to receive the application for the information from the PWDs in an accessible format. For example, there is no provision mandating the authorities to receive the application for the information in the Braille format from the visually challenged persons.

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317 Refer Art 12 ibid.
318 Refer Art 10 ibid.
319 Refer Art 5 (1) ibid.
320 Refer Art 5 (2) ibid.
321 Refer Art 5 (4) ibid.
322 Refer Art 5 (3) ibid.
323 Refer Art 12 (1) to (4) ibid.
324 Refer Art 12 (5) ibid.
325 Refer Art 21 (1) (a) to (d) of the CRPD.
326 Refer Art 21 (1) (a) ibid.
327 Refer Art 21 (1) (b) ibid.
ministry of Information and Broadcasting, IT and Telecommunication has to play a leading role in the process of enforcing this mandate of the Convention. The Government of India should bring suitable amendments in various legislations, including in the IT Act.

Right to Education:
The Convention prescribes the following goals to be achieved education system of the member countries they are: Firstly, the education system should promote a sense of dignity, self-worth and respect for human rights, fundamental freedom and human diversity. Secondly, it should promote the fullest potential, talents, creativity and the personality of the PWDs. Thirdly, it should promote the enablement of full participation of PWDs in the free society. The Convention provides the right to have access to free, compulsory and quality primary as well as secondary education to all children with disabilities. It empowers the PWDs to pursue all kinds of education such as professional, vocational and technical education. It mandates the states to provide reasonable accommodation for the PWDs in all educational institutions.

POLITICAL AND CULTURAL RIGHTS:
The Convention empowers the PWDs to enjoy political and cultural rights such as the right to vote, the right to contest in elections, the right to form trade unions and NGOs for the purpose of protecting their rights. It mandates the member countries to provide the reasonable accommodation for the purpose of enabling the PWDs to enjoy the cultural rights such as, the sports, leisure and recreation activities. The Convention makes it very clear that the IPR should not become an unreasonable barrier to PWDs with respect to the cultural material. The above said mandate of the Convention has been made by the international community as compatible with the provisions of the TRIPS Agreement of WTO by adopting the specific treaty, known as the WIPO Copyright Treaty for the Blind.

MEASURES RELATING TO AFFIRMATIVE ACTION:
In addition to the rights guaranteed by the Convention, it also prescribes certain affirmative action to be taken by State Parties for the purpose of empowerment of the PWDs. It is important to understand that the rights can be enforced against the state authorities and its entities. However affirmative actions are applicable to non-state entities including the private sector. The Convention provides the following affirmative action for the purpose of the empowerment PWDs viz., the measures relating to raising of awareness which includes the development of an attitude of respect for the rights of the PWDs in the minds of children in schools through the educational system, portraying the capabilities and the contribution of the PWDs in media and prohibiting stereotypes, prejudice and harmful practices against the PWDs in all walks of life. The Convention mandates the

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328 Refer Art 24 (1) (a) of the CRPD.
329 Refer Art 24 (1) (b) ibid.
330 Refer Art 24 (1) (c) ibid.
331 Refer Art 24 (2) (a) to (d) ibid.
332 Refer Art 24 (5) ibid.
333 Refer Art 24 (3) and (4) ibid.
334 Refer Art 29 ibid.
335 Refer Art 30(5) ibid.
336 Refer Art 30(3) ibid.
337 Refer Art 13 of the TRIPS Agreement.
338 Refer Art 12 of the Constitution of India.
339 Refer Art 27(1) (h) of the CRPD.
340 Refer Art 8(2) (a) to (c) ibid.
341 Refer Art 8(1) (b) ibid.
member countries to identify and eliminate barriers to access by PWDs of public services and facilities on an equal basis with others. It clearly mandates the states to develop, promulgate, implement and monitor the accessible standards to be complied by the private sector i.e., providing public facilities and services such as transportation, roads, Information and Communication Technology, etc.\(^\text{342}\)

**INTERNATIONAL LAW RELATING TO COPYRIGHT OF PERSONS WITH DISABILITIES**

There are many international instruments which protect and promote copyrights and copyrighted works in different fields in different modes (digital & non digital) in different points of time.\(^\text{343}\) However, it did not address the concerns of disabilities in general visually impaired in particular. This has been effectively addressed by the WIPO through adoption of the MARRAKESH treaty 2014.

**THE MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS TO THE PERSONS WHO ARE BLIND, VISUALLY IMPAIRED, OR OTHERWISE PRINT DISABILITIES:**

The Marrakesh Treaty has been adopted by the WIPO\(^\text{344}\) for the purpose of facilitating access to published copyrighted works in the normal as well as in digital mode by the persons who are visually challenged and print-disabled. This treaty is also known as WIPO Treaty for the Visually Challenged. The adoption of the aforesaid treaty by the WIPO marks a milestone in the history of implementation of the CRPD in the process of empowering the PWDs in general and the visually challenged persons in particular. India is one of the first few countries which has signed and ratified the treaty. It is highly pertinent to note that the Government of India has implemented the provisions of the treaty prior to its commencement in the year 2012 by incorporating the necessary amendments in the Indian Copyright Act, 1957. In this context, it is highly desirable to study the contribution made by the treaty and its impact in India in the process of carrying out the affirmative action to be taken by the international community including India for the purpose of promoting the rights relating to the freedom of expression and right to education, the opportunity to conduct research, the enjoyment of the cultural rights and sharing of the benefits arising out of the scientific developments by the visually challenged persons as mandated by the CRPD\(^\text{345}\) and the WIPO Treaty\(^\text{346}\).

**OBJECTS OF THE TREATY:**

The treaty aims to achieve the following objectives. They are: the promotion of affirmative action for the purpose of ensuring the rights relating freedom of expression, the right to education and the opportunity to conduct research by visually challenged persons by facilitating timely and effective access to published works in accessible formats to the visually challenged persons.\(^\text{347}\) It also recognizes the role of the authors and the right holders in the process of ensuring and making

\(^{342}\) Refer Art 9(2) (a) to (h) *ibid.*

\(^{343}\) Refer from Berne Convention, 1972 to TRIPS agreement, 1994 and the world internet treaties.

\(^{344}\) The treaty has been adopted by WIPO in Marrakesh on the 31\(^{\text{st}}\) of July 2013 (Available at: [www.wipo.org](http://www.wipo.org)).

\(^{345}\) Refer Arts 30 to 33 and 38 of the CRPD.

\(^{346}\) Refer the Preamble of the Marrakesh Treaty (hereinafter the WIPO Treaty for the Visually Challenged).

\(^{347}\) Refer the Preamble of the WIPO Treaty for the Visually Challenged.
available their copyrighted works inaccessible formats.\textsuperscript{348} Further it provides a balancing mechanism between the rights of the authors and larger interest of the visually challenged persons by timely and effective access to copyrighted works in the accessible formats.\textsuperscript{349} The treaty further provides a mechanism for the purpose of harmonizing the international law relating to copyrights and the law relating to the rights of the PWDs and the visually challenged persons. It also promotes the cross-border exchange of the copies in the accessible formats to authorized entities and the beneficiaries.\textsuperscript{350}

DEFINITIONS:
The treaty provides the definitions to the following terms. They are “works”, “authorized entities”, “accessible format” and “beneficiary” and others. The treaty does not define the term work specifically. On the other hand, it has adopted the term “literary and artistic works” as embodied in the Berne Convention.\textsuperscript{351} It defines the term accessible format in a manner so as to enable the visually challenged persons to read the published works feasibly and comfortably. The definition accommodates the special needs of the visually challenged persons as well as the rights of the authors.\textsuperscript{352} The treaty provides an inclusive definition for the term beneficiaries including the persons who are blind, visually impaired and print disabled.\textsuperscript{353}

MEASURES RELATING TO THE FACILITATION OF ACCESS TO VISUALLY CHALLENGED PERSONS:
The treaty has taken the following measures for the purpose of facilitating the access to the published works by the visually challenged persons. Firstly, it mandates the member countries to incorporate the necessary provisions relating to limitations and the exception in national copyright law for the purpose of facilitating the access to the published works by the visually challenged persons in the accessible formats.\textsuperscript{354} Secondly, it permits the member countries to adopt the same measure for the purpose of enabling the visually challenged persons to have access to public performances.\textsuperscript{355} Thirdly, it empowers the member countries to issue a compulsory license for the abovementioned purpose with or without remuneration to the right holder of the copyrighted works.\textsuperscript{356} Fourthly, it allows the member countries to freely import the accessible format copies for the purpose of facilitating access to visually challenged persons.\textsuperscript{357} Fifthly, it mandates parties to the treaty to ensure that the legal protection against the circumvention of effective technological measures do not prevent access by the visually challenged persons to the published works in the digital environment including in the internet.\textsuperscript{358} Sixthly, it promotes the cross-border exchange of the accessible format copies between the member countries\textsuperscript{359} and mandates the International Bureau to setup an information centre for facilitating international cooperation to achieve the

\textsuperscript{348} \textit{Ibid.}
\textsuperscript{349} \textit{Ibid.}
\textsuperscript{350} Refer the Preamble and Art 5 and 9 \textit{ibid.}
\textsuperscript{351} Refer Art 2 (1) of the Berne Convention 1971 and Art 9 (1) of the TRIPS Agreement OF WTO.
\textsuperscript{352} Refer Art 2 (b) of the WIPO Treaty for the Visually Challenged.
\textsuperscript{353} Refer the Preamble and Art 3 \textit{ibid.}
\textsuperscript{354} Refer Art 4 (1) (a) \textit{ibid.}
\textsuperscript{355} Refer Art 4 (1) (b) \textit{ibid.}
\textsuperscript{356} Refer Art 4 (5) \textit{ibid.}
\textsuperscript{357} Refer Art 6 \textit{ibid.}
\textsuperscript{358} Refer Art 7 \textit{ibid.}
\textsuperscript{359} Refer Art 5 and 9 \textit{ibid.}

\url{www.supremoamicus.org}
In addition to this, the treaty mandates the member countries to respect the privacy of the beneficiaries in their access to the copyrighted works and respect the three-step test as embodied in the Berne Convention, the WCT and TRIPS Agreement of the WTO. It also provides flexibilities to the LDCs in the process of carrying out the provisions of the treaty.

CONCLUSION

No doubt both the countries have taken necessary and effective steps for the purpose of implementing CRPD and the MARREKESH treaty for the purpose of promoting accessibility of copyrighted goods and services to PWDs. However, the modality of implementation varies. For example, the government of Australia has carried a thorough study before implementing the treaty and mandated the necessary stakeholders to implement the treaty wholeheartedly. India didn’t carry such a thorough study. Though India had taken early steps, it didn’t take effective steps comparing with Australia. For eg., the copyright rules amendment pertaining to accessibility is itself not available in accessible format. India has to take lot of measures to comply/fulfil the obligations arising out of the MARRAKESH treaty. It should fully utilise the international cooperative mechanism and the ABC made available by WIPO. They can also enter into a MOU with to promote cross border exchange of accessible materials. India should take effective steps to make available accessible materials to school kids. In this regarded the state governments should play a crucial role. The govt of India should establish a necessary mechanism for the purpose of coordinating various entities and institutions, monitoring the implementation, regulating the accessible standards to be complied by various stakeholders including private publishers and finally there shall be an effective mechanism for a periodical review to be undertaken for the purpose of ensuring the efficacy of accessible measures to be complied by various entities for the purpose of promoting copyrighted goods and services for PWDs.

360 Refer Art 9ibid.
361 Refer Art 8ibid.
362 Refer Art 10 and 11 of the WIPO Treaty for the visually challenged.
363 Refer Art 12ibid.
364 Refer the study made by the AG of government of Australia & Australia Law commission report related to copyright reforms.
PRACTICAL EFFECTS OF SHAREHOLDER ACTIVISM IN INDIA

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“To the wrongs that need resistance, to the rights that need assistance, to the future in the distance, give yourselves.”

If Carrie Catt was a shareholder in 2019 instead of a woman in the 19th century, this quote would still make perfect sense and that says a lot about the state of shareholder rights and activism in India. Much like Universal Adult Franchise, Corporate Franchise has been traditionally reserved for those in power, but not anymore. As the State legislates more transparency rules, SEBI enforces more Corporate Governance mechanisms and as the Investors themselves become more informed, Corporate Suffrage becomes more and more prominent in India Inc. Gone are the days when Companies could get away with tactics such as choosing remote locations for AGMs to discourage Investor Participation, India is on its way to fight concentration of Corporate power socially, legally and academically. But with the creation of a new right, come a ton of ways to misuse it. Misuse so grave that its evils sometimes exceed the right’s benevolence. Is shareholder activism taking us down the same path? Are we forgetting that the concept of Separate Entity means the Company’s best interests must be forwarded, which include but are not limited to shareholder interests? What about employee rights or corporate social responsibility that is negatively affected by short termism of activists? This part of the paper focusses on the ground reality of shareholder activism in India by discussing case studies and statistical data while analysing the same to determine the effect of activism on Market Operations.

Call it the hangover of the feudal system or sheer want of economical capital accumulation, promoters are sceptical to go public with their companies and even when they do, they reserve majority stakes in ‘their’ company. This high stake in the company, matched with the promoter’s powers to appoint directors or become one themselves, results in little distinction in the company’s ownership and management. So, any check on the management needs to come from the non-promoter shareholders. This process of scrutiny started by mere objections to Board Proposals that went against the interests of Shareholders, then came the stage where investors came up with their own proposals and finally, Activism reached the stage where minority Shareholders seek representation on the Board to forward their interests. We will discuss through case studies, how each stage of activism (supported by the legal framework at that time) affected Profitability and Shareholder Value by studying its effect on Share Prices immediately following and preceding said activism.

I. COAL INDIA LTD. AND THE FIRST CLASS ACTION SUIT IN INDIA

With 90% of its stakes in the government’s hands and no minority shareholder holding more than 1% individually, Coal India Ltd. was the poster child of India’s

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365 Catt, Carrie (1952)
concentration of power in 2010. That was until TCI entered the picture. It became the first public Shareholder holding more than 1% in Coal India in 2011 and thus started the battle which led to the first class action suit being filed in India. They had chosen the worst, most powerful opponent, the Government of India itself. With its majority stake, the Government had influenced directors of Coal India Ltd. to sell Coal at a discount of 70% to the International price which had cost the Company Rs 215,250 crore in pre-tax profits in the two years of its functioning. Since, there was no provision equivalent to s. 111 of companies act, 2013 (power of minority shareholders to file resolutions) in the old Companies Act, 1956, TCI had to approach the court after its complaints to Directors fell on deaf ears. Had it succeeded; TCI could’ve opened floodgates of mass investor action against a ton of PSUs where minority shareholders are oppressed by the Government’s exercise of its shareholding majority. However, after continuous failure in its actions, TCI realised that its efforts were misplaced and completely exited Coal India Ltd. Even though the activism failed, it provides us with a valuable case study.

ANALYSIS:

Why did TCI fail even after such apparent mismanagement of resources by the company? The answer lies in what is called a ‘Red Herring Prospectus’. It is one of the most common ways to limit the Company’s liability by mentioning in the prospectus that Promoter decisions might not be in minority shareholder’s best interest. Hence, by applying the rule of ‘Caveat Emptor’, the company forgoes its liability towards minority shareholders. The story of TCI seems like a story where Shareholder Activism failed to actualise results, but the Share prices and Return on equity tell a different story. Throughout the whole battle, CIL’s return on Equity remained above 30%, which shows Coal India’s efforts to satisfy Shareholders. Additionally, TCI fought back on three occasions, March 2012, November 2012 and August 2013. Coal India’s share prices increased immediately following these three initiatives but fell once again after the Board’s response and/or the Courts inaction which highlights the market enthusiasm and responsiveness to Shareholder Activism.

While the case of TCI was a decent baby step towards Shareholder Activism in India, the new Companies Act, 2013 opened new prospects for shareholder involvement and the SEBI regulations strengthened

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Shareholder presence even further. Provisions like S.151 of the Companies Act, 2013 which warranted the appointment of small shareholder directors ensured protection of interests and S.108 and 110 introduced e-voting and postal ballots respectively, which put physical access issues to bed. As a result, the scope of Shareholder Activism expanded from its initial limited area of operational mismanagement to more policy and recruitment-based concerns. According to InGovern, one of the three Proxy Advisory Firms in India, “Directorial appointments and their remuneration were the most scrutinised proposals by investors in the 2017 proxy season, comprising 82% of the total resolutions with a higher percentage of dissenting votes by the Top 100 companies’ investors.” \[371\] Illustrative of this trend was the battle for the appointment of a small shareholder Director in the country’s oldest Pharmaceutical entity, Alembic.

II. ALEMBIC LTD. AND THE INVOCATION OF S. 151, COMPANIES ACT, 2013

In 2017, Unifi Capital, a Portfolio Management Company with around 3% stake in Alembic Ltd. mobilised Small shareholders to move a resolution\[372\] appointing Murali Rajagopalachari as a Director on the Board of Alembic Ltd on their behalf under S. 151 of the Companies Act, 2013. The Board stalled the Postal Ballot for a long time before completely rejecting this proposal. Why? It was contended that there is a conflict of Interest due to Mr. Murali’s close nexus with the Company Unifi Capital and the small shareholders who were also related to Unifi capital in their other dealings. Another concern was that a majority of the Shareholders signing the resolution had become members only 3 days prior to the said resolution.

ANALYSIS:

The use of the term ‘may’ in S.151 denoting an absence of obligation on the part of companies to process such requests, coupled with the subjectivity of requirements such as being a ‘person of integrity’, provide defensive mechanisms for companies to reject such applications. The fact that it took four long years to invoke this provision for the first time shows a sheer difficulty of mobilising 1000 people towards a common goal. These problems of mobilisation have only increased as e-voting becomes the standard way of voting. Corporate Franchise is not merely a right to vote but includes the right to use that vote as an expression of shareholder’s informed decision.\[373\]

What follows from this is an absolute right to enquiry, clarifications and debate before any decision can be put to vote. These inherent problems faced by Shareholders are only maximised by the Promoter culture that rejects any representation in the above-mentioned manner. An appropriate alternative would have been for the board to intimate their views to the small shareholders thus enabling them to make an informed decision, completely stripping them off their right to vote in a matter solely

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\[372\] Rule 7(1) of the Companies (Appointment and Qualification of Directors) Rules, 2014

\[373\] “Voting through Electronic Means (Sec 108) – Part-1” (icsi.edu) <https://www.icsi.edu/media/portals/86/Geeta_Saar_54_Voting_through_electronic_means-Part-1.pdf>
subject to their votes is a gross misuse of Board power.
But there is an upside to this story as well. The share prices were up 11 points in the morning session following the small shareholder’s notice to mobilise against the Directors in July 2017\textsuperscript{374}. This piece of information seems even more impressive when you consider the fact that this happened when sensex was down by several points! The Best thing about the battle at Alembic was that shareholders started asking for action and change rather than merely responding to what has been proposed by the management. This sign of investors stirring and wanting to actively participate in managing the company rather than just affecting a few decisions shows that Shareholder Activism in India is on the right path.

III. OTHER INSTANCES OF SHAREHOLDER ACTIVISM AND ITS CRITICISM
In the same year (2017), 45 out of the Top 100 NSE Companies had at least one AGM proposal receiving 20% dissenting votes by either the institutional or non-institutional shareholders\textsuperscript{375}. In one case, the promoters of the company banded against its management, which is quite refreshing. But what about short termism? Does shareholder activism promote a myopic viewing of profitability and market operations? A research on the long-term effects of Hedge fund activism conducted by Bebchuk, Brav and Jiang\textsuperscript{376} gives a plausible answer to these concerns. It is found in the paper that operating performance improves immediately following episodes of activism and even during the third, fourth year following the intervention, performance tends to be better than it was before the activist episode. This resonates with the results found in this paper about share prices increasing with incidences of shareholder activism in a company. The two case studies discussed in this paper were both failed attempts in the specific endeavour but signalled a wider pattern of shareholder activism in India. There have been quite a few successful attempts of activism as well. For example, Fortis Healthcare underwent the removal of a director in 2018\textsuperscript{377} owing to the pressure of activist institutional investors and Funds, thereby showing their ability to affect Board composition. Whistleblowers are also increasingly calling companies out on lapses or regulatory violations with about 1/3\textsuperscript{rd} of Nifty 50 companies getting 3139 complaints in the year 2017. The awareness has been steadily increasing as the no. reached 3508 in the year 2018.\textsuperscript{378}

\textsuperscript{374} Alembic Ltd. Stock Price, Share Price, Live BSE/NSE, Alembic Ltd. https://www.moneycontrol.com/india/stockpricequote/pharmaceuticals/alembic/A08
\textsuperscript{376} Bebchuk L, Brav A and Jiang W, “THE LONG-TERM EFFECTS OF HEDGE FUND ACTIVISM” (Columbia.edu) <https://www8.gsb.columbia.edu/financialstudies/s...>
It has been argued by opponents of Shareholder Activism that Funds and Institutional investors use this concept to forward group interests that do little to benefit the rest of the shareholders. Activism is sometimes used by investors to forward pro-union policies and advance one groups agenda over the others, thereby creating a minority of the minority. This criticism, while valid, is only a result of the limited reach of Shareholder activism in India. Rather than defeating the utility of Activism it highlights the need to make it more pervasive so that all groups of shareholders can resort to its benefits.

IV. BOARD INDEPENDENCE (?)
One aspect of Corporate Governance that still needs to be addressed is the position of Independent Directors on the Board. Their presence is meant to ensure a Third-Party check on operations but in reality, the Independent directors are chosen from the social circle of the other Directors. Additionally, the trend in India is that one Director holds Board membership in a no. of holdings and subsidiaries. Hence, instead of independence, self-interest prevails with an added touch of diplomacy. Furthermore, in 2010, on an average, board members met 6.5 times during the year in India. An analytical review of the Business or constructive regulatory overview is not possible in such a short time span. What Boards actually do is, depend on the Management reports and informal Management discussions to arrive at an ‘informed decision’ on critical issues. Third party reports and stakeholder concerns are used as tools only by 23% of the companies. Shareholder activism gains even more importance in a market like this.

V. CONCLUSION
SEBI is constantly working on boosting shareholder activism to increase corporate governance in India. It has declared that investor rights groups fighting court battles will receive financial help from SEBI amounting to 75% of their legal fees. Funding will be considered on a case to case basis, the criteria being that at least a thousand investors are affected by said court battle. These are the initiatives that create a hospitable market for investment. creeping Acquisitions by Promoters, whereby only 5% additional stake is acquired by them every financial year and hence, they don’t need to make a public announcement is just one example of how Legal provisions can be twisted by those in power to suit their interests. S. 211 of the Companies act, 2013 provides for the appointment of Serious Fraud Investigation Officer (SFIO) who has powers to investigate matters of Fraud and also reserves the power of arrest. We have Judicial Activism in the Courts and Shareholder Activism on the fields to fight such misuse and mismanagement. It is time that Activism now shifts from a state-led regulatory activism to a more Market-led informed one. The Proxy-Advisory firms bring us closer to this goal and their regulation, which is a one-of-a-kind development in India ensures their unbiased

functioning. It is high time that Shareholders start regarding themselves as Nouns in the Financial Markets rather than being mere Adjectives to their Companies. Activism follows money and as the Asian Market grows into a powerhouse with India growing at a rate of 7.0 Percent, more and more investors are going to find their way into India’s Financial Market and as they do, Shareholder Activism will expand and diversify the Corporate Governance system of India.

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SMART CONTRACTS: AN EMERGING TECHNO-LEGAL REVOLUTION

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ABSTRACT:
The advent of digital technologies has enabled new forms of contracting and made it easier to engage in transactions and commercial relationships. The term ‘smart contract’ is used to refer to a software programme which is often, but not necessarily, built on blockchain technology as a set of promises, specified in a digital form, including protocols within which the parties perform on these promises. Smart contracts provide automatic enforceability, execution and automation of business processes, financial instruments or legal documents. While some assume that smart contracts can be fully integrated into existing contract law, others predict that it will be the vanishing point of contract law. The inherent uniqueness and complexity of smart contracts makes it difficult to discern where and how they fit within the legal frameworks of traditional contract law. This paper will trace the evolution of smart contracts and explain the underlying technology. While analyzing the current legal status and regulatory framework of smart contracts, it will also shed light upon the application of traditional contract law principles, the potential for unauthorized practice of law, challenges in drafting and enforcing smart contract. Finally, the paper will try to bring out the advantages and impact of smart contracts in the near future.

INTRODUCTION:
Technology promises to replace slow and imprecise paper institutions with efficient, digitalized counterparts. Contract law is a frequent target of these hopes. The advent of digital technologies has enabled new forms of contracting and made it easier to engage in transactions and commercial relationships. One such recent development in the quest to replace traditional contract law is Smart Contract. Smart contracts are computer programs that can automatically execute the terms parties have agreed on to regulate their relations. They provide automatic enforceability, execution and automation of business processes, financial instruments or legal documents. The aim of smart contract is to ensure the enforcement of agreement between the contracting parties by raising the costs of any breach by a prohibitive amount. It will revolutionize the way firms transact by facilitating autonomous negotiation with other parties thereby transforming our social and legal institutions. The inherent uniqueness and complexity of smart contracts makes it difficult to discern where and how they fit within the legal frameworks of traditional contract law. Therefore, it is necessary to recognize the critical features and fundamental set of legal issues that are integral to smart contracts.

MEANING OF SMART CONTRACTS:
The concept of smart contract was introduced by an American computer scientist and legal scholar Nick Szabo in 1996 as “a set of promises, specified in digital form, including protocols within which the parties perform on these
promises." Nick Szabo’s definition does not capture the difference between merely automated contracts, like vending machines, which are programmed with certain rules that can be included in a contract and respond to those rules. The difference is that smart contracts are addressed in a decentralized network that automates the performance, which can be the reason for it being called “smart”.

A Swiss computer scientist Prof. Roger Wattenhofer defined smart contracts as “an agreement between two or more parties, encoded in such a way that the correct execution is guaranteed by the Blockchain.” However, a smart contract does not need a blockchain to function, but blockchain technology provides the security and accuracy needed for a platform to be able to more fully utilize smart contracts. Therefore it is standard to use blockchain, in particular Ethereum, as a decentralized execution platform that stores smart contracts. Thus the term ‘smart contract’ is used to refer to a software programme which is often, but not necessarily, built on blockchain technology as a set of promises, specified in a digital form, including protocols within which the parties perform on these promises.

Smart contracts resemble “if-then” propositions, where, if Party A releases money into the blockchain, then the smart contract will self execute to meet the obligation laid out in the contract. Coders write the terms of a smart contract in blockchain computer code rather than in English or another traditional language. No individual or program can override or change the ledger. Once the parties meet conditions as stated in the ledger, the contract executes automatically without interjection from a third party. Smart contracts must collect outside information using an external data feed since smart contracts often rely on facts outside of the blockchain to determine if parties have met their requisite obligations. Smart contracts use oracles to collect facts outside of the blockchain to help determine if the parties have met their obligations.

EVOLUTION OF SMART CONTRACTS:

Variations of smart contracts, such as transaction processing systems that compute daily payments and receipts for financial institutions, have existed for decades. However, lack of requisite technology prevented widespread implementation. Prior to blockchain, smart contracts were computer programs that facilitated negotiation, verified and enforced performance on a centralized server. Long before Nick Szabo, financial institutions used a form of pre-blockchain smart contracts that eased

384 Ibrahim Bashir, Mastering Blockchain, 103 (2nd Ed. 2018).
385 Reggie O’Shields, Smart Contracts: Legal Agreements for the Blockchain, 21 N.C. Banking Inst. 181 (2017)
386 Id. at 180
389 Id.
bookkeeping transactions and option contracts by implementing computer code. Some other examples of pre-blockchain smart contracts include telecom providers locking phones and vehicle manufacturers incorporating automated speed limitations.

The concept of smart contracts has taken on new relevance and possibilities with the advent of bitcoin and its underlying technology called blockchain which allows smart contracts to use their full potential for automation. First proposed in 2008, the Bitcoin protocol was a successful experiment in the mass usage of decentralized ledgers, which forms an important basis of smart contracts.391 The proliferation of decentralized ledgers led to a new discussion of using technology to enforce agreements between individuals without recourse to third parties. New companies and protocols have aggregated the essential code to write smart contracts. This code exists apart from the Bitcoin ecosystem. These new companies are building an ecosystem for experimentation with implementation of smart contracts.

The first blockchain to enable the creation and deployment of sophisticated smart contracts was the Ethereum blockchain.393 It was proposed by Russian-Canadian programmer Vitalik Buterin in 2013 and went live in July 2015. It has its own coding language called Solidity. Using Ethereum, anyone can write, store, and execute small computer programs via a blockchain-based network. These computer programs are executed by multiple parties on the Ethereum network and thus have the capability to operate autonomously and independent of the control of any individual party.

APPLICATIONS OF SMART CONTRACTS:

Smart contracts are advantageous because they force parties to honour their original agreements. Smart contracts cause the risk of a breach to be more expensive for the breaching party, nearly eliminating the possibility of a breach.394 Avoiding breach altogether reduces the amount parties would spend to oversee enforcement and to litigate a costly dispute.395

Smart contracts that operate using blockchain technology will likely have a profound influence on various industries.396 In the legal field, smart contracts can drastically shorten litigation settlement times and mitigate risk for the user.397 Insurance industries can increase efficiency by implementing smart contracts to automate policy agreements.398 It allows the insurance policy holder to file a claim, which is then validated automatically by the codes written into the blockchain network. The validation involves assessing claims to verify their legitimacy then automatically executing the terms of the contract. Insurance companies can eliminate the risk of compensating fraudulent claims since the records of the claim are unbiased reviewed based on decentralization of the ledgers.

394 Jeremy M. Sklaroff, Smart Contracts and the Cost of Inflexibility, 166 U. Pa. L. Rev. 263, 279 (2017)
395 Id.
396 Id.
397 Id.
398 Id.
Governmental entities might improve processes if they used smart contracts to manage title recordings, social services, and e-voting. Further, consumers and utility companies can benefit from smart contract use in automatic bill-paying by debiting an account based on predetermined conditions. In manufacturing, smart contracts can replace slow and expensive supply chain processes.

LEGAL ISSUES WITH SMART CONTRACTS:

i. Traditional Application Under Contract Law:

Courts and policymakers have not assessed the full potential of smart contracts, making it difficult to place them within a regulatory scheme. No court has provided guidance for the enforceability of smart contracts, nor has there been a smart contract market with standardized practices established. The absence of authority and direction causes conflicting views about the enforceability of smart contracts. While some assume that smart contracts can be fully integrated into existing contract law, others predict that it will be the vanishing point of traditional contract law.

Some analysts characterize smart contracts as an alternative to legally enforceable contracts. Traditional contracts implicate future performance by creating an obligation for one or more parties. Smart contracts do not create a future obligation because once the parties activate the smart contract the parties have no entitlements beyond those written in code. The code executes robotically without any consideration of other factors. Proponents of this analysis believe that the smart contract does not create any contractual obligation. Smart contract does not give rise to a legal bond between the parties. Even if there is some kind of “bond”, which all the parties to it share, it relates to a technical bond of a party with blockchain platform of Smart contract. Therefore, this theory claims that smart contracts are developing in a technical universe not yet touched by the legal realm.

Others contend that smart contracts simply fit into the existing legal doctrines that govern traditional contract law. Acceptance and consideration are both confirmed through act of performance of the self-executing smart contract. If the contract executes, it meets the requisite elements of offer, acceptance, and consideration; if the contract does not execute, there is no legally binding contract, only an offer. Therefore, smart contracts do not require external interpretation and intervention with regard to contractual obligation. However, this theory also limits the potential future use of smart contracts by assuming all smart contracts ought to operate like traditional contracts.

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399 Id.
Because of this varying treatment and their legal status smart contracts requires more technical regulation than those currently in place. Software builders should express regulation in the code language they draft, progressively turning law into code. Coders can insert law into a smart contract as parameters that would require smart contracts to follow existing law in order to execute. The coded rules omit the possibility that legal safeguards might invalidate the contract as a result of failure to comply with specific formalities. This idea of “regulatory coding” provides additional regulatory certainty and lowers the costs of supervision and enforcement.

ii. Questions of Liability:

Ideally, coders write the smart contract so that it will perfectly execute the intentions of the parties. But users of smart contracts should not assume coders writing the contract are faultless. A coder could make an error, or an operator could bug the code with a virus that misinforms the smart contract. A hacker could identify vulnerability in the smart contract and use the vulnerability for their benefit. This situation already occurred when the first Decentralized Autonomous Organization, launched by the Ethereum founder to serve as an investment fund, raised $150 million before hackers exploited a vulnerability in the software, permitting them to take $55 million worth of cryptocurrency. To avoid misallocation of liability of a smart contract, parties should allocate risk in a prior agreement or in the smart contract itself. The way the parties allocate risk will depend on whether the contracting parties or a third party attribute to the coding error. This prior agreement would allow the parties to introduce extrinsic evidence to determine the intent if there were a dispute over the intended function of the code without the mistake. This proposition is analogous to traditional contract law, which supports the court’s consideration of evidence of surrounding circumstances to determine the parties’ intent. This would limit the need to resolve matters in court and could help facilitate innovative responses in light of the complexity of a new market.

iii. Financial Crimes Enforcement Challenges:

Smart contracts may also present special challenges with regard to compliance with anti-terrorism laws and money laundering rules. These rules typically require

409 Id.
410 Black’s Law Dictionary (10th ed. 2014) defining extrinsic evidence as “evidence relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement”
411 Dickson C. Chin, Smart Code and Smart Contracts, in Blockchain for Business Lawyer, 110 (2018)
413 Supra note 28 at 115
participants in financial transactions to know and verify the identity of counterparties and report “suspicious activity” to law enforcement\textsuperscript{415} or prohibit transfers of funds to proscribed persons.\textsuperscript{416} Since smart contracts are designed to be self-executing without human intervention, users of these smart contracts must build a control that allows them to comply with these laws by verifying identities and blocking unlawful transfers and transactions.

iv. Data Protection:

As the global market of smart contracts and blockchain platforms grow, law will have to solve new issues like Data Protection. It will be crucial to resolve the possible difficulty of identifying the person in charge of processing the personal and sensitive data that is included in the smart contracts, as well as to solve the potential risks of inadvertently making international data transfers through nodes of the blockchain platform without complying with the legal requirements.\textsuperscript{417}

REGULATORY FRAMEWORK FOR SMART CONTRACTS:

In the United States, 47 states in 1999 adopted the Uniform Electronic Transactions Act (UETA). The UETA regulates e-contracts, records and signatures etc. It says that the e-contracts are valid and the use of a digital signature will be deemed valid for providing consent. In 2017, Arizona has passed special regulations recognising smart contracts and their execution through blockchain technology. Vermont and Nevada followed by passing laws recognising smart contracts and their execution through blockchain technology.

There is no clarity regarding how the smart contracts shall be codified in the Indian Law. With regard to position of smart contracts in India it will be regulated by the Indian Contract Act, 1872, the IT Act, 2000 and the Indian Evidence Act, 1872 since there is no any other specific regulation. The most common questions amongst the legal fraternity involve the status of cryptocurrency being undefined in any law, and the questions of their taxation.

Further challenges are provided by the IT Act does allow contracts to be validated by the use of digital signatures. The IT Act, 2000 puts a limitation on obtaining these digital signatures, and provides that they can only be obtained through a government designated certifying authority as per Section 35 of that act. This does not help the cause of smart contracts where a hash key is used as unique identifier and authenticator produced by the blockchain technology to validate a smart contract.\textsuperscript{418}

This disparity is also extended to the Indian Evidence Act, Section 85B which states that an electronic agreement would be considered valid only if it has been authenticated with a digital signature. These two legal checkpoints not only corrupt the authentication process in blockchain through hash-key generation but also disallow any admissibility in the court as evidence.\textsuperscript{419}


\textsuperscript{416} 31 C.F.R. § 501 (2016)

\textsuperscript{417} Pablo Sanz Bayón, Key Legal Issues Surrounding technology. Vermont and Nevada followed by passing laws recognising smart contracts and their execution through blockchain technology.

\textsuperscript{418} Anirudha Bhatnagar, Smart Contract In The Indian Crucible, 19 June 2018, http://www.mondaq.com/india/x/711102/fin+tech/Smart+Contract+In+The+Indian+Crucible

\textsuperscript{419} Id.
CONCLUSION:
The new data-driven economy has led to the rise of innovative technologies like Blockchain and smart contracts. They have the potential to transform financial markets. However, smart contracts in the commercial realm are at a nascent stage. Assuming the technology is widely adopted, smart contracts will need to meet many of the same legal standards as traditional paper agreements. Proper technical regulation will render adequate clarity to reach the level of understanding necessary to frame a legislative policy that is truly adapted to face the legal problems that smart contracts phenomenon will face in the near future.
SCOPE OF ONLINE ARBITRATION IN INDIA

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INTRODUCTION

1. Concept of Online Arbitration

Online Dispute Resolution (ODR) is a branch of dispute resolution which uses technology to enable the resolution of conflicts or disputes between parties. It predominantly involves the application of arbitration, mediation, negotiation or a combination of any of the methods. Incidentally, ODR is recognised as the online equivalent of Alternative Dispute Resolution (ADR). Nevertheless, ODR can supplement the conventional means of settling differences or conflicts by employing novel practises and online technologies to the process.

ODR is yet a fairly recent development. It is an extensive field, which may be adapted to a range of disputes; from interpersonal disputes including consumer to consumer disputes (C2C) or marital separation to court disputes and interstate conflicts. It is said that proficient mechanisms to resolve online disputes will impact the development of e-commerce. Although the application of ODR is not limited to business to consumer (B2C) online transaction disputes, it seems to be apt for such disputes, since it is logical to use the same medium (internet) for the settlement and solving of e-commerce disputes when parties are located faraway from one another.420

ODR can be defined as the deployment of applications and computer networks for resolving disputes with ADR methods. Both e-disputes and brick and mortar disputes can be resolved using ODR. At the moment there are four types of ODR systems: 421

1. Online settlement, using an expert system to automatically settle financial claims;
2. Online arbitration, using a website to resolve disputes with the aid of qualified arbitrators;
3. Online resolution of consumer complaints, using e-mail to handle certain types of consumer complaints;
4. Online mediation, using a website to resolve disputes with the aid of qualified mediators

Not all of these types of ODR are fully developed yet. Online settlement and online mediation are currently the most advanced of them all.422

ODR is the synergy between ADR and Information & Communication Technology (ICT). It uses computer-networking technology to bring the disputing parties together on an ‘online’ platform to participate in a dialogue about resolving their issues and conflicts in a more efficient manner, and for which traditional means of dispute resolution were either inefficient or unavailable.423

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422 Ibid Note 2
423 ETHAN KATSH ET AL., ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE: A
Online Arbitration (OA) is that branch of dispute resolution, which uses technology and internet to facilitate resolution of disputes between the parties. OA is also termed as cyber-arbitration, cybitration, virtual arbitration, electronic arbitration or arbitration online techniques. This field has appealed plenty of legal scholars since the mid-nineties.

Arbitration involves a decision by an arbitrator, wherein the parties have agreed by contract for that decision to be binding. If OA is adopted by the parties, the arbitration processes utilise email, chat or messaging, audio-conferencing or video-conferencing methods for communication between the arbitrator and the parties.

OA is a combination of conventional Arbitration under Arbitration & Conciliation Act, 1996 along with technological features requiring application of Information Technology Act, 2000.

This paper looks at the various facets of Online Arbitration in India along with the difficulties, advantages and legal complexities that this form of dispute resolution entails. With the increase in number of consumer-seller disputes and the ever rising backlog of cases, the future of resolving conflicts in India is online arbitration. It would allow quick settlements to international as well as domestic business entities. The imminent need of this form of dispute resolution cannot be discarded.

2. Background

TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 21-33 (Eleven International Publishing 2012)

424 Rafal Morek, Online Arbitration: Admissibility within the current legal framework.

The advent of Internet and the development of the World Wide Web brought in a new era of communication and breaking down of physical barriers. It has changed for ever the conception of human interactions. We can communicate across continents, retrieve information from multiple sources and conduct business seamlessly in a global marketplace. However, just as real world interactions are subject to disputes, the same applies to the context of online interactions.

The courts find it difficult to handle disputes arising in the online context due to a number of reasons including the high volume of claims, the contrast between the high cost of litigation and low value of transactions, the question of applicable law and the difficulty in enforcing foreign judgements. Alternate Dispute Resolution (ADR) has been promoted by courts worldwide because of its speed, flexibility, informality and solution-centric approach to dispute resolution. However, the tradition tools of arbitration have not been found successful in addressing the complications of web based transactional disputes. The need for a new and effective system gave rise to the introduction of online dispute resolution (ODR) including online arbitration.

Though the internet began in 1969, the need for ODR was felt only in the early 1990s. During the first two decades, a limited number of people were using the internet for limited purposes. Till 1992, the internet was largely a US centric network, used mainly by academic institutions and the military. Commercial transaction was banned by the National Science
Foundation’s acceptable use policy. In 1992 the internet got commercialised and disputes related to online transactions started surfacing. The year 1994 saw the first case of spam and also the first internet fraud case. In 1996, The National Centre for Automated Information Research (NCAIR) provided funding for three ODR experiments. The Virtual Magistrate project was aimed at resolving disputes between Internet Service Providers and Users. The University of Massachusetts Online Ombuds Office was conceived to facilitate dispute resolution on the internet generally. The University of Maryland aimed at using ODR in family disputes where parents were located at a distance. In 1999, the availability of various tools made ODR more than just online communication. The ODR industry started emerging, and governments realised that ODR can be a solution for many problems originating in the online environment. The e-commerce industry has seen an exponential growth in the last decade and is the real driver for the expansion of ODR. According to Google, 22% of the world’s population had access to computers and used internet in 2010, which increased to 44% in 2014.

In India, the formal legal system is not equipped to handle the insurmountable backlog of disputes. The idea of arbitration was introduced to ease the access to justice. The first instance of arbitration introduced the role of arbitrators in dispute resolution through The Bengal Regulation Act, 1772. The Arbitration Act 1899 was repealed and replaced by the Arbitration Act 1940. Since then, arbitration in India has undergone a sea change with the introduction of the Arbitration and Conciliation Act, 1996 and its recent major amendment Arbitration and Conciliation (Amendment) Ordinance, 2015 allows scope for use of online methods. Online arbitration is a mixture of conventional arbitration combined with the technological features of the Information Technology Act, 2000. The National Internet Exchange of India (NIXI) has used ODR as an effective form of dispute resolution. It is similar to traditional arbitration but conducted over the internet. It is gaining popularity primarily because of its speed and cost effectiveness.

3. Scope of Online Arbitration and its Pros and Cons
The role of technology with regards to the ODR mechanism varies according to the degree of modern technological tools and software applications used, and the balance between the human factor and the electronic element in the process. According to the role technology plays in the process – ODR schemes could be grouped into three categories: (a) Technology-assisted ODR mechanisms, wherein technology is restricted to providing adequate and secure medium of communication and information exchange; (b) Technology-based ODR mechanisms, wherein a full-fledged cutting-edge technology is applied to resolve disputes; and (c) Technology-facilitated online dispute prevention (‘ODP’) guarantees, which aids in reducing the risk of potential e-disputes and enhances trust and security in e-business.

E-arbitration generally fall within category (a) since the countries worldwide have not
advanced to a stage where the human factor in arbitration, represented in the form of human arbitrator, is capable of being excluded. E-arbitration, in the strict sense denotes the integration of ICTs into arbitral proceedings to the extent that the proceedings are conducted wholly or substantially online. This would include filings, submissions, hearings, and awards being granted or decreed online. However, since such an idealistic perception of e-arbitration is not applicable universally. The ODR providers try to integrate ICTs into arbitral proceedings, with variable degrees, in an effort to stigmatize the process as a speedy, cost-effective, and efficient e-arbitration scheme.\textsuperscript{430}

When compared to traditional offline arbitration, OA has plenty of advantages. Firstly, OA is usually a swift procedure. Secondly, it is cost-effective. Thirdly, it offers round the clock accessibility and availability. Fourthly, it offers a more efficient case management. Fifthly, it is suitable for both small claims and highly complex and high value disputes.

The glitches OA faces in India are the lack of infrastructure and human institutions well versed with arbitration proceedings. Confidence and trust must be introduced to the litigant public who generally prefer courts to arbitration since they are not aware of arbitration proceedings. Technology gap between the old and the young generation should be shortened to further develop online arbitration. Lawyers should be instructed to not engage in frivolous litigation and encourage clients to settle their disputes amicably via e-arbitration proceedings. Education barrier and lack of access to technology is another main drawback behind implementation of online arbitration in India. OA may not be suitable for resolving all sorts of disputes such as criminal matters and matrimonial disputes which do need other forums for access to justice. However, in spite of the drawbacks linked with online arbitration, it remains one of the most significant methods of resolving Business to Business (B2B) and Business to Consumer (B2C) disputes in the current era.\textsuperscript{431}

E-arbitration related concerns are generally divided into technical and legal concerns. The technical concerns relate to technical standards and compatibility of systems, variation in the parties’ technical abilities and expertise, security and confidentiality of arbitral proceedings and communications, ability to organize and conduct hearings online, and data integrity and authentication. On a different note, the legal concerns could be grouped into three categories: (a) arbitration agreement related challenges; (b) arbitral proceedings related challenges; and (c) arbitral awards related challenges.\textsuperscript{432}

While the technical concerns or challenges are not exclusive to OA, it extends to all ODR schemes. They are of supreme significance in the context of arbitral proceedings owing to the legal and adjudicatory nature of such proceedings, which are normally subject to strict procedural norms that are needed to protect the integrity of the proceedings at large to prevent subsequent challenge to arbitral awards.

\textsuperscript{430} Ibid Note 10  
\textsuperscript{432} Supra Note 10
The legal concerns and challenges can be mitigated by adhering to proper systems and procedures, which are discussed below.

**Arbitration Agreement**

Hon’ble Supreme Court in the matters of *Shakti Bhog*[^1] and *Trimax*[^2] have upheld the validity of arbitration agreement entered into by exchange of emails though no formal agreement in writing signed by the parties had come into existence.

As in Conventional Arbitration, On-line Arbitration can either be Ad-hoc arbitrations or Institutional arbitration. In either of the situations, parties or the Institutions should clearly spell out the law governing the contract, the law governing the arbitration agreement, the procedural law, the jurisdiction of courts (whether exclusive/ non-exclusive), applicability of Part I of the Act, language of the proceedings, the place of arbitration and other procedural details.

In addition, being an On-line Arbitration, the procedures relating to use of technology have to be either agreed by the parties or laid down by the Institutions. The Institutions acquire further importance as they are in a better position than the individual parties to clearly lay down the details which are required in an On-line Arbitration so that parties who follow the rules of a particular Institution are not faced with any additional difficulties.

It is particularly important to spell out these details because On-line Arbitration, unlike Conventional Arbitration, is not by physical meeting of parties and arbitrators but is a virtual meeting. Extra caution needs to be taken and minute details need to be put into the rules and procedures keeping this aspect in view. Since arbitration proceedings are meant to be confidential in nature, the infrastructure that is agreed to be used by the parties should not only provide confidentiality of data but should also be reliable.

**Arbitral Proceedings**

Moving on to the second part, i.e. the arbitral proceedings which are virtual in nature, it is seen that the procedure which would be adopted by the parties would already have been spelt out in the agreement or the Institutional rules followed by the parties. In addition, the Statement of Claim and defence etc. which need to be sent by transmitting the physical copies can be transmitted in electronic form. They can be sent through emails by attaching PDF files and in addition, signed copies can be later sent though courier.

Again, Section 4 and 5 of the Information Technology Act, read with Section 65B of the Evidence Act come to the aid of the parties. Such pleadings can be transmitted in electronic form without losing recognition of law.

It may however be added that in the conduct of proceedings, there could be difficulties such as link failure, system failure, electricity failure etc. which need to be taken care of in the agreement or the Institutional rules so that either a back-up or an alternate provision is made and information/ data fed in the system can be retrieved.

ICC has taken a lead and framed certain Standards for On-line Arbitration which include rules for giving unique file names, recording of dates, retrieval of lost electronic documents, mode of transmission and storage of emails, and

[^1]: Shakti Bhog Foods Ltd. v. Kola Shipping Ltd., AIR 2009 SC 12
[^2]: Trimex International FZE Ltd. v. Vedanta Aluminium Ltd. (2010) 3 SCC 1
confirmation of receipt of email and rules for audio and video conferencing.

The procedural requirements of having the virtual proceedings have to be clearly spelt out including the details for exchange of pleadings, video conferencing and audio conferencing.

At this place, a word of caution may be added. In certain circumstances, parties and the arbitrators may be placed at different ends of the system in different geographical areas. Various permutations and combinations may arise, for example, a party may be sitting with an arbitrator at one end while the two arbitrators may be sitting at the second end and the other party may be sitting at the third end. This may lead to allegations of non-compliance of Sec 12 and 18 of the Arbitration & Conciliation Act, 1996. Rules for holding proceedings should be formulated in such a manner that in holding of virtual proceedings equality and impartiality to the parties is ensured.

It is a known fact that courts have already recognized appearance of accused and also cross examinations through video conferencing not only in England and Wales but also India.

The discussion amongst the arbitrators and the final signing of the proceedings can be ensured by exchange of drafts through emails, which, as already stated above, provide a valid record for future reference and are acceptable under the law.

**Arbitral Award and its Enforcement**

Coming to the third part, i.e. arbitral award and its enforcement, Section 31 of the Arbitration & Conciliation Act requires the award to be in writing and signed by the arbitrators. The award can be issued through email by sending scanned signed copies in PDF format. The actual signed copies can be sent through post.

Alternately, the arbitrators can affix digital signatures and provide authenticity and integrity to the award. For enforcement of the award, the original signed copy received by post or the digitally signed awards, as the case may be, can be filed before the courts.

New York and Geneva Conventions requires filing of original or duly authenticated copy of the award for enforcement. As per the functional equivalent approach promoted by Model Law of Electronic Commerce, electronic documents can be considered original for enforcement.

**ROLE OF JUDICIARY**

The role of the judiciary with regard to the topic online arbitration can be best understood by analysing the case study of Trimex International.

1. **Trimex International Fze Limited v. Vedanta Aluminium Limited**

**FACTS:**

Trimex offered, via an email, the supply of bauxite to VAL which, after several exchanges of e-mails, was subsequently accepted by latter, confirming the supply of 5 shipments of bauxite from Australia to India. Though a draft contract had also been prepared but it yet needed to be formalised.

435 The ‘functional equivalent’ approach is promoted by Model Law on Electronic Commerce. Also See ‘Guide to Enactment of the UNCITRAL New York, 1997’.
After VAL received first consignments of goods, it requested Trimex to hold back next consignment of goods so as to enable them to check bauxite’s utility value. However, on same day, ship owners nominated the ship for loading the cargo. Later when contract was cancelled by Trimex, it claimed damages paid to ship owners from VAL which latter refused by denying any contract.

ISSUES:

Whether the acceptance that was communicated to Trimex gave rise to any agreement between the two parties?

Whether there was any valid subsisting contract between the parties in absence of any formal contract?

JUDGEMENT:

The judgment held by P.Sathasivam J. stated that the agreement between Trimex International FZE Ltd. Dubai and Vedanta Aluminium Ltd. India was in fact a valid contract.

The fact that there was constant communication between the 2 parties with respect to various technical terms of the contract such as price condition, liability, payment of interest and dispute resolution, proves that both parties were well aware of the terms of the agreement and the mere fact that there was no “formal contract” will not tarnish it’s validity in the court. Vedanta’s argument that the “essential terms of the contract” have not been discussed clearly and our ambiguous do not hold weight either.

The term “essential” terms means those terms of a contract without which the contract cannot be carried out. However in the above case, the fact that shipments of bauxite were sent by Trimex and accepted by Vedanta proves that the agreement could be carried out and, was in fact, not ambiguous.

S.7 of the Indian Contracts Act, 1872 which states that “an acceptance must be absolute and unconditional” was also fulfilled. Thus, in the present case it is clear that the basic and essential terms had been accepted by the respondent thus leaving no option but to consider the contract as a concluded one.

ANALYSIS:

Trimex made a proposal for the supply of bauxite on certain terms such as price conditions, liability, and payment of interest, governing law and dispute resolution. Vedanta needed more information on the price and hence requested Trimex for the same. Before agreeing to Trimex’s proposal, Vedanta initiated certain changes in the terms of the agreement which were not accepted by Trimex.

However Vedanta agreed to Trimex’s proposal on the following day. At this point it was evident that the parties had reached a consensus. However it was not clear whether the consensus would imply the existence of a contract.

S.4 of the Indian Contracts Act states that “the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. The communication of an acceptance is complete- as again the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor, as against the acceptor, when it comes to the knowledge, of the proposer.” According to S.4 communication of acceptance was complete against Vedanta Aluminium Ltd. as soon as the confirmation of 5 shipment lots came to the knowledge of Trimex.
Also, the acceptance was unconditional and unqualified i.e. the deal was confirmed without making any changes in the original.

Against contention of ambiguity, the court held that there was an agreement on essential terms. Thus, as the respective terms were communicated to both the parties, an agreement existed.

With regards to the second issue, the acceptance of a contract entered into, or its implementation, is not affected by the mere fact that the contract has not been prepared; if the contract is concluded orally or in writing.

S.10 of the Indian Contracts Act states that “In order to convert a proposal into a promise the acceptance must-

(1) Be absolute and unqualified;

(2) Be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance.”

A contract is said to be concluded when the parties agree to the essential terms of the contract and leaving out minor details has no hard binding effect on the same.

Also, unless it has been specifically mentioned by either of the 2 parties that only when there is a formal contract will it be enforceable, the validity of the contract does not depend upon its formality.

Vedanta was well aware of the fact that Trimex had to enter into a contract with the ship owner for 5 shipments for the delivery of bauxite to Vedanta. Trimex had also urged Vedanta to confirm the latter’s acceptance so that it could enter into a contract with the ship owner. Thus the intention of the parties made their respective promises to each other before Trimex entered into a contract with the ship owner. Also the existence of a contract between Trimex and the ship owner was well communicated to Vedanta. Hence the contention of Vedanta that there was no contract in existence does not hold ground.

Thus, the compensation asked by Trimex was US $ 1million for the loss caused to ship owners due to the cancellation of the contract and an additional US $ 0.8 million for the losses incurred by Trimex on the cancellation of the contract. In the judgment it was stated that the terms of compensation would have to be discussed by both the parties in the presence of an Arbitrator. In the researcher’s opinion, since Trimex had already placed an order to send the shipments through the shipping company, and had made Vedanta aware of all the terms at every stage of the negotiation, the compensation asked is fair.

The Trimex case is considered as a landmark one because the entire communication between both the parties happened online through emails, without any written signed document. The judicial response vis-à-vis technology has been positive.

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436 Pagnan SPA v. Feed products ltd. (1987) 2 LLR 619
438 Shankarlal Narayandas Mundade v. The New Mofussil Co Ltd. & Ors. AIR 1946 PC 97.
The importance of Information Technology has been recognised by the Supreme Court in many other cases as discussed below.

2. Basavaraj R. Patil v State of Karnataka

In "Basavaraj R. Patil v State of Karnataka" the question was whether an accused need to be physically present in court to answer the questions put to him by the court whilst recording his statement under section 313. The majority held that the section had to be considered in the light of the revolutionary changes in technology of communication and transmission and the marked improvement in the facilities of legal aid in the country. It was held that it was not necessary that in all cases the accused must answer by personally remaining present in the court. Once again, the importance of information technology is apparent. If a person residing in a remote area of South India is required to appear in the court for giving evidence, then he should not be called from that place instead the medium of "video conferencing" should be used. In that case the requirements of justice are practically harmonized with the ease and comfort of the witnesses, which can drastically improve the justice delivery system.

3. State of Maharashtra v Dr. Praful B. Desai

In "State of Maharashtra v Dr. Praful B. Desai" the Supreme Court observed: 'The evidence can be both oral and documentary and electronic records can be produced as evidence. This means that evidence, even in criminal matters, can also be by way of electronic records. This would include video conferencing. Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. Thus, it is clear that so long as the accused and/or his pleader are present when evidence is recorded by video conferencing that evidence is recorded in the "presence" of the accused and would thus fully meet the requirements of section 273, Criminal Procedure Code. Recording of such evidence would be as per "procedure established by law". The advancement of science and technology is such that now it is possible to set up video conferencing equipment in the court itself. In that case evidence would be recorded by the magistrate or under his dictation in the open court. To this method there is however a drawback. As the witness is not in the court there may be difficulties if he commits contempt of court or perjures himself. Therefore as a matter of prudence, evidence by video conferencing in open court should be only if the witness is in a country which has an extradition treaty with India and under whose laws contempt of court and perjury are also punishable".

The above case laws shows that the judiciary in India is not only aware of the advantages of information technology but is actively and positively using it in the administration of justice, particularly the criminal justice.

http://perry4law.blogspot.com/2005/05/justice-through-electronic-governance.html

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441 2003 (3) SCALE 554.
442 Dalal Praveen at
CONCLUSION AND SUGGESTIONS

There is a favourable climate being put in place for dispute resolution through the initiative of court annexed ADR. A culture is going to be set in place wherein ADR and in turn ODR will take centre stage.

The IT Act of 2000 gives legal sanctity to electronic records. Parties can safely settle their disputes online with the guarantee that the settlement agreement, if arrived at and executed as per the requirements of the Act, would be enforceable in a court of law. The cases referred to above give a clear indication that use of technology has the blessings of the judiciary.

Based on the affordability and availability of technological infrastructure, ODR can become the preferred mode of dispute resolution, even when both the parties reside in the same city; as the to and fro commute in most of the metros is highly unproductive and a waste of time. Moreover, the parties may not be required all the time, in which case one can log off and attend to some other work. The parties save on legal costs as lawyers, especially counsels, charge by the hour and can be engaged for shorted duration in case of online proceedings. One also saves on travel and accommodation costs if one of the parties resides in another city. Another benefit of online proceedings is that the parties are able to engage the services of experts of their choice. These experts would have otherwise not been in a position to attend an offline meeting because of the time consuming efforts.

Resolution of disputes outside court will have a profound impact on the backlogs in the various courts in more ways than one. First, as we all know, a final order in a given matter does not finally end the matter – it only ends up as an addition to the backlog in a higher court as and by way of an appeal brought by the party aggrieved by the lower court’s order. On the other hand, a dispute resolved in a non-adversarial manner resolves the dispute finally and hence there is rarely ever any challenge brought against such resolution which is a settlement by mutual consent. Hence, when the pending matters start getting settled by Court-Annexed ADR, not only will that decrease the burden of that court, but it will not lead to any increase in the burden of the appeal courts. Second, once the backlog reduces substantially, justice would seem to be more easily achievable and this will prompt more members of society to come forth and file proceedings for settlement of their disputes which hitherto they avoided due to the delays in justice dispensation.

The ADR-related legislative reforms, when viewed in conjunction with other legislative provisions relating to information technology and e-commerce, provide an excellent opportunity to any group, body or institution seeking to establish themselves as service providers for Online Dispute Resolution (ODR). There are several established entities actively engaged in providing ADR services and who are already well-positioned to fill the space suddenly created by this healthy juxtaposition of the several legislative provisions. What is lacking is not only awareness of this opportunity but also the proficiency/expertise necessary to implement ODR as a truly viable and a much healthier alternative mechanism to litigating in a court of law. Considering the pool of talent available, it is only a question of showing the way.

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Another area which requires some effort is the formulation of a uniform code for ODR. This work should be carried out extensively and the different governments of the world should strive forth and establish an international body/organization, which would in turn co-ordinate with its member countries and the concerned forum of the United Nations. This will definitely aid in the creation of a set of transnational rules manifesting the interest and the will of the different countries.

India stands to benefit greatly from this effort simply because not only does it probably have the highest backlog of cases pending in its courts of law, but also because its litigious population does not take too many days off. Many have been shying away from the courts looking at the prolonged delays, but once they have an alternative and convenient mode like online resolution of disputes, they are certainly not going to shy away from opting for it to settle their disputes.

In fact, looking at the benefits that ODR has to offer, the Supreme Court is seriously considering setting up e-courts on the lines of the system which has been implemented in Singapore and is in the process of preparing a feasibility report for the said project. And when such courts are established, that would truly bring ODR to the centre-stage.

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COPYLEFT AND MORAL RIGHTS: A VIABLE SOLUTION TO ENHANCE THE INTERESTS OF COPYRIGHT OWNERS IN OPEN ACCESS MODELS

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Abstract

Humanity has come a long way since its conception. And it has since progressed slowly towards a better world. Human beings tend to develop new ideas about knowledge that has already been accumulated and thereby constantly improve existing knowledge. Copyright soon came into being after discovering their value, preserving these ideas and giving their thinker a monopoly on it. Nevertheless, the idea of "copyleft" came later, standing for how a free movement of information and knowledge would take place in society. Where the copyright license authorizes the author to prevent others from using, altering or reproducing his work, Copyleft, on the other hand, authorizes the author to distribute his work freely to the public for use, adaptation, alteration or reproduction purposes. Copyleft is strongly supported and criticized respectively by socialists and capitalists. Yes, copyleft is a noble idea when measured in terms of what benefits society. Not only can its compliance benefit society as a whole, but attempts to implement contracts under Copyleft will also show our society's tolerance towards people's will. The popularity of copyleft licenses not only represents people's will, but also shows the shifting process of societal perspective towards means of production. Copyleft should be enforceable only if these terms and conditions are agreed by the parties. It should not be enforced or built in accordance with other intellectual property laws. Ultimately, every law's ultimate goal is to promote society's progress and improve every civilization. Open access licenses are a derivative of the copyleft movement. In this paper the implicit recognition of author’s moral rights in open access movements will be examined. The paper will also focus on the relevance of moral rights in open access licenses. Also, the effects of recognizing moral rights on the economic interests of the copyright owner will be analyzed.

Keywords: Copyright, copyleft, open access models, moral rights.

Background

In 1976, the word ‘copyleft’ appeared in ‘Dr. Dobb’s Journal’. Copyleft licenses were used with computer software in the beginning and it has grown into ‘Free Software Movement’ later. The founder president of “Free Software Foundation”, Richard Stallman, developed the first copyleft license in 1984. There was widespread discontentment over profit-oriented intellectual property system and neglect of the requirements of general public. The working of copyright, patent and trademark was better suited for companies and not common people. Copyleft arose as a natural revolt against this, backed by a strong desire for intellectual freedom and need for sharing information openly. Copyleft inculcated a culture of sharing, using, and reusing intellectual creations. Copyleft and open access movement have paved the way for a new method of protecting moral rights of authors of digital content. Copyleft movement is considered as an add-on to copyright law, helpful both to users and authors. Copyleft guarantees
free dissemination of knowledge on condition that attribution is given to authors. Public gets information, and the moral right of author is respected. Copyleft movement has not produced any new legislation. But, it safeguards users’ interest and authors’ interest. Copyright is not done away with but is applied in a different way. Copyright remains deactivated till a breach of moral right occurs.

2. **Objective of the study**
   Copyright protection grants the copyright owner exclusive rights to reproduce, distribute, make derivative works, and publicly display or perform a work. In order to enjoy any economic reward from the work, the copyright owner depends on sales. But, the monetary interests involved in copyright restricts public access to knowledge. From a copyleft perspective the public owns such works. Copyleft is fundamentally against restricting access to knowledge. Open access licenses are a derivative of the copyleft movement. In this paper the implicit recognition of author’s moral rights in open access movements will be examined. The paper will also focus on the relevance of moral rights in open access licenses. Also, the effects of recognizing moral rights on the economic interests of the copyright owner will be analyzed.

3. **Research Problem**
   The Copyleft movement provides an alternative to copyright protection by proposing that authors release their works under the terms of a license to the general public. The implicit recognition of moral rights in the open access model offers to enhance the rights of the copyright owner. But, is it sufficient the economic rights of the copyright owner in a digital space should be analyzed.

4. **Scope**
   The Copyleft movement questions the necessity of the exclusive rights granted to a copyright owner. According to this movement the copyright on certain works should be relaxed so that it can be used for non-commercial and academic purposes. A limited copyright on works should be available to the author. Copyleft should not be imposed. It should be construed harmoniously with other provisions of intellectual property laws.

5. **Research Questions**
   1) Are the exclusive rights granted under Copyright laws restricting public access to knowledge?
   2) What is the rationale behind the recognition of moral rights of author in open access licenses?
   3) Does the recognition of moral rights compensate for the alleged reduction of economic rewards to the author in the open access model?

6. **Hypothesis**
   Moral rights in open access models will enhance the interests of the copyright owner including economic interests.

7. **Research Methodology**
   Doctrinal method of research will be used. While evaluating the rationale behind recognizing moral rights of the author in open access models two variables will be used: the moral rights of the copyright owner and the open access licenses attributed to the Copyleft movement. The research will be based on available primary as well as secondary sources. Primary sources include the Indian Copyright Act, 1957 and several case studies. Secondary sources like books, articles published in
8. Introduction to the topic
The copyright law in historical accounts is known to be the legacy of technology. It has undergone systematic changes keeping in view the nature, extent and domain of technology involved to secure the public interest of creativity, innovation and ingenuity.\(^{444}\) Its main thrust is to provide adequate incentives to authors and creators of diverse copyright works, on the one hand, and make such works accessible to the public on the other hand.\(^{445}\) The copyright law had to adjust itself between the need to award the creator and the desirability of making such works public.\(^{446}\) With the ubiquity of the Internet as a unique and wholly new medium of worldwide human communication all over the world, shrunk into a digital global village, the protection of copyright works has become a serious concern for lawyers, as well as, the other stakeholders.\(^{447}\) The Internet together with P2P computer networks makes it possible for an increasingly larger number of individuals to participate in collaborative information production, thereby enervate the efforts to provide incentives to original creators of intellectual property.\(^{448}\) The Internet enables the nearly-instantaneous, original quality reproduction of and worldwide, lightening-speed dissemination of copyrighted works. The above restricting features of Internet make itself emerge as “the largest and strongest copy machine in the world”\(^ {449}\). The puzzles and paradoxes underlying the digital dilemma, by nature, are connected with the dichotomy between the notion of “information wants to be free” and the demands for stronger proprietary control of information in the digital environment.\(^ {450}\) This paper focuses on the battle between producers of content and free riders; between copyright industries and their own consumers; between taking profit from content and making it free. It is a battle fought on many levels, an economic level, an artistic level, a legal level, and an ideological level.

8.1. Copyright and its effects on public access to knowledge
Access to educational materials is crucial for the development of human capital, especially in the field of higher scientific and technical education, in order to contribute to developing countries’ economic progress.\(^ {451}\) Access to affordable teaching and learning materials is required for educating people, colleges, universities and libraries.\(^ {452}\) Access is determined not only by a product's availability but also by its affordability.\(^ {453}\) The cost of educational materials when prohibitive inhibits educational opportunities, hence the need to ensure that educational materials remain affordable.\(^ {454}\) Copyright-protected educational materials are not always affordable.\(^ {455}\) The ability to

\(^ {445}\) Ibid.
\(^ {446}\) Ibid.
\(^ {447}\) Ibid.
\(^ {448}\) Ibid.
\(^ {449}\) Ibid.
\(^ {450}\) Ibid.
\(^ {452}\) Ibid.
\(^ {453}\) Ibid (n 8).
\(^ {454}\) Ibid (n 8).
\(^ {455}\) Ibid (n 8).
assign and license copyright has enabled various industries to be sustained, such as the book publishing industry and the music publishing industry.\textsuperscript{456} Such industries enabled by copyright determine the price and availability of copyrighted material.\textsuperscript{457} As a result, large quantities of educational materials are sold at a rate beyond market scope in developing countries. This is an obstacle to obtaining information, thereby denying the right to education.\textsuperscript{458}

8.2. Genesis of Copyleft

Some claim that copyright has gone too far, protecting commercial culture at the expense of non-commercial, favoring private rights holders to the detriment of the public domain, and inhibiting flows of inputs required for the ongoing development of art and intellect.\textsuperscript{459} There was widespread dissatisfaction with the profit-oriented system of intellectual property and disregard of the general public's requirements.\textsuperscript{460} Copyright patent and trademark practice was better suited for companies rather than for ordinary people. Copyleft emerged against this as a spontaneous rebellion, backed by a strong desire for intellectual freedom and the need to share information freely.\textsuperscript{461} Copyleft instilled a philosophy of exchanging technological inventions, using them, and rejecting them. In general, software development has seen the emergence of "open source" or "copyleft" licensing, a prominent example of which is the GNU General Public License ("GPL").\textsuperscript{462} A GPL uses existing copyright law to try to permit the free use of software while at the same time prohibiting its sale or advertising, using an owner's existing rights.\textsuperscript{463} Similarly, Creative Commons, a U.S.-based non-profit organization, attempts to build on current copyright law by providing a collection of "some rights reserved" licenses exclusively to authors and artists.\textsuperscript{464}

Software companies supplied proprietary licensed softwares without revealing source code to block user-end improvements.\textsuperscript{465} In addition, copyleft movement introduced a new type of software license that provided the user with the source code to modify and use the software as required. Clearly, copyleft was opposed to information privatization and copyleft licenses secured end-users uncurtailed freedom and interest.\textsuperscript{466} Copyleft licenses make the work much more accessible to the general public and the terms of use are transparent from the license itself, including those relevant to the author's moral rights.\textsuperscript{467} Copyleft is fundamentally not very different from copyright. The author is protected by copyright and the rights remain with the public under copyleft. Most common with computer software, copyleft licensing, spread over time to other areas of creative work. In 2000, the Free Art Licenses were issued for artistic, sculptural, musical or performance works.

\textsuperscript{456} Ibid (n 8).
\textsuperscript{457} Ibid (n 8).
\textsuperscript{458} Ibid (n 8).
\textsuperscript{460} Ibid.
\textsuperscript{461} Ibid.
\textsuperscript{462} Ibid.
\textsuperscript{463} Ibid.
\textsuperscript{464} Ibid.
\textsuperscript{465} Ibid.
\textsuperscript{466} Ibid (n 16).
\textsuperscript{467} Ibid.
Most music libraries currently use these licenses.\textsuperscript{468}

In addition, for the benefit of the general public, copyleft and open access suspends copyright. But the copyright law is enforced if conditions stipulated are violated. The campaign for copyleft and open access has paved the way for a new way to protect the moral rights of digital content authors.

The interplay between copyright protection and public's right to access knowledge will be discussed in the following chapter.

9. Copyright and access to knowledge

10. Copyright and dissemination of knowledge in the digital era

Copyright is a successful concept. It is a well-established legal tradition that has evolved over the years and has shown its exceptional ability to adapt to social change. For common law countries, copyright law traces its history back to the Statute of Anne, passed in 1710.\textsuperscript{469} Civil law countries are not far behind, having settled comfortably by the latter part of the eighteenth century on the principles of copyright.\textsuperscript{470} But now there has been a dramatic change. Copyright survival is at risk.

At first glance, the obvious cause is technology.\textsuperscript{471} There can be little doubt that technological change has brought completely new pressures to bear upon the world of copyright. With unparalleled ease and fluency, information is written, replicated and shared via digital media.\textsuperscript{472} The crucial moment in a work's life has become its digital format debut. Once a work is digitized, with practically no constraints, it can be translated into different media, transmitted to an entity, distributed to the public, or shared across borders. The digital environment has the unparalleled ability to relax traditional information flow constraints.\textsuperscript{473} This makes middlemen unnecessary.

This is the copyright industry's greatest fear: redundancy.\textsuperscript{474} How can they confront a new reality in which they no longer have the position as disseminators of knowledge? Two possible strategies were explored in the response of industry to this challenge. The first is fighting fire with fire—in this case, technology with technology, as the expression goes.\textsuperscript{475} Industry initially supported the design of digital "locks" making data unavailable, but the technique has had limited success.\textsuperscript{476} There is no completely secure encryption software, so code-breaking is a persistent threat.

A second and more complex approach has been to create a more abstract battle-to combat the proliferation of digital media by trying to impose legal restrictions on the use of copyright works where either technical constraints do not exist or can be circumvented.\textsuperscript{477} But here, not only has corporate strategy tried to hold on to existing rights. Alternatively, copyright companies have also tried to expand their rights in the digital world—lobbying governments to implement copyright legislation and pursuing litigation against groups and individuals who may be held responsible for the infringement of

\textsuperscript{468} Ibid.
\textsuperscript{470} Ibid.
\textsuperscript{471} Ibid.
\textsuperscript{472} Ibid.
\textsuperscript{473} Ibid.
\textsuperscript{474} Ibid.
\textsuperscript{475} Ibid.
\textsuperscript{476} Ibid.
\textsuperscript{477} Ibid.
copyright. Industry's approach to new media was all-inclusive. Copyright laws must prohibit any activity involving the replication and communication of works in digital format. In practice, this means that any digital use of a work will require the copyright owner's permission and a fee would be created for every digital transaction.

But that's not how copyright works. Historically, only certain applications of a work fall within the laws of copyright. A bright line, in particular, typically distinguishes the use of a work from private use for commercial purposes, which is outside the scope of copyright law. Much of what happens in the digital age involves activities that resemble what is usually considered to be private use of works.

10.2. Balancing the interests of the copyright owner and public

There is a deeper reason behind it: social choice. In the copyright industry, in general, actors have made contentious choices about how to adapt to new technology. In most cases, such decisions have failed to address social change, of which there is no question that an inflexible copyright law will become a target. Established relationships are going to change - authors and artists, publishers and record labels are all in new situations. The existing power balance is altered. Current business models need to be modified in the copyright industry.

Change is inevitable, but none of it means the demise of the principle of copyright. If the loss of copyright is indeed at hand, at least part of the blame rests with the tactics of key players in the copyright industry. They also helped create the greatest feeling of anti-copyright in history. To some extent, the copyright industry's position is understandable. They are engaged in a fight for survival, and from their viewpoint, the use of any weapon at their disposal is fully justified. The reaction may be disproportionate-tactics such as persecuting people in cases of copyright represent a lousy approach to public relations and weaken public sympathy for entertainment companies' actual plight.

Yes, their approach's aggressiveness has generated a backlash. The word "free" may summarize the reaction. "Free" for different people means different things. For most members of the public, "free" means available without charge in the form of music downloads. Yet "free" software and "free" culture supporters are saying something else. The dynamics of the copyright dispute are highly polarized, with industry pressing for maximum protections increasingly effectively, on the one hand, and anti-copyright campaigns on the other, calling for the abolition of most, if not all, knowledge-related copyright restrictions. Industry and protesters are the protagonists in this drama.

There is no real reason why the open access movement's sympathies should be against authors. Nonetheless, the rage of open access campaigns is rightly aimed at the copyright works' corporate owners, who enjoy the copyright control's financial rewards overwhelmingly. That point brings us back to the issue of freedom in the

478 Ibid (n 26).
479 Ibid.
480 Ibid.
481 Ibid.
482 Ibid.
483 Ibid.
484 Ibid.
485 Ibid.
486 Ibid.
487 Ibid (n 26).
digital age and what it entails Lessig’s definition of “free” is an appealing one, as is his call for a balanced approach to copyright law. It makes eminent sense to lighten copyright restrictions.

When the issue of lightening copyright restrictions is discussed, the impact of such relaxations on the moral rights of an author should be considered. Moral rights are not expressly mentioned under open access models but an implicit recognition is given. The relevance of such a recognition will be the primary focus of the following chapter.

11. Moral rights of Copyright owner in Open Access Models

Although there are several moral rights, the rights of attribution (paternity) and integrity are the most widely recognized moral rights. The right to attribution/paternity simply means that an author has the unfailing right to associate his name with his own work. According to the right of integrity the author also has the right to demand that improvements or inconsistencies remain uncompromising in the artistic integrity of his work—although in most jurisdictions the author should prove that his reputation is at stake in the matter. The nature of the interests of attribution and integrity is the capacity of the author to respond by asserting his rights in a court of law to the mistreatment of his work.

“With the arrival of the information society the question of moral rights is becoming more urgent than it was. Digital technology is making it easier to modify works.” This statement clearly states that the explosive growth of Internet and online services and technical resources allowing users to directly access and exploit creative works has resulted in a massive violation of copyright, including moral rights, as well as non-performance of the author’s moral right. The ability to copy, modify and redistribute works of art by means of information technology has made it extremely difficult for authors to control the use of their work and to assert their moral rights where problems arise.

11.1. Challenges posed to moral rights in the digital age

The doctrine of moral rights faces three kinds of challenges in the digital age. First, copyright law has become the primary form of regulation governing new technology. For example, computer program and databases are protected as 'literary work' under copyright. With the addition of these kinds of new works, the conventional copyright law norms sometimes become insufficient to meet the needs of these kinds of new subjects, particularly in digital works such as computer programs and software databases. The main problem with works relating to digital space is the question of authorship and originality.

488 Ibid.
490 Ibid.
491 Ibid.
492 Ibid.
493 Ibid.
494 Ibid.
496 Ibid.
497 Ibid.
The second challenge comes from new technology-generated creative possibilities. The development in information technology has created numerous ways to create new copyright quickly and easily alter, implement and use existing copyrighted work.

Thirdly, "new technologies have made it possible for members of public to intervene in creative works in a new way, making seamless and imperceptible changes." In case of open creative collaborative works authorship vests in the huge number of persons out in public. In these kinds of works, they can legally make seamless and substantial changes according to their choice. For the substantial changes made, they surely are the authors but the problem always arises about the recognition of moral right.

The moral right of integrity of the first and earlier author(s) is shaken when other authors modify the work according to themselves and while considering the entire work or text for attribution purposes, the moral right of paternity is questioned. And these rights are important to talk about as these are the author's intrinsic rights and mostly rights that are in perpetuity and can be exercised even after the copyright term has expired. And also because even when author's economic right is clearly determinable or even clearly secured, it may be in question.

11.2. Changes brought by Copyleft movement

Copy-left or open access movement’s objective of free access to knowledge has helped creating a new way of protection to moral rights of author in digital contents. The importance of moral rights in digital space has been summed up by Professor Mira T. Sundararajan in lines below, as: “...an emphasis on moral rights may help, not only to redirect copyright reform in less developed jurisdictions, but also, to re-establish a balance among the different interests implicated in copyright on the international stage. In particular, moral rights may help to build a new alternative to copyright for the Digital Age.”

Sure, digital content goes beyond the narrow scope of copyright law, and the new, non-economic, and fundamental defense of moral rights is the one that can only be used to take all digital content into the single copyright domain. But as we know, moral law itself was not sufficiently effective and the open access mechanism became the only viable thing to complete the above-mentioned objective and stop the copyright from dying, particularly in the copyright system of different countries. Although the copyright does not deliberately come before us in open access, but the truth is that copyleft is not opposed to copyright, it’s just a play of words. Open access uses the copyright as its armour and moral rights as its weapon and it collectively fights the complexities of digital contents in digital space.

11.3. Benefits of Copyleft

Since the live use of the internet and PC is the part of life, the violation could be mixed with and without any benefit, and the defense of copyright, including moral rights, is weakened even by the use of this device. This incapacity has begun copyright’s slow demise. "Copyright

498 Ibid (n 52).
499 Ibid.
500 Ibid.
501 Ibid.
502 Ibid.
503 Ibid.
504 Ibid (n 52).
505 Ibid.
survival is under threat.\textsuperscript{506} The open access movement has come to serve both ends as an add-on to copyright law; the end of the user as well as the end of the author. Since, copyright violation dilutes not only economic rights but also moral rights of author and it is not pertinent to stop the violation at all by means of protection or force, the open access makes the dissemination of knowledge without any excessive protection among the public on the condition that the attribution to its author is well provided.\textsuperscript{507} Thus the public, when gets knowledge free, in turn back tries to respect the moral rights of author or contributor. The reader then gets free access to information as a matter of right and author voluntary gets recognition among public and his moral rights are protected even in the very fragile kind of works i.e. digital contents.\textsuperscript{508}

11.4. Relevance of moral rights in digital space
The value of moral interests is generally recognized by open access campaigns. These movements are ideologically diverse, but moral rights seem to emerge in all of them from practical concerns about preserving the integrity of the open source environment.\textsuperscript{509} The language of authorship's natural rights is explicitly–maybe disingenuously–rejected by the free software community but for creative individuals the copyleft community has a soft-hearted sympathy.\textsuperscript{510}

Moral rights in a digital environment should not only be remembered, but their recognition should also be extended in two important ways. First, a corresponding human right of creators should be established as access to knowledge becomes recognized as a human right.\textsuperscript{511} Moral rights can provide the basic principles of such a right-disclosure, assignment and integrity Moral rights can also provide the correct legal framework: the moral rights principle clearly prohibits the possibility of ownership or possession in businesses.\textsuperscript{512} These are an author's personal rights, relying on a human being to invest and exercise them with meaning. It is important to recognize a human creative right, not only to protect authors and their works, but also to protect society as a whole from the consequences of losing touch with one's own humanity.\textsuperscript{513} An integral part of human nature is the intellectual life. Technology cannot replace culture, neither man nor woman can be replaced by machine.\textsuperscript{514} Surprisingly, the second area of moral rights growth can take them into the field of economic rights. Much of the open access movement's mindset is focused on the "free" access principle.\textsuperscript{515} While both the free software movement and Creative Commons underline the value of liberty in an ideological sense, the Creative Commons licensing system also means

\textsuperscript{506} Ibid.
\textsuperscript{507} Ibid.
\textsuperscript{508} Ibid.
\textsuperscript{509} Ibid.
\textsuperscript{510} Ibid.
\textsuperscript{512} Ibid (n 68).
\textsuperscript{513} Ibid.
\textsuperscript{514} Ibid.
\textsuperscript{515} Ibid.
freedom from payment, in practice. The "free" use model has its appeal and purposes in this sense.\textsuperscript{516}

11.5. \textbf{Interests of copyright owner in open access models}

As a matter of fact, all open access licenses preserve moral rights to the extent they apply. Unlike copyright, the open access licenses stipulate the provision of explicitly recognizing the moral right of paternity, when using the work of any author without even express consent or permission from him.\textsuperscript{517} Moral rights are inalienable and rights \textit{in perpetu}.\textsuperscript{518} Most of the countries doesn't allow waiver of moral rights.\textsuperscript{519}

The open access license makes the work in public only without any copying restriction.\textsuperscript{520} Actually any open access license never takes away the copyright.\textsuperscript{521} Rather, they impose an obligation on the user of that work to respect the moral rights of author in case if he wishes to continue use the work without the permission.\textsuperscript{522} And even that person doesn’t oblige to do the same the whole copyright including the moral rights imposes upon him.\textsuperscript{523} For protecting moral rights of author it’s a ‘double edged sword’, which in any case protects the same. Thus, open access has protected moral rights of author firstly in a ‘double edged sword’ manner, making them legally liable in either case and secondly making people liable to protect moral rights on their own by providing them right to free access to information, where cost is only to recognize and respect the moral rights of author, which in turn they do very happily; and thirdly by a whole new author- user relationship.\textsuperscript{524}

Open access uses the protection of moral rights to defend and promote authors’ integrity, which is the basic goal of this movement, but in the meantime it is the violation of moral rights that leads to invoke the mechanism of copyright against the possible infringement. The procedures for fundamental violation are the same, but they depend on the moral rights. Most of the world’s copyright system recognizes moral rights, and copyleft also makes them enforceable where the copyright system does not properly recognize moral rights.

11.6. \textbf{Recommendations}

The copyright schemes should accept open access licenses as providing better protection for digital content in digital space and rejuvenating copyright. This would also lead to better protection of copyleft and copyright-recognized authors’ rights. The infringers would then have greater certainty of being detected and would try not to breach the license terms. It may provide a more legal way for writers to opt out under copyleft licenses to publish their works.

The consistency of open access licensing is necessary to take action before expressly acknowledging it in the copyright process. The proliferation of licenses displaying a variety of terms creates confusion not only between authors, but also between users and law enforcers. Under the auspices of one universal organization or group of countries, the licensing terms of different organizations must be uniform along the line through any guidelines or rules.

\textsuperscript{516} Ibid.
\textsuperscript{518} Ibid.
\textsuperscript{519} Ibid.
\textsuperscript{520} Ibid.
\textsuperscript{521} Ibid.
\textsuperscript{522} Ibid.
\textsuperscript{523} Ibid.
\textsuperscript{524} Ibid.
12. Conclusion
Open access movements and moral rights are likely to be sympathetic to each other in several respects. Both reflect anti-corporate approaches to creative work. Each of them focuses on individual rights in their own way. Indeed, the two ideals share common social concerns. Moral rights, through preserving the link between human personality and creative work, aim to preserve culture. Through encouraging people to use and re-use culture to create new culture, Copyleft aims to encourage it.

Both models have significance, but they will be unique in the culture that emerges from each. Even copyleft recognizes that there are limits to "creative destruction" - even the "free" culture of copyleft cannot exist without any sense of preservation at all. This probably explains the migration of ideas regarding moral rights into the copyleft, which considers attribution and integrity as important principles in the digital environment.

Moral rights will always need to be balanced against freedom of expression. In fact, the problem is one of balancing mutual rights and freedoms. Both the freedom of expression of the creator of a work and the expressive freedom of the public who seek access to it must gain adequate recognition.

Recognition of moral rights as part of copyleft licenses will enhance the interests of the copyright owner in many ways. Users get free access to works and author’s moral rights is well protected. If these rights are violated copyright can be legally enforced. Copyright is not done away with but it is applied in a different way. Copyright remains deactivated till a breach of moral rights occurs. The copyright owner is not restricted from licensing out his works for a royalty and at the same time the licensees under open access models use it for dissemination of knowledge. The user of such licenses are not given the rights to commercially exploit the work without prior consent of the owner. The moment moral rights are violated the copyright law comes into play to protect the interests of the copyright owner. Thus, the hypothesis proposed can be considered to be proved to an extent.

The moral rights of the author are a way of recognizing and honoring creators - not only the authors of creative works, but also, the creator within ourselves. When the user of copyright works finally sees himself or herself represented in the author, society will actually be on the brink of an exciting transformation.

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Books

Articles
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PROTECTING TRADITIONAL KNOWLEDGE WITH PATENTS- ‘A MISNOMER’

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Abstract

Intellectual Property Rights (IPR) treat knowledge as a commodity with economic value and financial esteem as opposed to indigenous who consider their knowledge as pious sacrosanct. With the increasing quest to protect Traditional Knowledge and to prevent its misappropriation, the primary concern that has to be addressed is: Can IP protect Traditional Knowledge? Protecting Traditional Knowledge with IPR is often faced with the criticism that IPR stimulates the reification or commodification of knowledge. The subject of this paper will be limited to patent only, and not other areas of IPR. Should Patent protection be granted to Traditional Knowledge? If yes, the pivotal question is how to protect and prevent its misappropriation.

Keywords— Patent, Traditional Knowledge

Introduction

Patents recognize the right of an individual for his invention. However, on the other hand, Traditional Knowledge acknowledges community owned knowledge. Moreover, critics are of the opinion that Traditional Knowledge is innate cognition and already in public domain (not an invention). Therefore, no patent protection can be conceded to it. If one accepts the contention that patent protection will not work for Traditional Knowledge, another issue to be dealt with is Misappropriation of Traditional Knowledge (Neem and Turmeric patent controversies) by developed nations. Therefore, the protection of indigenous and Traditional Knowledge under IPR has garnered high attention since the adoption of the Convention on Biological Diversity (CBD) in 1992 and the various conferences of WTO held thereon. However, a fool proof solution could not be adopted, as financial crunch and technicality of patents has left indigenous people exasperating.

'Protecting Traditional Knowledge under Patents is a Misnomer’. To understand these contradictions, we must first know what is the nature of Traditional Knowledge. A report submitted by the International Council for Science Study Group on Science and Traditional Knowledge characterized Traditional Knowledge as: “a aggregate collection of knowledge, know-how, practices and representations maintained and developed by peoples with extended histories of interaction with the natural environment.

525 US patent No. 4946681 and US patent No. 5124349 were granted by the US Patent Office to W.R. Grace for extraction and storage processes of Neem, which is traditionally used in India since ages for its medicinal properties. US Patent Office counts only published work on inventions as prior art. However, there was a lot of hue and cry against these grants and US Patent Office Policies. India claimed that US is stealing their knowledge.

526 Prepared by a study group set up by the Executive Board of the International Council for Science (ICSU), following a resolution adopted by the 26th General Assembly of ICSU held in Cairo in September 1999.
These sophisticated sets of understandings, interpretations and implications are part and parcel of a cultural complex that encompasses dialect, naming and classification framework, resource use practices, ritual, spirituality and otherworldly existence and perspective.”

According to WIPO, “Traditional Knowledge refers to knowledge systems, creations, innovations and cultural expressions which have been transmitted from generation to generation; are regarded as pertaining to a particular people or its territory; and are always developing in light of an evolving situation.”

WIPO’s work on Traditional Knowledge addresses three distinct yet related areas: Traditional Knowledge in the narrowest sense (technical know-how, practices, skills, and innovations related to, say, biodiversity, cultivation or health); conventional cultural articulations of folklore (cultural manifestations such as music, craftsman ship, outlines, images and exhibitions); and genetic assets (genetic material of actual or potential value found in plants, animals and microorganisms). The remarkable nature of Traditional Knowledge poses various challenges for patent protection. To understand those difficulties, we should examine the relationship between these concepts.

Patent Law vis-à-vis Traditional Knowledge

As of now, sui generis protection for Traditional Knowledge is still a fantasy for many countries. Hardly, a couple of nations are offering explicit sui generis protection for Traditional Knowledge. The Patent law aims to further the causes of scientific research, technological and industrial progress. The monopoly is granted for fixed time. The inventor is required to disclose his invention at the Patent Office and upon the expiry of 20 years of the monopoly, the said invention passes into the public domain. Critics are of the view that contrary to it Traditional Knowledge is already in public domain, not an invention, therefore not fit for patent protection.

The importance of securing Traditional Knowledge by protecting it has been a prime concern of the world community. The other issue of equal importance is to forestall misappropriation of Traditional Knowledge. The object of Patent and Traditional Knowledge are different. Patent protects knowledge and secures information as a commodity with economic value and monetary esteem, which is by far different from Traditional Knowledge that is devout protection of intellectual property throughout the world.


528 The World Intellectual Property Organization (WIPO) is one of the 15 specialized agencies of the United Nations. WIPO was created in 1967 to encourage creative activity, to promote the...
from the Indigenous Person’s perspective. Be that as it may, there exists various criticism of protecting Traditional Knowledge with patent.

Patents are individualistic rights of an inventor. Traditional Knowledge is the knowledge of the community as a whole and not of a distinct person. Patents are granted to invention that is new, novel or one of a kind with inventive step, whereas, Traditional Knowledge is evolved and developed over generations, appraisal of Novelty and Inventive step is the most crucial aspect of Traditional Knowledge. On one hand, the Indian patents are expensive and on the other their legality and technicality are quite difficult on the part of indigenous people to draw in themselves. For the registration and maintenance of a patent exorbitant prices are to be paid, which is an impossible task for the indigenous people as they lack financial resources.

A patent is usually granted for an invention having the attributes of novelty, non-obviousness and utility. Thus it has been contended that Traditional Knowledge, which do not satisfy the existing pre-requisites of novelty, non-obviousness and inventiveness, ought not be prevented. Critics also argue that Traditional Knowledge is innate cognition and not an invention, therefore does not fulfill the requirements of patent, Thus Traditional Knowledge should not be protected by patents. It is fundamental for the legitimacy of a patent that it must be the inventor’s own idea or discovery rather than simple confirmation of what was known before the date of the patent.

A patentable creation, apart from being another manufacture, should be useful as well.531

Intellectual Property Protection of Traditional Knowledge

There are two kinds of intellectual property protection that are being sought for—

Defensive Protection, which aims to prevent individuals outside the community from getting intellectual property rights over a Traditional Knowledge. India, for instance, has incorporated an accessible database of traditional medicine that can be used as an evidence for earlier art by patent analysts while evaluating patent applications. This perspective was followed by a famous case in which the US Patent and Trademark Office granted a patent (which was later revoked) for the use of turmeric to treat wounds, a property which is mentioned under the ancient manuscripts in Sanskrit language and known to the traditional communities in India. Defensive procedures may be used to ensure sacred social indications, for example, sacred symbols or words from being registered as trademarks.532

Positive protection, which involves the granting of rights to the members of a community or group in order to enable them to foster and boost their Traditional Knowledge and also prevent it from being misused. By way of the special legislations existing in many countries

532 Supra note 6.
and the prevailing intellectual property system, a few uses of customary knowledge can be ensured. Special legislations for protection, followed by a particular nation may not equally hold good for any other nation. This is one of the reasons that numerous indigenous and local groups as well as governments are pressing for an international legal instrument.  

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Protecting Traditional Knowledge under Indian Patents Law

Although, for the protection of Traditional Knowledge there are apposite legal provisions in India, yet few practical and workable solutions are needed. Section 2 (1) (j) of the Patents Act, 1970, defines an ‘invention’ as ‘a new product or process involving an inventive step and capable of industrial application’. Now, since Traditional Knowledge is in the public domain, thus, any application seeking patent protection relating to Traditional Knowledge does not qualify as an ‘invention’ under the Indian Patent Act, 1970.

Further, under Section 3(e) of the Patents Act “a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or process for producing such substances” is not a ‘creation’ and is thus excluded from patent protection. The Indian Patents Act additionally has an extraordinary provision under Section 3 (p), wherein “an invention which, in effect, is Traditional Knowledge or which is an aggregation or duplication of known properties of traditionally known component or components” is not an invention and consequently, not patentable, as per the Patents Act.

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Moreover, applications for patents based on Traditional Knowledge and/or biological material contravening the provisions of law can be refused under section 15 or in pre-grant opposition under clauses (d), (f) and (k) of Section 25 (1) and granted patents can be revoked in post-grant opposition under clauses (d), (f) and (k) of Section 25 (2) of the Patents Act, 1970. Section 25(1)(j) and 25(2) provide for ‘Pre’ and ‘post’ grant oppositions respectively, on the grounds of non-disclosure or wrong mentioning of the source or geographical origin of the biological material, used for an invention. In the light of the gravity and sensitivity of the issue, it is crucial that due care and diligence be employed while processing Patent applications relating to Traditional Knowledge and/or biological materials as well as in dealing with the post-grant processes.

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The System Administrator is required to publish a list of all the pending Traditional Knowledge-related Patent applications. It is published in a separate link on the official website of the Patents, Designs & Trademarks, http://www.ipindia.nic.in/writereaddata/Portal/IPO GuidelinesManuals/1_39_1_5-tk-guidelines.pdf.  

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Id.
Controller General of Patents, Designs and Trade Marks (CGPDTM), under Section 11(A) of the Patents Act. Moreover, a list of all the patents related to Traditional Knowledge granted from July 1st, 2012, needs to be also published on the official website. The said lists should at least include the following fields/provisions—name of the applicant, application number, date of filing and the title of the invention.

A critical examination has to be made w.r.t the Patent applications pertaining to Traditional Knowledge on the basis of the disclosures (full and particular) made in relation to the said invention. The IPO has already laid down well settled laws and guidelines for the Patents related to Traditional Knowledge and since ‘Traditional Knowledge’ lies in the public domain, any such application (according Patent protection to Traditional Knowledge) does not qualify as an ‘invention’ under the section 2(1)(j) of the Patents Act, 1970.

With effect from 01-01-2005, in the Patents Act, 1970, the process of grant of patent has been modified to replace acceptance and subsequent grant and sealing of patent by a process of grant of patent.

Challenges

According to R S Praveen Raj, any endeavour to codify community-held Traditional Knowledge in the form of Traditional Knowledge Digital Libraries (TKDL) using ‘Prior Informed Consent’ and ‘Access and Benefit Sharing’ concepts would be a gross injustice to those communities if the knowledge was shared with patent offices or even with the manner in which indigenous communities have lived in and worked with the organisms in their parent environment has enriched them with extensive knowledge. Due to the non-technological nature of indigenous knowledge, it is commonly referred to as ‘Traditional Knowledge’. There are number of reasons because of which Traditional Knowledge can hardly be perceived in current patent procedures. Identifying Traditional Knowledge in a patent procedure is impeded by the reality that in India it is generally not codified, classified and structured in manners prevalent in the western countries. Without taking sufficient care to observe the mandate of law, the Indian Patent Office is granting patents on the use of Traditional Knowledge of India, particularly relating to the Ayurveda, Unani and Siddha systems of medicine, etc. Emphasis here is to be applied to the fact that other international patent offices are objecting in granting such patents on the basis of prior art evidence retrieved from the Traditional Knowledge Digital Library (TKDL).


537 Intellectual Property Organizations are organizations that are focused on Copyright, Trademark, Patent or any other Intellectual Property Rights concept.

researchers, as it would influence the livelihoods of Traditional Knowledge practitioners. He also cautions against creating statutory registrable rights on the same and categorizing Traditional Knowledge under Intellectual Property Rights (IPR). Rather, he suggests the promulgation of a Traditional Knowledge Docketing System (TKDS) which covers the following aspects:

a. source of the Traditional Knowledge (i.e. the location at which it is available),
b. the community that possesses such Knowledge,
c. nature of such Knowledge, and
d. Community protocol, if any.\textsuperscript{539}

Further, he goes on to contend that the indigenous communities should be educated and empowered to protect their Traditional Knowledge through existing legal mechanisms or take patents on the innovations made by them on it (if they feel so) and to negotiate with the potential clients by forming societies or trusts of their own. There is no bar for patenting inventions, though it may be based on Traditional Knowledge.” Section 3(p) of the Patents Act, 1970 does not expressly bar the patenting of any invention based on Traditional Knowledge but only prohibits patenting of Traditional Knowledge or something which is an aggregation, duplication, etc. of the known properties of component(s) which are traditionally known.

**Efforts of the Indian Government**

First of all, the conceptualization and then the establishment of the Traditional Knowledge Digital Library (TKDL) has been a foremost attainment for India as also serves as a vast pool of Traditional Knowledge. “India has been successful in thwarting the attempts to misappropriate its Traditional Knowledge. The next challenge is to use India’s vigor in Traditional Knowledge for its effective promotion, development and utilization.”\textsuperscript{540}

IPR Policy of the Kerala Govt. – Intellectual Property Rights (IPRs) Policy of Kerala which was released in 2008 suggests that for the preservation of Traditional Knowledge there should be adoption of concepts like ‘knowledge commons’ and ‘commons licence’.\textsuperscript{541} This policy seeks to separate Traditional Knowledge from the public domain by putting all Traditional Knowledge into the sphere of ‘knowledge commons’. On one hand, direct misappropriation can be prevented by codifying Traditional Knowledge in digital libraries and sharing the same with Patent Offices. While, on the other hand, it is feared that by making cosmetic advancements to such Traditional Knowledge, an opportunity for private appropriation may be thus be provided.\textsuperscript{542} In the words of the Chief Architect of the Policy, R.S. Praveen Raj– “TKDL cannot at the same time be kept confidential and treated as prior art.”

To be entitled for patent protection, an invention must be new and innovative.

\textsuperscript{539} T. Nandkumar, Caution on classifying-Traditional Knowledge under IPR, The Hindu, Aug. 28, 2015.

\textsuperscript{540} Supra note 7.

\textsuperscript{541} Roy Mathew, IPRs policy proposes ‘knowledge commons’, The Hindu (Chennai), June 28, 2008.

\textsuperscript{542} Emphasis needs to be given on the fact that such a Traditional Knowledge may not be readily accessible otherwise.
Novelty is assessed by comparing the invention with the relevant prior art. In theory, the prior art may include anything and everything that was ever made available to the public anywhere in the world in any language. In practice, however, no one has access to all the world’s knowledge and there is a ceiling to what patent offices can check in assessing applications. Traditional Knowledge may be considered prior art if it has already been—
• published;
• publicly used (this will require proof of when and where it was used); or
• orally disclosed (again, this will require proof)

There is wide variation among patent offices as to whether the novelty and inventive step of a claimed invention is assessed and, if so, how. A few countries’ laws require the patent office to inspect each patent application thoroughly to ascertain whether novelty and other necessities have been met, but in other countries the patent office may not inspect for novelty or inventive step. The high-level Brundtland Report (1987) proposed a change in the development policy that observed the rights and aspirations of the indigenous people and authorized a direct community based participation. A ‘Working Group on Indigenous Populations’ was established after a group of indigenous peoples and others successfully beseeched the United Nations. It made two early surveys on and land rights as well as treaty rights. Therefore, a need was felt to address the issue of collective human rights thereby giving greater public and governmental recognition to land and resource rights of the indigenous population.

India has played a consequential position for bringing the protection of Traditional Knowledge at the focal point of the Intellectual Property System at an international level. These efforts of India have resulted inter alia in setting up of an Inter-Governmental Committee (IGC) on Intellectual Property, Traditional Knowledge, Genetic Resources and Folklore by WIPO and the Doha Ministerial Declaration of the year 2001 wherein it was decided to establish a relationship between the TRIPS Agreement and the UN Convention on Biological Diversity (CBD) on the issue of Access to Genetic Resources and the fair and equitable sharing of the benefits arising from their utilization. Further, India has been successful in concluding TKDL Access Agreements (Non-Disclosure) with various international patent offices such as United States Patent and Trademark Office (USPTO), European Patent Office (EPO), Japan Patent Office (JPO), etc. Accordingly, many patent applications concerning India’s Traditional Knowledge have either been cancelled or withdrawn or claims have been modified in several international patent offices.

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545 Patwardhan B & Mashelkar RA., Traditional medicine-inspired approaches to drug discovery:

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The novelty and inventive steps are two fundamental principles of patentability as per Indian patent law. They are regarded as to be the final gatekeeper of the patent system. In case of Traditional Knowledge based inventions, the set guiding principles must be followed in assessing the said principles. Therefore, the subject-matter of claims is not considered as novel over the teaching of prior art obtained from TKDL. This would exclude the patenting of even the convincing, independently developed inventions, which in some remote way would be relating to Traditional Knowledge.

Conclusion

By fostering innovation, the patent system seeks to galvanize steady enhancement of R&D, technological and industrial progress, economic growth. This also serves as the prime objective and rationale behind the patent system. It would then be easy to refute even the genuine claims for grant of patents dealing with the Traditional Knowledge-inspired inventions, on the basis of prior art. Hence, it is ineluctable to consider an effective mechanism to comprehend and demarcate between typical knowledge accessible under the Traditional Knowledge and Traditional Knowledge-inspired innovations. Also, Traditional Knowledge-based innovations and inventions play a key role in health care and drug discoveries and this role is globally recognized.546

The validity of any application for acquiring patent protection should be decided on a case to case basis and prominence should be given to the level of sophistication of the problem which the invention seeks to solve. The rigorous patent laws would be a discouragement for those who inspired from Traditional Knowledge involving traditional systems. This approach would encourage practice of trade secrets and avoiding their protection with patents. Such a scenario would be a loss for both, scientific invention and economic. Therefore, a need arises to harmonize or strike a balance between the demand of patent innovation and Traditional Knowledge by way of such a system which provides for industrial development without destroying the abilities or compromising the rights of indigenous people.

The guidelines such prepared that may encourage innovations. In order to ensure that innovations are encouraged, the Indian Patent Office should make suitable revisions and amendments and also take serious cognizance of experts’ opinions. It is essential that due care and diligence be exercised in case of patent protection to Traditional Knowledge in view of the above facts and the sensitivity of the issue. It should also be ensured that all Traditional Knowledge’s patent applications are accurately identified and classified as ‘Traditional Knowledge’. The relevant clauses of Section 3, particularly Sections 3(c), (e), (i), (j) and (p) of the Patents Act, for Traditional Knowledge, should be strictly followed while deciding the


546 Id.
patentability of the claimed subject matter.

However, certain details given in the guidelines pertaining to ‘assessment of novelty’ and ‘assessment of inventive procedure’ are useful but still need to be reappraised. As discussed above, specific protection afforded under national law may not work for other countries. Hence an international legal instrument is needed to by indigenous and local communities. As well as for Defensive protection an infallible database of Traditional Knowledge is required. The efforts of Indian patent office have been considerable but still more authentication is essential. Misnomer between Traditional Knowledge and Patents can be rooted out by constructing an international legally binding instrument on protection of Traditional Knowledge.

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CROSSING THE JATI LINE: SUPREME COURT’S ROLE IN PROMOTING INTER-CASTE MARRIAGE IN INDIA

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Abstract
Let’s begin with the concept of social problem and its true meaning. It is a state or a condition which is considered to be undesirable by the society. These social factors are generally based on religious aspirations. Due to attachment to such ideologies, social problems arise when deviations take place from such ideologies which are considered inherent in their society. Opposition or the resistance shown to inter-caste marriage is a social problem which is considered to be a crime in the society just because of the non-alignment of such a concept with their sociological beliefs. The crime of honour killing is a major crime in India even though the judiciary has failed to put such an offence under a separate section in the Indian Penal Code, 1860. This crime is what many societies consider as one of the punishments for marrying out of the caste. For example, the Hindu Marriage Act has clearly stated under Section 5- “A marriage may be solemnised between any two Hindus...”. This clearly states about marriage between two Hindus, and has nowhere mentioned the word caste in any instance while solemnising a marriage. Article 21 of the Indian Constitution has stated with the clarity the fundamental right to “protection of right and personal liberty”. The scope of this article has been widened by the judiciary where this article is also inclusive of “right to live peacefully”. In the case of Deepika v State of Uttar Pradesh, the supreme court held that, if the parties are major, they have unfettered or unrestrained right to live with whomsoever they choose to. The court does not concern itself with the fact of the parties marriage being solemnised while living together. The self-conscious nature of the Indian society is what has withheld the development of this society. The endogamous nature of marriage institutions which has been followed till date by the society consider inter-caste marriage as outside the commandments of the texts they follow due to the narrow interpretation. This paper deals with the reasons behind the sociological differences which has led to the outcast of many men and women just because they chose to exercise the right of choosing their own partner. Adjudication in many cases by the Supreme Court in this regard has led to a new awareness much needed in society which is paving way for modernisation. Such crucial judgements also need to be dealt in depth to understand the outline of inter-caste marriage in our country. Therefore, this paper deals with the growing importance for the society to do away with traditional or age old concepts of society and marriage, while taking into consideration landmark judgements which ensures the right to marry of choice.

Introduction
One of the professor’s of law school has termed the right to marry as a positive right.

548 The Hindu Marriage Act, 1955.
550 AIR 2014 All 1 (7).
This is important to reconcile intimate liberty with equality. Though this was said in the right of same sex marriage, the principle behind the above reconciliation is nothing but a private right of choice to be given to both men and women. The most important topic to be dealt with today is how empowering the right to marry diminishes inequality in the society. This inequality arises from the vast spectrum of caste differentiation which leads to horrendous consequences in the near future if anybody in the society has tried to exercise the right to marry. The Supreme Court in India in various judgements has given support to this caste dilution through inter-caste marriage as it leads to rise in equality. The tolerance towards other religion or sect or division in their very own society increases, which leads to the diminishing occurrence of communal riots across the country. In the case of Lata Singh v State of Uttar Pradesh, the Supreme Court held that “The caste system is curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system.” Under no law has it been specifically stated that two parties marrying must belong to the same caste. Hindu reformist movement led by both Brahmo Samaj and Arya Samaj talk about dissolving the distinctions of caste system in India by reinforcing inter-caste marriage in India. This will lead to creation of inter-caste harmony, as believed and propagated by many people back then too. Something very crucial was stated by sociologist M.N. Srinivas (who was mostly known for his work on caste and caste system) at the national seminar of ‘Casteism and Removal of Untouchability’ under his paper named “Castes: Can They Exist In The India Of Tomorrow’. He expressed his views on the subject of inter-caste where he clearly mentions- “While caste as a system is dead, individual castes are flourishing.” It is clear that caste is base more on juxtaposition than on hierarchy as it maintains the level of difference and uniqueness of different societies. Even though the power and rule of casteism is diminishing, the consequences of such continue to be severe in today’s so called modern society too.

Existing Legal Situation
In current times, acceptance and liberalism has been prevailing in the right to choose while marrying. Though this does not mean that it has been widely accepted and there have been no crimes being committed as a consequence of this. Even though, the 242nd Law Commission Report recommended the creation of a separate act to protect the marital institution in an inter-caste marriage, this bill has not been introduced yet. The suggested legal framework covers a multitude of topics ranging from interference of panchayats in marital matters to the right of personal liberty and

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553 2006 (2) KLI (SC) 735.
from honour killing to harassment of young couples or couples intending to marry. The recommendations of the report include:

a) Treating members involved in condemning a marriage with a view to take consequential action as unlawful assembly for which punishment has been prescribed under the Indian Penal Code, 1860.

b) Endangerment of personal liberty of couple or their family by harassment of social boycott as a punishable offence.

c) Presumption of people a part of unlawful assembly to also be a participant in the commission of any offence which was consequential.

This bill also criminalises honour killing specifically. Due to the stagnancy of legislature in this regards, honour killing is not being dealt with as a separate crime under a specific section of the Indian Penal Code. The existing penalties for such a heinous crime are:

i. Sections 299-304: Murder and culpable homicide not amounting to murder, where the punishments are life sentence or death and fine, and imprisonment up to 10 years and fine respectively.

ii. Section 307: Penalise murder with imprisonment up to 10 years and fine.

iii. Section 308: Attempt to commit culpable homicide for imprisonment upto 3 years or with fine or both.

iv. Section 120A: Penalising any person who is part of a criminal conspiracy

v. Sections 107- 116: Penalises a person for abetment of an offence which includes murder and culpable homicide.

vi. Section 34 and 35: Penalises criminal acts done by several persons in furtherance of a common intention.

In a fairly recent judgement passed by the sessions court in Karnal, five people were awarded death penalty for murdering a young couple who had married against the whims of the khap panchayat. Even though it had become too late since when active measures were started to be taken in such a regard, there’s still many changes pending including criminalising honour killing under a separate section in the Indian Penal Code, 1860.

**Literature Review**

The basics of the stratification of social class can be understood while reading ‘Social Stratification’ edited by Dipankar Gupta. The development of caste or varna system and the relative hierarchical differences which form the basis of inter-caste marriage being negated can be well understood. The fact that caste system in our country is based more on the unique identity a society wants to maintain over the actual hierarchical nature is what makes framing laws and values important. Intercaste marriages are considered to be the destruction of this unique society due to the dilution in their society taking place. ‘Social Problems in India’ has discussed a variety of social problems in India varying from poverty to illiteracy to female subordination. One feature intrinsic to all the social problems are that illiteracy has different meanings in different contexts. A highly educated family or society would...
also believe in maintaining pure societal blood just to maintain its unique identity. The issue of negating inter-caste is not prevalent only in backward or illiterate society. The fact that this has equally been marginalised is the most probable conclusion drawn after reviewing the above literatures.

A paper discussing a play named “Kanyadaan” by Vijay Tendulkar, has specially mentioned women being subjected to atrocities on the basis of caste and the respective divisions in the society. The portrayal of the dalit community having different marital responsibilities and behaviour can form the basis of the violation of Article 14 and 15 of the Constitution of India. Where even though the upper caste is similar in its treatment regarding the same matter, it has not being questioned due to the division in the society. The point is that in trying to maintain an identity, the society as a whole is losing its natural identity of belonging to one another. This is why, inter-caste marriage has always been the most targeted societal problem as people consider it the only way of maintaining their so called identity. The article ‘Positive Right to Marry’ voices the opinion of the right to marry as a “power right”. This power right in relation to the concepts mentioned in ‘Social Stratification’ can clearly be related. As societies feel the need to maintain its uniqueness and hierarchical structure, the concept of “power right” would diminish its power to maintain the former. A power right can be considered as a right where an individual has sole right or jurisdiction over. This sole right forms the basis of a family which in turn forms the society as per the changing needs. If control over this power right is performed, the society can automatically be built over what would consider it unique and not as per the changing needs.

The above literatures can easily be inter-related with each other as the historical perspective of societies and matrimonial alliances can help understand the abhorrence of inter-caste marriage till date.

**The Social Stratification**

Class analysis is important to understand a social stratification, the culmination of which influences the major social institution which is marriage. Under the Marxian method of class analysis, societies are factories producing people and goods satisfying their desires which are called the social relations. Social anthropologists have suggested that these relations are spread and communicated through interaction with people belonging to the same society. Due to this, the same societal beliefs are passed down. Now in the case of people interacting with someone belonging to another society and forming social relations with them, i.e., matrimonial alliance, a mixation of beliefs take place. This mix diluted the beliefs of one society while giving way for another society competing in beliefs. The simple answer would be the emergence of strong societal control over such an interaction so as to not dilute a particular society’s sphere.

In the Indian society in particular, ‘The Ideology of Purity’ is essential forms the presumption behind the existence behind a ‘stable’ society so as to avoid uproars on 20th August, 2019.

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560 n(6).

against it. In one of the most recent case of ‘honour killing’ of Kevin P Joseph, punishments were awarded to the convicted people by the Kottayam Sessions Court. His said alleged relation with the sister of the accused led to his murder purely on the grounds of him belonging to the dalit community of the Christian society. The ideology of purity or maintaining bloodline of a particular community is crystal clear in the above case where the accused considered the dalit youth of inferior caste which would mix with the blood of his sister if they co-habited together. Honour killing which the gross result of inter-caste marriage has witnessed the highest number of registered cases in the states of Haryana, Punjab, Rajasthan, Bihar and Uttar Pradesh. An excerpt from Pradip Kumar’s writing, helps us come to the conclusion ourselves about the reason being inter-caste marriage being a sole major target. Various castes since the historical time have suffered through various problems. These problems includes economic problems in the form of agricultural shortage, upper castes abusing lower castes for loans granted, seclusion of casted from certain rituals and events, and various other issues which have also been clearly prevalent since the British time period. This has in turn developed hatred among the social strata and have considered an alliance formation between all the strata in the society as a taboo due to the above mentioned differences. The easiest way to form an alliance is through matrimony which is why there has been the most revulsion to the concept of inter-caste marriages. The social system in our country only functions as a system to prevent formation of united social classes with a commonality of interest or unity of purpose. The Panchayats or the social councils of different castes and society assume the role of community guardians and apply the principle of ‘moral vigilantism’ as a recourse for protecting ‘community interests’. This has strongly been condemned by the Supreme Court on the grounds of violation of the constitutional rights of a person.

Supreme Court and Indictments
In the recent case of Armugum Servai v State of Tamil Nadu, the Supreme Court strongly deplored and condemned the conduct of katta or khap panchayats. Such bodies have taken law into their own hands and indulged in offensive activities by punishing people who have exercised their right of choice guaranteed under Article 21 of the Indian Constitution. These bodies have no constitutional validity of its autonomous functioning even though they have been looked upon as guardians of the interests of the community but in turn leads to the destruction of the basic morals. Justice Makkandey Katju has briefly written in the very same judgement – “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator by certain inalienable rights that among these are life, liberty, and the pursuit of happiness” - American Declaration of Independence, 1776. He also continues to write- “Over two centuries have passed since Thomas Jefferson wrote those memorable words, which are still ringing in history, but a large
section of Indian society still regard a section of their own countrymen as inferior. This mental attitude is simply unacceptable in the modern age, and it is one of the main causes holding up the country's progress.” It has been a very long time since this modern age came into being but as rightly said we haven’t been able to escape the clutches of the past.

The most landmark judgement involving both inter-caste marriage and honour killing is *Lata Singh v State of Uttar Pradesh*. An important passing remark was made in the judgement which is as follows- “The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system……….There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism.” The uncivilised society before is in no comparison to the civilised society today. The continuance of such atrocities and violations only prove the nature of uncivility in today’s society too. The court directed that there is no bar to an inter-caste marriage under the Hindu Marriage Act or any other law. The police or administrative authorities have the responsibility to ensure is a boy or girl who is a major willingly marry, the couple is not to be harassed by anyone. They should not be subjected to any threat of violence and any person or body involved in such threats or instigates them is taken into account by instituting criminal proceedings by the police against them. It is important to note that the existence of society of community councils or panchayats itself give way to having scant autonomy over personal liberty and autonomy.

As per the proposed changes in the 242nd Law Commission Report, the above councils or panchayats were suggested to be brought under the purview of the penal law or penal provisions to act as a preventive measure. The report has also proposed bringing ‘honour killing’ under the ambit of Section 300 of the Indian Penal Code specifically so as to provide a clear and transparent laws on such atrocities. Repressive social practices are pursued even today due to the adjustment from past social practices to individual freedom which creates major tension. Individual freedom is paramount in law and should not be abrogated on the face of dated social practices. Past social dogma cannot be said to have been upheld by few elderly being a part of community councils if it is in violation to the rights of self-worth. Social protection in such a form is only superficial. Joseph J. Ellis has propounded “We don’t live in a world in which there exists a single definition of honour anymore, and it’s a fool that hangs on to the traditional standards and hopes that the world will come around him.” This in reference to the case of *Shaktivaahini v Union of India*, where the grounds or basis on which the crime of honour killing is committed was stated. The petitioner which is an organisation which was entrusted with the task of conducting research study on “Honour Killings in Haryana and Western Uttar Pradesh”. It was contended that social pressure instilled deep fear in the minds of

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566 (2006), 5 SCC 475.
567 n(18).
the couple wanting to marry and are treated inhumanly by the core group of the society or community one belongs to. Especially, the existence and reputation of a woman solely depends on the decisions of the male dominated family. If the girl or woman decides to dissent, then at such situations even the family chooses to be silent on how she is dealt with when the core group of a society decides to intervene. The research studies proves that the actions related to honour based crimes are as follows - (i) loss of virginity outside marriage; (ii) pre-marital pregnancy; (iii) infidelity; (iv) having unapproved relationships; (v) refusing an arranged marriage; (vi) asking for divorce; (vii) demanding custody of children after divorce; (viii) leaving the family or marital home without permission; (ix) causing scandal or gossip in the community, and (x) falling victim to rape.

The existence of parallel law enforcement agencies in any society is against the rule of law and such ‘law governing bodies’ are illegal. It was also stated that - “It is because their violent acts have not been taken cognizance of by the police and their functioning is not seriously questioned by the administration. The constitutional provisions are shown scant regard and human dignity is treated at the lowest melting point by this collective. Article 21 which provides for protection of life and liberty and guards basic human rights and equality of status has been unceremoniously shown the exit by the actions of these Panchayats or the groups who, without the slightest pangs of conscience, subscribe to honour killing. In this backdrop, prayers have been made as has been stated hereinbefore.” Kartar Singh v State of Punjab has included a piece of writing by a judge of the International Court of Justice, C.G. Weeramantry which talks about social interests in the following words- “The protections the citizens enjoy under the Rule of Law are the quintessence of twenty centuries of human struggle. It is not commonly realised how easily these may be lost. There is no known method of retaining them but eternal vigilance.”

In Vikas Yadav v State of Uttar Pradesh, a young man was murdered by the brother of a girl who was all though was fully educated, believed to follow social honours till eternity even though they existed in the past. Proceeding further, the Court held:-

“75. One may feel “My honour is my life” but that does not mean sustaining one’s honour at the cost of another. Freedom, independence, constitutional identity, individual choice and thought of a woman, be a wife or sister or daughter or mother, cannot be allowed to be curtailed definitely not by application of physical force or threat or mental cruelty in the name of his self-assumed honour. That apart, neither the family members nor the members of the collective has any right to assault the boy chosen by the girl. Her individual choice is her self-respect and creating dent in it is destroying her honour. And to impose so-called brotherly or fatherly honour or class honour by eliminating her choice is a crime of extreme brutality, more so, when it is done under a guise. It is a vice, condemnable and deplorable perception of “honour”, comparable to medieval obsessive assertions.” Time and again the court has held such judgements and given clear views on such evils persisting in the society. As it has been rightly said by Blaise Pascal, “Men never do evil so completely and cheerfully as when they do it from religious conviction.


570 Blaise Pascal: The Pensees (The Perfect Library, www.supremoamicus.org 180
be both religious and social or communal which has tirelessly brought us down.

**Conclusion**

Even early scholars like Max Mueller, Abbe Dubois, and sociologist Max Weber were uncertain about the capability of India to modernise itself due to the caste system. They opined that it may be difficult for India to side-line the system of caste and develop socially and economically. The above is true to an extent in the matters of social norms. The hypothesis is proved to be null as economic progress in our country has nowhere paved the path for social progress. The entire concept of ‘honour killing’ only proves the social backwardness which the scholars predicted about. Individual’s right to choose guaranteed under Article 21 of the Indian Constitution overrules any societal norms. Castes functioning under the misapprehension of protecting interests of its members is in turn destroying it by controlling aspects of their life they have no right over. The same right to privacy has also been guaranteed by Article 21. It’s the age to bind the society together and not divide it. This binding is what would promote social progress which would in turn also promote economic progress to a much greater extent. The question of social distinction which is prevalent even today is due to a society clinging on to its past identity which maintained its uniqueness and hierarchy. The Supreme Court has clearly overruled community council’s interest as binding due to their illegal position in the society. Promoting hatred towards other castes by such entities are a threat to the democratic, social and secular nature of our country. Stronger laws must be made by the legislature on the control of panchayats or councils and must be punished for a single action on promoting hate towards others and publicly deepening the societal divisions through acts of subservience from young couples. The 242nd Law Commission Report has recommended a separate bill named ‘Prohibition of Interference with the Freedom of Matrimonial Alliances Bill’. This has not been brought into force by the legislature till date. The existence of a separate bill will ensure stricter and specific laws even under the penal provisions. The courts till date have been juggling between various sections in the Indian Penal Code in the absence of a statute. If the above bill comes into force, the courts will waste lesser than in convicting criminals as specific laws would be in existence. Checks on panchayats or communal councils must be mandatory so as to regulate their working and keep tabs on their actions. This way many heinous crimes can be kept at bay by having preventive measures since the beginning. The fear of law will also be instilled in the minds of the councils/panchayats where they will refrain from abridging the rights of the people and lose the unnecessary control over the society they previously had.

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The Hindu Marriage Act, 1955.
The Indian Penal Code, 1860.
STRIKING A BALANCE BETWEEN SEDITION LAW AND RIGHT TO FREEDOM OF SPEECH & EXPRESSION

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I. Abstract
Freedom of Speech and freedom of Expression are indispensable conditions for the full development of the person. They constitute the foundation stone for every free and democratic society. The freedom of speech and expression is the first and foremost human right, the first condition of liberty, mother of all liberties, as it makes the life meaningful. However freedom of speech often poses difficult questions, like the extent to which State can regulate individual conduct. Since, individual’s autonomy is the foundation of this freedom; any restriction on it is subject to great scrutiny. Although reasonable restrictions can always be imposed on this right in order to ensure its responsible exercise and to ensure that it is equally available to all citizens. The offence of sedition is provided under section 124A of the Indian Penal Code, 1860. The relevance of this section in an independent and democratic nation is the subject of continuous debate. There is an apprehension that this provision might be misused by the Government to suppress dissent and fair criticism. The paper deals with the history of sedition to its evolving during the pre and post constitutional era to what it is today. Also the paper suggests the questions that still need thorough discussions and debates taking into consideration the fact that India is the largest democracy in the world and freedom of speech and expression is the most celebrated fundamental right.

II. Introduction
Freedom of Speech and Expression is the bulwark of democratic government. In a democracy, freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been variously described as basic human right, a natural right and the like. Many International Organizations have declared freedom of speech as a basic fundamental right. The Constitution of India also guarantees freedom of speech and expression to all citizens. It includes right to express one’s views and opinion at any issue through any medium like by words of mouth, writing printing etc. It thus includes the freedom of communication and the right to propagate or publish opinions. However the freedom of speech often poses difficult questions, like the extent to which State can regulate individual conduct. Since, individual’s autonomy is the foundation of this freedom.

572 Dharam Dutt v. Union of India, AIR 2004 SC 1295.
575 Radha Mohan Lal v. Rajasthan High Court, AIR 2003 SC 1467.
any restriction on it is subject to great scrutiny. Reasonable restrictions can always be imposed on this right in order to ensure its responsible exercise and to ensure that it is equally available to all citizens. The offence of sedition is provided under section 124A of the Indian Penal Code, 1860 (hereinafter IPC). There has been continuous debates and discussions about the relevance of this section in an independent and democratic India. Those opposing it see this provision as a relic of colonial legacy and thereby unsuited in a democracy. There is an apprehension that this provision might be misused by the Government to suppress dissent.

III. Sedition Laws in India: Pre-Constitution Era

II.A History of Sedition Law in India

Lord Macaulay’s Draft Penal Code of 1837 consisted of Section 113 that corresponded to today’s Section 124A of IPC. The punishment for Sedition proposed at that time was life imprisonment. Sir John Romilly, Chairman of Second Pre-Independence Law Commission commented upon the quantity of punishment proposed for sedition on the ground that in UK, the maximum punishment had been three years and he suggested that in India it should not be more than five years. However, this section was not included in IPC when it was enacted in 1860. Consequently sedition was included as an offence under section 124A through Special Act XVII of 1870. This section was parallel with the Treason Felony Act of 1848 that penalized all the seditious expressions. The intention behind introducing this section was to punish an act of exciting feelings of disaffection towards the Government, but this disaffection was to be distinguished from disapprobation. Thus people were free to voice their feelings against the Government as long as they project a will to obey its lawful authority.

In 1898, the section was amended by the Indian Penal Code (Amendment) Act 1898 providing for punishment of transportation for life or any shorter term. The amended section made new changes in the existing definition and also made bringing or attempting to bring in hatred or contempt towards the Government established by law punishable. The provision was further amended in 1995 substituting the punishment as ‘imprisonment for life and/or with fine or imprisonment for 3 years and/or with fine. The British Parliament enacted the Prevention of Seditious Meetings Act in 1907, in order to prevent public meetings likely to lead the offense of sedition or to cause disturbance as meetings against the British rule were held in different parts of India, with the main objective of overthrowing the Government. In 1911, the Act was repealed by The Prevention of Seditious Meeting Act, 1911 which enabled the statutory authorities to prohibit a public meeting in case such meeting was likely to provide disaffection or to cause disturbance in public tranquility. The violation of the provisions of the Act was made punishable with imprisonment for a term which could extend to six months or fine or both. However the act now stood repealed vide Repealing and Amending (Second) Act.

III.B Pre- Constitutional Rulings


Section 124A was used extensively to curb the political dissent in India. One Mr. Jogendra Chandra Bose was charged with the offense of sedition merely for criticizing the Age of Consent Bill and the negative impact on Indian economy due to British Colonialism. While directing the jury on the case the Court observed that the offence stipulated under Section 124A IPC was milder as compared to what it is in England, as there any overt act in consequence of a seditious feeling was penalized, while in India only those acts that were done with *an intention to resist by force or an attempt to excite resistance by force fell under this section*\(^{578}\). In another famous case of *Queen Empress v. Bal Gangadhar Tilak*,\(^ {579}\) the defendant was charged of sedition for publishing an article in newspaper invoking the example of the great Maratha warrior Shivaji to incite overthrow of British rule. In this case the word disaffection was 185cepticism widely by including hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government. Disloyalty is perhaps the best general term, comprehending every possibly form of bad feelings to the Government. The interpretation that, only acts that suggested rebellion or forced resistance to the Government should be given to this section was rejected expressly by the Court leading to the amendment in the Section in 1989 wherein the explanation defining disaffection to include disloyalty and feelings of enmity were added. Following the Tilak judgment two landmark judgments were *Queen Empress v. Ramchandra Narayana*\(^ {580}\) and *Queen Empress v. Amba Prasad*.\(^ {581}\) In Ramchandra case, the Court tried to define the expression attempt to excite feelings of disaffection to the Government as equivalent to an attempt to produce hatred towards Government as established by law, to excite political discontent and alienate people from their allegiance. However Court also clarified that every such act did not amount to disaffection provided the accused is loyal at heart and willing to obey and support the Government. The same interpretation was reiterated in Amba Prasad Case. The Court 185cepticism in the section liberally categorically held that it is not necessary that an actual rebellion or mutiny or forcible resistance to the Government or any sort of actual disturbance was caused by the act in question. These cases brought into light the ambiguity being created by the explanation in interpreting the term disaffection. In order to remove any further misconception in interpretation of Section 124A, legislature introduced Explanation III to the section which excluded ‘comments expressing disapprobation’ of the action of the Government, but do not intend to lead to an offence under the section. The main intention of legislature behind incorporation of this explanation was to make law more precise. However it can be seen that the British Government was not keen on granting Freedom of Expression to Indians to the extent, enjoyed by the people in England. It can also be said that it was difficult for the British rule to limit the scope of sedition to direct incitement to violence or to commit rebellion in view of the fact that the country was under foreign rule and inhabited by multiple races, ethnicity with diverse customs and conflicting creeds.

\(^{578}\) *Queen Emperor v. Jogendur Chandra Bose*, (1892) 19 ILR Cal 35.

\(^{579}\) *Queen Empress v. Bal Gangadhar Tilak*, ILR (1898) 22 Bom 112.

\(^{580}\) *Queen Empress v. Ramchandra Narayana*, ILR (1898) 22 Bom 152.

\(^{581}\) *Queen Empress v. Amba Prasad*, ILR (1897) 20 All 55.
While the British Government was justifying the enlargement of the ambit of sedition laws, the Court refused to term a speech that condemned Government legislation declaring Communist party of India and various trade unions and labor organization who were voicing against the exploitation by the Government illegal, seditious. It was opined by the Court that imputing seditious intent to such kind of speech would completely suppress freedom of speech and expression in India. This reflects the tendency of the then Government to use sedition to suppress all and any kind of criticism. Realizing the same, Court in Niharendu Dutt Majumdar v. the King Emperor digressed from the literal interpretation given to the section and held that the offence of sedition was linked to disruption of public order and prevention of anarchy and until and unless speech leads to public disorder or a reasonable anticipation or likelihood of it, it cannot be termed seditious. Later on, this was overruled in King Emperor v. Sadasiv Narayan Bhalerao, wherein the reading of ‘public order’ in Section 124A was not accepted and the literal interpretation given in Tilak’s case was upheld.

IV. Post-Constitutional Developments
Sedition was not acceptable to the framers of the Constitution as a restriction on the freedom of speech and expression, but it remained as it is in the penal statute post-independence. After independence, the section came up for consideration for the first time in the landmark case of Romesh Thapar v. State of Madras, the Apex Court held that unless the freedom of speech and expression threaten the ‘security of or tend to overthrow the State’, any law imposing restriction upon the same would not fall within the purview of Article 19(2) of the Indian Constitution. Following the ruling the Punjab High Court in Tara Singh Gopi Chand v. The State, held the 124A unconstitutional as it directly contravene Article 19(1)(a) of the Constitution observing that “law of sedition though necessary during the period of foreign rule has become inappropriate now by the very nature of the change which has come about”. In 1951 by 1st amendment in Constitution two additional restrictions, namely ‘friendly relations with Foreign State’ and ‘public order’ were added to Article 19(2), for the reason that in Romesh Thapar, Court had held that freedom of speech and expression could be restricted on the grounds of threat to national security and for serious aggravated forms of public disorder that endanger national security and not relatively minor breaches of peace of a purely local significance. The amendment echoed the logic in dissenting opinion of Jt. Saiyad Fazl Ali in case of Brij Bhushan, in his opinion serious and grave instances of public disorder and disturbance of public 186pecticism might affect the security of public and State. However the constitutional validity of sec.124A came to be challenged again in Kedar Nath Singh Case, the constitutional bench upheld the validity of sec. 124A and this time kept it at a different pedestal. The Court drew a line of difference between the terms, ‘the

582 Kamal Krishna Sircar v. Emperor, AIR 1935 Cal 636.
583 Niharendu Dutt Majumdar v. the King Emperor, AIR 1942 FC 22.
584 King Emperor v. Sadasiv Narayan Bhalerao, AIR 1947 PC 84.
586 Tara Singh Gopi Chand v. The State, AIR 1951 Punj. 27

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Government established by law’ and ‘the persons for the time being engaged in carrying on the administration’ and held that “Government established by law is a visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted and hence its continued existence is an essential requirement for the stability of the State. That is why ‘sedition’, as an offence has been characterized, come under Chapter VI relating to offences against the State. At the same time, Court also tried to strike a balance between the right to free speech and expression and the power of the legislature to restrict such right observing thus that “the security of the State, which depends upon the maintenance of law and order is the very basic consideration upon which legislation, with view to punshing offences against the State, is undertaken. Such legislation has on other hand, fully to protect and guarantee the freedom of expression, which is the sine quo non of a democratic form of the Government that our Constitution has established. A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder.” Public disorder has been considered to be a necessary ingredient of sec. 124A after this judgment and it also became necessary to establish that the accused has actually done something, which would threaten the existence of the Government established by law or might cause disorder. In Common Cause & Anr v. UOI, a prayer was made to issue directions for review of pending cases of sedition in various Courts, where a superior police officer may certify that the ‘seditious act’ either led to the incitement of violence or had the tendency or the intention to create public disorder. The Court granted the prayer and directed that while dealing with offences under 124A, authorities are to be guided by principles laid down in Kedar Nath case. In the famous Kanhaiya Kumar Case, the Delhi HC observed that while exercising the right to freedom of speech and expression under Article 19 (1) (a) of the Constitution, one has to remember that Part IV, Article 51A of the Constitution provides Fundamental Duties of every citizen, which form the other side of the same coin. The aforesaid judicial pronouncements have been discussed to get an idea as to what amounts to seditious acts. In the light thereof, it could be stated that unless the words used or the actions in question do not threaten the security of the State or of the public, lead to any sort of public disorder which is grave in nature, the act would not fall within the ambit of sec. 124A of IPC.

V. Freedom of Speech and Sedition

Democracy is based essentially on free debate and open discussion, for that is the only corrective of Government action in a democratic set up. If democracy means Government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential.

590 Common Cause & Anr v. UOI, ( 2016) 15 SCC 269
591 Kanhaiya Kumar v. State (NCT of Delhi, (2016)
592 Maneka Gandhi v. Union of India, AIR 1978 SC 597.
The Hon’ble Supreme Court, while crystallizing the relationship between a democratic society and freedom of speech opined that in a democratic set-up, it is the right of the people to be kept informed about current political, social, economic and cultural life as well as the burning topic and important issues of the day in order to enable them to consider and form a broad opinion about the same and the way in which they are being managed, tackled and administered by the Government. In the case of S. Khusboo v. Kanniamal & Anr., observing that the morality and criminality do not co-exist, the Supreme Court opined that free flow of the idea in a society makes its citizen well informed which in turn results into good governance. For the same, it is necessary that people be not in constant feat to face the dire consequences for voicing out their ideas, not consisting with the current celebrated opinion. Emphasizing the importance of the freedom of speech Sec. 66A of the Information and Technology Act, 2000 was declared unconstitutional on the ground that it was in direct conflict with the fundamental right of freedom of speech and expression. The Bombay HC in the case of Cellular Operators Association of India v. Telecom Regulatory Authority of India held that right to information rests upon the right to know, which ultimately was an inseparable part of freedom of speech guaranteed under art. 19(1)(a). The other important aspect to be kept in mind is reasonable restriction on the speech and expression which enables the State to impose certain restrictions on the right to free speech is the “harm principle” which means the until and unless a speech does not

594 Re Harijai Singh, AIR 1997 SC 73.
596 Shreya Singhal v. Union of India, AIR 2015 SC 1523.
597 ibid, para 8
598 Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal, AIR 1995 SC 1236.
599 Indian Express Newspaper (Bombay) (P) Ltd. v. Union of India, AIR 1997 SC 73.
600 S. P Gupta v. Union of India, AIR 1982 SC 149
601 Cellular Operators Association of India v. Telecom Regulatory Authority of India & Ors., AIR 2016 SC 2336.
602 PUCL v. Union of India, AIR 2003 SC 2363.
result into some sort of harm, the same cannot be suppressed. However the yardstick on which this harm is to be measured has to be high. The harm is to be of such intensity that it threatens the very existence of the society; it disturbs the public order and results into the chaos in the society.603 Thus, whenever there is a need to interfere, the Courts have laid down certain rules as touchstones. In case of S. Rangarajan v. P. Jagjivan Ram,604 it was held that unless there is a danger to the society and public order, the right to freedom of speech and expression cannot be restricted. The anticipated danger should be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a ‘spark in a powder keg’. The Courts opined the same in subsequent cases.605 Also in number of cases, 189cepticism has been expressed about the potential misuse of sedition law. Justice AP Shah, in one of his writings, warns about the very basis for the logic of sedition law. He compared the idea of sedition to a parochial view of nationalism which often endangers the diversity of opinion rather than protecting them against rebellion. The use of religion in electoral campaigns was challenged under s. 123 of Representation of the People Act, 1951.606 The contention put forward was that repeated use of open threats to India’s constitutional commitment to secularism could be construed as ‘disloyalty’ and the threat of public nuisance. However, the contention was rejected and it was held that candidate expressed at best a ‘hope’ for creation of a monolithic rashtra than, in fact, acting on elimination of minorities and thus threatening to eliminate other religions. Significantly, sec.123 of RPA, 1951 covers use of such speed in the campaigns and therefore there is no question of invoking the provisions of sec.124A IPC. Thus, expression of a particular image of the country does not alone amount to a threat to the security of the nation.

V.A Expression not amounting to sedition The Courts have been categorical in expressing that every criticism does not amount to sedition and the real intent of the speech must be considered before imputing seditious intent to an act. In Balwant Singh v. State of Punjab,607 the Court refused to penalize casual raising of slogans few times against the State by two individuals like [Khalistan Zindabad, Raj Karega Khalsa etc.]. It was observed that raising of lonesome slogans, a couple of times by these two people, without any action, did not constitute any threat to the Government of India as by law established nor could the same give rise to feelings of enmity or hatred among different communities or religions or other groups. On the same ruling, it was emphasized that holding an opinion against the Prime Minister or his actions or criticism of the actions of Government or drawing inference from the speeches and actions of the leader of the Government that the leader was against a particular community and was in league with certain other political leaders, cannot

603 Gompers v. Buck’s Stove & Range Co., 221 U.S 418(1911).
605 Romesh v. Union of India, AIR 1988 SC 775; see also Nazir Khan & Ors. v. State of Delhi, AIR 2003 SC 4427; see also Union of India & Ors. v. The Motion Picture Association & Ors., etc. AIR 1999 SC 2334.
be considered as sedition. The need to look into the context of the speech was reiterated by Delhi HC in *Pankaj Butalia v. Central Board of Film Certification & Ors.*, held that while judging the cases of sedition, it is extremely important to take into consideration the intention. An offense under se.124A IPC has to be ascertained by judging the act ‘holistically and fairly without giving undue weight to isolate passages.' In case of *Sanskar Marathe v. State of Maharashtra*, a cartoonist Assem Trivedi was booked under se.124A for defaming the Parliament, Constitution of India and National Emblem and attempting to spread hatred and disrespect against the Government through his cartoons. The Apex Court in the present case distinguished between strong criticism and disloyalty observing that disloyalty to Government established by law does not stand on the same footing as commenting in strong terms upon the measures or acts of Government, or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of those acts or measures by lawful means, that is to say, without exciting those feelings of enmity and disloyalty which imply excitement of public disorder or the use of violence. In case of *Arun Jaitley v. State of U.P.*, Allahabad High Court opined that a critique by a writer of a judgment of the Supreme Court on National Judicial Appointment Commission does not amount to sedition; it is merely a constructive criticism. Thus expression of strong condemnation towards the State or its institution can never amount to sedition for the simple reason that no institution or symbol alone embodies the whole country in entirely. In many cases the critique over a failed law expressed through for instance, the burning of national flag or expression of disappointment with the members of Parliament through a visually disparaging cartoon or an image of Parliament cannot amount to sedition because often the protests may be routed in an idea of India which has been frustrated by its elected representatives or a law that has been demeaned or disappointed citizens of India.

VI. Private Member’s Bill Suggesting Amendment.

In year 2011, a private member bill titled the Indian Penal Code (Amendment) Bill, was introduced in Rajya Sabha by Mr. D. Raja. The Bill proposed that sec. 124A IPC should be removed as it is a colonial law used by the Britishers to oppress the speech and criticism against them. But it is still being used in independent and democratic India despite having specialized laws to deal with internal and external threat to destabilize the nation. Another Bill titled The Indian Penal Code (Amendment) Bill, 2015 was introduced in Lok Sabha by Mr. Shashi Tharoor to amend the original section and suggested that only those words/ actions that directly result in the use of violence or incitement of violence should be treated seditious. This proposed amendment revived debates on interpretation of this section. The Courts through various judgments have settled that not only words, either spoken or written, or signs or visible representation that are likely to incite violence should be considered seditious.

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610 Romesh Yashwant Prabhoo v. Prabhakar Kashinath Kunte & Ors., AIR 1996 SC 1113
VII. Sedition vis-à-vis other Statutes

Potentiality and impact of expression has always been looked into by Courts to determine the permissibility of its restriction. In order to qualify as sedition, the act must be intentional and must cause hatred. Disturbance of public order has been recognized as an important ingredient of sedition in India. The term ‘public order’ has been defined and distinguished from ‘law and order’ and security of State’ in Ram Manohar Lohiya case613 wherein the Court observed, that one has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest one represents security of State. This made it easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of State. Since sedition is an offence against the State, higher standards of proof must be applied to convict a person, which is necessary to protect fair and reasonable criticisms from unwarranted State oppression. Section 124A IPC must be read in consonance with Article 19(2) of the Constitution and the reasonableness of the restriction must be scrutinized carefully on the basis of facts and circumstances of each case.614

The Indian Penal Code, 1860, within its ambit covers a wide range of actions threatening the peace of the society. For e.g.- Chapter IV includes offences against State like waging or attempting to wage a war,615 collecting arms etc. with intention of waging war against India,616 concealing with intent designed to wage war617 etc. Chapter VII covers provisions relating to abetting mutiny.618 Further Chapter VIII covers actions which, if allowed, would disturb public peace. Section 141 IPC defines unlawful assembly and punishment is also provided for the same.619 The Code also prohibits actions promoting enmity between different groups on grounds of race, religion, language, place of birth etc.620 Hence these are certain provisions that take care of any activity which might be indulged into for the purpose of waging war against India or causing disruption of public order.

Secondly, the Unlawful Activities Prevention Act, 1967 was enacted to prevent terrorist activities and to freeze the assets and other economic resources belonging to terrorists. The main object has been to enable the State authorities to deal with “activities directed against the integrity and sovereignty of India”. In 2012, the Act was amended, removing the vagueness in the definition of ‘terrorist act’ to include offences which may threaten the economic security of the nation. The Criminal Law Amendment Act, 1961 was also enacted with the purpose of curbing activities that are likely to jeopardize the security of the country and its frontiers point. The Act deals with cases where someone questions the territorial integrity, which is likely to prejudice safety and security of nation.621 It is also notable that Central Government may by notification declare ‘any area adjoining the frontiers of India, as notified area in which no person shall enter without the permission of designated authority.622 Furthermore, the Act also empowers the State Government to forfeit any newspaper

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614 Om Kumar v. Union of India, AIR 2000 3689.
615 The Indian Penal Code, 1860, s.121.
616 The Indian Penal Code, 1860, s. 122.
617 The Indian Penal Code, 1860, s.123.
618 The Indian Penal Code, 1860, s.131, 132.
619 The Indian Penal Code, 1860, s.143.
620 The Indian Penal Code, 1860, s. 153A.
621 The Criminal Law (Amendment) Act, 1961, s.2.
622 The Criminal Law (Amendment) Act, 1961, s.3(1).
or book which in its opinion contains material which is contravention to sections 2 and 3(2) of this Act.623

VIII. The Way Forward
For the proper functioning of a democracy it is important that its citizen indulge in constructive criticism or debates, pointing out the loopholes in the policy of the Government. Expressions used in such thoughts might be harsh and unpleasant to some, but that does not render the actions to be branded seditious. Section 124A should be invoked only in cases where the intention behind any act is to disrupt public order or to overthrow the Government with violence and illegal means. Every irresponsible exercise of right to free speech and expression cannot be termed seditious. For merely expressing a thought that is not in consonance with the policy of the Government of the day, a person should not be charged under the section. Certain issues which need thorough consideration are;

a) Given the fact that 124A was introduced by British to oppress the Indians, how far is it justified today and shouldn’t it be redefined in a country like India that is the largest democracy of the world?

b) What is the extent to which the citizens may enjoy the right to offence and at what point this right to offend would qualify as hate speech?

c) What could be the possible safeguards to ensure that the section is not misused?

d) How to strike a balance between s.124A IPC and right to freedom of Speech and Expression?

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623 The Criminal Law (Amendment) Act, 1961, s.4(1).
INTRODUCTION

The following project on **Strict Liability: Concerns and Challenges** is based on analysing the law, its applicability, and legality under both common law and Indian law. Since, the project is assigned under the discipline of Criminal Law, so, it would largely concentrate its arguments, legality and matters that have been dealt under Indian Penal Code 1860. The project will try to find out the affirmation/negation of its two hypotheses which are based on the nature and reasonability of the liability. The project will cover strict liability and its inclusion in Indian Penal Code as punishable offence. The further addition will be regarding the shortcomings or challenges of having strict liability, the discrepancies it has created among the law makers regarding its nature and demeanour of infliction. The work also includes verdicts on cases of the same nature which led to the development of the concept and its further inclusion as modern form of criminal liability which is much different from the traditional liability.

**Strict liability under legal dictionary is defined as legal wrong or largely offences in which the plaintiff need not prove the negligence or fault. It need not require proving the involvement of mental element or intent of the person. He is anyway responsible for his part of involvement in the very act which has been put under the case of strict liability. A person could be held liable for strict liability both under law of Torts and Criminal Law. It is important to mention in here that the concept was in fact developed under Law of Torts which was further included under criminal liability as well when the elements of criminality matched with that of liability.**

1.1. BACKGROUND OF THE CONCEPT:

Liabilities come with rights. If persons have been vested with the rights of doing certain acts, they are also held back by certain liabilities. Liabilities should be there to control a person’s activities. Criminal liability is based on two elements **Mens Rea** and **Actus Reus**. But strict liability is an exception to this rule as it doesn’t require the mens rea to be proved for making a person liable.

FB Sayre has emphasized that the trend is away from punishment as an institution and towards punishment as a means to an end, as a means to social protection. This trend has had its most striking manifestation in the growth of strict liability or public welfare offences. Long ago, the United States supreme court pin pointed that the doctrine doesn’t have general application, but as to some specific acts it has been quoted that these act will be done on the risk of the doer and no defence on the ground of good faith or ignorance would be heard. **The liability was first introduced under Law of Torts, in the case of Ryland v. Fletcher. It was further included as a criminal liability.**

A crime is an offense against the state, as defined by each state’s criminal laws. No act is a crime until it is recognized as such by society and written into the states’ and federal criminal codes. We may think...
certain acts have always been crimes or are treated as crimes everywhere, but that is not the case. In order to convict a person of a crime, the state must usually prove liability in addition to the fact that an act occurred. In other words, in order to prove theft, the state must prove that the defendant took property belonging to another and that the defendant took the property with the intent to deprive the owner of it. But, by simply engaging in certain conduct, a person may be found criminally liable for some crimes regardless of intent. An example is the crime of statutory rape. A person may be convicted of statutory rape even if the victim consented to the sexual contact (and, in some states, even if the defendant did not know the victim was under age). Thus, the prosecution need not prove that the defendant intended to rape the victim in order to convict the defendant; the very fact of the sexual conduct (the act alone) is sufficient to support a conviction.

1.2 AIMS AND OBJECTIVES

- To find out the origin and the background of concept if any.
- To find out a person’s legal implication under this liability.
- To know its validity under IPC.
- To know about its shortcomings, if any.

1.3 HYPOTHESIS

- Strict liability doesn’t involve mental element
- Strict liability is well justified to be included as criminal liability

1.4 RESEARCH QUESTIONS

- What is strict liability?
- What is the difference between strict liability under law of torts and criminal law?
- What are the elements of strict liability?
- Does mental intent and negligence hold importance in holding someone responsible under strict liability?
- What are its shortcomings and concerns?

1.5 RESEARCH METHODOLOGY

The researcher will be relying on doctrinal research method to complete the project. These involve primary and secondary sources of literature and insights.

1.6 SOURCES OF DATA

PRIMARY SOURCES

- Case laws
- Constitution of India
- Indian Penal Code etc.

SECONDARY SOURCES

- Blogs and Journals
• Books

• Case commentaries

1.7 REVIEW OF THE LITERATURE


The following book is a legal work, one of the prominent from the time. Its explained yet simple paragraphs are apt for the readers both for beginners and experienced law scholars. All technical rules of procedure have been illustrated and explained in a clear and insightful manner. The 22nd edition has been updated to include much better explanation and relevant case laws and current development. Originality and reliability have always been hallmark of this publication and every possible care has been taken in to maintain its originality.

1.8 LIMITATION

The researcher had territorial, monetary and time limitations in completing the project.

Since, the project has been made in the midst of the third semester, the researcher barely got any time to verify the facts. The researcher was purely dependent on already available facts and analysed information for making this project. She was not able to collect information from a wide area and her area of research was confined to the nearby people and the local acquaints who had knowledge regarding the topic.

MENS REA AND STRICT LIABILITY

The term mens rea comes from the writings of Edward Coke, an English jurist who wrote about common law practices. He advocated that “an act does not make a person guilty unless [their] mind is also guilty”. This means that while a person may have committed a criminal act, they can only be found guilty of criminal activity if the deed was deliberate.

To put it simply, mens rea determines whether someone committed a criminal deed purposefully or accidentally. This idea commonly applies to murder cases. The perpetrator’s mens rea, or mental state at the time of the killing, is an essential factor in whether they will be declared guilty or innocent. In order to receive a conviction, the lawyer must prove that the accused party had some intention or willingness to end the life of another person. On the other hand, if evidence shows the death to be accidental and unavoidable, the suspect must be declared innocent and set free.

MENS REA is a legal phrase used to describe the mental state a person must be in while committing a crime for it to be intentional. It can refer to a general intent to break the law or a specific, premeditated plan to commit a particular offense. To convict an accused person of a wrong doing, a criminal prosecutor must show beyond any reasonable doubt that the suspect actively and knowingly participated in a crime that harmed another person or their property.

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accused party had some intention or willingness to end the life of another person. On the other hand, if evidence shows the death to be accidental and unavoidable, the suspect must be declared innocent and set free.

In 1962, the American Law Institute created the Model Penal Code (MPC) to better define mens rea. It stated that in order to be blameworthy for any activity, the suspect must have done the act willingly, with the knowledge of what the final result would be or in a reckless manner with no consideration for the safety of others. Actions that meet these qualifications are viewed as intentional crimes, even if the perpetrator claims to be unaware that their activities were illegal. This concept falls under a U.S. law which states “ignorance of the law or a mistake of law is no defense to criminal prosecution

2.1 OFFENCES AND REQUIREMENT OF MENS REA

Offences are violation of code of conduct or are criminal wrong. Offences are mainly defined under code while some are defined under acts or statues. Offences are generally divided into several forms but in context of mens rea, we would talk about two main branches, those being, malum in se and malum prohibitum. Malum in se is a generalised form of offence which is recognised at a large by public of being a wrong human conduct, it being morally and statutory wrong both. People recognised it as wrong since long period of time. Malum in prohibitum is a wrong which is considered a wrong because of established rules and regulations and not because people from long time consider them so.

Generally, it is required by the prosecutor to prove guilty mind when to prove wrong of a person. Then only, he could be made liable. But in some offences mostly malum prohibitum, it is not required to prove mens rea because of the prohibitory and regulatory nature of the statue. The reason behind is that if the perpetrators are left just on the ground of absence of mens rea, then, it would cause chaos and irregularity in the society because of huge public negligence.

3. STRICT LIABILITY AS CRIMINAL LIABILITY

According to Cambridge Dictionary, criminal liability is the responsibility for any illegal act which causes harm to someone or something. Actus Reus and Mens Rea are the two elements for proving criminal liability. Strict liability is an exception to criminal liability as mens rea is not required. In strict liability mens rea is already presumed. Mens Rea has always been a deciding element in proving criminal liability.
Strict liability was first introduced as a part of mens rea but gradually the concept evolved and became part of public law to control much harsh wrong against the public. In tort law, there are two broad categories of activities for which a plaintiff may be held strictly liable - possession of certain animals and abnormally dangerous activities. Additionally, in the area of torts known as product liabilities, there is a sub-category known as strict products liability which applies when a defective product for which an appropriate defendant holds responsibility causes injury to an appropriate plaintiff. In criminal law, strict liability is generally limited to minor offenses. Criminal law classifies strict liability as one of five possible mens rea (mental states) that a defendant may have in pursuit of the crime. The other four are "acting knowingly," "acting purposely," "acting with recklessness," and "acting with negligence." The mens rea of strict liability typically results in more lenient punishments than the other four mens reae. Typically in criminal law, the defendant's awareness of what he is doing would not negate a strict liability mens rea (for example, being in possession of drugs will typically result in criminal liability, regardless of whether the defendant knows that he is in possession of the drugs).

The main substances under Mens Rea are intention, recklessness and negligence. Intention is the closest as it is worst to kill someone intentionally than recklessly or negligently. In court, judges are used to apply ordinary meaning of the word which has created so many confusions. Talking about recklessness will require discussing about an important case of R v. Wollin. In this case, the man threw his infant against a wall in order to make the infant quiet but he recklessly killed the infant as he could see what possibility result out of the consequence of his could act anyway. Negligence is acting in a way which a reasonable person would not. To determine it, objective test is conducted.

8https://www.law.cornell.edu/wex/strict_liability, retrieved on 31st August, 2019, 3:00PM
9ibid
10 Supra note 7

3.1. PRINCIPLE OF STRICT LIABILITY

- Offences in which we do not have to prove mens rea for that offence.
- These are only certain offences which are exception to mens rea.
- So, it’s an offence which has occurred but one doesn’t need mens rea to prove that it was an offence.
- It resembles no fault liability.
- Elements of mens rea, i.e., intention, recklessness, negligence is absent

3.2. CHARACTERISTICS OF STRICT LIABILITY

- Strict liability occurs when a defendant has committed a crime but is not blameworthy. An easy example of this is, if a liquor shop sells alcohol to two young men who are under the minimum age made mandatory for the consumption of alcohol. Although the defendant is
under the misconception that the purchaser was over the minimum age required but still he will be held liable\(^\text{11}\). (Harrow London BC v. Shah)

- Section 11 of Indian Penal Code defines a person as any company or association or anybody of persons whether incorporated or not. Intent is defined in law by the ruling in \textit{R v Mohan} (1975) as "the decision to bring about a prohibited consequence." Since, strict liability doesn’t require mens rea so the test of intent is not required.

- Strict liability mostly found in statues often have to do with possessing unlawful weapons and drugs, driving offences such as drink driving and speeding and it also have to do with preparation of the food products and other consumable goods. In this case of \textit{Smedleys v. Breed} (1974), large scaled manufacturers of peas, convicted under Food and drugs act 1955 of common law for supplying food unfit for consumption of humans\(^\text{12}\). House of Lords put it in the category of strict liability. Reasonable care need not to be proved here as mens rea was assumed and it was for a public good so strict liability ought to be used

**UNDER COMMON LAW:** Outraging public decency, public nuisance and criminal defamatory libel are all part of strict liability under common law. It is for the

11 https://www.lawteacher.net/free-law-essays/tort-law/an-act-committed-without-mens-rea.php, retrieved on 1\(^\text{st}\) September, 2019, 3:00PM

12 ibid

parliament to state mens rea for the offences of common law\(^\text{13}\). Therefore, the court has to include mens rea, unless, it is in black and white that the following is strict liability. So, statutory liability have wording on their statues which help in deciding a lot whether it is strict or not. There are several key words and phrases within the act that will help and aid the judge in concluding whether the offences are under strict liability or not. The interpretation on these words and phrases are deciding factors.

**3.3 CATEGORIZATION OF OFFENCES UNDER STRICT LIABILITY:**

**REGULATORY OFFENCES:** These are no moral crimes but are acts prohibited under law for the public good. These crimes don’t stigmatize people’s picture in the eyes of the society and are mostly penalized offences, the maximum penalty of which is surprisingly low. These laws are mostly on hygiene, measurement, food, drinks etc. In the case of \textit{Sweet v. Parsley}, Ms Sweet, a teacher by profession took a piece of land and leased it to tenants who used the land for smoking cannabis, a harmful drug under \textit{dangerous drugs act 1965}. The court held that since it was related to real social stigma
which could malign the image of people and that’s why it was put under true crimes and not under strict liability. So, Ms Sweet was not held responsible under strict liability. The court has never laid down any specific categorization of such offences.

**ISSUES OF SOCIAL CONCERN:** There are certain acts which are of social concern and are required to be put under strict liability in order to make people extra careful for their conduct which could bring in imminent danger and prove fatal for the people. Certain acts of murder and rape are also life threatening and are ferociously dangerous but the only difference between them and the former is that the former doesn’t involve added social stigma with them which the later holds. The later is not only punishable with much harsh punishments but also demeans public image of the person charged under such offence. In the case of Harrow London Borough Council v. Shah, the selling of lottery ticket to the minor was put under strict liability. Issues of social concerns sometimes overlaps with that of regulatory offences but it is more dangerous and requires more care and protection. That’s why more penalty is imposed on such crimes than regulatory offences.

**THE WORDING OF THE ACT:** Words like cause, possession and knowingly are used for an act of strict liability. Most of the acts under statues are not expressly determined by wordings to be under strict liability or a normal crime but some of them have been put under strict liability under these wordings.

**THE SMALLNESS OF THE PENALTY:** Strict liability is most often imposed for offences which carry a relatively small maximum penalty, and it appears that the higher the maximum penalty, the less likely it is that the courts will impose strict liability. However, the existence of severe penalties for an offence does not guarantee that strict liability will not be imposed. In Gammon Lord Scarman held that where regulations were put in place to protect public safety, it was quite appropriate to impose strict liability, despite potentially severe penalties.

3.4 CRIMINAL LAW AND REGULATIONS: There are some commonly accepted moral codes which are regulated by criminal laws. They are backed and their violations are dealt under criminal laws while there are regulatory laws to establish regulations and conduct of people on roads, in supply and manufacture etc.

**STRICT LIABILITY: IN INDIA**

Strict liability in India is mostly a part of law of Torts. However, there are some offences which has been put under strict liability and are punishable under criminal law. Most of the criminal offences have been evidently dealt under Indian Penal Code while others have been dealt under various acts. While most of the provisions and laws of India has been derived from


14 https://catalogue.pearsoned.co.uk/assets/us/Elliott_Criminal_C02.pdf, retrieved on 1st September, 2019, 11:00AM
common law and even the concept of strict liability but the concept and applicability of mens rea in a statue is where both of them differ.

The strict liability under common law was decided under Sweet v. Parsley. *Sweet v Parsley* 16 was a case where the defendant landlady of a farmhouse (which was let to students and which she visited infrequently) was charged under a 1965 Act "of having been concerned in the management of premises used for smoking cannabis".

Even though she had neither knowledge of nor privity with the offence, it took place on her property and at first instance she was convicted, being deemed "liable without fault". This conviction was later quashed by the house of lords on the grounds that knowledge of the use of the premises was essential to the offence. Since she had no such knowledge, she did not commit the offence.

The case's significance in English criminal law is that it sets out new set guidelines for determining whether an offence is one of strict liability or whether mens rea is a presumed requirement 17.

Lord Reid laid down the following guidelines for all cases where the offence is criminal as opposed to quasi-criminal:

1. Wherever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, words importing mens rea must be read into the provision.

2. It is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted.

3. The fact that other sections of the Act expressly require mens rea is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. It is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament.

While deciding mens rea, there are two school of thoughts which developed because of the following judgements 18:

1. First is embodied in the Judgment of Wright J. in the case of *Sherras V/s De Rutzen* 1920 that in every statute mens rea is to be implied unless the contrary is shown.

2. Second is that of Kennedy, L.J. in *Hobbs V/s Winchester corporation* that you ought to construe the statute literally unless there is something to show that mens rea is required. It means the mens rea is implied in certain statutes and not in others and there are no words in the statute itself to show the recognition of mens rea but the Judges provide for it on their own authority.
Some important cases regarding mens rea usage and strict liability:

**R v. Prince**\(^{21}\):

_In this case, Prince Henry was tried for having unlawfully taken away an unmarried girl, below the age of 16 years, out of the lawful possession and against the will of her father, under the belief that she was eighteen. The jury found upon evidence that before the defendant took her away the girl had told him that she was 18. It was held that the prisoner’s belief about the age of the girl was no defence. It was argued that the statute did not insist on this knowledge of the accused that the girl was under 16 as necessary for conviction, the doctrine of mens rea, should, nevertheless, be applied and conviction be set aside in the absence of criminal intention. Sixteen judges tried the case and all but one unanimously held the prince guilty._

**R v. Tolson**\(^{22}\):

_In this case the accused was tried under Section 57 of the Offences against the Person Act, 1861 for having committed the offence of bigamy. In this case Mrs. Tolson was married to Mr. Tolson in 1880 and after one year in 1881 she was deserted by her husband. She made all possible enquiries about him and ultimately came to know that her husband had been destroyed in a ship bound for America. Therefore, supposing herself to be a widow she married another man in 1887. The whole story was known to the second husband and the marriage was not a secrecy. In the meantime Mr. Tolson suddenly reappeared and Mrs. Tolson was charged accordingly. In the trial court she was convicted for one day’s imprisonment on the ground that a belief in good faith and on reasonable facts about her husband’s death is no defence to the charge of bigamy. The accused went to the higher court by way of appeal. The question before the appellate court was whether Mrs. Tolson had guilty intention in committing the offence of bigamy. The appellate court by majority set aside the conviction on the ground that a bona fide belief about the death of the first husband at the time of second marriage is a good defence in an offence of bigamy. The court also laid down that the doctrine of mens rea would be applied in statutory offences also unless it is ruled out by the statute. Coming back to India, it follows the second school of thought, that is, it follows the statues as they are written and most of the statues are clearly well written in such a manner that the judges and litigants easily recognises that whether the following requires mens rea or is properly under strict liability._

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18Eugene J Chesney, Mens Rea under strict liability, volume2, Journal of criminal law and criminology
\(^{19}\)[1895] QB 918
Retrieved on 19th August, 2019, 5:00PM

\(^{21}\)Regina v. Prince, L.R. 2 C.C.R. 154 (1875)

\(^{22}\)R v Tolson (1889) 23 QBD 168
Definition of any statue in India has clearly pointed out the conduct of the person as well as his state of mind while the commission of any overt act. The words are dishonestly, voluntarily, recklessly, negligently, wantonly, corruptly, malignantly etc. The word Mens rea have nowhere been used in the Indian Penal Code but they have been applied in two different ways:

(i) While defining offences some words used in the respective section which indicate the actual criminal intent required for the offence. Such words are fraudulently, dishonestly, voluntarily, intentionally etc. Such words haven’t been used in case of offences which can’t be committed by an innocent person. Such offences are Waging War against Government (Section 121), Sedition (Section 124-A) and Counterfeiting of Coins (Section 232) etc.

(ii) The Code also contains a separate Chapter i.e. Chapter IV on General Exceptions (Section 76 to 106) which indicates the circumstances where the absence of Criminal intent may be presumed. This negative method of applying mens rea has been found to be very useful.

The doctrine of Mens rea has been applied by Courts in India and now it is firmly settled law that mens rea is an essential ingredient of an offence. Besides it, the offences created by the Prevention Of Food Adulteration Act, Drugs act, Weights and Measures Act are in terms of absolute prohibition and the offender is liable for the offence without the proof of any guilty knowledge or intention, as it also decided by the Hon’ble Supreme Court in the case of Sarjoo Prasad v/s State of U.P.¹²⁴

Some other important cases related to strict liability are:

Nathulal v. State of MP²⁵: The appellant is a dealer in foodgrains at Dhar in Madhya Pradesh.²⁶ He was prosecuted in the Court of the Additional District Magistrate, Dhar, for having in stock 885 maunds and 21/4 seers of wheat for the purpose of sale without a licence and for having thereby committed an offence under section 7 of the Essential Commodities Act, 1955 (Act X of 1955), hereinafter called the Act. The appellant pleaded that he did not intentionally contravene the provisions of the said section on the ground that he stored the said grains after applying for a licence and was in the belief that it would be issued to him. The learned Additional District Magistrate, Dhar, found on evidence that the appellant had not the guilty mind and on that finding acquitted him. On appeal a Division Bench of the Madhya Pradesh High Court, Indore Bench, set aside the order of acquittal and convicted him on the basis that in a case arising under the Act "the idea of guilty mind" was different from that in a case like theft and that he contravened the provisions of the Act and the order made thereunder, it sentenced the appellant to rigorous imprisonment for one year and to a fine.

²³ https://www.lawteacher.net, retrieved on 1st September, 2019, 11:00PM
of Rs. 2,000 and in default of payment of the fine he was to undergo rigorous imprisonment for six months.

**State of Maharashtra v. MH George**

In the case, the respondent left Zurich on 27th for Santa Cruze along with some gold slabs. Till 24th it was legal to bring or take gold through India. The respondent was arrested at the airport. It was held that the person has violated section 8 of foreign exchange regulation act. Since, the statute doesn’t mention the term knowingly or intently so, the section would be read and considered in its literal meaning and thus, it’s not important whether the mens rea was present at the time of commission or not, the respondent is anyway liable.

**All these cases clearly states that the statue for India speaks clearly that for holding someone liable for criminal acts, proving guilty mind is not required and thus, these hold strict liability against the wrongdoer whose guilty act is necessary enough to make him a convict.**

**4.1 CRIMES UNDER IPC WHICH COMES UNDER STRICT LIABILITY**

**Kidnapping:**

Whoever takes or entices any minor under 1[sixteen] years of age if a male, or under 2[eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

**Sedition:**

124A. Sedition. —Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in [India], shall be punished with [imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

1. **Explanation 1.** —The expression “disaffection” includes disloyalty and all feelings of enmity. **Explanation 2.** —Comments expressing disapprobation of the measures of the Government with
a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section. Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting

or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

**Counterfeit of coins and stamps:**

**section 231:** Whoever counterfeits or knowingly performs any part of the process of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

**Section 232:** Whoever counterfeits, or knowingly performs any part of the process of counterfeiting 3*[Indian coin], shall be punished with 5*[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

**Section 255:** Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any stamp issued by Government for the purpose of revenue shall be punished with 1*[imprisonment for life] or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

**Waging war against the government:**

Whoever, wages war against the [Government of India], or attempts to wage such war, or abets the waging of such war, shall be punished with death, or [imprisonment for life] [and shall also be liable to fine]. A joins an insurrection against the [Government of India]. A has committed the offence defined in this section.

All the above sections have been expressively and impliedly been made to evidently sound that they don’t ask for the presence of mens rea in order to make a person liable under these sections. Other statues or sections which require the presence of mens rea for proving the crime of the person which have been discussed in the mens rea chapter of this project.

**Strict liability: pros and cons**

Strict liability was introduced in common law through Ryland v. Fletcher case and then some of the faults under strict liability also put the person at default under criminal liability. Further, it was taken up in India as well. First, as a liability under torts and secondly, liability under criminal acts without mens rea in IPC and other offences created by the prevention of food adulteration act, drugs act, weigh and measures act. All these offences are those where actus reus is required to be proved. The party’s enrolment in the crime is sufficient enough to make them criminally liable and the usual procedure of establishing mens rea doesn’t apply in such
cases. Most of the jurists and learned people of the field believes that it’s unfair to have such laws which punishes an innocent mind and doesn’t give him the chance of correcting himself while people of the contrary view argues that correcting is what the law or statue is doing for the wrong doer. He’s given a minute punishment in order to make him more cautious of his acts and make him aware that his act is of such grievous nature and affects the society in such a way that acquitting the wrongdoer just on the ground of mens rea would be injustice to the society and aggrieved. So, the researcher could now reach to the inference that having strict liability brings to the society both pros and cons.

Here, some of them have been highlighted:

5.1 ADVANTAGES:

PROMOTION OF CARE: It would promote a greater degree of care among people regarding the issues which are of great social or public concern and the person at default could not be spared just because of the absence of mens rea. This would make people negligent regarding grave issues and would hamper the rights of others and expose them to extraordinarily dangerous situation.

DETERRENT VALUES: It is suggested that through regulatory acts and rules, through different acts and bodies and not always by police, these matters could be dealt by placing pressure on the offenders. When there is no need to prove mens rea then it would decrease the chances of acquittal of offenders who are in most of the cases where mens rea needs to be proved are acquitted.

31 https://www.nolo.com/legal-encyclopedia/what-common-strict-liability-crimes.htm, retrieved on 24th August 2019, 10:00AM

EASIER ENFORCEMENT: strict liabilities are easy to be enforced and to make people liable. The administration of a place would come to standstill where even small and petty matters require proving guilty intent and defaulters would be acquitted easily and this would make them negligent towards this basic rules.

DIFFICULTY OF PROVING MENS REA: strict liability works in those circumstances where it is difficult to prove mens rea while the wrong is clearly visible through act. Here, mens rea is perceived through the nature of act and it's not required to be proved and the wrongdoer can’t escape.

NO THREAT TO LIBERTY: In many strict liabilities, the punishment is mostly confined to fines or small imprisonment. So, there is no threat to liberty.

PROFIT FROM RISK: Those who are not following rules and regulations are earning certain gains.

5.2 DISADVANTAGE:

INJUSTICE

Strict liability is criticised as unjust on a variety of different grounds. First, that it is not in the interests of justice that someone who has taken reasonable care, and could not possibly have avoided committing an offence, should be punished by the criminal
law. This goes against the principle that the criminal law punishes fault. Secondly, the argument that strict liability should be enforced because mens rea would be too difficult to prove is morally doubtful. The prosecution often find it difficult to prove mens rea on a rape charge, for example, but is that a reason for making rape a crime of strict liability? Although many strict liability offences are clearly far lesser crimes than these, some do impose severe penalties, as Gammon illustrates, and it may not be in the interests of justice if strict liability is imposed in these areas just because mens rea would make things too difficult for the prosecution. It is inconsistent with justice to convict someone who is not guilty, in the normal sense of the word, just because the penalty imposed will be small. Even where penalties are small, in many cases conviction is a punishment in itself. Sentencing may be tailored to take account of mitigating factors, but that is little comfort to the reputable butcher who unknowingly sells bad meat, when the case is reported in local papers and customers go elsewhere. However slight the punishment, in practice there is some stigma attached to a criminal conviction (even though it may be less than that for a ‘true crime’) which should not be attached to a person who has taken all reasonable care. In addition, as Smith and Hogan (2005) point out, in the case of a jury trial, strict liability takes crucial questions of fact away from juries, and allows them to be considered solely by the judge for the purposes of sentencing. In a magistrates’ court, it removes those questions from the requirement of proof beyond reasonable doubt, and allows them to be decided according to the less strict principles which guide decisions on sentencing. Strict liability also delegates a good deal of power to the discretion of the enforcement agency. Where strict liability makes it almost certain that a prosecution will lead to a conviction, the decision on whether or not to prosecute becomes critical, and there are few controls over those who make this decision.

INEFFECTIVE:

Most of the time, the deterrent is not the fear of being convicted but the fear of being caught. Many a times, even if the company or startup has not been convicted then also it brings bad name and deterioration to its business which is probably not the objective of the government. Most of the time, people are least bothered about their involvement in these sort of crimes and they find it much cheaper to pay fines and carry on with the wrong doing.

LITTLE ADMINISTRATIVE ADVANTAGE:

In some of the cases mens rea to some extent is required to be proved which makes it difficult for sentencing.

INCONSISTENCY

Most of the laws and statues clearly don’t state whether strict liability applies in that very situation or not. Many s times, as in India, it is clearly mentioned in statues that whether the following statue requires mens rea or not. But in many countries it is left upon the judges to decide whether mens rea is required in the following or not.

CONCLUSION, CRITICISM AND SUGGESTION

The researcher in all the chapters of the project has drawn a large emphasis on the topic of mens rea, cases concerned, judgement of various courts from England
and India. The difference between common law and Indian while dealing with strict liability was also pointed out. While Indian law reads the statues as it is, the common law presumes the presence of *mens rea* when it has not been mentioned in the statues. Coming to the hypothesis to the work, the first one stands wholly in affirmation. It has been discussed both in chapter second, third and fourth of the project that to impose *strict liability*, the prosecutor only needs to prove the guilty act and no mens rea is required to be proved. Two schools of thought over the statues regarding the interpretation of strict liability have been discussed as well. For the second hypothesis, the views are mixed, different and equally strong as well as valid from both the sides.

**CRITICISM**

There are sets of both pros and cons holding strict liability. None of the baggage comes without a rubbish and not even the one having a silver lining. Same is with the strict liability. Strict liability assures a swift and proper implementation of rules and regulations. These rules are mostly regulatory laws in order to maintain law and order in the society and prevent chaos. If mens rea is required to be proved even in regulatory laws, then it would loose its importance, there would be chaos, irregularity and lawlessness in the society. Secondly, there is a chance of acquittal of accused when there is a need to prove mens rea and it’s a total injustice against the public to acquit a person knowing his guilty act but having a cent of doubt on the actual intentions of the person involved. Thirdly, there are some acts which are of grave public importance and leaving the person only on the ground of absence of mens rea would make them negligent and they would probably not pay heed to these rules and regulations. It will cost a huge to public interest. Thus, imposing strict liability is quiet in favour and in accordance to the public. While, critics of opposite view claim that strict liability leads to injustice and inconvenience to people who are punished without guilty intent or because of their failure to know about the existing laws, it is pointed out by the people in favour of imposing strict liability that the punishment for strict liability is pretty less and it is just for the sake of making people conscious of the existing laws and avoiding its repetition.

**SUGGESTIONS**

**Restriction to public danger offences:** Strict liability for regulatory offences if the liability imposed should be shifted from its objective of being tighter to being a liability in the acts posing real threat of danger to public.

**Liability of Negligence:** It should be a liability of inefficient, hopeless and careless people and not those who are genuinely blameless, were involved because of complete unawareness of the matter on some reasonable grounds.

**Defence of all due care:** where strict liability is applied, there should be a defence of due care in order to protect those people who have followed the rules and regulations and haven’t failed in recognising them, haven’t been careless toward these laws and the damage occurred all out of the control of the person. But, there should be a scope of absolute liability like we have in India under law of Torts where the person know that he is possessing a dangerous and harmful substance, the escape of which would cause harm to the public but still keeps it for his own benefit. There, absolute liability should be applied
even when the person takes all due care of the matter

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ACHIEVING ENERGY SECURITY
BY RENEWABLE SOURCES OF
ENERGY POLICY TRENDS IN
DEVELOPING SUSTAINABLE
ENERGY

By Naina R Nerli
From University Law College, Bangalore
University

“The earth, the air, the land and the water are not an inheritance from our fore fathers but on a loan from our children. So we have to handover to them at least as it been handed over to us.” Mahatma Gandhi

This saying of Mahatma Gandhi way back, almost seven decades ago is becoming all the more relevant with each passing day. In a race to achieve progress and be developed, the impact of industrialization and environmental degradation got ignored globally. As a result, today world is witnessing the result of environmental imbalance on a global scale. Tornados, hurricanes, tsunamis, unprecedented rains etc are all results of nature’s fury. Thus it is the responsibility of each and every individual towards our planet, irrespective of where we live. We all belong to the earth first, and not that the earth belongs to us. It is the need of the hour to come together and put combined efforts globally. Since ages India has believed in this and has always been committed to participate in support of efforts to save the environment on a local as well as global scale.

India is going through a conflicting time. India needs to meet the growing energy demands for rapid industrialisation on one hand and on the other hand require attending to millions of people’s basic day today needs. Thus the need of the hour is to put economic development on a climate-friendly path that meets the demands of the present without imperilling the needs of the future generations as expressed by Mahatma Gandhi. This principle leads the renewable energy sector spread its wing across India.

India’s energy sector is one of the most diversified in the world. Sources of energy generation range from conventional sources such as coal, lignite, natural gas, oil, hydro and nuclear power to viable non-conventional sources such as wind, solar, and agricultural and domestic waste. Traditionally India has mainly relied on coal for its energy needs as it has 4th largest coal reserves. As conventional sources has its own disadvantages, viz ill effects on environment, non sustainability and cost factor, India is stressing policies to develop and use nonconventional affordable sources which are environment friendly, sustainable, secured and renewable to balance the economic growth and environment stability.

India geared up for energy security after two oil shocks in 1970s. As a result of it,

1 http://fox2now.com/2017/03/01/devastating-images-of-tornado-damage-from-perryville-mo/.
5 http://unfccc.int/paris_agreement/items/9485.php.
7 http://coal.nic.in/content/coal-reserves.
government constituted Commission for Additional Sources of Energy (CASE) in 1981. The Commission was charged with the responsibility of formulating policies and their implementation, programmes for development of new and renewable source of energy (NRES) apart from coordinating and intensifying R&D in the sector. Department of Non-conventional Energy Sources (DNES), that incorporated CASE, was created in the then Ministry of Energy in 1982\(^8\). This indicated that the stage of commercialization of NRSE devices had been reached, requiring a range of conducive policy measures. To facilitate commercialization and market development, the Indian Renewable Energy Development Agency Limited (IREDA) was established in 1987. The IREDA functions as the promotional and financing arm of the Ministry and has been able to tie up funds from domestic and international institutions for lending to end-users, manufacturers, financial intermediaries and entrepreneurs, predominantly in the private sector. In 1992, DNES was elevated into a separate Ministry of Non-conventional Energy Sources (MNES) reflecting the political commitment towards the promotion of NRSE \(^8\). The MNES with involvement of the private sector and NGOs was successful in creating one of the most broad-based renewable energy programmes in the world. The Ministry is broadly organized into six groups dealing with rural energy, solar energy, power from renewable, energy from urban and industrial wastes, new technologies and administration and coordination. It was realized that renewable energy has to play a much deeper role in achieving energy security in the years ahead. In October 2006, the Ministry was re-christened as the Ministry of New and Renewable Energy.\(^6\)\(^3\) India is perhaps the only country to have exclusive ministry for renewable energy. Since then the Ministry has been facilitating the implementation of broad spectrum programs such as harnessing renewable power, use of renewable energy to rural areas for lighting, cooking and in urban areas for industrial and commercial applications \(^6\)\(^3\)2.

The Government of India has taken several initiatives to achieve “Power for All” by 2022\(^6\)\(^3\)3. It introduced the concept of solar parks, organized RE-Invest 2015—a global investors’ meet, launched massive grid-connected rooftop solar programmes earmarking Rs.38,000 crore for a Green Energy Corridor, increased eight-fold in clean environment cess from Rs.50 per tonne to Rs.400 per tonne, launched solar pump scheme with a target of installing 100,000 solar pumps and programme to train people for solar installations under the Surya Mitra scheme, levied no inter-state transmission charges for solar and wind power, made compulsory procurement of 100% power from waste to energy plants etc. The other significant initiatives are launching of improved cook-stoves initiatives; initiating coordinated research and development activities in solar PV and thermal; second generation bio-fuels, hydrogen energy and fuel cells etc. As a result today 1.2 million households are using solar energy to meet their lighting energy needs and almost similar numbers of the households meet their cooking energy needs from biogas plants. Solar Photovoltaic (PV) power systems are being used for a variety of applications such as rural electrification, railway signalling, achievements/.

\(^10\) http://www.powerforall.org/blog/2016/2/28/infographic-indias-247-power-for-all-program.
microwave repeaters, mobile towers, TV transmission and reception and for providing power to border outposts.\textsuperscript{634}

**Infrastructure development:**
Every State has a department, for implementation of renewable energy programmes of the Ministry, besides their own programmes of renewable energy. In addition, institutions namely National Institute of Solar Energy (NISE) at Gurgaon, National Institute of Wind Energy (NIWE) at Chennai, The Sardar Saran Singh National Institute of Bio-Energy (SSS-NIBE) at Jalandhar. Solar Energy Corporation of India (SECI) and Indian Renewable Energy Development Agency (IREDA) have been established to provide technical support to the renewable energy sector in the country. The reputed technical institutions i.e. IITs, NITs and Universities provide support for research and development work. A large domestic manufacturing base has been established in the country for renewable energy systems and products. Companies investing in these technologies are eligible for fiscal incentives, tax holidays and accelerated depreciation apart from the remunerative returns for the power fed into the grid. Further, the government is encouraging foreign investors to set up renewable power projects with 100 % foreign direct investment.\textsuperscript{635}

**Policy initiatives:**
Favourable regulatory policy initiatives such as Electricity Act 2003\textsuperscript{636}, renewable purchase obligation scheme under which each state has to set a state level target for renewable energy purchase by ‘Obligated Entities’. The obligation can be met by either ways i) by directly purchasing renewable energy ii) by generating renewable energy. Launching of The Jawaharlal Nehru National Solar Mission (JNNSM) in November 2009 was marked as the foundation stone in India’s endeavour to solar energy, popularly known as ‘Solar India’. The renewable energy sector has always been given a ‘Priority Sector’ status by the Reserve Bank of India for the purpose of providing loans through banks.\textsuperscript{637}

**Power from renewable:** Grid interactive and off-grid renewable power

**Wind Energy Programme:**
Wind energy has emerged as most successful renewable energy option in India and is the fastest growing renewable energy technology for generating grid connected power amongst various renewable energy options. The Ministry’s wind power programme covers wind resource assessment, facilitation of implementation of demonstration and private sector projects through various fiscal and promotional policies. India is the fourth largest wind power producer in the world, after China, USA and Germany.

**Technology Development and Manufacturing Base:**
Wind turbines are being manufactured by 21 manufacturers in the country with 55 models up to a capacity of 3.00 MW single turbines, mainly through joint ventures or under licensed production agreements. A

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\textsuperscript{12} http://www.makeinindia.com/sector/renewable-energy.


few foreign companies have also set up their subsidiaries in India.  

**National Solar Mission:**
India is endowed with a very vast solar energy potential. Most parts of the country have about 300 sunny days. Average solar radiation incident over the land is in the range of 4-7 kWh per day. The solar energy can be utilized through solar photovoltaic technology which enables direct conversion of sunlight into energy and solar thermal technologies which utilizes heat content of solar energy into useful applications. Over the last three decades several solar energy based systems and devices have been developed and deployed in India which is successfully providing energy solutions for lighting, cooking, water heating, air heating and cooling and electricity generation.

**Solar Parks and Ultra Mega Solar Power Projects:**
The scheme for development of Solar Parks and Ultra Mega Solar Power Projects has been conceived on the lines of the “Charaka Solar Park” in Gujarat which is a first-of-its-kind large scale Solar Park with contiguous developed land and transmission connectivity.

**Grid-interactive solar rooftop and small spv power plants programme:**
With an objective of increasing energy security, reducing fossil fuel imports and a cleaner environment, the Government of India has set a target of 1,00,000 megawatts (MW) of solar installations by the year 2022, out of which 40,000 MW are targeted for rooftop solar photovoltaic (RTS) systems. There is a large potential available for generating solar power using unutilized space on rooftops and wastelands around buildings. Small quantities of power generated by each individual household, industrial building, commercial buildings or any other type of building can be used to partly fulfil the requirement of the building occupants to replace the existing diesel generators and surplus, if any, can be fed into the grid. Ministry of Shipping plans to install 160.64 MW of solar and wind based power systems at all the major ports across the country by 2017, thereby promoting the use of renewable energy sources and giving a fillip to government’s Green Port Initiative.

**Atal Jyoti Yojna (AJAY):**
Under this programme, Solar LED Street Lights in rural, semi-urban and urban areas will be installed across states of Uttar Pradesh, Assam, Bihar, Jharkhand and Odisha where the household electrification is less than 50% as per 2011 Census by March 2018. The installation of Solar LED Street Lights will ensure ample light in major roads, markets, public conveniences etc.

**Million Solar Urja Lamp (SoUL) Program:**
India has one of the youngest populations in the world with 350 million children of less than 14 years of age, making school education essential for future of the country. However, 221 million people residing in India are still without electricity access and many more with poor quality of supply. Alongside ‘Right to Education’, it is desirable to provide ‘Right to Clean Light’ and hence there is a need for a country wide, self-sustainable solar lamp program. The Million Solar Urja Lamp (SoUL) Program developed and executed

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by IIT Bombay is to provide clean light for study purpose to each and every child in the country, with cost effective fastest possible way. One million SoULs were distributed during 2014-16 in 4 Indian states of Madhya Pradesh, Maharashtra, Rajasthan and Odisha, covering 23 districts, 97 blocks and more than 10,900 villages.641

Deployment of the box and dish type solar cookers:
One of the major energy consuming sectors is the cooking sector. In rural areas, cooking is still a mammoth task. People are still dependent on traditional fuel and method of cooking which are not only inefficient but also causes toxic indoor air pollution. This is an important programme leading to reduction in drudgery among the rural women and girls engaged in collection of fuel wood and reduction in the rate of deforestation and getting many health benefits.16

Implementation of Solar Thermal Components including Solar Green House” in Leh and Kargil region:
Kargil has natural advantage of having lots of sunshine in the winter months. The Green House is introduced which is designed to maximize the solar absorption in the day and to minimize the heat loss in the night.16

Renewable Energy for Rural Applications:
The Ministry has been supporting renewable energy programmes for rural areas of the country by deploying renewable energy systems such as family type biogas plants, solar water heating systems, solar cookers and other solar energy devices. In addition to family type biogas plants, the demonstration of integrated Technology package on Biogas-Fertilizer Plants (BGFP) for generation, purification/enrichment, bottling and piped distribution of biogas. This highlights the biogas fuel applications to meet stationary, motive power, electricity needs including cooking and heating requirements.

National Biogas and Manure Management Programme (NBMMMP):
Biogas is a clean cooking gaseous fuel, produced when biodegradable organic wastes are subject to a process called anaerobic digestion. At the end of the process organic enriched bio-manure is produced simultaneously as by-product from the process. The anaerobic digestion process is a low carbon generating technology for efficient management of organic wastes and sanitation. Biogas, thus produced, can be used for cooking, heating, generating electricity etc. The MNRE is implementing the Unnat Chulha Abhiyan (UCA) Programme for the promotion of improved biomass cook stoves in the country. Household biogas plants in addition to replacing the need of LPG, helps in reducing the pressure on forests and other conventional fuels like coal and kerosene. Small and marginal farmers benefit from biogas plants providing digested slurry with high quantity and quality of Nitrogen, Phosphorus and Potassium (NPK) for use as organic bio-manure, which helps not only in sustaining soil health but also providing nutrients for obtaining higher crop yields. The biogas plants are thus potential source of helping farmers in adopting both conventional and organic farming without affecting environment.642

Wind-Solar Hybrid Power:


www.supremoamicus.org
Wind and Solar Power being infirm in nature impose certain challenges on grid security and stability. Studies have revealed that wind and solar are almost complementary to each other and hybridizing of two technologies would help in minimizing the variability apart from optimally utilizing the infrastructure, including land and transmission system.16

Renewable Energy for Urban, Industrial and Commercial Applications:
The Ministry has been promoting the use of technologies for energy recovery from municipal, industrial and commercial wastes such as market wastes, slaughterhouse waste, agricultural residues and industrial wastes and effluents.16

Energy efficient solar/green buildings programme:
Buildings are major consumers of energy in their construction, operation and maintenance. Globally about 40% of energy consumption is estimated to be in building sector. Energy conscious architecture has been promoted which includes the use of solar passive design concept, use of eco-friendly and less energy intensive building materials, integration of renewable energy and energy efficiency, water conservation, waste recycling etc. A GRIHA rating system has been developed in collaboration with The Energy and Resources Institute (TERI).16

Development of Solar Cities Programme:
The “Development of Solar Cities” programme aims at minimum 10% reduction in projected demand of conventional energy which can be achieved through a combination of energy efficiency measures while enhancing supply from renewable energy sources. The Ministry assists Municipal Corporations and Urban Local Bodies in preparation of a master plan for increasing energy efficiency and renewable energy supply in the city, setting up institutional arrangements for the implementation of the Master Plan and awareness generation and capacity building activities. The Ministry has a target to support 60 cities for Development as “Solar/ Green Cities”. Eight cities; Bhubaneswar, Chandigarh, Gandhinagar, Mysore and Nagpur are being developed as ‘Model Solar Cities’. The MNRE has started promoting Akshay Urja Shops (earlier known as Aditya Sholar Shops) in major cities for the easy access and the after sale services of solar energy products.16

Tariff Policy – Power from WTE plants:
As per the amended National Electricity Tariff policy, in compliance with Section (3) of the Electricity Act, 2003, distribution Licensee(s) shall compulsorily procure 100% power produced from all the Waste-to-Energy plants in the State, in the ratio of their procurement of power from all sources including their own, at the tariff determined by the Appropriate Commission under Section 62 of the Act.13

Energy from Industrial and Agricultural Wastes/Residues including Biomass power and Bagasse Co-generation Programme:
Biomass Power and Bagasse Co-generation Programme aims at efficient utilization of biomass such as agro-residue in the form of stalks, stems and straw; agro-industrial residues such as shells, husks, de-oiled cakes and wood from dedicated energy plantations for power generation. The
potential for bagasse cogeneration lies mainly in sugar producing States, like Maharashtra and Uttar Pradesh. 644

Small hydro project:

Small hydro projects are environmentally benign and normally do not encounter the problems usually associated with large hydro projects like deforestation and resettlement/ rehabilitation due to submergence. The projects have potential to meet power requirements of remote and isolated areas. These factors make small hydro as one of the most attractive renewable source of grid quality power generation. 24 States of the country have policies in place towards private sector participation to set up SHP projects in their states. 645

Greening of Islands:
The Ministry has formulated a scheme for setting up of 40 MW Distributed Grid-Connected Solar PV Power Projects in Andaman and Nicobar and Lakshadweep Islands with the objective to develop Carbon Free Islands thus to contribute to the National Action Plan on Climate Change. 16

Research and Development:
The Research and Development efforts of the Ministry are directed towards technology development and demonstration, leading to commercialization, apart from strengthening the capacity of R&D. The ultimate goal is to reduce the cost and improve efficiency in the near future. 16

International Solar Alliance:

International Solar Alliance was launched as a special platform for mutual co-operation among 121 solar resource rich countries lying fully or partially between Tropic of Cancer and Tropic of Capricorn at COP21 in Paris on 30th November, 2015 to develop and promote solar energy, with its headquarter in India. 5

Support Programmes Information and Public Awareness Programme:

Public awareness programmes are conducted to inculcate the importance of renewable energy amongst masses. The information is spread through a variety of media like electronic, print, exhibition etc. It also brings to the fore benefits, technological developments and promotional activities taking place in the renewable energy arena from time to time. 646

Human Resource Development:

With the aim of 175 GW Renewable Power by 2022, the need of trained and qualified manpower in Renewable Sector has increased unprecedentedly. In view of the required manpower in Renewable Sector, the Human Resource Development division of the Ministry is engaged working in developing and promoting suitable framework in the country by supporting educational institutions working in Renewable Sector and other similar organizations to undertake such activities. Surya Mitra Scheme has been launched for creating trained solar photovoltaic technicians. 16 Ministry also supports to students for undertaking courses in renewable energy in select educational institutions by way of providing

21 https://www.iitk.ac.in/npsc/Papers/NPSC2010/7018.pdf.
22 http://mnre.gov.in/file-manager/hydro-
scheme/Annexure-E.pdf.
fellowships/stipend under National Renewable Energy Fellowship Scheme. 647

Conclusion:
India’s well conceived and timely initiated “Energy Security Plan” to focus on renewable energy to balance today’s requirement of clean energy with the development of economy is an example in itself. As a result, the Indian Renewable Energy Programme has received wide recognition internationally in the recent years. At home though several remote villages are getting electricity round the clock, there are still so many villages / places in the dark without electricity. No doubt the task is mammoth, but with Government’s support and people’s participation India is confident to achieve its dream of “Power for All”.

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I RESERVE THE RIGHT TO REMAIN SILENT

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It’s quite common place for the phrase “I plead the 5th” or “You have the right to remain silent” used by actors in various Movies and TV Serials centered around a dramatical recreation of the legal profession and the court proceedings. But, these phrases signify the essential right of any person, be it the accused, to remain silent in cases where silence is the only way to avoid self incriminatory comments. The freedom that one has to express and say whatever they want also enshrines them with the right to withhold their statements in cases where inclination towards restraint is the only way out for the person being questioned. This concept of Right to Silence isn’t a codified concept in any provision, but a following and abiding by the essence of natural justice. The person being questioned, be it by the police or by the court, has the right to remain silent and the same has been enshrined under various procedural codes as an essential procedural aspect of any criminal trial. Section 179 of the Indian Penal Code talks about questioning by a Public Servant and Section 91, 93, 161 and 313 of the Code of Criminal Procedure also laying emphasis on the concept of Search and Seizure, Questioning by a Public Servant and a Court of Law and how the right to silence can be exercised in such cases. In cases of a civil nature, the concept of right to silence has been a topic of debate with various courts including the American Courts having differing views on it. In India, there hasn’t been a conclusive answer to this question either and it is still up for debate as India is party to International Covenant on Civil and Political Rights which provides for certain rights to the accused in a civil case with Article 14 (3) (g) stating that: “Not to be compelled to testify against himself or to confess guilt”.

The Constitution of India given to the people of this country by themselves bestows various fundamental rights with an endeavour to confer upon them in essence the right to live freely and safely under Part III. These rights have turned to be highly valuable as an aid to those accused of an offence. Among these rights, freedom of speech and expression under Article 19(1)(a) of the Constitution is regarded as an essential element of any healthy democracy as it allows for its people to participate effectively, without any restrictions in the social and political process of a democratic country. This right is considered to be the most prominent liberty among other liberties so conferred under the Constitution. In fact, the freedom of speech and expression enshrines greater scope and meaning to the citizenship of a person, extending the concept from the level of basic existence to giving a person political and social life.

However, strikingly, Article 19(1)(a) is not restricted to mere outward expression of ones thought. Rather this multi faceted right includes under its ambit the right not to express which was recognised by the Supreme Court of India in Bijoe Emmanuel vs. State of Kerala

648 1987 AIR 748
singing, they still stood up for the Indian National Anthem. The High Court of the State held them guilty under the Prevention of Insults to National Honour Act. It was only on an appeal to the Supreme Court that it was observed that there was no provision of law that compelled any person to sing the national anthem. The Court also observed that the same act of the children does not classify as an act of disrespect to the national anthem. The Hon’ble Court by its decision also protected the children’s right under Article 25 as in the instant case, they being Jehovah’s Witnesses, only believed, worshiped and supported the cause propagated by Jehovah, the Creator.

Right to silence is not only available under Article 19 but can also be understood in the light of the right against self-incrimination. The 5th Amendment of the American Constitution empowers the American people to exercise their right against self-incrimination by stating their intentions to do the same clearly through their choice of words in the court of law or during a police interrogation. Nemo tenetur prodere accusare seipsum – “No man is bound to accuse himself” is the legal maxim which governs the principle of Right to Silence and was for the very first time coined in the case of Miranda vs. Arizona649. The Indian principle regarding Self Incrimination under Article 20(3) of the Constitution is also based upon this same principle and was quoted in the leading case of Mohammed Ajmal Mohammed Amir Kasab vs. State of Maharashtra650. Right against self incrimination is a concept of fair trial. Article 6 of European Convention on Human Rights elucidates the concept of fair trial in light of the right against self incrimination during an interrogation by a police officer. In India, neither oral nor documentary testimony can be forcefully acquired by compelling the accused. This concept was further enforced in the leading cases of State of Kerala vs. ShankaranNair651 and MP Sharma vs. Satish Chandra652. This is in view to control the exercise of powers by the police while conducting an interrogation for an investigation or restricting them to resort to immoral methods of extracting information and compelling the accused to confess about his role in the commission of the offence. In MP Sharma vs. Satish Chandra653, the Apex court held that the phrase “to be a witness” does not include things like thumb, palm or foot impression. Rather, furnishing the same does not tend to incriminate himself and does not constitute and abide by the term “being a witness against themselves”. Reiterating the holding of MP Sharma vs. Satish Chandra654, the court in the case of State of Bombay vs. Kathikalu655 held that “a person has a right to silence and he (accused) cannot be compelled to be a witness against himself”. Further, it was held that acquiring finger impression and handwriting from the accused shall not attract the provisions enshrined under Article 20 (3) rather they act as corroborative evidence. Selvi vs. State of Karnataka656, the Narco Analysis Case, discerns that no individual can be forced to subjection of a Narco Analysis Test because it falls within the scope of “testimonial compulsion” where protection of Article 20 (3) can be taken.

649 384 U.S. 436 (1966)
650 (2012) 9 SCC 1
651 AIR 1960 Ker 392
652 AIR 1954 SC 300
653 Ibid.
654 Ibid.
655 1961 AIR 1808
656 (2010) 7 SCC 263
In the case of *Dr. Shashi Tharoor vs. Arnab Goswami*[^657^], a case for claiming damages on the grounds of defamation were filed, asking the court to compel the defendant to pay for making defamatory remarks in regard to the plaintiff in context of him being involved in the alleged suicide of the plaintiffs wife. In the said case, the Honourable High Court of New Delhi held that the plaintiff has a **Right to be Silent** on the fact of him being accused for subjecting his own wife to cruelty and abetting her to commit suicide. He can’t be compelled to comment on the same under **Article 20 (3)**.

Contrastingly, if any person who is legally bound to answer the questions of a public servant truthfully, refuses to do so, is punishable with a simple imprisonment of 6 months under section 179 of the Indian Penal Code, 1860. This provision clearly is in contravention to the provisions enshrined under Article 20 (3) of the Indian Constitution as the said provision compels the accused to truthfully answer the questions of the public servant and abstaining from doing the same leads to the accused being punished under Section 179 of the Code. In *Nandini Satpathy vs. PL Dani*[^658^], the appellant was charged under the Prevention of Corruption Act and was asked to appear at the police station to answer some questions. The appellant refused to answer the questions during the interrogation, claiming protection under Article 20(3). Because of her actions, she was prosecuted under section 179 of IPC which provide for punishment to a person refusing to answer questions demanded by the public servant. It was held by the court that in such cases, where there is a conflict of law, Article 20 (3) shall prevail and shall protect the appellant and section 179 shall not be applicable. Hence, in such a case, the Constitutional Provision shall reign supreme over the provisions mentioned under the Indian Penal Code.

Section 161 of the Code of Criminal Procedure, 1973 states that a person shall be bound to answer all questions as truthfully as possible when a public officer asks him to do the same pertaining a case. But, if the questions that have been asked by the public servant have tendency to expose the person answering them to a certain criminal charge or a penalty, in that case that specific person has the right to remain silent. This provision has been enumerated by keeping in mind the concept of self incrimination under Article 20 (3) of the Indian Constitution as the accused can invoke the right of silence if the questions asked are of an incriminatory nature. Another provision of the Code of Criminal Procedure that deals with the concept of Self Incrimination is that under section 313. This section enumerates the instance when the court, without a previous warning, questions the accused as they deem necessary. This section lays specific emphasis on the concept of self incrimination which elucidates that refusing to answer the questions or giving false answers shall not render the accused to any kind of punishment. But in clause(4) it has been clearly mentioned that if the accused does decide to answer, in that case the same can be treated as evidence against him.

This section can be compared to the concept enumerated under Section 342 of the Code of Criminal Procedure, 1898 which states that the accused shall not render himself liable to punishment if either he refuses to answer the questions all-together or gives false answers to the questions asked by the

[^657^]: cs(os) 253/2017

[^658^]: 1978 AIR 1025
court or the jury, and both the court and the jury can make any sort of inference on the basis of such silence or falsified answers. In the case of *Prasanta Biswas v. State of West Bengal*\(^{659}\), the court went on to say that the accused was not obligated under Section 313 of CrPC to say where he was at the night of the incident. “An accused has the right to remain silent and such silence cannot be held to be admission of any charge brought against him. An accused is presumed innocent until proven guilty. The burden of proving him guilty is on the prosecution. The accused need not say anything at all” the bench concluded.

Under this section, the right to silence can be exercised but that does not stop the court from making an inference on the basis of that silence. [Held in *Ramnaresh & Ors. Vs. State of Chattisgarh*\(^{660}\)]. It was observed that the court would be entitled to draw an inference on the basis of his silence, be it adverse inference, as may be acceptable in accordance with the law in force at that time. But in the case of *Raj Kumar Singh @ Raju vs. State of Rajasthan*\(^{661}\) it was held that the court, on the basis of his silence, can make an adverse inference only if the incriminating material against that person (accused) has been fully established and the accused isn’t able to prove in contravention to that fact. The act of the court to make a negative inference on the grounds of silence of the accused has been heavily criticised by D.D. Basu in his commentary that refers to the case of *Adamson vs. California*\(^{662}\). D.D. Basu criticised the said act on the grounds that making a negative inference on the basis of his (accused) silence would amount to the court assuming his silence as a testimony and therefore subjecting him to be guilty. Hence, he was of the opinion that the intention of the drafters of this provision was in essence to ensure that the accused does not endure persecution on the basis of an inference made on the accused being silent.

Protection of Article 20 (3) does not extend to a search made in pursuance of a summons issued under Section 91 and a subsequent seizure after an issuance of a warrant under Section 93 of the Code of Criminal Procedure, 1973. In this the court after issuing the summons, issues a warrant if it is of the belief that the person in possession of a certain document and other things, won’t present the same. These provisions have been heavily criticised for being in contravention to the provisions of Article 20 (3) as the accused is compelled to provide incriminating documents and other things to avoid search and subsequent seizure of the same.

“Silence is a defensive mechanism against the onslaught of the court”

Right to Silence acts as a shield for an accused or any person enabling him to withhold his words pertaining to the questions being asked of him which ensure that his silence on the matter would be indicative of his attempts to avoid incrimination of self in an instant case. The American and the European laws forged the way for this concept in India. This right of silence is vivacious and comes to life in cases of both pre trial and also at the time of the trial. An accused or a person can exercise this right during an interrogation

\(^{659}\) https://www.livelaw.in/news-updates/right-to-remain-silent-147798

\(^{660}\) (2012) 4 SCC 257

\(^{661}\) (2013) 5 SCC 722

\(^{662}\) 332 U.S. 46 (1947)
by the police and also during the questioning by the court of law and ensure that his decision of withholding information is a mere attempt to prevent incrimination rather than an admission to guilt.

In cases of confession, the Indian Evidence Act lays an emphasis on the same but there have been certain interpretations of this concept which lead us to believe that the same is considered as more of a privilege rather than a right. Honourable Justice Mr. Y.V. Chandrachud stated that: “evidence of confession by an accused is not admissible unless it can be proved that such confession was voluntary and free”.

Hence, the Indian evidence Act lays specific emphasis on the privilege against self-incrimination with the same privilege forgone at the option of the accused if he voluntarily confess to a certain offence. Hence, this right of silence is an essential right to maintain and uphold the sanctity of the principle of natural justice which ensures that any person including the accused has a right to a fair trial and the same isn’t marred by the negative inference derived by his calculated decision of remaining hush hush and exercising his right not to express on the questions put forth to him.

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663 https://shodhganga.inflibnet.ac.in/bitstream/10603/207487/11/8_%20chapter%205.pdf
COMPAT TO NCLAT: AFTERMATH OF THE MERGER

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Abstract

Company law and competition law both play a significant role in Business and Commercial sector, this article throws light on one of the major overlap between the two sectors of law, which is the merger of the Competition Appellate Tribunal to that with the National Company Law Appellate Tribunal. The authors have tried to analyse the merits and demerits of such merger. With the completion of almost two years of such merger, the authors believe that the Tribunals should have fetched some results specially in disposing of old cases for better understanding of which they have filed an RTI before the authorities the statistics of which are recorded in the article. The article contains essence of the Two hundred and Seventy Second Report of the Law Commission of India. It thus helps to clearly demarcate the areas to be focused on, in order to ensure smooth functioning of the National Company Law Appellate Tribunal in the additional jurisdiction that they have been assigned.

Keywords: COMPAT, NCLAT, Finance Act, Competition Act, Merger.

As per the Government the main objective of an Administrative tribunal is to provide speedy remedy and inexpensive justice to the people concerned by the Act under which the Tribunal is set up. But our Head of the Government Mr. Narendra Modi has a different view point, in April, 2015 he said “there is a need to brainstorm over whether tribunals lead to faster delivery of justice or are acting as “barriers” to it and slowing it down.” This idea of rationalizing the number of tribunals was again proposed in the Budget of 2017 by the Finance Minister Mr. Arun Jetley, who in between his speech mentioned the “issue of multiple tribunals with overlapping functions.”

This was the onset of the Finance Bill of 2017 which received assent of the Hon’ble President on 31st March 2017 and came to be known as the Finance Act, 2017 (No. 7 of 2017) (hereinafter “Finance Act”) which resulted in, inter alia, the merger of 36 tribunals in India to 18. The Act brought in some sensible mergers like that of the Railway Rates Tribunal into Railway Claims tribunal, but at the same time bought in some preposterous mergers, at least on the face of it, like that of Appellate Tribunal of Foreign Exchange with that of Appellate Tribunal of forfeiture of Property Act, or Airports Economic Regulatory Appellate tribunal with Telecom Dispute Settlement and Appellate Tribunal. However, the objective of this Research

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664 Govt. of India, Summary of Administrative Tribunals Act, 1985 (2014).
665 Draft law on anvil to bring down number of tribunals from 36 to 18, Hindustan Times, Feb 22nd, 2017
666 As per the Government the main objective of an Administrative tribunal is to provide speedy remedy and inexpensive justice to the people concerned by the Act under which the Tribunal is set up.
Article is to focus on whether the merger of Competition Appellate Tribunal (Hereinafter “COMPAT”) into National Company Law Appellate Tribunal (hereinafter “NCLAT”)671 falls under the category of sensible or preposterous amendments.

Rationale behind the formation of COMPAT:
To understand the requirement of any tribunal we need to analyse the objective behind the Act that sets up such body. The NCLAT was formed to deal cases related to company matters under the Companies Act which also heard matters under of the Insolvency and Bankruptcy Code, 2016672. While the COMPAT was formed to address issues of competition law under the Competition Act, 2002 (No. 12 of 2003) (hereinafter “Competition Act”) which has a completely different objective from that of Companies Act, 2013673 (No. 18 of 2013) (hereinafter “Competition Act”). Thus seeing that the objective behind both the bodies were completely different.

In the case of Brahm Dutt vs. Union of India674 the constitutionality of the Competition Commission of India (CCI) under the Competition Act was challenged by way of a Writ Petition, the main contentions of the Writ petition were that, the body is established as a Judicial body carrying out adjudicatory functions and is Constituted by the Government of India, which is why it encroaches upon the concept of Separation of Powers.675 Also the CCI consisted of qualified persons of other disciplines instead of judicial background. The Court declined to answer the contentions of the petition, however they observed that it would be better if the legislators took note of the point to establish two different bodies are established to perform two different kinds of function-advisory and adjudicatory. As a response to this judgment the COMPAT was established.676

Technical nitty-gritty and requirements of the Tribunals:
As we know, one most distinguishing character of a Tribunal is its understanding of the technical requirements of the Act establishing the body, through its members having specific knowledge in relation to field of concerned tribunal, for example the National Green Tribunal has experts from the field of environmental studies to assist the judicial members who possess knowledge of the law in the Tribunal.

It was also pointed out in the 272nd Law Commission Report that:

Due to growing commercial ventures and activities by the Government in different sectors, along with the expansion of Governmental activities in the social and other similar fields, a need has arisen for availing the services of persons having knowledge in specialised fields for effective and speedier dispensation of justice as the traditional mode of administration of justice by the Courts of law was felt to be unequipped with such expertise to deal with the complex issues arising in the changing scenario.677

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672 Insolvency and Bankruptcy Code § 61 (2016)
673 Competition Act, Preamble (2002)
674 See also, Brahm Dutt vs. Union of India, AIR 2005 SC 730
675 See also, S.P. Sampath Kumar v Union of India, AIR 1987 SC 386
676 Abir Roy & Jayant Kumar, Competition Law in India, 29-33 (Revised Ed. 2018)
677 Govt. of India, 272nd Law commission report, Assessment of Statutory Frameworks of Tribunals in India, 22 para 3.4 (2017)
Which brings home the importance of a technical member in the bench of any Tribunal and role of such experts leading to effective adjudication.

As we can see that under § 411 of the Companies Act the NCLAT comprises of three types of members, the chairperson, a Judicial Member, and a technical member. While the Chairperson and Judicial Member required standard qualification as regard to any other tribunal, it is the technical member that describes how equipped the tribunal is to hear the matter under specific Acts that has been filed before it. As per § 411(3) a technical member of the NCLAT “shall be a person of proven ability, integrity and standing having special knowledge and professional experience of not less than twenty-five years in industrial finance, industrial management, industrial reconstruction, investment and accountancy.”

While under the original composition of COMPAT “the member of the Appellate Tribunal shall be a person of proven ability, integrity and standing having special knowledge of, and professional experience of not less than twenty-five years in, competition matters, including competition law and policy, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which in the opinion of the Central Government, may be useful to the Appellate Tribunal”

In Madras Bar Association v. Union of India, AIR 2015 SC 1571, the SC held:


678 Also see, NCLAT website (August, 17th 2019 at 12:11 PM) https://nclat.nic.in/?page_id=802

Thus we can see, that these two bodies had its own set of technical needs, which were almost mutually exclusive of each other, given the fact that Competition law is a different field altogether having negligible overlap with that of Companies law. Thus, in an ideal situation where one was merged with another, these exclusive technical requirements should also have been merged, or in easier words, the
qualifications of the technical members of the NCLAT should have been revised to include members having sound knowledge of Competition Laws and requirements in order to fulfil the basic objective of any tribunal, but till date, the provisions of composition of NCLAT has not been amended to accommodate the needs of COMPAT.

Strength of the Tribunals:
It is also pertinent to mention here that the NCLAT currently comprises of 3680 members including the Chairperson, while the COMPAT alone comprised of 3681 members including the chairperson when it was in function. So we can say that the not only has the governing legislation not provided with an accommodation of a technical member in the field, but also has over-burdened the existing members of the NCLAT with competition cases without adequate increase in the required number.

Disposal Rates:
As discussed in the beginning the main purpose behind establishment of a tribunal is speedy and inexpensive remedy. Therefore, we believe one of the major parameters to test the viability of the said merger is to see what the disposal rates of the NCLAT in case of competition law matters looks like.

To find out the actual scenario and have a better understanding of the impact of the merger of COMPAT into NCLAT the authors filed a Right to Information application682 before the NCLAT enquiring the following:

1) What is the number of cases transferred from COMPAT to NCLAT after the enactment of the Financial Act, 2017?
2) What number of such transferred cases have been disposed of by the NCLAT as of 22nd January 2019?
3) What number of fresh applications have been filed before the NCLAT under the Competition Act, 2002?
4) What number of such fresh applications (Query No. 3) have been disposed of as of 22nd January 2019?

The same was filed on 22nd of January 2019, almost 2 years after the idea of the Bill was first proposed in the budget of 2017 by the finance minister. The reply to the said RTI did not paint a very glorious picture in regard to the merger of the tribunals.

The two-fold analysis of the said RTI is as follows:

1. Number of cases transferred from COMPAT to NCLAT were 47, with only 26 of them having been disposed of. Thus giving the disposal rates of 55% in case of transfer cases.
2. While fresh appeals filed before the NCLAT under the Competition Act in the past two years were 154, out of which only 18 were disposed of. Providing a 4% disposal rate in case of fresh applications.

In this chain of thought it is extremely important to mention that § 53B(5)683 suggests that endeavours should be made in order to dispose of the cases before the appellate forum within 6 months from its filing. While the guidelines under the Companies Act, 2013 say that the cases

680 NCLAT website (August, 7th 2019 at 12:11 AM)
https://nclat.nic.in/?page_id=117
681 NCLAT Archives (August, 7th 2019 at 12:25 AM)
682 NCLAT/R/2019/50002
before the tribunal should ideally be disposed of within 3 months, and on failure of the same the Tribunal should record the reason for such delay and the President or Chairperson may extend such time by a maximum of 90 days. However, the figures provided by the authorities shows a completely different statistical data when it comes to the status of disposal. The situation is even more worrisome since under § 53-N explanation (b)- an appeal before the forum is preferred only for determining the quantum of compensation and not for re-examination of the matter afresh. Which means ideally the NCLAT in its appellate jurisdiction does not carry on lengthy processes of investigation and examination, hence it should be able to dispose of matters in short periods, however in reality it does not.

As the 272nd Law Commission Report correctly pointed out that the compelling reason behind the establishment of a Tribunal was the pendency of large number of cases before the Courts, resulting in delay of justice. However, the above figures are evidence enough that the intended decision of merging the two individual tribunals vitiates the whole purpose behind having a fast-track tribunal, because it is unable to provide speedy remedies even after being free from the procedural trappings of a normal Court. Further, the situation, if not taken care of might worsen, for the simple reason that the NCLAT currently sits in three different jurisdictions which are all major thrust areas and attract huge number of litigations every year, thus simply adding on to the back log.

Discrepancies in the two Acts:

During the research, it was also found that the Act that should have been completely amended to accommodate the switch from COMPAT to NCLAT was not amended, rather only express provisions relating to composition and others were changed in places where the term “Appellate Tribunal” was used, hence giving rise to a number of confusions. Apart from the suggested disposal period of the two Acts and course of action to be taken when the deadlines are not met, some of the other main areas of such discrepancies are-

i. The time limit to prefer an appeal under the Companies Act is 45 days from the date of availability of the copy of the order of the Tribunal, while that under the Competition Act is 60 days.

ii. Furthermore, the Competition Act still provides for a fine and/or imprisonment for contravention of orders of the appellate forum, extending up to as much as 1 crore and 3 years of imprisonment, but the Companies Act is silent about the same. Ideally when the tribunals are being merged there should be a uniform procedure and rule for appeal before such forums so that there are no discrepancies.

Rules in furtherance of the Tribunals:

Further it is pertinent to mention that, the legislators have not only neglected to make new rules and guidelines in regard to the procedure, application format, the fees etc., of an appeal before the NCLAT, but also the old rules in relation to COMPAT have not been taken down and are still available on the Ministry of Corporate Affair’s website. This is a matter of concern since

684 Companies Act, § 421 (3) (2013)

www.supremoamicus.org
it is unclear to the Appellants as to which rule to follow while making payment of the fees, or which format of application to follow, etc. Apart from the fact that the amended Competition Act does not mention that the existing NCLAT rules be read with the same, the very fact that there exist some key differences in few of the basic procedures of appeals, as discussed above, we cannot consider, that the rules existing for the NCLAT incidental to the Companies Act, be read as a part and parcel of the workings of the appellate authority as under the Competition Act, 2002, amended in 2017. Thus leaving the aggrieved party in an obscure situation and the law in sheer ambiguity.

Conclusion:
Thus, from the above research, the Authors have come to a conclusion that, the merger of COMPAT into NCLAT not only lacks in technical competence due to the reasons discussed above, the merger does not even have sufficient manpower to tackle the legal hustles, which is one of the major reasons behind delay in disposal of cases. Such delay in disposal further leads to an expensive procedure for the aggrieved parties, leading to a violation of their Fundamental Rights, since the Right to Fair and Speedy Trial is very much a part of the Right to Life and Personal Liberty, a fundamental right guaranteed under Article 21 of the Constitution of India and therefore, any kind of delay in the expeditious disposal of cases infringes the same. Furthermore the ambiguity in the existing laws and the absence of specific rules for such incorporation, adds to the confusion and decrease in efficiency of procedure. *Franks’ Report (1957) identified the advantages of Tribunals as ‘cheapness (cost effectiveness), accessibility, freedom from technicality, expedition and expert knowledge of their particular subject.*

Ergo, we feel that not only is the impugned merger preposterous, but also has not been thought through, which is why the authors believe that all that is good for the public exchequer is not necessarily good for the public too. Recently, the same has also been taken up for discussion before a five-judge Bench in the Supreme Court.

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THE ACCUSED PERSON’S RIGHT TO RELY ON EXCULPATORY MATERIAL AT THE STAGE OF FRAMING OF CHARGES

By Nipun Kalra
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INTRODUCTION

The prosecutor has been appointed as the officer of the state under Section 25 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “Procedure Code”). The prosecutor should act as the representative of the state and not of the police. He/she is not part of the investigating agency, nor is vested with forwarding authority but is charged with a statutory duty. The Public Prosecutor is supposed to be a Minister of Justice whose critical role includes maintaining impartiality in the field of the criminal law justice.

In a large number of cases, the Supreme Court has held that the court cannot look beyond the material presented by the prosecution. Ultimately, this leads to prosecution solely choosing the evidence which is incriminatory in nature. However, in the recent judgment of Nitya Dharmananda v. Gopal Sheelum Reddy, the Supreme Court has again raised a question regarding the scope of the right of the accused to rely on material other than the police report, in order to make a case for discharge. The Court, in this regard, stated that if the evidence if of a sterling quality then the same can be relied upon. However, the author believes that the use of this term has not clearly given the law in place. Therefore, through this article, the author explores the scope of the accused person’s right to rely upon the material other than the police report. Firstly, the role of prosecutor has been traced. Thereafter, the statutory provisions and case laws are listed relating to the above law. By use of Relevancy and Admissibility as concepts, it is then demonstrated that how not relying upon accused person’s evidence can further lead to failure of justice.

A. ROLE OF THE PUBLIC PROSECUTOR

It is settled law that fair and just investigation is a hallmark of any investigation. In the case of Ashutosh Verma v. CBI, it was held that prosecution cannot pick and choose evidence, and accused must be supplied with those materials which support the accused’s case and are ignored by the prosecution. The duties of a public prosecutor extend to ensuring that there is fairness involved in the proceedings. It should be ensured that for the just determination of truth, if the magistrate feels appropriate, the accused must be supplied with those materials which are in prosecution’s possession. Additionally, in common law jurisdictions, the role of the prosecutor is

not restricted to securing convictions but extends to bringing forward all material evidence even if it falls in favour of the accused.\(^{696}\) The impartiality of the prosecutor is as fundamental as the impartiality of the Court.\(^ {597}\) And it shall be considered as violation of the due process if prosecution has suppressed evidence which is material to the case of the accused.\(^ {598}\) Moreover, as held by the Apex Court in *Nitya Dharmananda* that if the evidence is of sterling quality which has been withheld by the prosecution, then the court is not debarred from summoning or relying upon the same even if such document is not part of the charge-sheet.\(^ {699}\)

Further, in the advanced stage of trial, after the material has been supplied by the prosecution under §207 of the *Procedure Code*, accused can claim access to the documents in police’s protection. But if the same cannot be provided, then its suppression can cause serious prejudice to the accused if it had crucial bearing on the case.\(^ {700}\)

### B. Statutory Scheme of Related Provisions

Under *Procedure Code*, the law relating to discharge has been given under Section 227 and Section 239. Depending on the nature of the offence, these provisions are applicable (Section 227 provides for discharge in Sessions cases while Section 239\(^ {701}\) is applied in Magistrate cases) in respective cases. For convenience purposes, I will only refer to Section 227 for explaining the law, which states:

> If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.\(^ {692}\)

The above provision uses the expression “record of the case”. This leads to the inference that the Court can only decide on the basis of the police report and other documents submitted alongside, as to whether the person can be discharged, on consideration of the grounds of conviction. Hence, in most cases, the police report would necessarily entail the material in favour of the prosecution. Therefore, it is important to know what all this police report contains. The relevant provision in this regard is Section 173(5), which refers to police report containing “all documents or relevant extracts thereof on which the prosecution proposes to rely”. The above expression limits the scope of the report to the material posited by the prosecution. This provision is openly misused by the investigating agencies to selectively choose the evidence which serves their ends. They go on to heavily rely on incriminating evidence and avoid the exculpatory material in order to maximize the chances of conviction. In such a situation, either the court or the accused must have a right to summon such material, which has

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\(^{698}\) *Brady v State of Maryland* 373 US 83 (1963).


\(^{701}\) *Procedure Code*, §239.

\(^{702}\) Ibid §227.
exc tulatary tendencies. Section 91(1) of the Procedure Code states:

“Whenver any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.”

The above provision is wide enough to be used at the stage of discharge by the court. However, this has still been not used due to the effect created by Section 227 and Section 239 (provisions relating to discharge), which limit the scope to police report, in the first place. Hence, the tussle between the above provisions has resulted in the court choosing only those materials which are filtered down by the investigating agencies.

The amalgamation of above provisions was first taken up in the case of State of Orissa v. Debendra Nath Padhi. The 3-judge bench of the SC in this case ruled that:

“…it is clear that all that the court has to do at the time of framing a charge is to consider the question of sufficiency of ground for proceeding against the accused on a general consideration of the materials placed before it by the investigating agency. There is no requirement in law that the court at that stage should either give an opportunity to the accused to produce evidence in defence or consider such evidence the defence may produce at that stage.”

Hence, it was ruled that the accused could not avail of the right to file material in his/her favour at the stage of discharge. This would practically mean that the said right could only be used at the stage of trial. In effect, this would lead to prejudice against the accused, when s/he would not have any remedy against the blatantly wrong conduct of investigating functionaries, at the stage of discharge. The above position was repeatedly used by the Court to exclude the accused person’s say from the stage of discharge.

C. LATEST POSITION: LAW OF THE LAND

The Supreme Court in the case of Nitya Dharmananda v. Gopal Sheelum Reddy, in this regard, ruled that:

“...it is clear that while ordinarily the Court has to proceed on the basis of material produced with the charge sheet for dealing with the issue of charge but if the court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not a part of the charge sheet.”

The dictionary meaning of the term “sterling” (Collin’s dictionary) is, something which is very good in quality. This expression when used in reference to the evidence which has been withheld by the prosecution, does not provide a clear meaning to include within it the evidence,
which might be in favour of the accused person. The use of this term does not do justice to the purpose that has to be achieved because the same is open to different interpretations and subjectivity, when applied by the judges. Something might be of sterling quality to one judge, might not be of the same to another judge. Hence, this brings in the unguided discretionary power to the judges and makes the law judge-centric in nature. Thus, in order to give meaning to the term “sterling quality”, it is necessary to recognize the implications that are there in deciding the permissibility of any evidence in the Court of Law.

D. RELEVANCY AND ADMISSIBILITY

It is the duty of the prosecution to bring all prima-facie evidence before the court. Although discretion has been accorded to the prosecution, it is required that the prosecution relies on all the relevant evidence. In this regard, a bare reading of the Section 5 of the Indian Evidence Act, 1872 is important. The said section reads as:

“...Evidence may be given in any suit or proceedings of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.”

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. High probative value of a evidence is considered when an examination of its source indicates that it would have been given considerable weight by the judge. That the prosecutor honestly doubted the admissibility or reliability of the undisclosed information does not preclude reversal because the attention of the court is focused solely on the probable accuracy of the judgment and not on the competency or intent of either counsel. The text messages had a high probative value and would have been deemed weighty by the judge, had they been allowed to be introduced.

For relevancy of a fact, there need to be satisfaction of two types of relevancies:

1. Logical relevancy- It means that the evidence must tend to prove or disprove a fact at issue. If a fact present has either cause or an effect over the final outcome, then it can be used. For example, in a case of theft, in order to prove mens rea, if the prosecution does not present an evidence, which has a tendency to negate the ‘bad intention’ factor, then the said evidence cannot be excluded. This is because of the logical relation between the facts and the issue at hand. This further means that not all logically connected facts are admissible in the Court of Law.

2. Legal relevancy- It means the evidence must be admissible and cannot be used to prove something that is inadmissible or not provable in the case. This simply indicates the evidence in question should be ‘legal’ in nature.

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706 Procedure Code, §25.
707 Indian Evidence Act (1872), §5.
708 Montana Code Annotated 2015, art IV.
710 Mallard, ¶83.
711 People v. Hoffner 208 Misc. 117 (1952) 120.
E. FAILURE OF JUSTICE CAUSED BY SUPPRESSION OF EVIDENCE

According to §465 of the Procedure Code, any finding, on appeal, of error, omission or irregularity in the course of trial proceedings shall not warrant a vitiation of the proceedings unless such error, omission or irregularity has resulted in a failure of justice.\(^{713}\) To determine “failure of justice” the Court must examine whether the accused was given a full and fair chance to defend herself.\(^{714}\) Non-reliance on important evidence must compulsorily necessitate vitiation of proceedings because a tailored or perfunctory case by the prosecutor leading to conviction is regarded as causing injustice to the accused.\(^{715}\) Moreover, non-disclosure of copies of the relevant material to the accused will deprive him of a reasonable opportunity to defend himself.\(^{716}\)

Additionally, grave prejudice can be caused to the accused person if the exculpatory evidence is purposely kept out of the purview of the Court. Article 10 of the UDHR\(^{717}\) and Article 14 of the ICCPR\(^{718}\) have also stated that everyone is entitled to fair and public hearing, with equality by the impartial tribunal. Furthermore, the basic presumption in the criminal administration system is innocence of the accused till charges are proved beyond reasonable doubt.\(^{719}\) Therefore, the substantive omission\(^{720}\) to rely on accused person’s evidence can cause an error of incurable nature,\(^{721}\) thereby warranting a fresh trial.

F. CONCLUSION

The Supreme Court, in the case of Nitya Dharmananda, has taken a liberal move by ensuring that a fair trial is given to the accused through the application of Section 91. However, this move has to be challenged in terms of its compatibility with the earlier position in law, when the accused person had no right to bring up any evidence during the hearing for discharge. Even after this judgment, the accused person has to prove that the evidence s/he has brought before the Court is of sterling quality, the standard for which is not defined anywhere. This does not change the accused person’s position to a larger extent. Although the move to rely on accused person’s evidence is welcomed with open arms, the objective reasons have to be taken into account. The move has rather shifted the burden on the accused to prove that the evidence s/he has brought is good in law.

What has to be adjudged at this stage of criminal trial is the relevancy of the evidence. In this article, I have described relevancy as a touchstone of evidence and how it has to be applied whenever any evidence is brought before the Court. This article has also explored how non-reliance upon accused person’s evidence can lead to ‘failure of justice’.

\(^{713}\) Procedure Code, §465; \(^{714}\) Gurbachan Singh v Punjab AIR 1957 SC 623 ¶7; William Slaney v Madhya Pradesh 1955 SCR (2)1140 ¶5.


\(^{717}\) Universal Declaration of Human Rights [UNGA Res 217 A(III)] Art. 10.

\(^{718}\) International Covenant on Civil and Political Rights [999 UNTS 171 (ICCPR) Art 14.


\(^{720}\) Santhosh De v Archana Guha (1994) 2 SCC 40 ¶5.

\(^{721}\) Securities and Exchange Board of India v Gaurav Varshney (2016) 14 SCC 430.
TRIPLE TALAQ: JUDICIAL AND LEGISLATIVE HISTORY

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ABSTRACT
The Legislature and Judiciary are entrusted with the sacred responsibility and duty of reforming the society and bringing change to further the transformation of people’s conscience. The recent past is evidence of this responsibility acquiring its practical form. There have been major ground breaking and revolutionary judicial pronouncements and legislative enactments which are aimed at doing away with archaic practices. One such instance can be ascribed to prohibition and scrapping of the unconstitutional practice of ‘talaq-e-biddat’ or triple talaq. The researcher in this research paper has therefore analysed the practice of triple talaq adopting a critical view. The research paper has elaborated the concept and issues associated with triple talaq by analysing various judgements as well as certain legislations relevant to the discussion. The researcher here has tried to ascertain the judicial and legislative history of the practice of triple talaq while also giving his own views on the matter as to its constitutionality and morality. In the further part of the paper the researcher has also tried to relate the matter with concept of feminist jurisprudence and concluding by stating the need of an Uniform Civil Code as enshrined under article 44 of the Indian Constitution. The aim of the researcher here is to provide a comprehensive facet of the practice of triple talaq and explain how it was ultimately abrogated.

Keywords: triple talaq, uniform civil code, feminisim.

INTRODUCTION
Indian judiciary is at its prime delivering ground-breaking judgements within such short period of time which ranges from permitting same sex marriages to allowing the entry of women in the Sabrimala temple. One of such landmark judgement is the Supreme Court verdict on the issue of ‘Triple-Talaq’ or ‘talaq-e-biddat’ which was given in the case of Shayara Bano v. Union of India. The judgement was seen as step ahead in women empowerment, gender equality and instilled in the citizens of India a hope of Uniform Civil Code. The judgement has been widely acclaimed amongst judicial experts although having been a victim of large number of Muslim population and other extremists. In spite of the wide criticisms it received, it was accepted with wide arms by the Muslim women who saw the judgment as a tool for their emancipation, liberating them from the blockades of unreasonable religious customs and traditions.

Triple talaq or talaq-e-biddat has been a practice adopted by the Muslim husbands for a very long time to divorce their wives. This practice has been called as being bad in theology, but still it was in prevalence until the judiciary finally stepped in and came up with concrete steps. However, the case of Shayara Bano is not the first instance where the issue has been brought before the Court. There have been many earlier instances where this issue has been raised before the Indian Courts, but with no


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The Legislature has also been in the shadows when confronted with the issue by the public. Still India is awaiting a final act to be passed making the practice of talaq-e-biddat as unlawful, replacing the ordinances.

Taking this into consideration, the researcher in this research paper has tried to analyse the judicial and legislative trends which the practice of talaq-e-biddat or triple talaq has undergone. The research paper proceeds by first explaining the practice of talaq-e-biddat and its status in the Islamic religion followed by laying down various judicial pronouncements dealing with triple talaq and its validity. The author has tried to grasp a trend among the judicial pronouncements and then has proceeded to the legislative side of the issue to further have a comprehensive picture of how India has so long was dealing with the practice of talaq-e-biddat. Thus conclusively, it would be pertinent to say that this research paper deals with plethora of judgments of the Hon’ble Supreme court on this issue and also takes into account the actions of the Legislature to that effect.

FORMS AND KINDS OF TALAQ UNDER ISLAM AND THEIR STATUS-

Though the marriage under Islam is of sacred status, the window for dissolution has been provided under the Quran in cases where it has become apparent that the marital alliance cannot be peacefully maintained. The separation initiated at the instance of the wife is called as ‘Khula’, while the one initiated at the instance of the husband has been called as ‘Talaq’. The separation with mutual consent is called as ‘Mubarat’. It is the second kind of separation of which triple talaq is a part. Talaq is further divided into three categories, namely- talaq-e-ahsan, talaq-e-hasan and last one talaq-e-biddat. The first two forms of talaq are considered as being reasonable and thus largely permitted amongst the Muslims. The reason because of the ahsan and hasan forms of talaq are considered as reasonable is because they provide an opportunity for the husband and wife to have reconciliation and also the pronouncements of talaq are not made after prescribed period of times thus giving them enough time to change their mind regarding separation. Both these forms of talaq holds good both in theology as well as in law as they are revocable.

Talaq-e-biddat – talaq-e-biddat or triple talaq involves three consequent pronouncements of the term ‘talaq’, for instance “talaq,talaq,talaq” by the husband in a single sitting. The pronouncements then sever the matrimonial ends irrevocably between the husband and wife. This form of talaq is largely practiced by the Hanafi school of Islam. In the Shayara Bano case, the petitioners have made it clear that Quran does not permit this form of talaq and is therefore considered as bad in theology. Though legally permitted, it was regarded as sinful even by those who practice it.

The reason why this form of talaq has received such a mammoth criticism is due to its draconian character. Much of the criticism has come from Muslim women who are of the stand that permitting the man to follow the practice of talaq-e-biddat makes them the chattel of their husbands who on lives on the whim and caprice of

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them. The situations started to turn more bitter in the modern times when new ways of divorcing through talaq-e-biddat came in prevalence. These include divorce by way of text messages, video calls on skype, writing talaq three times on a piece of paper and handing it over to the wife and many other such imprudent ways. This angered the Muslim women because such pronouncements were made without even consideration to the fact that they are pregnant, or of old age etc. but the reason that this practice was legal until now is because it constituted a part of the personal laws of Muslim and thus Judiciary as always, was reluctant to interfere with the matters of the personal law. This practice have been challenged for quite a few time before the judiciary which will be discussed in the following part of the paper. however one thing that is to be kept in mind is that the practice of talaq-e-biddat was a lopsided tool in the hands of Muslim husbands giving them a superiority in relation to their wives.

THE COURTS AND THE ISSUE OF TALAQ-E-BIDDAT
Before facing the 5-judge constitutional bench of the Hon’ble Supreme Court in the year of 2017 in case of Shayara Bano, the issue of triple talaq has been dealt with in several of the earlier judicial pronouncements. Thus it would be right to say that this issue has underwent a long road in the Indian judiciary.

Rashid Ahmed v. Anisa Khatun726.- The Rashid Ahmed case is one of the earliest cases bringing triple talaq at the doors of the judiciary. The brief facts of the case were that the husband, Ghiyasuddin, after being married for about a month divorced her wife in front of two witnesses but in the absence of the wife herself. The talaq was made practicing talaq-e-biddat. In spite of the pronouncement the cohabitation continued for fifteen years until death of the husband. The divorce was challenged by the wife because of it having been pronounced in her absence and also because of continuation of cohabitation. Apart from other issues, the one pertinent for this study is the validity of triple talaq. Judgment here upheld the validity of talaq pronounced in absence of the wife and thus uphold the validity of triple talaq. However it is pertinent to note that the judgement was delivered in the year 1932, before the enactment of Muslim Personal Law (Shariat) Act, 1937. Thus the later judgements have regarded the decision as being based on incorrect understanding of the Muslim personal law Shariat. Though upholding the sanctity of triple talaq, Justice Baharul Islam observed that talaq must be on reasonable grounds involving attempts of reconciliations involving the members of their families. It is only after such attempts have failed that divorce must be finalised.

Jiauddin Ahmad v. Anwara Begum727.- This Guwahati High Court judgment dealt with the validity of talaq-e-biddat. The husband here contested the claim for maintenance by his wife on the ground that he has divorced her by the pronouncement of triple talaq. While delivering the judgement, the learned judges relied on the commentaries of eminent scholars such as Mohammad Ali and Yusuf Ali which have described triple talaq as being whimsical.

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and capricious and therefore has considered as being bad in theology. The court also acknowledged the fact that in the instant case there was no reasonable ground and any attempt of reconciliation initiated by the husband. Having being short of these essentials, the court held the divorce pronounced by the husband as being invalid and thus the marriage was found to be still in existence. Also it was observed that though the husband pleads that divorce has been pronounced but there has been no proof presented for the approval of this fact.

**Must. Rukia Khatun v. Abdul Khalique Laskar**

As other cases, the facts of this case too are related to the issue of talaq-e-biddat’s validity. When maintenance was demanded from the husband by the wife, he contended that he has divorced her by following the practice of triple talaq and was therefore under no obligation to pay her the maintenance. Deliberations included references to Quran and Ameer Ali’s Treatise on Mohammadan Law among others. It was observed that when talaq is given on unreasonable ground’s, it amounts to stupidity and ingratitude towards god. Also by having made references made to the Quranic verses, conclusion was derived at that for a talaq to be effective there are certain conditions precedent to it. These conditions include, and which have been reiterated from time to time in other judgements, attempts at reconciliation through appointment of arbitrators from each side. It is only after the failure of arbitration that husband is finally able to talaq his wife.

For these conditions to operate, a certain time period is requisite which under triple talaq is not possible. It for this reason that the court in this case ruled that the triple talaq pronounced by the respondent husband to his wife was not a valid one because it fell short of all the requisite pre conditions. Thus the talaq was held be invalid.

**Masroor Ahmed v State (NCT of Delhi)**

The facts were that Aisha Anjum, the wife was married to Masroor Ahmed, marriage was consummated, and they had a daughter. After she left the matrimonial home due to demands of dowry, the husband filed for restitution of conjugal rights after which she returned. However, there was once again some discords between them following which the husband pronounced talaq-e-biddat to her wife. The wife then complained that husband lied to the court and has already divorced her while he was claiming for restitution of conjugal rights and that if she had known this fact earlier she would not have agreed to have conjugal relations with him.

While forming the issues, the Court had before it the challenge on the legality and effect of triple talaq and whether talaq given in anger result in dissolution of marriage. The court in its conclusions observed that the Islamic schools consider the practice of triple talaq as sinful and invalid. It is bad in theology but still good in law. However the distinctive feature of this judgement was that it considered the pronouncement of three consecutive talaqs under talaq-e-biddat as a single pronouncement of talaq and therefore for final separation the husband would have to follow the procedures of other forms of talaq namely, ahsan and hasan.

These are the judgements which expressly dealt with the issue of triple talaq as the
main challenge and there seem show be a clear fact that only the Rashid Ahmad case is the only one which had upheld triple talaq. The similar thing was witnessed in the case of Sarabai v. Rabiabai730 where it was expressed that in spite of biddat being bad in religion and considered as sinful, still it is good in law and ‘good’ here refers that it is permissible under law. Another judgement pronounced in the year 1917 held that, “Basically Sunna sanctions only two modes of divorce, but since the second century of the Mahomaden Era talaq-e-bidat has been recognized as a valid mode of repudiation and once pronounced cannot be revoked”.731 The similar is the case with other judgment’s which upheld the practice of talaq-e-biddat due to it being the most common form of practicing talaq as well as due to being the most prevalent form of talaq among the Muslims.732

After going through the judgements of the Courts on the issue of triple talaq few things are apparently clear that the reason why triple talaq is being considered as invalid is because it lacks the time period for fulfilling the condition of conciliation. This has been reiterated in plenty of cases. Though the above mentioned judgments have dealt greatly with the practice of talaq-e-biddat, however they were unable to reach a decisive result considering the hardships caused by it being in prevalence. It was in the year of 2017 that Supreme Court finally declared the practice as being unconstitutional and being violative of the fundamental rights in the ground-breaking judgment of Shayara Bano v Union of India.

Shayara Bano and Ors. v. Union of India and Ors.735 The popular case of Shayara Bano v. Union of India strikes the practice of triple talaq from its roots. The five judge constitutional bench of the Supreme Court delivered the judgement on 22nd August, 2017. The petitioner in this case challenged the triple talaq pronounced to her by her husband calling it as discriminatory and making the wives appear as chattel of their husbands.

While deliberations were taking place in the court, wide range of cases were taken into consideration dealing with the practice of triple talaq. Also the position of talaq under Quran and Muslim personal law Shariat was dealt with for ascertaining its religious sanctity.

Some of the major contentions of the petitioners challenging the validity of the practice were that first of all the practice of talaq-e-biddat is considered as sinful under the Islamic religion and it only the Hanafi school of Islam which considers it to be valid. The Hanafi school though considers it to be valid regards it as sinful. Thus what has been already declared as unpracticable by its followers itself should also be declared as being unlawful by the courts. Another contention on the behalf of the petitioners was that it is in violation of right to equality736 which is a constitutionally guaranteed right available to all the citizens.

730 Sarabai v. Rabiabai ilr 1906 30bom537.
731 Amiruddin v. Musammam Khatun Bibi, (1917) 39 Ind. Cas. 513 (All)
734 Kunhimohammed v., Ayishakutty 2010 (2) KHC 64; Dilshad Begum Ahmedkhan Pathan v. Ahmad khan Hanif Khan Pathan & Anrs LNIND 2007 Bom 61.
735 (2017) 9 SCC 1.
736 Article 14- Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
of the country. The practice permits the husbands to arbitrarily divorce his wife without her having any say in it. It was also violative of article 15\textsuperscript{737} of the Indian Constitution which prohibits discrimination on grounds of sex. The learned counsels thereafter contended that the practice of triple talaq does not constitute an essential religious practice of Islam. This point negates the contention of the rival parties which contends that talaq-e-biddat constitutes and essential religious practice and is sacrosanct to the religion. This contention if was upheld would have given the practice constitutional protection form intervention by the virtue of article 25 of the constitution. It was the point of the conditions that since it is not, therefore the court had all the powers to intervene and end the practice because of violative of fundamental rights.

To further strengthen their contentions the petitioners’ side argued that in other countries, even Islamic Theocratic countries, the practice of triple talaq has been done away with legislation and thus India should also do the same, that is, do away with the practice. Mr. Anand Grover, senior counsel on behalf of the petitioners further added that the reason why the triple talaq has not already been abolished is because of the British courts in pre independence era validating the practice. This is reference to the Rashid Ahmed case. The issues before the Hon’ble bench of Judges were that whether the practice was an essential religious practice, whether it was Islamic and whether the practice has been made statutorily enacted by section 2\textsuperscript{738} of the Muslim Personal Law (Protection) Act, 1937.

The judgment of the Supreme Court delivered received a majority of three with two being in minority. The majority opinion included Justice Nariman who wrote the judgement on Justice U.U. Lalit’s behalf too which shows his concurrence. A separate majority judgement was written by Justice Joseph highlighting his own observations on the issue. While Justice Nariman, Justice Lalit concurring with him, held it to be violative of fundamental rights of the enshrined under the constitution and thus invalid, Justice Joseph observed that provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

\textsuperscript{737} Article 15- Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public

(3) Nothing in this article shall prevent the State from making any special provision for women and children

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special

\textsuperscript{738} Application of Personal law to Muslims.— Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).
having already been regarded as bad in theology, it was only pertinent to delve into the legal sanctity of the practice. He relied on the judgement of Shamin Ara v. State of U.P. which declares that triple talaq lacks legal sanctity. His judgement relied on the earlier judgements which had already declared the practice of triple talaq as being invalid and unlawful. Having considered these pronouncements, Justice Joseph declared the practice as unlawful, unconstitutional and therefore liable to be abolished.

Justice Nariman in his separate judgement came to the conclusion that the practice of talaq-e-biddat is not an essential religious practice under practice under Islam and thus the Court has the authority to intervene and abolish the foresaid practice. A learned judge held that the Act of 1937 transformed the personal law into a statute and was thus a law in force. Since it was violative of the fundamental rights it was to be struck down by the virtue of article 13 of the Constitution.

However the minority opinion of the Chief Justice Khehar and Justice Nazeer differed on the opinions holding that the practice constituted essential practice of the religion and thus was under protection of article 25. They therefore regarded that having constitutional protection, the Court does not have the authority to declare it as unlawful, rather it is the Legislature who has the power and responsibility to pass relevant law on the mater and declare it as unlawful and ultimately ban it.

In the end however, it was ultimately decided that the practice need to be declared as unconstitutional to stop it from being practiced by the Muslim husbands all over India. It is worth mentioning that this judgement while arriving at the conclusions took into its ambit wide variety of sources and dealt with mammoth concepts ranging from the stand of Quran on talaq, legislations all over the world on triple talaq and a numerous list of cases f Indian courts on the practice and related issue. Thus it can be aptly said that the decision was not taken hastily but was done after proper considerations and deep research on the issue.

Thus after going through a plethora of judgments over around eight decades, triple talaq was ultimately done away with by the judiciary.

**LEGISLATIONS CONCERNING TRIPLE TALAQ**

The Indian Legislation has largely been silent on the issue of triple talaq, though it has a codified law in the form of Dissolution of Marriages Act 1939. The Act

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739 Laws inconsistent with or in derogation of the fundamental rights

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void

(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality.
of 1939 does not mention of the validity or invalidity of triple talaq. Also the act of 1937, ‘Muslim Personal Law (Shariat) Application Act’ does not provide for triple talaq explicitly but gives validity to personal.

With the pronouncement of the triple talaq verdict by the supreme Court, the Legislature became active in partaking the issue on its hand and has thereto tried to come up with an Act banning the practice in its entirety. However the Legislature has failed to come up at consensus and what India has had in the meanwhile is listed below-

The Muslim Women (Protection of Rights on Marriage) Bill, 2017740 Among the present legislations, to protect Muslim women against the crime of triple talaq stands the Muslim Women (Protection of Rights on Marriage) Bill, 2017. According to which whoever pronounces talaq upon his wife, such pronouncement is illegal and void. Adding to the bill, it is stated that such an act is a punishable offense, leading to a imprisonment extending up to 3 years and fine. Furthermore, it is clearly expressed that any other law present shall not disentitle the victim wife to demand a amount of sustenance for her and her children . She shall further be entitled to the custody of her minor children. The act has been taken as a cognizable and non-bailable offense.

The Muslim Women (Protection of Rights on Marriage) Bill, 2018741 After the lapse of 2018 ordinance, the central government promulgated this ordinance of 10th January, 2019 receiving presidential assent on 12th January, 2019. The ordinance of 2019, creates scope for both the parties from avoid the exhausting procedures of court. The bill introduced that in cases where the victim on whom such talaq has been pronounced , request such act to be compoundable , the act can be treated as a compoundable offense, and both the parties can mutually agree on the terms and condition under the magistrate, and avoid the exhaustive legal procedures. This ordinance was to work up to the new bill is passed by both the houses.

The Muslim Women (Protection of Rights on Marriage) Bill, 2019742 After the lapse of 2018 bill and the formation of new house, the bill of 2019 ultimately passed through both the houses successfully though there have been plethora of opposition to it. The bill, once converted to Act, seeks to uphold the decision of the Supreme court in the

740 (Bill No. 247 of 2017).
741 (Bill No. 181 of 2018).

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Shayara Bano case. The salient features includes; triple talaq through any mode of communication is to be declared void and illegal, instant triple talaq is a cognizable and non-bailable offence with punishment extending to 3 years along with fines, information of offence can be given by wife as well as one of her blood relatives. The wife will also be entitled to allowances and is entitled to seek custody of her children, the manner of which will be determined by the magistrate.

After much turmoil, the bill has been passed by the upper House receiving 99 favor votes and about five hours of debate. The only destination left in the journey of the bill is to receive the assent of the president which will convert it into an act thus concluding what was started by the judiciary in combating the practice of triple talaq.

The Muslim Women (Protection of Rights on Marriage) Act, 2019- The bill after being successfully passed in both the houses, amid plethora of criticisms from the opposition, has ultimately received the assent of the President, thus concluding its legislative journey and its transformation into law. The provisions of the Act seeks to criminalise the practice of triple talaq and provides for imprisonment of three years to the husband divorcing her wife by way of this. Thus it can be said that what was started by the judiciary has been concluded by our Legislature.

However this must not be regarded as an end to this, it is now for the actual subjects who will be governed by this law to accept it whole heartedly to further the constitutional morality. It is on the society to implement the law effectively and thus fulfil the aim of the Legislature.

FEMINIST JURISPRUDENCE AND THE ISSUE OF GENDER JUSTICE - The Supreme Court judgement quashing instant triple talaq – talaq-e-biddat – is not only a big relief for Muslim women who suffer unilateral and irrevocable invalidation of marriage, but also a liberating step in their fight for justice against unjust and archaic practices. The Shayara Bano case dealt not only with question of constitutional validity or protection of fundamental rights but it has been a great leap in achieving justice or more precisely gender justice. The practice of triple talaq was seen as discriminating and arbitrary against the women giving the man an upper hand and thus subjugating the feminine gender.

The supporters of the school of feminist jurisprudence works in the favour of Rights of Women. The petitioners themselves can be seen as proponents of this ideology. It is clear from their contentions that what they advocate is essential to establish gender equality in India. The verdict has not only benefitted the appellant party but it can be seen as a boon to a large section of Muslim women who were earlier subjected to several atrocities at the hands of their husband. The triple talaq Act can be seen as adoption of feminist jurisprudence in the working of the Parliament. The working and law making is now slowly becoming woman need centric, which have long been a demand of the Indian society.

NEED FOR UNIFORM CIVIL CODE - ANALYSIS

742 A L I Chougule, SUPREME COURT VERDICT WAKE UP CLL FOR GENDER JUSTICE(article),2017,

The Judiciary and Legislature has done what they were entrusted to do. The practice of triple talaq has been declared as void and illegal, the practitioner of which will be imprisoned for three years. The Muslim women are the special, or we can say, the prime beneficiary of the triple talaq Act. From a long period of time, a Muslim woman’s marital life was always under sword of being declared dissolved. Women were treated as mere chattel off her husband who can at his will dispose of her anytime he wanted by simple utterance of talaq three continuous time in a single seating. But the judiciary and Legislature both took upon them a daring task, which is rarely seen, to bring changes in the practices associated with, o sanctioned by the religion itself. They interfered in, what was contended by the opposing parties in the Shayara Bano case, their personal matters. The whole issue emerged due to absence of a Uniform Civil Code which would have made uniform laws applicable to every community and people irrespective of their religion.

The need for personal laws to be replaced by a uniform law emerges for the reason that there are several discrepancies in the personal laws of different communities and it would be prudent that such diversified communities would be governed by a single code of law. The benefit of the uniform code will be that the work of parliament would become hassle free if they wish to amend certain religious practices which are, ‘though good in theology, but bad in law’. The prominent benefactors would ultimately those governed or comes within the ambit of law, that is the society at large. This could not be explained any better without taking into consideration the practices permitted under Muslim law. The practices such as ‘Nikah halala’ and allowance of keeping four wives, that is polygamy, are permitted under Muslim law, but doesn’t find a place in other personal laws. though they are considered draconian by even those for whom they are, not much success has been achieved in abrogating them. The Uniform Civil Code as mentioned in Article 44 of our Constitution, would prove to be the only effective solution for such practices. Since such practices are not permitted under other religions but only in Islam, it is violative of article 14 of our Constitution. The hope in the future is to take some lessons from the acts of Judiciary and the Parliament to finally bring a Uniform Civil Code to reform and make the religions free from evils.

CONCLUSION
Having gone through the judicial and legislative trends which the practice of talaq-e-biddat has been a witness of, it can be concluded that the year of 2017, the year when the judgement of Shayara Bano was pronounced was nothing but a victory for the Muslim women who have been for long been a subject of discrimination and arbitrariness at the hands of their husbands who have hitherto kept them at their whim and caprice. This practice had been followed for about 1400 years and it has always been derogatory for the women. It was however with the growth of legal system which ultimately provided them with the ground to raise their voices. The Supreme court in the year 2017 has done what the Indian judiciary had for so long had been unable to do. It fulfilled the aspiration of thousands of Muslim women suffering from the draconian practice of

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743 Article 44- Uniform civil code for the citizens The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.
talaq-e-biddat and saved uncountable women who may have suffered if the practice would not have been done away with. After Indian Judiciary performing its part, the legislature has also taken an active role in bringing an Act, as CJI Khehar has said, is necessary by keeping aside their differences, to make the practice as unlawful and provide for stringent punishment for those who still profess it. Apart from judicial and legislative sides, it is also necessary that the Indian society also show it readiness for change which would finally free India from its clutches of age old customs having derogative affect on it. It is also for the All India Muslim Personal Law Board to cooperate with the Legislature on the matter. The Judiciary and Legislation has done its part. It is now time for the society to accept the change and fulfil the constitutional mandate to further the rule of la, gender equality and secularism.

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FEDERALISM OR CON-FEDERALISM: RE-EVALUATING INDIA’S FEDERAL STRUCTURE

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ABSTRACT
To resolve the ever-persisting dilemma of the identifying the true nature of the Indian ‘federal’ set-up, the Article begins by unravelling the character of the Indian Constitution taking a look at both federal and unitary features of our Constitutional provisions to ascertain whether India qualifies as a federation in terms of the yardsticks laid down by K.C Wheare and other prominent scholars. Multiplicity of power devices in federalism produces potentialities of differentiations and disparities, but federalism’s commitment to justice and democracy imposes obligation upon power holders to act with a sense of responsibility to avoid disparities in access to positive rights and welfare. The paper therefore presents a heuristic perspective on Indian federalism by analysing historical evidence to propose a contemporaneous balance between conflicting questions of state autonomy, self-determination, human rights and national integrity and unity. The Kashmir Imbroglio, as a manifestation of this conflict has often been seen as an intractable and stubborn problem that has defied resolution despite persistent and protracted efforts at it. In unravelling this imbroglio, the paper methodically analyses the contrived conflict, its origin and history and scrutinizes the archived narratives surrounding the integration of Kashmir into the Indian federation as well as the consequent birth of Article 370 and the contentious issues that its introduction was inevitably accompanied by. Ultimately the Article analyses the legal and constitutional validity of the abrogation of Article 370 and its irreversible impact on the federal orientation of India while discerning its aspirations to resolve the impending issues that its genesis brought about.

CHARACTERISATION OF THE INDIAN CONSTITUTION
The nature of the Indian Constitution has been the subject of many an academic question. One such question that repeatedly arises is of the nature of the Indian Constitution. A few scholars have accepted this as a federal Constitution. Most scholars hesitate to characterise the Constitution as ‘federal’ and have labelled it as ‘quasi-federal’, ‘unitary with federal features’ or even ‘federation with a strong centralizing tendency’. The most commonly accepted and professed academic characterization of our Constitution has been made by Austin, who characterizes it as co-operative federalism.

A. ESSENTIAL FEATURES OF INDIAN FEDERATION
Article 1 of the Constitution describes India as a Union of States and Territories as specified in the First Schedule. None of the constituent units of the Indian Union was sovereign and independent in the sense the American colonies were before they formed their federal unions, in fact even the princely states and territories had eventually become subject to the authority of the British Crown. The definition of

745 M.P Jain, Indian Constitutional Law with Constitutional Documents (7th ed. 2014).
746 Indian Const. Art 1.
India as a Union of States emphasizes the important part which the States have to play in our Constitution. The Constitution itself states by Article 1 that India is a Union of States and in interpreting the Constitution one must keep in view the essential structure of a federal or a quasi-federal Constitution namely that the units of the Union have also certain powers as has the Union.\textsuperscript{747}

There are various provisions within the Constitution itself that establish the essence of federalism and convey the intent of the framers of the Constitution for maintenance of such a federal structure. These provisions include among others List II and List III of the Seventh Schedule which confer plenary powers of the States. Another important provision is that of Article 252\textsuperscript{748} which confers conditional power on the Centre (Parliament) to legislate on a field covered by the States only with the Consent of two or more States with provision for adoption of such legislation by any other States.

It is evident that these provisions have been meticulously drafted with the intent of ensuring that such powers are not misused in any manner by providing for a limited scope of application or extension of the Centre’s powers over the States. The competence of Parliament to legislate in matters pertaining to the State List, remains only for a limited period under Article 259\textsuperscript{749} in the “national interest” or under Article 250\textsuperscript{750} during “emergency” vesting the President with powers under Article 258\textsuperscript{751} to entrust a State Government with the consent of the Governor function in relation to matters to which executive power of the Union extends.

\textsuperscript{747} H.M. Seervai, Constitutional Law, 307 (4\textsuperscript{th} ed. 1994).
\textsuperscript{748} Indian Const. Art 252.
\textsuperscript{749} Indian Const. Art 259.

Dr. Ambedkar in all his vision and wisdom, foresaw a criticism of the Constitutional Structure as favourable to the Centralism. In in his final address to the Constituent Assembly, he addressed this concern by referring to this criticism as an ‘exaggeration’. In his view, the basic principle of Federalism is that Legislative and Executive authority is partitioned between the Centre and the States by the Constitution itself. Since the States are in no way dependant on the centre for their executive or legislative authority and the Centre and States are co-equal in this matter, the constitutional structure cannot be described as centralism despite the larger field of operation granted to the Centre for its legislative and executive authority.

B. JUDICIAL INTERPRETATION

The debate whether India has a federal Constitution has been grappling the Apex court in India because of the theoretical labels given to the Constitution of India over time, namely- federal, quasi-federal, unitary etc. The Supreme Court has invariably shown favour to expansive interpretation of legislative powers and upheld the law when it comes to contests between individuals and the State, however, contests between the State and the Centre have resulted in the Apex Court showing its strong predilection for a strong Centre, which may be viewed as undermining of certain federal principles.

In the landmark case of West Bengal v. Union of India,\textsuperscript{752} the Supreme Court contemplated the traditional view of Federalism and characterised the Indian Constitution as not being true to any traditional pattern of federation. This case was followed by State of Rajasthan v.

\textsuperscript{750} Indian Const. Art 250.
\textsuperscript{751} Indian Const. Art 258.
\textsuperscript{752} West Bengal v. Union of India, (1964) 1 SCR 371.
Union of India, where the court chose to judge Indian federalism by the yardstick laid down by K.C Wheare and characterised our Constitution as more unitary than federal. The court also went on to say that “the extent of federalism in it is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically co-ordinated, and socially, intellectually, and spiritually uplifted.”

Although there undoubtedly exists a division of functions as envisioned in Part XI of our Constitution, there is no watertight compartmentalisation of functions. As the Governments of the States and the Centre act side by side in the furtherance of the same objectives and within a singular framework, inevitably many types of relations arise amongst them and many instrumentalities to promote intergovernmental co-operation come into existence. Thus, the view taken by CJ Beg in the State of Rajasthan case still holds true.

Another landmark case of SR Bommai helped instantiate the nature of the Constitution, with various judges taking different views of the federal structure in India. Firstly, Democracy and federalism were described as essential features of our constitution and held to be part of the basic structure. As far as the nature of this ‘federalism’ is concerned, J. Ahmadi, alluding to K.C Wheare described the Constitution as “quasi-federal” because “it is a mixture of the federal and unitary elements, leaning more towards the latter”. Another important principle was laid down in this case, with regard to the powers of the State and Centre and their interrelation. The court held that although greater powers are conferred upon the Centre, within the sphere allotted to them, States are supreme and the Centre cannot tamper with their powers.

Despite the evident Unitary bias in our Constitution, the irrefutable federal features like supremacy of the constitution, division of subjects between the union and states, bicameralism, dual administration, and independence of judiciary distinguish our set up as a unique blend of the two, perhaps best described by Austin as co-operative federalism.

A HEURISTIC PERSPECTIVE ON INDIAN FEDERALISM

Although these federal features appear to be dominant in our Constitution, the Courts in India generally tend to lean in favour of a strong Centre, a feature that militates against the concept of strong federalism. Apart from the aforementioned Emergency powers and in the event of a proclamation being issued under Article 356 that the governance of the State cannot be carried on in accordance with the provision of the Constitution, Article 251 when read with Article 259 in effect permits the Rajya Sabha to encroach upon the specified legislative competence of a State legislature by declaring a matter to be of national importance. Thus, although these powers had been initially included as a constitutional safeguard, the political interest of conflicting State and Central Governments often subvert the constitutional interests leading to the misuse of the additional powers given to the Centre.

754 Ibid.
757 Indian Const. Art 356.
Financially, the constitution has created a dependency of the States on the Centre, which has kept with itself the power to levy important taxes. States have only been given the option to seek grants and loans for the upliftment of the weaker sections of the society. The Union government can borrow money from within India and abroad on the security of consolidated funds of India, however, States can do so only within India. Furthermore, no state can have a separate constitution from that of India (except the erstwhile State of Jammu and Kashmir which along with its Constitution has ceased to exist). There is also no double citizenship allowed in India.

Moreover, barring the provisions dealing with presidential elections, representation of states in the upper house of parliament, amendment procedure and changes in the Seventh Schedule, the rest of the constitution can be amended by the parliament by a simple majority for which the states’ consent is not required.

Apart from the aforementioned aspects, Centralized planning, office of the governor, Article 356, and All India Services, have all been major irritants in the Indian federation. The model of federalism which India adopted is unique in the sense that it favours a strong centre. The autonomy of States has eroded considerably over a period of time on account of the continuous rule of one party at the centre and states, and misuse of constitutional provisions against the state governments. States do not enjoy a free hand in shouldering the responsibilities entrusted to them by the Constitution.  

A. FEDERALISM AND STATE AUTONOMY

Regardless of the degree of State autonomy or the extent of centralism sanctioned by a Constitution serving as the Rule of Law in a Federation, there is bound to be an inevitable tussle between greater demands for greater State autonomy and demands for greater centralization. There exists no magical formula for ensuring stability and balance in a federation, regardless of the allocation of powers between the Centre and State. However, certain essential powers such as common defense, foreign affairs, regulation of interstate commerce etc. are generally retained by the central government.

American federalism contemplates that states will retain a significant degree of autonomy so that state power can serve as a meaningful counterweight to national power. It is often said that states exercise this function through extraconstitutional processes centered on the political party system. As discussed earlier, State autonomy in the Indian Federation has been generally subverted by the Centre in favour of the greater ‘national interest’. This is justifiable as a natural reaction to protect independence after over 2 centuries of British rule. However, it is important to understand that both federalism and regional autonomy, are based as much on the idea of self-rule and autonomy of the individual as democracy and respect for human rights.

The working of the federal arrangements in India took a big turn in 1967 when the monopoly of one party rule at the Centre

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760 Ibid.
and the states started crumbling with splits within the party and emergence of several regional parties in different states. Since 1989 either a minority government consisting of a combination of different political groups or of one political party supported by other parties from outside or a coalition of several national and regional parties had been in office at the Center, coalitions continue to govern at the Centre despite resounding majority in favour of a single party. This has led to a situation wherein over the past decade, a coalition of several parties is ruling at the Centre while some of these parties and parties in opposition are ruling in different states. These political developments and future projections have deeply changed the character of Indian federalism, with regional parties demanding greater State autonomy, motivated either by political ambitions or the welfare of the constituents. Any country that has this kind of diversity must develop a robust federal structure ensuring enough scope for national unity consistent with regional autonomy, which cannot be fixed forever but has to be a flexible and dynamic process.

B. STRIKING A BALANCE
The perception created when demand for greater autonomy is raised by any State is generally founded on a more fundamental demand- the demand for rights. Generally, this demand is one projected as Human Rights or some other fundamental right that the constituents of that state are purported to have been deprived of. If diffusion of powers assures respect for human rights then, division of powers between different levels of government is even a greater assurance of respect for human rights than separation of powers. The totality of powers gets divided not only between different wings of the same government but also between different governments conscious of their identity, independence and autonomy, but when such a demand for autonomy turns into a threat to the unity and national integrity of the Union, thus becoming a threat to its very existence, the demands have historically been ignored. Be it the Akakli movement, the Dravidnadu movement or the Kashmir uprising, difference of politics does not seem to deter the heads of the Union from taking adverse steps to secure national integrity, albeit at the cost of International condemnation. This militant determination, although at great costs, has been the primary reason that many an integral component of India still remains a part of it. State autonomy, religious autonomy, the Right to self determination and even Human Rights have all been undercut when there is a threat to the national integrity. Since this manuscript is an academic one, the correctness of these actions cannot be commented upon but questions as to the legal and constitutional validity of these moves have been subsequently.

FEDERALISM AND SELF-DETERMINATION
Federalism has undeniably served as the most accepted solution to challenges posed by multi ethnic, multi-cultural secular societies of the modern era. Failures of federalism as a system of governance over the years have generally been due to human deficiencies and not due to any systemic shortcomings in the federal set-up. A large cause of this failure tends to emanate from the very nature of most modern federations, where politics of nationalism ends up feeding into a set of grievances that have the
potential to mobilize individuals behind calls for territorial redistribution of power, including independence.\textsuperscript{763} The question of whether or not a federal set-up would be a lasting solution to the aforementioned challenges posed in a multi-ethnic State depends on a number of factors, including nature of the federal arrangements, the fairness with which the system is operated and the political maturity displayed by the leaders of the federation as well as the leaders of its constituent units.\textsuperscript{764} As long as the costs of remaining a member are not seen as excessive in relation to the benefits accruing from membership, there is a reasonable chance of the federation succeeding without secession.

While federations can be seen as the binding force between constituent units of a federation having different religious, cultural and social fabric, they can also become the first step towards secession. The right to self-determination, although still a very recent concept, has gained wide international acceptance and occupies a significant position in International Human Rights Instruments. It is often used by various separatist movements who base their claims in finding a common ethnic, cultural or religious idea, that is so diverse from the rest of the federation that peaceful co-existence becomes impossible. However, the tenability of these claims in International Law is a matter of debate. Claims based on national, ethnic or religious identity in a time where pluralism and cosmopolitanism are given global recognition and encouragement have to be analysed in the light of the well-entrenched principles of International Law that give sanction to the territorial integrity and sovereignty of a nation.\textsuperscript{765} It therefore follows that a representative and inclusive government would receive more support and less sanction from the International Community, despite the representations made by those advocating for secession. Justifications for secession in the opinion of the writer are subjective and no definite parameters can be drawn out in determining whether a particular cause is worthy of being deemed as just or reasonable. Neither is it possible to categorize or compartmentalize these causes as it impossible to ascertain their plausibility and legitimacy in absence of verifiable empirical evidence. It would therefore be appropriate to contextualize these causes, analyse their validity and determine how to address them in a definitive manner.

THE KASHMIR CONUNDRUM
The erstwhile State of Jammu and Kashmir has long occupied a peculiar position in the Indian federation just as Article 370,\textsuperscript{766} occupied a \textit{sui generis} locus in our Constitution. In Jammu and Kashmir, the Hindu Maharaja, Sri Hari Singh, with his predominantly Muslim subjects in the Kashmir Valley had “acceded” to India under imminent threat from Muslim tribesmen sent by Pakistan.

A. BRIEF HISTORY & BACKGROUND
On the day India became independent, in accordance with the Cabinet Mission plan of May 1946, following the creation of the dominions of India and Pakistan, Kashmir bordering on both India and Pakistan had, like any other native state, three alternatives, viz., to assert complete independence, to accede to Pakistan or to accede to India. Power to take the decision

\textsuperscript{763} Graham Smith, \textit{Federalism the Multi-ethnic Challenge}, 10 (1995).
\textsuperscript{764} Venkat Iyer, \textit{Federalism and Self-Determination: Some Reflections}, 11 LEGAL ISSUES
\textsuperscript{765} Ibid.
\textsuperscript{766} Indian Const. Art 370.

www.supremoamicus.org
vested exclusively in the Ruler according to the British Government’s declared policy. In his letter dated 26 October 1947, addressed to the Governor-General, the Maharaja of Jammu and Kashmir, offered to accede to the Dominion of India. The Governor-General accepted the offer on 27 October 1947 with certain stipulations. On 5 March 1948, the Maharaja issued a proclamation forming a responsible Government of Council of Ministers headed by the Prime Minister which was to take steps to constitute a National Assembly based on adult franchise to frame a Constitution for the State. The Instrument of Accession was in no way different from that executed by some 500 other states. It was unconditional, voluntary and absolute. It was not subject to any exceptions. It bound the State of Jammu and Kashmir and India together legally and constitutionally. The execution of the Instrument of Accession by the Maharaja and its acceptance by the Governor-General should have ideally settled the issue of accession of the State of Jammu and Kashmir. It was only after the accession that the Governor General in his personal capacity replied to the Maharaja’s Letter stating that the “accession should be decided in accordance with the wishes of the people of the State” and “the question of State’s accession should be settled by a reference to the people.”

M.C. Mahajan rightly opined that the “finality which is statutory cannot be made contingent on conditions imposed outside the powers of the statute. Any rider which militates against the finality is clearly ultra vires and has to be rejected”.

The accession of the State of Jammu and Kashmir to India imposed an obligation on the Dominion of India to defend the State. To drive the invader out of the State was the task which the dominion of India was asked to face as soon as it finally accepted the Instrument of Accession. However, it is pertinent to note that despite the aforementioned events, Sheikh Abdullah had declared in the Constituent Assembly that any suggestion for altering arbitrarily the basis of the Kashmir’s relationship with India would not only constitute a breach of the spirit and letter of the constitution but would lead to “serious consequences” for harmonious association with the State of India. Therefore, the controversy with regards to integration of Kashmir in India without bringing the question for reference to the people of the state in light of the aforementioned events and the right of self-determination earlier discussed, continues to persist.

B. CONTEXTUALIZING ARTICLE 370

Article 370 is a self-applying Article and applies ex proprio vigore without having to depend on any other Article of the Constitution of India for its enforceability. The Article has been described as a “temporary provision” in the Constitution. The temporary nature of this Article arises merely because the power to finalize the constitutional relationship between the State and the Union of India had been specifically vested in the Jammu and Kashmir Constituent Assembly. By the accession, the Dominion of India acquired jurisdiction over the State with

respect to the subjects of Defence, External Affairs and Communications, and like other Indian states which survived as political units at the time of the making of the Constitution of India, the State of Jammu and Kashmir was included as a Part B State in the First Schedule of the Constitution of India, as it was promulgated in 1950. Given the special circumstances of the accession, all the provisions of the Constitution applicable to Part B States contained in Article 238\textsuperscript{771} were not extended to Jammu and Kashmir. The Government of India declared that it would be the people of the State that would have the power, being represented by their Constituent Assembly, to decide which provisions of the Indian Constitution would apply to the State. The application of the other Articles was to be determined by the President in consultation with the Government of the State.\textsuperscript{772}

The first official act of the Constituent Assembly of the State was to put an end to the hereditary princely rule of the Maharaja. It was one of the conditions of the acceptance of the accession by the Government of India that the Maharaja would introduce popular Government in the State. Thus, came to an end the princely rule in the State of Jammu and Kashmir and the head of the State was henceforth to be an elected person.

The Government of India accepted this position by making a Declaration of the President under Article 370(3), to the effect that for the purposes of the Constitution, “Government” of the State of Jammu and Kashmir would be who the legislative assembly of the State recognizes as the Sadar-i-Riyasat of Jammu & Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office.\textsuperscript{773}

This “Sadar-i-Riyasat” was later construed to mean the Governor of the of Jammu and Kashmir as mentioned in Article 367\textsuperscript{774} which the President applied to the State of Jammu and Kashmir, by virtue of the Constitution (Application to Jammu and Kashmir) Order, 1954, with concurrence of the Government of the State of Jammu and Kashmir.\textsuperscript{775} The references to the Sadar-i-Riyasat were to be construed to mean references to the Governor of the State of Jammu and Kashmir and the same was upheld in a multiplicity of cases.\textsuperscript{776}

ABROGATION OF ARTICLE 370- THE FINAL SOLUTION?

Article 370 (3) of the Constitution, raised an important question of law- Could Article 370 ever “cease to be operational” since the “Constituent Assembly” of Jammu and Kashmir no longer exists? This question was answered by virtue of the notification issued by the President on August 6, 2019, wherein the President declared that all clauses of Article 370 would become inoperative except a clause that read into it application of all provisions of the Indian Constitution to the State of Jammu and Kashmir.

The acting Central Government of India, making use of Clause 1(d)\textsuperscript{777}, of Article 370 which gives the President the power to

\textsuperscript{771} Indian Const. Art 238.
\textsuperscript{772} Id. at 24.
\textsuperscript{774} Indian Const. Art 367.
\textsuperscript{775} Id. at 29.
\textsuperscript{777} Indian Const. Art 238., Cl.1 (d).
apply other provisions of the Constitution to the State, subject to appropriate modifications, modified Article 367 of the Constitution, more particularly the terminology used within the Article to enable de-operationization of Article 370. Since this move, various questions have been raised over its constitutionality and legal validity. These questions have also been brought before the Supreme Court and the matter is currently sub-judicia. Regardless of the eventual judicial outcome, it raises an important academic question, which is not restricted to the legality and constitutionality of the move but has implications on the federal structure of India.

**A. LEGAL VALIDITY OF THE ABROGATION OF ARTICLE 370.**

In making the amendment to Article 367, which has a slew of definitions of Constitutional expressions and making its application available for usage in Article 370, the Central Government enabled the use of terms ‘Government of the State of Jammu and Kashmir’ to mean a reference to the ‘Governor of Jammu and Kashmir, acting on the advice of his Council of Ministers’ and the use of term ‘Constituent Assembly of the State’ to be read as ‘Legislative Assembly of the State’. This was done by the virtue of Constitution (Application to Jammu and Kashmir) Order, 2019, which added clause (4) to Article 376.\(^{778}\)

Questions as to the permissibility of these actions of substitution and attribution of new meaning to existing terms have already been answered by the Apex Court, when dealing with term “Sardar-i-Riayasaat” in Article 370, which was by Presidential Order, allowed to be construed as the Governor of the State of Jammu and Kashmir. The legal juxtaposition with this subject and the judicial opinion on the same has also already been substantively dealt with earlier.\(^{779}\) The power of the Union, by the President to alter the existing terminology must stand vindicated. The Constituent Assembly of Jammu and Kashmir had resolved to be dissolved on November 17, 1956 and it finally ceased to exist on January 26, 1957.\(^{780}\) There can be no doubt cast over the intent of Article 370 or the nature of the provision. Undoubtedly, it was meant to occupy a temporary place in our Constitution and it is for this very reason that it has been classified as ‘temporary, transitional and special provision’ and has neither occupied nor was intended to occupy permanent position in our Constitution. This is because, the Article in itself foresaw the possibility and the inevitability of its own termination.

A bare glance at the provisions of the Article reveals that the temporary nature of Article 370, specifically clause (3), which opens with a non-obstante clause, “Notwithstanding anything in the foregoing provisions of this article.” Literally construed, this clause emphasizes that whatever is given in the preceding clauses of this article in terms of special consideration shown to the State of Jammu and Kashmir, the President is empowered to undo the same. He may, by public notification, declare that this Article shall cease to be operative or shall be operative with such exceptions and modifications and from such date as he may specify. This

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\(^{779}\) Supra note 33.

overriding clause seems to affirm that the provisions contained in clauses (1) and (2) of Article 370 are indeed ‘temporary provisions’.

By the very fact that the Constituent Assembly has ceased to exist and can never be reconvened, it is manifest that the concurrence of the prevailing governing body- that is to say the State Legislative Assembly is required. In the current situation, the President has by Order directed the use of the term ‘Government of the State of Jammu and Kashmir’ to mean a reference to the ‘Governor of Jammu and Kashmir, acting on the advice of his Council of Ministers’.

Being under President’s rule, all the functions of the State Assembly has been transferred to the Parliament. Since all powers and functions have been transferred to the Parliament, the concurrence of the State has been delegated to the Parliament, when put under Presidents Rule as per Article 356, to “express its views”. Since there exists no State Assembly in the State concerned, the Parliament has acted on behalf of the State Assembly to enable the abrogation. As a matter of Constitutional Law, this must be viewed as an exercise of a purely Legislative function of the State and is distinct from the exercise of the Executive power which may be open to judicial challenge.

Without delving into the political motivations or the sagacity of the move, it is evident that based on the altered definitions, the reassignment of authority to dictate concurrence and the technical competence to make such changes, there can be no legal impediment to the validity of the move.

B. CONSTITUTIONAL VALIDITY OF THE ABROGATION OF ARTICLE 370- A THREAT TO INDIA’S BASIC STRUCTURE?

The Basic Structure doctrine as expounded upon in the SR Bommai case, where democracy and federalism were described as essential features of our constitution and held to be part of the basic structure, now holds constitutional and legal relevance in answering the question of whether this abrogation constitutes a potent threat to India’s federal structure and therefore it’s prevailing constitutional framework. The Indian Constitution foresaw the inevitability of different center-state relations in maintenance of our federal structure and this is the very reason that special, temporary powers were allowed to be made part of our constitutional structure, which enabled these special provisions to be exercised for the benefit of those states in light of different needs and requirements of these States. The application of these provisions is not limited to the State of Jammu and Kashmir but also extends to other States such as Nagaland in the form of Article 371-A.

However, these provisions have been created not with the object of granting special favour or bestowing unwarranted benevolence on these States, but with the non-partisan object of ensuring conformity to overriding constitutional principles of state welfare and equality. The underlying idea was to address the dissimilarity and disproportionality in an adequate way to ensure over-arching equality and parity.

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781 Supra note 35.
782 Indian Const. Art 356.
783 SR Bommai v Union of India, AIR 1994 SC 1918.
784 Indian Const. Art 371-A.
amongst the States quantitively. Once the objectives of these temporary provisions have been met, there would remain no reason to keep such special provisions operative as they would then digress from the limited constitutional intent of securing parity.

Moreover, the executive powers of the Centre over Kashmir have been largely tamed and the State and its citizens have been brought on par with other citizens of the country, by allowing them access to the same benefits, privileges and rights that other citizens of the country, which is in line with the constitutional objective of ensuring parity amongst the states. Be it at the individual level of the citizen or at the State level, keeping in mind the goal of achieving equality of citizenship the State has the power to decide to do away with the temporary provisions once it deems its objectives to have been met.

Apart from these equalizing tendencies, it also addresses certain other issues that existed with the special status of the State of Jammu and Kashmir. Before abrogation of Article 370, the State of Jammu and Kashmir was the only State in India that is governed by its own separate Constitution which defines the relationship of the State of Jammu and Kashmir with the Union of India and certain provisions of the Indian Constitution that were deemed to be applicable by Presidential Order.

The rule of this separate Constitution also allowed the State to enact certain Draconian, unjust and regressive laws that were constitutionally impermissible. The Jammu and Kashmir Constitution enabled the State to enact a bill that seeks to deprive married daughters of the rights accrued to them as permanent residents. This bill was earlier enacted by the State Legislature, despite its inherently discriminatory nature. In fact, the full bench of J & K High Court in State of J & K v. Susheela Sawhney, also ruled that the daughter of a permanent resident of the State of Jammu and Kashmir will not lose status as a permanent resident of the State of Jammu and Kashmir on her marriage with a person, who is not a permanent resident of the State of Jammu and Kashmir.

Article 35A of the Indian Constitution was an article that empowered the Jammu and Kashmir state’s legislature to define “permanent residents” of the state and provide special rights and privileges to those permanent residents. Furthermore, Article 35A in itself legitimised the laws enacted by the State Legislature of Jammu and Kashmir and freed them from constitutional challenge on the basis of rights conferred to other citizens of India. This constitutional infirmity acted as a double-edged sword which subject the citizens of the State of Jammu and Kashmir to some and draconian laws which could not be challenged on the basis of the rights conferred upon Indian Citizens.

At the same time, it also conferred an unfair advantage upon the people of the State of Jammu and Kashmir who enjoyed all the rights guaranteed to the Citizens of India under the Constitution of India, but also had the additional rights and privileges to the exclusion of the other non-permanent residents, such as the right of suffrage to the Legislature of the State, to the local bodies and other institutions, preferential claims to the services and scholarship and above all


786 Indian Const. Art 35-A.
to the exclusive rights for the acquisition and possession of immovable property.

The move to repeal the Article has also brought about equality of citizenship by ensuring rule of the *grund norm*, therefore ensuring supremacy of the Indian Constitution. Not only have the unfair advantages to the permanent residents of the State of Jammu and Kashmir been eliminated, but the laws of the State are now also subject to the same constitutional challenge as any other law in India, therefore ensuring an all-pervasive check on their reasonability and their conformity to the constitutional principles.

CONCLUSION- PUTTING AN END TO THE IMBROGLIO

The Kashmir Imbroglio that has often been seen as an intractable and stubborn problem that has defied resolution despite persistent and protracted efforts at it. The strained situation in Kashmir, has marked the international landscape for close to seven decades now. It has understandably caused apprehension and trepidation amongst the international community for it is seen, and legitimately so, as a potential flashpoint for the two nuclear-armed neighbours, India and Pakistan, who are contesting the dispute.

This manuscript refrains from delving into political questions of intent, wisdom and motivations behind the move to abrogate, limiting itself to scrutinizing the legality and constitutionality of the move and therefore cannot make any astrological predictions as to the success or failure of the move in terms of the effect it would have on the lives of the common citizen and the eventual outcome of such impact. Therefore, it cannot be conclusively stated that this move would either successfully resolve the conflict or cause further snowballing and sensationalism at the International stage to elevate to another potential flashpoint.

What has been conclusively established is that the move is legally and constitutionally sound and does not pose a threat to the basic structure or federal nature of the Indian Union. In any case, the scholarly classifications of India’s federal structure are unlikely to be amended based on the abrogation of temporary provision that foresaw its own end. Over the years, the interplay of certain extra-constitutional forces like the multiparty system, political attitudes and political movements have considerably influenced the actual pattern of Centre-state relations, in spite of which, classification of India as quasi-federal and the description of the Indian federal structure as co-operative federalism has remained the same.

However, what remains imperative is not some scholarly label attached to the description of what the Indian federation can be classified, but the success of the federation in itself. It would perhaps be appropriate to end with a quote from Dr. Rajendra Prasad, our first President, who commented upon nature of the Indian Constitution saying: “Personally, I do not attach any importance to the label which may be attached to it—whether you call it a federal Constitution or a unitary constitution or by any other name. It makes no difference so long as the Constitution serves our purposes.”

787 Constituent Assembly Debates, Constituent Assembly of India - Volume XI, 26th November, 1949.
FDR’S SECOND BILL OF RIGHTS AND DIRECTIVE PRINCIPLES OF INDIAN CONSTITUTION

By Prateek Mishra
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Introduction

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly on 10th December, 1948. The Declaration came into existence due to impact of World War II. The principles and the provisions embodied in the Declaration were adopted by various Constitutions. Later some other conventions took place to give effect to the aforesaid Declaration.

On January 11, 1944, at State of Union Address the President of United States Franklin D. Roosevelt delivered the greatest speech of 20th century. In his speech he excoriated those Americans with selfish and partisan interests, who tried to profit themselves from war and those who had sought to avoid the prodigious sacrifices it required. If there was a time to subordinate individual or group selfishness to the national good, Roosevelt proclaimed “that time is now”.

The Constitution of India was one of the Constitution which came into existence in the after years of UDHR and FDR’s address. The principles and provisions of UDHR and FDR’s second bill of rights can be seen in the Indian Constitution. Some of it found as Fundamental Rights and some are as Directive Principles of State Policy. These Fundamental Rights are binding in nature but the Directive Principles of State Policy are not of binding nature. The Directive Principles under the Constitution is of much similar thought as FDR once had. The rights which FDR proposed in his address are somehow seem more relative to the Directive Principles of Constitution. The similarity of these two concepts becomes more important when it comes to the enforcement of them. After death of Franklin D. Roosevelt no single president of United States ever talked about enforcement of his Second Bill of rights neither in Indian case it is ever attempted by any government to make this part of the Constitution enforceable in the Court of law.

Universal Declaration of Human Rights and FDR’s Second Bill of Rights

During the World War II the four freedoms were adopted by allied Nations, which were Freedom of Speech, Freedom of Assembly, Freedom from Fear and Freedom from want, as there basic war aims. Later the United Nations reaffirmed faith in the fundamental human rights. It promoted the universal respect and observance for human rights and also promoted the freedoms for all without distinction as to race, sex, language or religion.

During the WW II Nazi’s atrocities on Jews were enough to show the world community that the UN charter was not sufficient to deal with the Human Rights. A Universal law was required to deal with the issues regarding human rights protection. Then a commission on human rights was constituted which initially prepared an International Bill of Rights. This commission had representatives from many Nations including India. And finally it was adopted as Universal Declaration of
Human Rights, 1948\textsuperscript{788} by vote of 49 countries in favor of it on December 10, 1948. The declaration is followed by to International Covenants, which are: International Covenant on Economic, Social and Cultural Rights, 1976\textsuperscript{789} and the International Covenant on Civil and Political Rights, 1976\textsuperscript{790}. These covenant were adopted to give the force to the UDHR.

However, these covenants are not enough to promote and protect the human rights of individual of a person. Not so far, four years before the UDHR came into existence the United States optimistic, aging, self assured, wheelchair-bound President, Franklin Delano Roosevelt delivered his union address to Congress. His address was not so elegant, it was messy, unruly and not at all literary. But it was a revolutionary address because it was proposing the Second Bill of Rights. Due to the content of the address it became the one of the greatest speech of the 20\textsuperscript{th} century.

Today his speech is forgotten and his idea of Second Bill of Rights also. But it helped ironically to shape the countless constitutions throughout the world and to frame the UDHR. He delivered his speech at noon on 11 January, 1944, during it that time the United States was involved in its longest conflict since civil war. President Roosevelt began his speech with “it is our duty now to begin to lay the plans and determine the strategy for the winning of a lasting peace and the establishment of an American standard of living higher than ever before known...”. His speech was peace centric and he wanted to uplift the standard of living of middle class American people, he concerned about ill-feeding, ill-clothing, ill-housing and insecurities. He further said that now these civil and political rights are insufficient to get a better life and we need some rights which are more economic, social and cultural in nature than civil and political. Then he suggested some rights which he thinks can uplift the living standard of American people. These rights were related to jobs, adequate food and clothing and recreation, for farmers to get a return sufficient return form his product live a decent life, for big or small businessman to trade in free atmosphere, a right to have a home, right to adequate medical care, right to adequate protection for old age and right to good education. These rights at first instance seems very easy to provide and of general welfare but because they are of economic nature so it was difficult to assure the people of United States with these rights when the WW II was ongoing. So he said in the end also that when they will won the war they will work forward to implement these rights and will achieve the new heights of living standard of human being.

Well, the speech was forgotten later by the American people and the idea of Second Bill of Rights was also lost. Although, it played very important role in formation of Universal Declaration of Human Rights and International Covenant on Economic, Social and Cultural Rights (ICESCR). As Mr. Patrick J. Austin said in his research paper on Second Bill of Rights “The ICESCR was rooted in Rooseveltian ideology due to Eleanor Roosevelt’s involvement in its inception. Along with the Rooseveltian influence, there is a consistent theme found in FDR’s Economic Bill of Rights and Eleanor Roosevelt’s ICESCR –

\textsuperscript{788} UDHR, 217(III)A
\textsuperscript{789} UNGA Res. 2200A (XXI), 1966
\textsuperscript{790} UNGA Res. 2200A (XXI), 1966
the government must be empowered to secure and promote the liberties of individuals…” Further he says “both seek to fundamentally alter the relationship between the individual and the government by establishing a new, wide-ranging set of positive rights afforded to all citizens and requiring government action to adequately deliver those rights…” Roosevelt’s vision was undoubtedly inspiring but it went under ignorance by the American people itself.

FDR in his address on Jan 11, 1944, proposed eight new types of rights. These rights more or less are enshrined in the Constitution of India under Part IV. The rights under this part are in the form of directive principles of the State and as discussed above are not enforceable by the Court of law. In FDR’s Second Bill of Rights the proposed rights were:

I. The right to a useful and remunerative job in the industries job or shops or farms or mines of the nation;
II. The right to earn enough to provide adequate food and clothing and recreation;
III. The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;
IV. The right of every businessman, large or small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;
V. The right of every family to a decent home;
VI. The right to adequate medical care and the opportunity to achieve and enjoy good health;
VII. The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;
VIII. The right to a good education.

This is what FDR wanted to be added to Constitution of United States. But he never succeeded to get it incorporate and later no other Presidents tried to do it.

Fundamental Rights and Directive Principles of State Policy

In the 1858 some small Indian princely States revolt against the Company’s rule. Then the King and Queen of Great Britain took the control from the East India Company and passed Regulation Acts. They were passed by the British Government time to time and were Administration centered and less of general welfare. The Constitution of India contains a big part of Regulating Act of India, 1935. The Indian Constitution is formed with a huge research of existing Constitution of various countries of that time.

The Constitution of India is divided into XXIV parts with 395 numbered Articles. Under part III of the Constitution the Fundamental Rights are secured and under part IV the Directive Principle of State Policy are provided. With the addition of these two parts to the Constitution it became welfare centric from administrative.

Part III provides basic human rights as fundamental rights and puts obligation on the State to secure them for citizens and non-citizens as the case may be. Initially when the Constitution was drafted and presented there were 21 Articles in part III, but after the Constituent Assembly Debates and adoption of the Constitution 27 Articles in part III including definitions of State and Law. The rights that part III contains are of civil and political nature. Under part III the rights secured are; right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and
educational rights, rights to constitutional remedies. These rights are the promise to the people of India that they will have these all protection and the State shall take guarantee to provide these rights to them. When constitution was formed these fundamental rights were not widely interpreted but with the passes of time they were interpreted in possible widest manner. In various judgment of the Supreme Court it was again and again held that these fundamental rights are not only matter of linguistic interpretation only they are subject of juristic interpretation. In the most famous and revolutionary judgment of Kesvananda Bharti v. State of Kerala\(^7\), it held rightly held that the Constitution of India should be interpreted in widest possible manner.

The framers of the Constitution of India borrowed the idea directive principles from the Irish Constitution. When the Constitution was drafted there were 13 Articles and today there are 20 Articles in the part VI. The DPSP are the main objectives of the State to achieve. These principles guides the Government as well as provides a blueprint for welfare of the people of the nation. At one time it was thought that State was mainly concerned with the maintenance of law and order and the protection of life, liberty and property of the subject. Such a restrictive role of the State is no longer a valid concept. Today we are living in an era of a welfare State which has to promote the prosperity and well being of the people. The Directive Principle of State Policy lay down certain economic and social policies to be pursued by the various governments in India. They impose certain obligations on the State to take positive action in certain direction in order to promote the welfare of the people and achieve economic democracy.

Since we know that the concept of the welfare state is largely discussed in the Directive Principles and Fundamental Rights of Constitution of India. The phrase “economic and social justice” under Art.38, which would promote the welfare of people, had acquired a meaning, which is conveniently described by the phrase ‘welfare state’. As defined in Collins English Dictionary, the definition of Welfare State as follows “a system in which the government undertakes the responsibility for providing for the social and economic security of its population, usually through unemployment insurance, old age pensions and other social security measures.”

In his speech in the Constituent Assembly Dr. B. R. Ambedkar repeatedly said that the main object of Directive Principle of State Policy are to set standards before the legislature and the executive, the and the other authorities, by which the success and failure can be achieved. These are of social, economic and political nature. In other words they are positive Human Rights. But the Fundamental Rights and Directive Principles of State Policy are different in the Constitution of India. Where Fundamental Rights are justiciable and Directive Principle are non-justiciable. It means if some person infringes others Right to freedom of free speech under Article 19(1)(a), the person may file a suit against the violation of his fundamental right and it will be the duty of the State to protect that individuals interest but if some right provided under Directive Principle of State Policy for instance, Right to work under Article 41, is not given to an unemployed person, he can not sue the State for it.

\(^7\) Kesavananda Bharti v. State of Kerala (1973) 4 SCC 225
Directive Principles are those rights, which the State needs to provide to all but due to some economic reason the State is not willing to do so. In landmark judgment of Kesavananda Bharti, the Supreme Court has said that “fundamental rights and directive principles aim at the same goal of bringing about a social revolution and establishment of a welfare State and they can be interpreted and applied together. They are supplementary and complimentary to each other. It can well be said that the directive principles prescribed the goal to be attained and the fundamental rights lay down the means by which that goal it to be achieved.” The Supreme Court in above judgment explained that directive principles are interconnected, that they are related to each other. In the cases of State of Madras v. Champakam Dorairajan792 and In re Kerala Education Bill, 1957, the words used in Art. 37 were not analyzed and the fundamental rights prevailed over the directive principles. But from F. N. Balsara v. State of Bombay793, things changed and the Supreme Court said that the directive principles were in the nature of an instrument of instruction, which both the legislature and the executive were expected to respect and to follow. In later period, whether it was Minerva Mill’s case794 or Randhir Singh v. Union of India795 or Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh796, the Courts while delivering the judgments started taking cognizance of Directive Principles. Directive principles of State Policy provide guidance for interpretation of Fundamental Rights as also the statutory rights. In a number of decisions the Supreme Court has given many Directive Principles of State Policy, the status of Fundamental rights. In Unnikrishnan v. State of A.P.797 (1993) 1SCC 645, the directive principle contained in Article 45 has been raised to the status of fundamental rights. It has been that the children from the age of 6 year to 14 years have fundamental right to free and compulsory education. Similarly, ‘equal pay for equal work’ has been held to be a fundamental right in Randhir Singh v. Union of India798, AIR 1982 SC 879, and therefore enforceable in Courts. In M.H. Hoslot v. State of Maharashtra799, it has been held that legal aid and speedy trial are fundamental rights under Article 21 available to all prisoners and can be enforced. If we look towards the Judgments of the Courts regarding Article 21 of the Constitution, the embed of it has become so large that all the human rights which necessary for living of a person and all the duties of the State to make a better life of its citizens are embodied in it.

Conclusive Remarks

The idea of adding of the Directive Principles to the Constitution of India was to provide the State a path to walk towards the welfare State. But due to weak economy and backward technology the idea of being a welfare State is still waiting. Although, now it is not justified to say that India is a weak Economy and backward in technology, today we have sufficient means to proceed towards a Welfare State. Now the time has come to achieve the dream of our Constitution framers and our father who built this great nation. This is the right time to move towards the revolution to change parameters and imply the directive principles as mandatory rights. The amendment in the Constitution is required

792 AIR 1951 SC 226
793 AIR 1951 SC 318
794 AIR 1980 SC 1789
795 AIR 1982 SC 879
796 AIR 1985 SC 652
797 AIR 1993 SC 217
798 AIR 1982 SC 879
799 AIR 1978 SC 1548
to bring the directive principles within the judiciable force.

However, the Judiciary has started the revolution of making the directive principles enforceable. Now it is our duty to give enough support to the judiciary. Once this dream was seen by the great American President but unfortunately it was not succeed. Today we are standing at such time and we can make our dreams to come true, our dream of being a great nation, our dream of having higher standard of living, our dream of being prosperous. This revolution may lead to fulfill our dreams and it will also be the best tribute to our Constitution maker and to those who built our nation.
ONE PERSON COMPANY

By Ram Sharma
From Symbiosis Law School, Pune

Introduction

One person at a time, one company at a time

- By Marc Benioff

Even though the term company has no technical or legal definition or meaning, the same is defined under the Companies Act, 2013 as a company formed and registered under the Companies Act. The same may be referred to as any legal device which is used for the attainment of any social or economic end, and has a legal personality of its own. The companies can be divided into various classifications, one of the most important classifications being on the basis of ownership. Under this classification, one of the types of companies is one person company.

Talking about One Person Company, such companies were introduced in light of the recommendations made by the JJ Irani Committee and incorporated in the Companies Act 2013, which gave such companies great importance to such companies to ensure that small private companies were provided with greater flexibility for carrying out its operations.

They have been defined by the Companies Act as a company which has its own legal identity, has only one person as its member and for the functioning of the company, only one director is necessary. Such a company can be incorporated in the form of a private company for any type of lawful purpose, which has to be registered with the Registrar through a written consent. The one person can also be substituted by some other person after the member gives notice and informs about such a change to the company and Registrar, to avoid any kind of confusion or chaos in the company.

Another important aspect which needs to be considered is that Director of the Company and the Nominee Director, both are required for the incorporation of the company. Along with that, all the shares of the company can be held by the sole member only, and any OPC can be converted into a private or a public company by increasing the number of members.

**VOLUNTARY CONVERSION OF OPC INTO PRIVATE/PUBLIC COMPANY**

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800 Stanley, re.(1906) 1 Ch 131,134
801 Companies Act,2013, S.2, Cl.(20)
803 Ministry of Company Affairs, Report of Expert Committee on Company Law, May 2005
804 Companies Act,2013, S.2, Cl.(62)
805 Companies Act, 2013, S.149,Cl.(3)
806 Companies Act, 2013, S.3, Cl.(1)
809 Companies(Incorporation) Rules, 2014, Rule 7
The different types of OPC are-
- OPC limited by shares
- OPC limited by guarantee
- OPC limited by guarantee and share capital
- OPC unlimited with share capital
- OPC unlimited without share capital

Now an important question which is in front of us is that whether the system of OPCs been successful in our country?

Looking at the statistics, we see that in India today there are more than 10 thousand OPCs which are registered in India, with a collective authorized capital of more than 350 crores. But even though the OPCs have reached a large number in terms of registered companies, they are still less than one percent of the total incorporated companies. This implies that even though there is a large number of OPCs in our country, the same is not preferred to be the best type of company to undertake your business with.

Blue represents One Person Companies (0.81%) and Red represents other type of registered companies (99.19%)

Features
The features of a One Person Company are-

1. Nature: The one person company is usually private in nature.
2. Number of Members: There is only one member of the company, who also acts as the sole shareholder of the company. Being the sole shareholder, he has the power of determining the administration of the company.
3. Nominee: During the time of the registration of the company, a nominee needs to be appointed by the member of the company. The nominee will become the member of the company in the event of the death of the member or in case of a situation where the member can’t function in a proper manner, rather than some family relative of the member taking charge in his place. It is then upon the nominee to either accept or to reject the appointment as a member.
4. Number of directors: For a one person company, only one director is necessary for carrying out the functions of the company. But the maximum number of directors which can be appointed for the company is 15.
5. No minimum amount of paid- up share capital: Paid up capital refers to the

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810 The Economic Times, Nearly 17 lakh companies registered till September end, Updated: Nov 01, 2017, 01.41 AM IST (https://economictimes.indiatimes.com/news/econo)

811 Bacha F. Guzdar v. CIT, (1955) 1 SCR 876
amount of money which is received by a company in exchange for shares of stock from the shareholders. Under the One Person Company, no such minimum amount of paid up share has been specified for the incorporation of the company.

6. No minimum capital amount: No minimum amount of capital for the incorporation and registration of a one person company has been specified under the Companies Act, 2013. The main reason for the same is to promote and encourage small private companies to engage in business activities, and not to stop the same due to the bar of a specific capital amount.

7. Registration only by an Indian: The registration of the company can be done only by an Indian citizen or a national of India. The same can’t be managed by any NRI or foreign national.

Disadvantages
Along with all the features and the advantages, the one person company have a lot of disadvantages as well. Some of them are-

1. Autocratic Rule of Member: A one person company can often go on to become autocratic in nature, with the sole member not being accountable or answerable to any person in the company.

2. No more than one OPC: No person can be allowed to make more than one OPC or become the nominee of more than one OPC.

3. Non banking activities: Any OPC can’t carry out any type of non banking financing activities. The same also involves putting the shares of the company in any other corporate body or investing in the shares of some other corporate body.

4. No rights to a minor: No minor can hold any type of shares in an OPC for beneficial interest. Along with that, any minor can’t become a member or a nominee of a One Person Company, even though there is no such legal bar in any other type of company.\textsuperscript{814}

5. Compulsory conversion: Any OPC is to be compulsorily converted into a private or public limited company within 6 months after they reach the threshold limit of turnover, which is 2 crore rupees.\textsuperscript{815} Due to this, the OPC often loses its identity after it reaches this threshold.

6. Section 8 companies: An OPC can never be converted into a company under Section 8\textsuperscript{816} of the Companies Act.

7. No FDI: An OPC will not allow FDI from any country and will lose out on its own nature, if the same is allowed.

Privileges-

Being a company with just one member, such companies often enjoy a lot of privileges. Some of these privileges are- 

1. The one member of the company has the sole authority to take any type of

\textsuperscript{812} Aashna Jain, \textit{An Expository Analysis of One Person Company Concept: Is it an Arrow Shot in the Dark or is it Serving its Purpose}, 2015

\textsuperscript{813} Companies(Incorporation) Rules, 2014, Rule 3

\textsuperscript{814} Dewan Singh v. Minerva Films Ltd. (1959) 29 Comp Cases 263 (P&H)

\textsuperscript{814} Dewan Singh v. Minerva Films Ltd. (1959) 29 Comp Cases 263 (P&H)

\textsuperscript{815} Companies(Incorporation) Rules, 2014, Rule 6

\textsuperscript{816} Companies Act, 2013, Sec.8

\textsuperscript{815} Companies(Incorporation) Rules, 2014, Rule 6

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\textsuperscript{814} Dewan Singh v. Minerva Films Ltd. (1959) 29 Comp Cases 263 (P&H)

\textsuperscript{815} Companies(Incorporation) Rules, 2014, Rule 6

\textsuperscript{816} Companies Act, 2013, Sec.8

\textsuperscript{814} Dewan Singh v. Minerva Films Ltd. (1959) 29 Comp Cases 263 (P&H)
decision in relation to the working and functioning of the company.

2. In the Companies Act, specific emphasis is given on the contracts which are entered by One Person Company with the sole member of the company.818

3. The provisions of the Chapter VII of the Companies Act, Section 98819 and Sections 100 to 111 will not apply on such companies, which talks about the management and administration of the company. This implies that the administration and the management of the company takes place in a much more independent manner.

4. Such one person companies find it very easy to get a loan from the banks to a certain limit without depositing any type of security. Furthermore, very low rate of interest is charged on such loans. A loan may even be given if the OPC has a bad credit rating.

5. Any type of remuneration which is paid to the director of any OPC will be treated as a deduction as per the income tax law of the country, giving tax flexibility and saving benefits to the company.

6. Along with this, it is not necessary to present a report at the Annual General Meeting.

7. If the buyer of the OPC is to receive any payment, and the same is being made after a stipulated time period, then the buyer is entitled to charge interest on the same.820

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### Difference between One Person Company and Sole Proprietorship

Even though the OPC and Sole Proprietorship may be conceived to be similar in nature, there are many differences between both of them. Some of the differences are-

<table>
<thead>
<tr>
<th>Basis</th>
<th>One Person Company</th>
<th>Sole Proprietorship</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registration</td>
<td>Registratio n needs to be done under the company act</td>
<td>Registration is not necessary</td>
</tr>
<tr>
<td>Liability</td>
<td>Limited liability of owner as company is a separate entity</td>
<td>Unlimited liability as the assets of owner may be used to pay off a debt</td>
</tr>
<tr>
<td>Taxation</td>
<td>Same will be taxed in the manner of private limited company</td>
<td>Same will be taxed in the manner of individual income</td>
</tr>
<tr>
<td>Succession</td>
<td>Succession is often by nominee appointed by member</td>
<td>Succession may be through will or perpetual succession</td>
</tr>
<tr>
<td>Legal Status</td>
<td>Separate legal entity</td>
<td>Not a separate legal entity</td>
</tr>
</tbody>
</table>

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818 Companies Act, 2013, Sec. 193  
819 Companies Act, 2013, Sec. 98  
820 Enterprises Development Act, 2006
International Perspective

Just like India, the concept of One Person Company has been adopted in many other countries as well. Some of the example of the countries which adopted the concept are-

i) **United States of America**
   - All such corporations are lawful in United States and provided with full limited liability protection.
   - The owner must a natural US citizen
   - They may be taxed as an entity or as a corporation, whatever the owner may deem fit.

ii) **Singapore**
   - A company in Singapore may be registered by a single shareholder as well. Such a shareholder can be an individual or a corporation.
   - There is no requirement of the shareholder to be a resident or national of Singapore.\(^{821}\)
   - The liability of the shareholders is limited to the amount of the shareholder.
   - No amount of minimum capital is required for the incorporation of such a company.

iii) **China**\(^{822}\)
   - The sole shareholder may be a natural or a legal person.
   - The minimum amount of capital required for the incorporation of a company is 10000 RMB

   - Natural persons can invest only in one company, and the company can’t invest in any other one member companies.

iv) **Russia**
   - The company is known as Russia Limited Liability Company (LLC).
   - The LLC should have atleast one shareholder or member.
   - The registration process is to be completed in about thirty days.
   - The minimum authorized capital for the same is of 330 US Dollars.

**Landmark Case**

One of the most important cases in relation to the One Person Company is of *Saloman v. A Saloman & Co. Ltd.* \(^{823}\). Passed by the House of Lords, the case was responsible for setting up a precedent which went on to evolve as the concept of one Person Company.

The facts of the case are that Saloman transferred his business to a company named Saloman & Co., the price for which was paid through shares and debentures. After a point of time, Saloman came to recover the amount when the business failed.

Now the issue in question was that can a controller or a shareholder be held liable for a debt higher than the capital contribution. When the case went to the Court of Appeal, it was declared that the company formed in the present case has been formed against the provisions of law. But when the case went to the House of Lords, the ruling was reversed and held that the company is an

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\(^{821}\) Pearlie Mc Koh, *For Better Or For Worse — The Statutory Derivative Action In Singapore*, (1995) 7 SAcLJ 74

\(^{822}\) Special Provisions on One Person Limited Liability, 2013,Sec. 3

\(^{823}\) [1896] UKHL 1
independent person with its own rights and liabilities.

This case not only recognized the concept of one person company, but it also gave them separate legal identity.

**Conclusion**

To conclude, we can say that one person companies play a very vital role in promoting new businesses and to help them prosper in business. Along with that, the same involves very less formalities as compared to other type of companies and privileges like low taxation etc. But, on the other hand, the member often has to face a lot of restrictions if they are made the member or nominee of one OPC, which often acts as a major hurdle for them. So, some changes need to be made to ensure that such companies function in a better and proper way. Some of the suggestions are-

- The compulsory conversion of the company into a private or public company after a threshold is reached needs to be changed to ensure that the identities of such companies is not lost.
- The FDI which comes to such companies needs to be allowed to ensure that the companies may profit more.

After incorporating some more changes the concept of one person company may work in a much better way than it works at the present time.

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TECHNOLOGY IN SPORTS AND LEGISLATIONS RELATED TO IT

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ABSTRACT
Sports in India have been pursued like a religion. Its scenario has changed over the years. The UN has acknowledged sports as a method for promoting health, education and development and so there is a need of proper law framework. This paper talks about how there was negligible adjudication in the field of sports and how there have been advancements in this field. Many laws and legislations have been enacted in this field in India yet there are certain shortcomings in our Indian legal system in this context. This paper also mentions the existence of international bodies and their adjudication process. This paper talks about the use of technology and technological developments in the field of sports. This paper also talks about doping and discusses anti-doping laws and rules. Doping is the use of drugs which enhances the performance of the player. It increases the performer’s red blood cells and stamina which increases their capacity and endurance. It also mentions some anti-doping agencies, like WADA, NADA and USADA, their working, rules and regulations. WADA is in charge of updating and publishing the list of prohibited substances. If an athlete has a legitimate medical reason to use one of the banned substances a Therapeutic Use Exemption (TUE) may be granted only after review. It mentions substances prohibited at all times and prohibited in-competition and in particular sports. The purpose of International Standard for Testing and Investigations (ISTI) is to plan for effective testing. This paper talks about sports betting and discusses its good and bad sides. This paper gives us a complete understanding of sports and related matters in today’s world.

TECHNOLOGY IN SPORTS AND LEGISLATION RELATED TO IT:
The usage of technology in sports is eminent and proves to be the safest and dependable option for making sportsman aware of its utility and application for the betterment of their respective skills. Some people oppose to the involvement of technology in improving performance of sportsman but in reality it is inevitable. Research and development in the field of sports industry itself creates opportunity for investment and employment. The history of technology in sport is lengthy as well as complicated. It has disrupted careers of many for using it in a feigned way, built success for people using it in benevolent manner. By allowing any of these evolutionary steps it is likely to trigger a debate regarding the importance and limits of progression towards technological development.

The prominent advancements in modern technology have had a significant influence on sports, includes, analyzing performance of sportsman also providing the coaches with an opportunity to greatly improve the standard of feedback to players, athletes, enhance the preciseness of time measurements of performance given by sportsman, enabling referees as well as umpires and sport officials to give better decisions and instructions on violation of the rules, improvements in the design of sport equipment and apparel.

Lastly, accommodating the spectators with better viewpoint of sports performances. Emerging sporting equipment are currently
undergoing research and development to enhance performance of sportsman. Some of them include full body swimwear, made up of polyurethane, made a remarkable impact in the Olympics 2008 but got banned a year later as it was making a difference to performance of sportsman, raving cycles and rowing shells which are made up of lightweight but strong materials that reduce the dragging though the air or water, technology in racing cycles used by sportsman in cycling races like tour de France and many more like it.

In football, for instance, new devices are used for different reasons such as to help referees in decision-making and to quantify the athletes’ performance during a game, thus helping the coach to set the training program and the game strategy. One of the most famous and recent technologies introduced in football, is called ‘goal line technology’. It is used to determine if a ball has crossed the goal line, in order to support the referee.

Instead, as regards the quantification of the athletes’ performance during a football match, different kind of devices have been produced in the last few years. The video camera also became prevalent in the 1980’s and moreover, provided coaches with an option to capture and analyze sport performance way better than the earlier used methods. The video camera is perhaps the most important development in field of coaching in the modern phase of sport. Video cameras can be deployed in places such as car races, falling of cricket stumps, goal posts, and even placed on the athlete themselves. Nowadays electronic timing is controlled by computers is employed to mark the performance timings of sportsman in many sports like swimming, cycling, bobsled, Triathlon and many more. Electronic timing⁸²⁴ is also used in measuring and recording the athlete’s reaction time to the start of gun in case the athlete moves too early which are also the grounds for disqualification.

Hawkeye Technology, a computer system was for the first time used in 2001 for depicting the trajectory of a ball in cricket, has made multitudinous difference to the sport of Cricket. Hawkeye produces almost all kinds of statistical analysis done in cricket such as speed of ball, ball pitch on the wicket and the trajectory of the ball after bouncing off. Hawkeye is now prominently used in Tennis to assist in determining whether a shot falls ‘In’ or ‘Out’ category. The analysis of sport performance provided by Hawkeye has been greatly improved the spectator’s awareness and involvement. Wearable devices that are capable of monitoring heart rate have been further integrated with tracking technologies that also includes global positioning system (GPS), gyroscope sensors, which are used in describing the athletes’ movement and physical demands of the human body. Therefore, these new technologies can articulate the number of collisions and jumps that might take place during a match. These data-sets have become increasingly important for coaches, athletic trainers and doctors. In fact, coaches use them to provide better strategies for their team. Knowing exactly where and how their players move on the field, they can choose the best player for each position or change a player according to the opponents’ level. Athletic trainers try to use these data-sets to plan and strategize the training sessions of the athletes during pre and regular season, and develop technologies that can be used

⁸²⁴ https://www.freelapusa.com/what-is-electronic-timing-really/
by athletes to provide them with measurable training routines, specifically for each athlete. For example, some technologies have been designed in such a way to enhance both the physiological and psychological aspects of the game. Moreover, athletic trainers, team doctors and coaches can utilize heart rate and sensor data in a way to prevent injuries when players are about to initiate and exceed their physical thresholds.

ACCESSIBILITY:
The equipment employed to perform a sport is considered as a huge factor in determining its success as well as levels of participation. Novel and thought-provoking technology might keep us engaged with a sport. But the main issue that is the cost and accessibility needs to be kept under supervision for it to remain accessible. If we are making sports equipment and technology deployed in it too exquisite then it is expected that only very few future athletes will participate. If the equipment used is technically inefficient to use then amateur sportsman will have to move onto other resort. Stand up paddle-boarding, for example, is the world’s fastest growing water sport. But there is no attention made to the body governing it or equipment specification manuals about the length or width of boards. Board width helps in determining how stable the board is when paddled upon and therefore how much skill is required in balancing it, and how the person needs to operate it accordingly. The narrower the board is, the speedier it will move, but it would make it more challenging to use it. Make it wider and raw the sportsman’s performance will suffer.

SAFETY:
We have to seriously analyze the impact of technological progress on safety. As we all know that the headgear used in amateur boxing was eventually used to provide extra protection to its athletes. But we also have to think about the unintended consequences. While headgear has obviously minimized the severity of head injuries, it can also provide a boxer with invulnerability. This might be sufficient to explain the reason behind no reduction in the number of recorded head injuries since headgear was introduced. Ultimately, a balance has to be struck between technologies that facilitate a sport and those that empower it. Empirical science often has to be coupled with philosophical debate. In the case of runners with an amputation, it isn’t just about how a prosthetic limb performs. It thereby challenges the approach towards disability and how proximately humans should bespeak with technology. Technology is there to expedite a sport and also to challenge the bar of our performance. But this has to be mitigated with caution and alertness to ensure that a sport remains fair, safe and handy. It can be argued that the use of new technologies is changing not only the way of training players and playing their sport, but also the whole experience of living and watching sport on TV across the globe.

EVERYTHING ABOUT SPORTS LEGISLATION IN INDIA:
There are no central or state legislations in India to regulate sports. The government set up ministry to regulate different sports events that take place in India. The paddle or one's hands.

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825 The sport of lying, kneeling, or standing on a paddleboard or surfboard and pushing oneself through the water with the help of a
administration of sports is in the hands of autonomous bodies such as, Sports Authority of India (SAI), Indian Olympic Association (IOA), Hockey India (HI) and Board of Control for Cricket in India (BCCI). These governing bodies receive government’s aid and are also registered under the Societies Registration’s Act of 1860. The following govern the whole of the Sports Law:

- **National Sports Policy, 1984/2001**

This act was laid down to raise the standard of sports which was degrading due to corruption, betting etc. The bill of 1984 was incomplete. Its implementation was not complete, so the bill was revised in 2001. The guidelines are three-fold:

- Firstly, to earmark the areas of responsibilities which different agencies have to undertake to develop and promote sports.
- Secondly, to lay down the procedure to be followed by the autonomous bodies and federations to make the assistance and aid by the government available.
- Thirdly, identifying the sports federation that is eligible for coverage under these set guidelines.

The government aims to achieve excellence in sports. And it was only after this policy that the lawmakers realized the importance of sports and therefore ‘Sports’ was included in the Constitution in the State list of the Seventh Schedule.

- **Sports Law and Welfare Association of India:** It is not for profit organization that works for promotion of ethical sports in India. It provides consultancy services on matters concerning sports, like IP issues in sports, sports policy, sports injuries etc. It provides a legal forum wherein the legal practitioners set rules for ethical sports.

- **Sports Authority of India:**

SAI is an apex National sports body set up by the Ministry of Youth Affairs and Sports in 1984 for achieving excellence in sports in India. It is located across 9 regions at Bangalore, Gandhinagar, Chandigarh, Kolkata, Imphal, Guwahati, Bhopal, Lucknow and Sonepat and two Academic institutions like Netaji Subhash National Institute of Sports (NSNIS), Patiala and Laxmibai National College of Physical Education. It is also engaged in activities like providing coaching and spreading awareness about physical education.

- **The Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act:**

This act was passed in 2007 to encourage a large audience by providing access to listeners and viewers. It covers all sports events which are of national importance through Prasar Bharti. This act provides that no content owner or holder or TV or radio broadcasting service can carry out a live TV broadcast of the sports events. For doing this, it has to share its live broadcasting signal simultaneously (except advertisements) with the Prasar Bharati.

- **National Sports Federation:**

It undertakes the task of management, direction, supervision, regulation, promotion, development and sponsorship. They are expected to discharge these responsibilities in adherence with the Olympic Charter or the Charter of the Indian Olympic Association in compliance.
with Government guidelines applicable to NSFs.

- **SAI:**

The SAI provides support to NSF for the identification, training, and coaching of sportspersons, also to improvise infrastructure, equipment, and such other facilities. It also releases funds to NSFs against proposals approved by the government.

**DOPING:**

Doping has become a prominent and convoluted issue in the modern sphere of sports, which deserves serious considerations well as attention in every problem arising due to it. As specialists and experts are still trying to find the origin as well as how and why it happens, and how to subsequently stop it.

The reason behind the cases of doping and why it compromises the credibility of performance in sports, the victories of some sportsman is becoming questionable and disputable. Nowadays some sporting disciplines have made it possible in surpassing the human limits as well as the legal limits. Some reasons have been indicted and believed to be acting as a contributor to the use of doping as a prevalent technique like the financial interests, the pressure to get good and better results, and the media influence used in sports competitions.

Nowadays, we all have noticed that sports have ceased to remain just sports. Sports has become part of or we can say has managed to become a whole industry, a business, a political reason for national pride, and these facts can only lead to violation of any rules to win.

The doping phenomenon in sports is becoming a prominent and a complex issue, as are the drugs used under this phenomenon. There is an increased and constant competition among those who try to invent new doping techniques and procedures and sports ethics organizations that are investing in the research and development areas for more methods to detect them. Unfortunately, the former is always a one step ahead.

Improving scientific methods which are used to detect prohibited substances is of course a necessity as well as a challenge. Stricter laws with the involvement of authorities are required to prevent the spreading, marketing and usage of these substances.

Doping techniques were first also used in the Roman Empire, where the racing horses were doped with different blends of substances aimed at increasing their speed and stamina and health. 1928, the International Athletics Federation (IAF) was the first international federation to ban the method called as ‘doping’ in every athletic competitions, 32 years later anti-doping testing method was implemented in the field of sports.

The Olympics considered as grandeur in the field of sports, the first official controls took place at the 1972 Olympic Games in Munich for conventional substances. Anabolic steroids were one of the first substances to be controlled at the 1976 Olympics that took place in Montreal and as a result number of athletes were disqualified and lost their medals. This event made is necessary for the International Olympic Committee (IOC), which further stated that the results of doping tests are bound to be made public within the competition.

This was the beginning of an open altercation that began in the 1980s between those who were seeking and searching for
new doping substances that were till then not mentioned in the anti-doping list and the authorities that were trying to detect these substances.

In modern sports, many athletes have been accused and tested positive with use of forbidden substances, perhaps the most famous case being that of Canadian Ben Johnson, the 100 meters runner for the usage of anabolic steroids. It was the first doping scandal in the history of the Olympic Games, which eventually led to Johnson’s suspension for two years and then for life, because he occurred to test positive again in 1993.

Currently, violation of the following rules would fall under doping: the use or attempt to use a forbidden substance that is use of substances mentioned under the anti-doping list or a prohibited method, refusal for sampling after receiving an invitation to doping control in accordance with anti-doping rules, avoidance of sampling, falsification or attempt to falsify any part of the doping control, possession of prohibited substances and / or methods, trafficking or attempted trafficking of any prohibited substance and / or methods.

EVERYTHING ABOUT WORLD ANTI-DOPING AGENCY:
The World Anti-Doping Agency (WADA) was established in 1999. It is an international agency composed and funded by governments all over the world. Its activities are scientific research, education, development of anti-doping capacities. Its aim is to create a doping free sports environment. The first world conference took place in Switzerland which resulted in Lausanne Declaration on Doping in Sport. Pursuant to this, WADA was established. There are representatives from public authorities and public movement.

Similarly, NADA conducts these activities in India. It adopts anti-doping policies and rules which conform to the World Anti-Doping Agency. It is formed by the Union Government under the Societies Registered Act. It included scientists and representatives from Indian Olympic Association.

WADA has World Anti-Doping Code which is a core document that harmonizes rules, regulations, policies within sports organization and public authorities. It harmonizes anti-doping efforts worldwide. More than 660 sports organization have accepted this code. They are called the signatories. These organizations include the International Olympic Committee (IOC), the International Paralympics Committee (IPC), all International Federations (IFs) and all IOC-recognized IFs, National Olympic and Paralympics Committees, National Anti-Doping Organizations. These signatories have to undertake 3 steps in order to comply to the code i.e., acceptance, implementation and enforcement. Acceptance means that the signatory agrees to the principles of the code. Then in the implementation process the anti-doping organization amends its rules and regulations so as to incorporate all the mandatory articles of the code. Enforcement refers to the organization actually enforcing its amended rules in accordance with the code. WADA monitors all of this.

There are certain drugs which enhance the athlete’s performance which enables them to perform better than other athletes. It increases the endurance of the athlete by decreasing the sensation of fatigue. The use of such drugs to increase the endurance is considered unethical and therefore it is prohibited. Also these drugs can be life threatening in the long run. It has many side effects on the athletes like impaired liver function, baldness, heart failure etc.
WADA publishes every year the World Anti-Doping Code Prohibited List. This list was originally published in 1963 and since 2004 WADA is in charge of publishing the list. There are different groups in the list of the substances that are banned at all times i.e. in and out of competition and those that are banned in competition and those that are banned only in particular sports.

Substances prohibited at all times:
- **S0. Non-approved Substances**
- **S1. Anabolic Agents**
- **S2. Peptide Hormones, Growth Factors and Related Substances**
- **S3. Beta-2 Agonists**
- **S4. Hormone and Metabolic Modulators**
- **S5. Diuretics and Other Masking Agents**

Substances prohibited in competition:
- **S6. Stimulants**
- **S7. Narcotics**
- **S8. Cannabinoids**
- **S9. Glucocorticosteroids**

Substances prohibited in particular sports:
- **P1. Alcohol**
- **P2. Beta-Blockers**

**TUE:**

There are certain substances on the WADA’s prohibited list that an athlete may need to take due to illness or some medical conditions. Such a practice shall not be considered anti-doping rule violation. If it is consistent with the provisions of a Therapeutic Use Exemption (TUE) granted in accordance with the ISTUE\(^\text{827}\).

In order to not consider this as a violation of rules the athlete must have proper medical documents with sufficient medical data that shows that he meets the criteria for grant of TUE. For this purpose the athlete must make a TUE application to his relevant Anti-Doping Organization. But the athlete is required to show that the prohibited substances is needed to treat that particular medical condition without which he would suffer a serious impairment to health. And that prohibited substance should not produce any enhancement of performance. Although there may be some enhancement of individual performance as a result of the efficacy of the treatment, nevertheless, such enhancement must not exceed the level of performance of the Athlete prior to the onset of his/her medical condition.

WADA documents help the physicians to apply the criteria to the medical conditions of the athlete. The document is called the “Medical Information to Support the Decisions of TUECs“

**APPLICATION PROCESS:**

A TUE is required for all treatments involving prohibited substances. All the articles regarding the process are laid down in International Standard for Therapeutic Use Exemption (ISTUE).

- **SUBMISSION:**

Any athlete who needs a TUE must apply as soon as possible.

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\(^{826}\)https://www.wada-ama.org/sites/default/files/wada_2019_english_prohibited_list.pdf

\(^{827}\)Code Article 4.4.1
• In case of substances prohibited in-competition only: the athlete must apply at least 30 days before his/her competition unless there is an emergency or exceptional situation.\textsuperscript{828}

• In case of substances prohibited at all times: The TUE application must be submitted as soon as the medical condition requiring the Use of a Prohibited Substance or Prohibited Methods is diagnosed. If the condition is diagnosed before the Athlete becomes subject to anti-doping rules prohibiting the Use of Prohibited Substances and Prohibited Methods, he/she should submit a TUE application as soon as he/she becomes subject to those rules, unless he/she is one of those Athletes competing only at national level or below who is permitted by his/her NADO to apply (if necessary) for a retroactive TUE.\textsuperscript{829}

All the forms of the Anti-Doping Organization must be either in French or English and any national language must be used. All the applications sent to WADA must also be in French or English or a translation of the application in French or English must be provided.\textsuperscript{830}

• SUBMISSION OF MEDICAL INFORMATION:

The athlete must submit all the appropriate medical information in French or English. The files received by the ADO must be translated in French or English before sending it to WADA.

\textsuperscript{828} ISTUE Articles 4.3 and 6.1
\textsuperscript{829} ISTUE 4.3(c)
\textsuperscript{830} ISTUE Article 5.4

• SUBMISSION OF APPLICATION:

The athlete applies to his/her National Anti-Doping Organisation (NADO) and International Federation (IF) using the TUE application available on ADO’s website.\textsuperscript{831}

The athlete then submits his/her TUE application to ADO via WADA’s Anti-Doping Administration and Management System (ADAMS) or in paper format using the appropriate TUE form in the latter case.

• APPROVAL:

The application is examined by the Therapeutic Use Exemption Committee (TUEC). The decision is taken within 21 days from receipt of all the documents and is communicated to the athlete in writing by the ADO.\textsuperscript{832}

• COMMENCEMENT OF MEDICAL TREATMENT:

The TUE becomes effective only when the ADO notifies that TUE has been granted.

• DOCUMENTATION:

The following documents must be attached with the completed TUE application:

- A statement by an appropriately qualified physician, attesting to the athlete’s diagnosis and need to Use the Prohibited Substance or Prohibited Method in question for Therapeutic reasons.\textsuperscript{833}
- A comprehensive medical history, including documentation from the

\textsuperscript{831} ISTUE Article 6.1
\textsuperscript{832} ISTUE Articles 6.7 and 6.8
\textsuperscript{833} ISTUE Article 6.2(a)
original diagnosing physician(s) (where possible) and the results of all examinations, Laboratory investigations and imaging studies relevant to the application.

Incomplete applications will be returned to the athlete for completion and resubmission.

- **REQUEST FOR ADDITIONAL INFORMATION:**
  
The TUEC may ask for additional information, examination or other information from the athlete or from his/her physician or other medical experts.

- **COSTS:**
  
The athlete is responsible for all the costs related to the TUE application.

**DURATION OF TUE:**

The TUEC assigns each TUE a start and end date, upon which the TUE expires automatically. If the Athlete needs to continue to Use the Prohibited Substance or Prohibited Method after the specified end date, he/she must apply for a new TUE well in advance, to allow sufficient time for a decision to be made on the application before the existing TUE expires.

**SPORTS BETTING:**

Sports betting is a type of gambling that involves placing a wager, also sometimes referred to as a bet, based on the outcome or happening of a sporting event. The primary purpose of sports betting is to ancillary or extra money. A bet will have two possible outcomes. In either case one shall win a profit based on the bookmaker odds, or one may lose the wager.

As we all are familiar with the fact that sports betting also undertakes wagers on sports like rugby and tennis, it also involves betting on entertainment, such as the winner of variety shows, and in case of finance, such as interest rate changes.

**ORIGIN:**

The first ever record of sports betting dates back to a number more than 2,000 years ago. The Greeks’ immense penchant towards sports led them to introduce the Olympics to the world also the earliest records of betting taking place in athletic competitions.

From the Greeks, sports betting started to spread towards ancient Rome where it was accepted as well as legalized too. Romans used to bet on the gladiator games, and even when this ancient sporting event eventually became dormant, gambling did not leave its position and also started to spread to other kingdoms.

Later on, gambling became increasingly famous in England mainly in horse race betting. The English spread this practice like disease to the rest of the world, specifically US, where it rapidly became a favorite drudgery for many people.

Overall, gambling has continued to become a prominent practice worldwide and is very popular today, especially in the continents like Europe which has become the world’s enormous sports betting market. An increase in the variety and numerous categories of sporting events that people can easily wager on has also helped in improving the popularity of sports betting. Some of the sports one notices today were not even in existence more than a few centuries ago. Today, one can bet on a huge variety of sports.

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834 ISTUE Article 6.2(b)
835 ISTUE Article 6.5
836 ISTUE Article 6.6
variety of sporting events from soccer to American football and everything type of sports falling in between.

CONCLUSION:
We would like to sum-up the essence of the paper by stating that the modern developments in technology in the field of sports has helped India organically, and has led to recognition of India as a country on the global map. Like every coin has two sides we also expect the developments to bring with them the gaping holes. The legal use of drugs or the drugs listed under the WADA, NADA, etc. which may help enhance the performance of players, but on a flip side as a result of fierce competition doping is still a disease to be cured. However, technology helps such authorities to combat such problems.
PREVENTIVE DETENTION – THE WEAPON OUGHT TO BE PRESERVED

By Ritodeep Bhattacharyya
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Abstract: -
The Indian legal system standing in the twenty first century has one of the most unique and vulnerable provision in its system for keeping a check on the criminal activities happening in the nation. The provision which is of quite importance in today’s situation that is the preventive detention holds greater significance as this remedy brings in or prevents any future crime which might take place in future. If the detaining authorities are convinced that this particular individual in future might commit some cognizable offence which would ultimately disturb the national security or the law and order of the country, then the authorities can take that individual under detention so as to prevent the same. It is basically an anticipating measure to prevent the loss of life and property to the fullest. The increasing rate of crime in today’s generation has seriously brought up the need of preventive detention which can potentially become an asset so as to bring down the rate of criminal cases in India.

However, it is quite unfortunate to mention out the ground level reality that this extraordinary relief has been repeatedly misused by various police personnel and other detaining authorities in today’s time. This misuse is taking place in the society with various establishments of false and fabricated facts which is ultimately leading to the serious infringement of the fundamental rights of the individuals who are detained without any justifiable reasoning. The article therefore focuses on the legislative objective behind this provision and various other judicial pronouncements wherein the courts of India has defined the provision at its depth and its degree of consistency with the fundamental rights guaranteed under the Constitution of India.

Introduction: -
The preventive detention, under the present situation of the society is considered as one of the pivotal weapon to regulate the law & order situation of our country. This constitutional provision has gained immense importance in today’s society as well as from the time of independence, it allows preventive detention of a person if the authorities are convinced and satisfied that the particular is a threat to national security or law and order. The main object behind this provision is to prevent the individual from committing a suspected prospective crime.837. It is for the national security that the suspected is confined for a particular period of time so as to prevent a crime which would have affected thousands of common people. An individual can be detained under these provision for a time period up to 12 months however, the state government needs to be intimidated as soon as possible that a person has been detained under the National Security Act. Various International forums are not in support of the provision enshrined under the Indian legal system. As India is one of those few democratic countries in the world whose legal system allows for preventive detention to take place in regular affairs of the country. Various global organisations in various instances have pointed out that the safeguards enshrined under the Constitution of India is not in adequate to https://www.gktoday.in/gk/article-22-and-preventive-detention-in-india/
upheld the fundamental rights of the citizen. The South Asia Human Rights Documentation Centre in its submission in August, 2000 recommended to the Indian officials and its government to delete all those provisions from the legal system which allows preventive detention. They are of the firm opinion that the weapon of preventive detention enshrined under Article 22 strikes a fatal blow to the fundamental rights of the citizen, it takes away the personal liberty of an individual which is considered as one of the backbone of a democracy. The European Court of Human Rights in its various statements clearly made out the point that preventive detention is illegal and unconstitutional under the European Convention on Human Rights regardless of the safeguards provided by the supreme source of law of the land. Legislative Objective: -

The Madras High Court in the case of Mariappan v. The District Collector and Ors838, stated in its judgement that the object of detention is not to punish, but to prevent the commission of certain crimes so as to bring out a safer society for the citizens. The prevention is from doing any act which affects the public interest at large. The suspicion or the satisfaction of the detained authority is a question of fact which is depending on the facts and circumstances of the particular case. the danger or the alleged activity should basically cover the following few areas: -

I. Foreign Affairs,
II. Public order,
III. Security of the state

However, this provision which is in force today in India had to face a lot of criticism and hatred as this weapon brings a direct attack on the fundamental rights of a citizen guaranteed by the Constitution. Such legislative objective was considered unconstitutional and barbaric for the welfare of the society. England, has eradicated this provision and applies this principle only in cases of national emergency, in those type of situations wherein some particular individuals becomes a threat to the national security and attempts to jeopardise the countries integrity. India, being one of the biggest democracy holds this provision in its system in its regular affairs of the nation so as to maintain the constitutional machinery of the democracy. The philosophy behind India keeping these provision as a regular element in its security system is that India is a multi-structured country comprising of various languages, religions, caste etc. where in communal violence has become an unfortunate regular locus. The Indian independence history also states that during the time when the Constitution came in force, this provision was very much required. The following statement made by Dr. Bhirao Ambedkar clearly establishes the importance of these provision. He said, "...... in the present circumstances of the country, it may be necessary for the executive to detain a person who is tempering either with the public order or with the defence services of the country. In such case, I don't think that the exigency of the liberty of an individual shall be above the interest of the state"839. The legislative object of the preventive detention laws got its constitutional sanctity subsequently and was incorporated in the Part-III of the Constitution of India840, therefore, it is irrelevant to compare the conditions of various nations as each and every country

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838 H.C.P.(MD) No.244 of 2014
839 https://www.gktoday.in/gk/article-22-and-
has their own unique identity and issues, the societal evolution of different nation remains completely different from each other which therefore, needs different remedies so as to uphold the harmony of the society and to make sure that the multi-structured citizens of our country lives happily without the fear of crime. Article 22 of the Indian Constitution provides that the person who has been detained under the preventive detention shall have the constitutional right to have his representative against his reviewed by the advisory board appointed. If the advisory board comes up with the finding that the detention is false and not justified, then the detained must be released immediately without any further time waste. However, if the board finds out same material in it and states that the detention is justified, then it is on the government to decide for the time period of the detention of the individual. The advisory board needs to finish its proceedings within the time prescribed by law, if there is a failure then it will lead to an automatic invalidity of the detention. The landmark judgement of the Supreme Court in the case of Ahmed Noor Mohammad Bhatti v. State of Gujarat upheld the validity of these provision and stated this provision as a pivotal step towards a safer society. The three – judge bench upheld the validity of the power of the police authorities under section 151 of the Code of Criminal Procedure 1973, to arrest and detention of a person without a warrant, to prevent commission of a cognizable offence, ruled that a provision could not be held to be arbitrary and unconstitutional.

The recent judicial pronouncement has clearly made out the point that illegal preventive detention leads up to the serious violation of fundamental right under Article 21 of the Indian Constitution. The personal liberty of an individual gets infringed and it leads to serious encroachment on the fundamental rights of an individual. In the

841 Appeal (crl.) 109 of 2001

The blatant exploitation: - However, this legislation with the passage of time has faced several criticisms from the nation due to various instances wherein this urgent and immediate relief has been blatantly misused by the authorities and the police. Various procedural exploitations have taken place wherein proper procedure was not followed and excessive time was taken which led to utter delay. The law has repeatedly come under various questions and arguments regarding its constitutionality. The Uttar Pradesh government in the month of January, 2018 released a report stating that it had detained 160 people under the National Security Act. However, it is quite unfortunate to mention out the fact that all those cases of detention had not been investigated and they are still pending. The Law Commission Report in this regard has stated that more than 14 lakh people were held under preventive laws in India, without any justifiable cause, maximum of these cases are still pending for the verdict. The exploitation and inhuman treatment of the detained people in India has led to the intervention of various International Human Rights Organisation and the Human Rights Commission of India to the issue, such inhuman treatment towards the detained has made India one of those barbaric nation which failed to show humanity towards the prisoners and the detained individuals.

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case of Prem Narayan v. Union of India Throu. Secy. Minister of Home Affairs & Ors. The division bench of Madras High Court clearly stated that an illegal preventive detention is an encroachment upon the personal liberty of an individual and it cannot be done in a casual manner. Hon’ble Justice Shabihul Hasnain and Hon’ble Justice Rekha Dikshit on 22nd December 2019, in its judgement clearly pointed out the fact that if any preventive detention takes place based on false or fabricated fact or evidence, it leads to a serious form of injustice and directly hits the personal liberty of an individual enshrined under Article 21 of the Constitution of India.

The court was of the firm opinion that if an act falls within the category of public interest, it should be of such nature which should disturb the ordinary tempo of the society, it should bring in certain unfavourable scenarios which will lead to certain crisis in the law and order situation of the country. If the ordinary criminal law of our country has the capability to efficiently deal with the present situation or the alleged activity, then the need to apply the course of preventive detention does not arise, thus it is an extraordinary relief which needs to be applied in exceptional situation wherein no other relief is available. The above mentioned case clearly establishes the point before the court of law that the present facts and circumstances and the arguments of the detaining authorities could not establish the alleged act as a threat to the public order or national security. It was a pure manipulation and influence on the part of the authority which is frivolous and fabricated in nature. This recourse always involves the element of political influence in it which cannot be completely ruled out or ignored but it is one of the prime duty of the executive body to make sure that there remains a minimal instance of political influence which will ultimately make this remedy a transparent weapon to curb the rising offences taking place in our nation.

In the case of Peham Ningol v. State of Manipur & Ors., the Apex Court of India clearly stated that if any of the grounds specified under the detention order are nonexistent, misconceived or irrelevant under the National Securities Act,1980, it will be invalid, unmaintainable and will directly hit the personal liberty of an individual. Therefore, this recourse needs to applied with utter efficiency and upon the true knowledge of the facts otherwise it will lead to a serious miscarriage of justice. The principle of Audi Alteram Partem considered as a principle of natural justice comes as a weapon to safeguard the victims of unlawful preventive detention by providing them the reasonable opportunity to be heard and defend themselves. The petition of Habeas Corpus also act as a defence for the petitioner in case of a an illegal detention.

Conclusion: -
The weapon of preventive detention is considered as one of the most critical tool to keep a check on the criminal activities that are taking place in the nation. When the Constitution came in force, the provision of preventive detention was of much importance. The unique feature of the Indian Constitution which provides for this provision during peacetime also faced various criticism from the nation and various global organisations due to the inadequacy and the exploitation faced by the individuals when they are detained by

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842  H.C.P No. - 27130 of 2019

843  S.L.P. (Crl.) No. 2555 of 2010
the various authorities. Various instances in India show up the fact that this provision is being blatantly misused which directly injures the fundamental right of an individual. Various political influences, agendas and various fabricated facts leads to exploitation of the provision at its peak level. At this situation, it is on the executives of the country to minimise this external influences as much as possible and tend to detain those individuals which are a real threat to the nation. All the law enforcing agencies needs to be regulated and properly checked so that these exploitations are decreased and all those safeguards which are provided in the Indian Constitution are applied with utter fairness so that the transparency of the mechanism appears on the face of the democracy. The Indian Judiciary also known as the temple of justice needs to intervene and make sure that these cases are dealt in a speedy manner so as to provide justice to those individuals who has been exploited blatantly and whose personal liberty has been jeopardised by the State.
A CRITICAL ANALYSIS OF CONSUMER PROTECTION ACT 2019

By S. Jothi Poorna
From Bharath Institute of Higher Education and Research

ABSTRACT
Consumer Protection Act (hereafter referred to as COPRA or “the Act”) is an act of the parliament of India enacted in 1986 to protect the interests of consumers in India. Now the COPRA 2019 has recently replaced the three decade old Act of 1986. COPRA intended to protect consumers, as well as the relationship between the consumer and producer and the dealings they engage in, with a view to enhance consumer rights in digital economy, expand the scope of grievances consumer complaint and ease the process of filing complaints, the government has introduced the COPRA 2019. The objective of this article is to understand COPRA, what are the differences between COPRA 1986 and COPRA 2019, what are the new changes in COPRA 2019 and the benefits of COPRA 2019.

KEYWORDS: COPRA, digital economy, consumer rights, consumer complaint.

INTRODUCTION
The COPRA 1986 is a piece of welfare legislation. In order to protect the consumers from exploitation and adulterated and substandard goods and deficient services the COPRA came into force on 15th April, 1986 and it applies to the whole of India except to the state of Jammu and Kashmir. The Act provides certain rights to the consumer and also the remedies in case of defects or deficiencies. Thus, the COPRA 1986 is a comprehensive legislation made by the parliament to protect the rights of consumer. In mid-August, the COPRA 2019 repeals the previous consumer protection legislation which had been in effect since 1986. This prior legislation had been amended time to time to bring it in accordance with changes brought about by economic liberalization, globalization of markets and digitalization of products and services. The 2019 COPRA brings about fundamental changes to the existing 1986 legislation. But it also envisages a Central Consumer Protection Authority and vests too much power and control in this authority without proposing adequate administrative safeguards.

CONSUMER

Who is a consumer
Section 2(d)/2(1)(d) defines consumer as any person who buys any goods or receives any services for consideration is called a ‘consumer’. It also includes a person used or using such goods or services with the permission of such buyer. Consideration may be money or barter or exchange or services etc. But the sale of goods Act1930 insists money only. Further, consumer is a person who uses the goods.

The COPRA 2019 has widened the definition of ‘consumer’. The definition now includes any person who buys any goods, whether through offline or online transactions, electronic means, teleshopping, direct selling or multi-level marketing. The earlier Act did not

845 Vijayasekhar .D.R.DR.; law of torts; Vijay law series; fifth edition;2017;
847 Ibid.,
848 Supra note 2 at [205].
specifically include e-commerce transactions, and this lacuna has been addressed by this New Act.\(^{849}\)

- **Who is not a consumer?**\(^{850}\)
  - A person is not a consumer if he/she:
  - Purchases any goods or avails any services free of charge.
  - Purchases a good or hires a service for commercial purpose.
  - Avails any service under contract service.

**CHANGES IN COPRA 2019**

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<thead>
<tr>
<th>PROVISIONS</th>
<th>COPRA 1986</th>
<th>COPRA 2019</th>
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<tbody>
<tr>
<td>Regulator</td>
<td>No separate regulator.</td>
<td>Central consumer protection authority (CCPA) to be formed.</td>
</tr>
<tr>
<td>Consumer court</td>
<td>Complaint could be filed in a consumer court where the seller’s (defendant) office is located.</td>
<td>Complaint can be filed in a consumer court where the complaint resides or works.</td>
</tr>
<tr>
<td>Product liability</td>
<td>No provision. Consumer could approach a civil court</td>
<td>Consumer can seek compensation for harm caused by</td>
</tr>
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<td></td>
<td></td>
<td>but not consumer court.</td>
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Table 0.1\(^{851}\)

**WHAT IS MEANT BY CONSUMER RIGHTS**

- The definition of a consumer right is the ‘right to have information about different aspects of a good or service such as its quality, quantity, potency, purity, price and standard’.\(^{852}\)

- **Consumer Protection Bill, 2019**

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\(^{850}\)Consumer court FAQ’S

\(^{851}\)https://www.economictimes.com/wealth/spend/heres-

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how-consumer-will-benefit-under-the-new-consumer-protection-act/article/show/70771305.cms

The Consumer Protection Bill, 2019 was introduced in Lok Sabha by the Minister of Consumer Affairs, Food and public Distribution, Ram Vilas Paswan on July 8, 2019. The Bill replaces COPRA 1986.853.

Existing rights of consumers

There were a total of 6 consumer rights which have been defined in the Consumer Protection Bill they are854:

- Right to safety.
- Right to information.
- Right to choose.
- Right to be heard.
- Right to redressal.
- Right to consumer education.

So in addition to the existing consumer rights, there are five new consumer rights they are855:

- Right to file a complaint from anywhere.
- Right to seek compensation under product liability.
- Right to protect consumers as a class.
- Right to seek a hearing using video conferencing.
- Right to know why a complaint was rejected.

COMPLAINT

Definition of complaint

Any person who buys any goods or receives any services for consideration is called a ‘consumer’. It also includes a person used or using such goods or services with the permission of such buyer. According to Section 2(1) complaint must be made in writing by complainant against856:

- Defects in goods.
- Deficiency in services.
- Excess of price.
- Hazardous goods, which are dangerous to life and safety.
- An unfair trade practice or restrictive trade practice.

In COPRA 2019 the government has introduced online portals for the consumers to make complaints easily thus saving time (E-filing of complaints).

Who can file a complaint

- The consumer
- Recognized consumer association through consumer
- Government
- One or more consumers in case of common interest.

REMEDIES TO AN AGGRIEVED CONSUMER: SECTION 14

- To remove the defect.
- To replace with defect-free goods.
- To refund the price.
- To remove the deficiency.
- To discontinue or not to repeat unfair trade practice.
- To stop the sale of hazardous good.
- To provide costs857.

NEW PROBLEMS AND NEW REMEDIES

- Changing business models can create new sets of problems for consumers.
- The COPRA 19 has introduced new concepts like product liability and protection against unfair contracts. This new framework expand the
scope of grievances that consumer can complain against.

- **Product liability**
  A consumer can claim compensation under a product liability action for a ‘harm’ caused to him due to deficiency in a product or service. Although, under the 1986 Act, the district, state and national commissions could allow claims as a result of mental agony, what qualified as ‘harm’ wasn’t specified. The 2019 Act provides a statutory ground to consumers by defining harm and injury to include stress and mental agony. A product liability action will lie against the manufacturer or design defects or if it deviates from manufacturing specifications or express warranties, said Swathy Satyaamurti, director of operations at Consumer Association of India.

- **Unfair contracts**
  A contract between a manufacture or trader and consumer will be deemed to be unfair under the COPRA 2019, if it causes a significant change in rights of consumer. Contractual terms which specify excessive security deposits, provide for unilateral termination or assignment without consent of other party are among the several grounds which render a contract unfair. The 1986 Act did not provide consumers with a single forum against such contracts.

- **False and misleading advertisements**
  Under the new law, a consumer can file complaint with the Central Consumer Protection Authority against any advertisements which gives or conveys false description of a product or service or contains a representation constituting an unfair trade practices etc. the authority can direct the Director General-its investigation wing-to investigate complaints against misleading advertisements by any person if a prima facie case is established against the advertiser.

- **Jurisdictional changes**
  Jurisdiction under 2019 Act will decide on the basis of ‘value of goods or services paid as consideration’ by the consumer. Enhancement of jurisdiction amounts at all levels reflects the escalation in commodity prices in the last 30 years said by Ashim Sanyal, chief operating officer of Consumer Voice.

**CENTRAL CONSUMER PROTECTION AUTHORITY**

The new bill, passed by the Lok Sabha proposes to set up a Central Consumer Protection Authority (CCPA) to tackle e-commerce frauds, violation of consumer rights, unfair trade practices and misleading advertisements. With the passage of the consumer protection Bill in the Lok Sabha shoppers come a step closer to initiating class action lawsuits over grievances such as refund and return of products. The new Bill, which would replace the COPRA 1986 aims to address consumer

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859 Id.,

860 Id.,

861 Id.,

vulnerabilities to new forms of unfair trade and unethical business practices in the fast-changing new-age economy. The current three-decade old law does not adequately cover the ecommerce sector or even direct selling. Under the Bill, there is provision for central government to set up a central Consumer Protection Authority (CCPA) to promote, protect and enforce the rights of consumers and it will be empowered to investigate, recall [faulty/unsafe goods and services], refund and impose penalties", the Ministry of Consumer Affairs, Food & Public Distribution said in a statement.

CONSUMER WELFARE FUND

- **Meaning**
  - Consumer Welfare Fund was created to promote and protect the welfare of consumer, to create consumer awareness and strengthen consumer movement in the country, particularly in rural areas. Amount of refund which is not payable to the applicant is credited to the Consumer Welfare Fund.

- **History**
  - The consumer Welfare Fund Rules were framed and notified in the Gazette of India in 1992, which have been incorporated in Consumer Welfare Fund Rule 97 of the CGST Rules, 2017. Consumer Welfare Fund has been setup under section 57 of the CGST Act, 2017. Earlier, the Central Excise and salt Act, 1944 was amended in 1991 to enable the Central Government to create a Consumer Welfare Fund (CWF) where the money which is not refundable to manufacturers and others is being credited. The Consumer Welfare Fund rules were notified in the Gazette of India in 1992. Guidelines for seeking financial assistance from Consumer Welfare Fund were framed based on the report of a working Group set-up in 1993, which was subsequently revised twice, in 2001 and 2014.

CONSUMER COURT

Consumer court is a special purpose court in India that deals with cases regarding consumer disputes, conflicts and grievances. They are judiciary hearings set up by the government to protect the consumer’s rights. Its main function is to maintain the fair practices & contracts by sellers. Consumers can file a case against a seller if they are cheated or exploited by sellers. The court will only give a verdict in favour of the consumers/customers if they have proof of exploitation, i.e. bills or purchase memos. If a consumer does not have the proper documents required for filing a case then it would be very difficult for the consumer to win or even file a case. Now with the help of COPRA 2019 the cases can be solved without going to court via video conferencing.

CONCLUSION

Consumer protection has social, ethical and economic dimensions. Every man is a consumer, and ought to be a producer. He is...
by Constitution expensive, and needs to be rich.”- Ralph Waldo Emerson. COPRA 2019 framework has many benefits for consumers and the new reformation in the old Act has brought many changes which were useful for the consumers. This new Act establishes Central Consumer Protection Authority, product liability & penal consequences, penalties for misleading advertisements, provision for alternate dispute resolution, covers E-Commerce transaction, enhancement of pecuniary jurisdiction and E-filling of complaint. In this digital era digitization has provided easy access, a large variety of choice, convenient payment mechanisms, improved services and shopping as per convenience. Keeping this in mind and to address the new set of challenges faced by consumers in the digital age, the Indian Parliament, on 6 August 2019, passed the landmark Consumer Protection Bill, 2019 which aims to provide the timely and effective administration and settlement of consumer disputes. The Government has given consumer their rights as a consumer; it is our duty to beware of our rights and to voice our rights whenever it has been violated.

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871 Supra note at 6
THE EVOLUTION OF RIGHT TO EDUCATION IN INDIA

By Sadhak Sharma
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“Education is the special manifestation of man; Education is the treasure which can be preserved without the fear of loss; Education secures material pleasure, happiness and fame; Education is the teacher of the teacher; Education is God incarnate; Education secures honor at the hands of the State, not money-A man without education is equal to animal.”

ABSTRACT

Education is a tool which leads to the development of both the individual and the society. It empowers the individual to achieve liberation from ignorance which leads to her advancement as well as that of the society. It invests within the person the power to reason the various situations which allows her to participate in the day-to-day affairs of their community as upright citizens. An individual equipped with education helps a society in economic terms by using the most efficient means for the optimum utilization of the scarce resources. Such an individual also ensures proper and efficient participation in the governance of the society thereby leading to its development.

This paper delves into the evolution of the right to education from a luxury provided only to the higher strata of the society to eventually a fundamental right of each and every child aged between 6-14 years of age. The responsibility in the modern era is put upon the Government to ensure for infrastructural capabilities for providing education in addition to ensuring compulsory enrolment, attendance and completion of education of the children. This paper draws a chronological timeline of events of the evolution of the right to education, starting from the pre-Constitutional era; the setup of education system in the ancient era and the growth of educational awareness in the British era. The drafting-era of the Constitution looks into the aspirations of the drafters of the Constitution to educate the Indian masses and the final decision taken upon by them after looking into various options. The role of the judiciary mentioned in the paper is the most important step which led to the recognition of right to education as an intrinsic part of the right to life under Article 21 which led to the enactment of the 86th Constitutional Amendment Act.

Keywords: Advancement, Compulsory, Development, Education, State-sponsored.

INTRODUCTION

The term education can be understood as transmission of knowledge and the process of fostering of inquiry and reasoning skills that are conducive to the development of autonomy of an individual. It is considered to be the most potent mechanism for the advancement of human beings which leads to liberation from ignorance. Education equips individuals with the skills and substantive knowledge that allows them to define and to pursue their own goals, and also allows them to participate in the life of their community as full-fledged, autonomous citizens. Education significantly influences a person’s life chances in terms of labor market success.
preparation for democratic citizenship, and general human flourishing. John Dewey in the opening chapter of his classic work *Democracy and Education* (1916), defined education in its broadest sense as a means of the “social continuity of life.”\textsuperscript{873}

In addition to the instrumental and intrinsic value of education to an individual, education is also valuable for society. A society in an economic sense can benefit from the social surplus and the quick responses to change in preferences by productive and knowledgeable workers. Whereas in terms of governance, a society can benefit from educated citizens who are capable of participating in the project of shared governance due to strong and effective correlation between educational attainment and civic participation.\textsuperscript{874}

It is pertinent to understand United States Supreme Court’s unanimous judgement in *Brown v. Board of Education* (1954) in wherein it recognized the importance of education through the following observation: “In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education”. The Court also observed that education is of utmost importance for the performance of the most basic public responsibilities and it is ‘the very foundation of good citizenship.’\textsuperscript{875}

The importance of education in the development of an individual was also observed by Chief Justice S.R. Das in the *Kerala Education Bill* case in which he expressed the following:

\textquoteright one of the most cherished objects of our Constitution is to secure to all its citizens the liberty of thought, expression, belief, faith and worship. Nothing provokes and stimulates thought and expression in people more than education. It is education that clarifies our belief and faith and helps to strengthen our spirit of worship. \textquoteright \textsuperscript{876}

I. EVOLUTION OF THE RIGHT TO EDUCATION

The evolution of the right to education to a constitutional right in the present context can be understood through a sequence of events from the pre-constitution era. Therefore, the paper is divided into four parts namely: (i). The pre-Constitutional era, (ii). The drafting stage of the Constitution, (iii). The role of the judiciary, and (iv). The 86\textsuperscript{th} Constitutional Amendment Act.

A. The pre-Constitutional Era

The Indian society which is deeply rooted in the caste division and hierarchy never recognized the need for equal educational opportunities. Not only were the Shudras, the lowest in the hierarchy totally alienated from education, the Kshatriyas and the Vaishyas, the second and third classes respectively in the Chatur Varna System received only some form of elementary and professional education. Thus, access to formal education in the past was determined by birth.\textsuperscript{877}

\textsuperscript{873} Philosophy of Education, Stanford Encyclopedia of Philosophy; https://plato.stanford.edu/entries/education-philosophy/
\textsuperscript{874} Equality of Educational Opportunity, Stanford Encyclopedia of Philosophy; https://plato.stanford.edu/entries/equal-ed-
\textsuperscript{876} In Re The Kerala Education Bill, 1959 1 SCR 995; paragraph no. 11.
\textsuperscript{877} Aradhya, Dr. Niranjan. *Universalization of School Education; The Road Ahead*. Bangalore:
A drastic change in the educational jurisprudence was observed during the freedom struggle to overthrow the colonial power which required the growth of national consciousness which required education of the masses. The need for ‘Free and Compulsory Education’ was demanded by the people from the colonial power. In the evidence placed before the Education Commission (Hunter Commission) appointed in 1882, Dadabhai Naoroji and Jyothiba Phule from Bombay demanded State-sponsored free education for at least four years. The demand was indirectly acknowledged in the Commission’s recommendations on primary education; the Commission also recommended that schools should be open to all castes and classes. 878

The first law on compulsory education was introduced by the State of Baroda in 1906 which provided for compulsory education for boys and girls in the age groups of 7–12 years and 7–10 years respectively. 879 In 1917, Vithalbhai Patel moved a Bill in the Bombay Legislative Council for the introduction of compulsory education in the municipal areas of the state. The Bill was enacted as a law in 1918, popularly known as the ‘Patel Act’, which was the first legislation to accept the principle of compulsory education. 880

The next landmark development during the pre-Constitutional era in the history of demand of ‘Free and Compulsory Education’ was the Post War Plan of Education Development (1944), also called the Sargent Plan. It proposed the establishment of nursery schools on a voluntary basis for children under six; while from 6-14 years of age, it recommended that education should be free and compulsory for both boys and girls which ought to be achieved in a phased program spread over 40 years (1944-1984). 881

B. The Drafting Stage of the Constitution

India achieved its independence from the foreign rule and became an independent nation in 1947. The Constituent Assembly was imposed with the duty to draft the Constitution in order to pursue the long-proclaimed aims and aspirations of the people of the country. One of the most important aspiration of the people was to ensure the achievement of the ‘Free and Compulsory Education’ policy. Unfortunately, during the drafting stage of the Constitution, there was no unanimous view that the citizens of India should have a right to education, let alone a fundamental right.

The ‘Provision for free primary education’ was provided for in Article 36 of the ‘Draft Constitution.’ The Constituent Assembly Debates reveal that an amendment was moved by Pandit Lakshmi Kanta Maitra to ensure that the ‘Provision for free primary education’ was reduced to a non-justiciable
policy in the Constitution.\textsuperscript{882} He proposed to alter the part of Article 36, ‘Every citizen is entitled to free primary education’ by deleting the word ‘entitled’ in order to bring the provision in consonance of draft articles 30-35 and Article 38 which provided for ‘the policy that is to be pursued by the future governments of the country’\textsuperscript{883}; i.e. directive principles of state policy. Further, a demand to provide such free and compulsory primary education in the respective mother tongue was also raised by Shri B. Das during the amendment discussion of draft Article 36.\textsuperscript{884}

Therefore, it can be noticed that one of the most prominent demand during the freedom struggle of ‘Free and Compulsory Education’ was not upheld to be a fundamental right in the Constitution but was reduced to a non-justiciable directive principle of state policy.

Article 45 of the Constitution i.e. a directive principle of state policy provided for the duty to be imposed upon the State to endeavor “to provide within a period of ten years from the commencement of this constitution, for free and compulsory education for all children until they complete the age of fourteen years.” The following three things were adopted and established by the Constituent Assembly.\textsuperscript{885}

i. A time frame (10 years) for implementation of the Right to free and compulsory education,

ii. An upper age limit (14 years), and

iii. No lower age limit because it was never an issue during that period.

Furthermore Article 45 coupled with Articles 39(e) & (f), 41, and 46 unambiguously directed the state to protect the interests of children and also to provide ‘Free and Compulsory Education.’

C. The Role of the Judiciary

The right to education remained a directive principle of state policy and not a fundamental right until the decision of the Hon’ble Supreme Court in Unnikrishnan J.P. v. State of Andhra Pradesh.

The right to education being covered under Part IV of the Constitution was non-justiciable; but the principles laid down in Part IV are nevertheless fundamental in the governance of the country and therefore the duty to implement these principles in the course of making laws is imposed upon the State.\textsuperscript{886} Furthermore, the various verdicts given by the Supreme Court from time to time unequivocally established the organic and inseparable link between the provisions of the Directive Principles in Part IV and the Fundamental Rights in Part III of the Constitution of India.

The question of right to education being a fundamental right arose for the first time before a Division Bench of the Supreme Court in Mohini Jain v. State of Karnataka.\textsuperscript{887} The Court accepted that right to education was not expressly guaranteed in the Constitution but importance was given to right to education in lieu of Article 21 read with Articles 38, 39(a), 41 and 45. The Court opined that in lieu of such constitutional provisions, “it becomes clear that the framers of the Constitution made it

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{882} Constituent Assembly of India- Volume VII; Tuesday, the 23\textsuperscript{rd} November, 1948; http://parliamentofindia.nic.in/lst/debates/vol7p11.htm
\item \textsuperscript{883} Ibid.
\item \textsuperscript{884} Ibid.
\item \textsuperscript{885} Historical Development of Free and Compulsory Education in India During Pre - Independence and Post- Independence Era, Shodhganga: http://shodhganga.inflibnet.ac.in/bitstream/10603/102629/13_chapter%205.pdf
\item \textsuperscript{886} Article 37 of The Constitution of India.
\item \textsuperscript{887} AIR 1992 SC 1858.
\end{itemize}
\end{footnotesize}
obligatory for the State to provide education for its citizens.” The Court argued that without realizing the right to education mentioned in Article 41, the illiterate people would not be able to realize the fundamental rights guaranteed to them by the Constitution. The Court ruled that “the right to education flows directly from right to life” and that right to education being concomitant to the fundamental rights, “the State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens.” It was also held that the charge of capitation fee for the admission of students amounts to discrimination on a class basis thereby in violation to Article 14 of the Constitution and charging of such amounts to contravention of the constitutional scheme.

The criticism to the judgment was that the Court took an extremely expansive view of providing education to everyone at all levels by the State. The obligation upon the State to provide education at all levels through various educational institutions from a practical view seemed hardly viable, feasible and tenable for a Government which itself was under a huge fiscal debt.

The landmark case which recognized the right to education as a fundamental right under right to life i.e. Article 21 was the Constitutional Bench in UnniKrishanan J.P. v. State of Andhra Pradesh. The Court observed that “A true democracy is one where education is universal, where people understand what is good for them and the nation and know how to govern themselves.” Therefore, the importance of education was recognized for not only the development of the individual but also the country. The Court observed that if education is not provided to the citizens, the objectives set forth in the Preamble to the Constitution cannot be achieved.

The Bench also relied upon the United States Supreme Court judgments in Brown v. Board of Education and Wisconsin v. Yoder. From the former, the Supreme Court observed the utmost importance of education whereas the Court from the latter, observed the duty of the State of ‘providing public schools ranks at the very apex of the function of a State.’

The decision of the Supreme Court in Bandhua Mukti Morcha v. Union of India was also taken into consideration by the Bench wherein it was observed that the right to life guaranteed by Article 21 does take in educational facilities.

The Court held that the right to education ‘flows from right to life’, even though Article 21 is negative in character but an affirmative dimension was given to Article 21 in consonance to the directive principles of state policy namely Articles 41, 45 and 46 which provides for imposition of a positive duty upon the State.

Regarding Part III and Part IV of the Constitution to be both supplementary and complementary to each other, the Supreme Court placed harmony between right to life and other directive principles providing for right to education. The Court referred to Justice Bhagwati’s observation in Bandhua Mukti Morcha v. Union of India, where he stated that “the right to life with human dignity enshrined in Article 21 derives its life from the Directive Principles of State Policy.”

The Court observed the right to education as a fundamental right in light of the importance given to education by the Indian Constitution.

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888 (1984) 3 SCC 161
889 Right to Education under Article 21, Indian Constitutional Law, M.P. Jain, Lexis Nexis
890 1984 AIR 802, Headnote no. 2
founding fathers of the Constitution in various constitutional provisions such as Articles 41, 45, 46 i.e. the directive principles of state policy and even Articles 29 and 30 i.e. the fundamental rights.

Therefore the Supreme Court held every citizen has a right to free education until he/she completes the age of 14 years. But the Court also held that such right to education is not absolute and its parameters must be determined in light of Article 45 and Article 41. This meant that the obligation of the State to provide education is subject to the limits of its economic capacity and development. Therefore the Bench harmonized the criticism leveled against it in Mohini Jain case that it did not look over the economic capacity of the State by including only primary education under the realm of right to education as a fundamental right. The Court also observed that the obligation to provide free education to all citizens below 14 years of age can be fulfilled not only through the State schools but can also be fulfilled by the State by permitting, recognizing and aiding non-governmental organizations with their consent. The Bench also observed the role which can be played by unaided private schools to further the constitutional ideal of right to education.

D. The 86th Constitutional Amendment Act

Subsequent to the decision of the Supreme Court in UnniKrishnan case, the Constitution (Eighty-Six Amendment) Act, 2002 was enacted which inserted Article 21A into the Constitution. The right to education was now inserted into Part III explicitly which requires the State to provide free and compulsory education to all children aged 6 years to 14 years. The Fundamental Duties under Article 51A were also amended with addition of clause (f) to impose a duty upon “a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.” Article 45 was also amended to provide for

A pertinent point to be noted is that the Karnataka High Court in Associated Managements of Primary and Secondary Schools in Karnataka v. The State of Karnataka by its Secretary, Department of Education and Ors has accepted the demand of Shri B. Das during the discussion of ‘Provision for free primary education’ in the Constituent Assembly of providing primary education in the respective mother tongue in relation by reading Article 21A with Article 19 (1)(a).

Justice Dalveer Bhandari in Ashoka Kumar Thakur v. Union of India directed the Union of India to set a deadline to completely implement Article 21A and therefore a need to enact a legislation to achieve the same was felt.

Therefore, the Union Parliament in 2009 enacted The Right of Children to Free and Compulsory Education Act which inter alia provides admission of every child above 6 years of age to be compulsorily educated free of cost in a neighborhood school.

“The RTE Act is the first legislation in the world that puts the responsibility of ensuring enrolment, attendance and completion on the Government.” - World Bank Education Specialist for India, Sam Carlson.

891 ILR 2008 KAR 2895.
894 About, Right to Education; http://righttoeducation.in/
The Act imposes a time bound duty upon the respective State Governments or the respective local authorities to establish neighborhood schools in areas where such schools are not so established within a period of three years of the commencement of the Act.\(^895\) The duty is imposed upon all schools whether state schools, aided or even unaided schools to provide free and compulsory education to a fixed percentage of children of the total number of children admitted.\(^896\) The Act mandates all private schools to reserve 25% of the seats for students from Economically Weaker Sections (EWS) which is to be reimbursed by the State as part of public-private partnership.\(^897\) The Act also provides for a duty imposed upon the parent or guardian to admit or cause to admit his/her child onward to elementary education in a neighborhood school.\(^898\) The Act lays down the norms and standards \textit{inter alia} relating to the Pupil Teacher Ratios (PTRs), infrastructural requirements, school-working days, teacher-working hours.

\section*{II. CONCLUSION}

It is often said that ‘the pen is mightier than the sword’, but the driving force behind the pen is always neglected and often only the advantaged classes get to use the pen. The driving force behind the pen is education which in the words of Nelson Mandela is the most powerful weapon which one can use to change the world. It not only holds an important place in the social and economic development of an individual but also of the country which he/she serves. Education invests within the individual the quality of making a rational choice which is very important for the functioning of a democracy where the power structure and social setup of such a State is dependent on such rational choices and decisions of its citizens. Therefore, education also trains its citizens to not only represent his/her interests but also that of the society of which he/her is a part of by allowing him/her to be elected to the decision making authorities of the State due to his/her educational and cogent qualities. The right to education as a fundamental right therefore ensures the holistic development of an individual thereby equipping him/her with the knowledge to live a life with dignity and also ensures the development and growth of the country he/she serves.

The evolution of the right to education in India is one which flows through various stages; the right to education grew from the right granted only to the higher classes in ancient India to grant of such a right to only a few states during the British rule, to non-justiciable and non-enforceable directive principles and finally to an enforceable fundamental right. The most significant feature of such an evolution was how a luxury which earlier was only enjoyed by the higher classes of a society is now an enforceable right granted to each and every citizen of the country from six years to fourteen years of age. The recognition of the right to education under the right to life by the Supreme Court and subsequently the

\(^{895}\) Section 6, The Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).  
\(^{897}\) Public Private Partnership (PPP) in education in India, NCE India; http://www.nceindia.org.in/2012/08/public-private-partnership-ppp-in-education-in-india/  
inclusion of Article 21A into the Constitution with an effective mechanism to ensure the implementation of the right to education setup by ‘The Right of Children to Free and Compulsory Education Act’ ensures that favorable conditions to ensure that the power to use the pen is granted to each and every citizen. But the question still arises whether rural India which lacks infrastructural facilities will ever be able to ensure that fundamental goal of providing education is achieved?

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STRENGTHENING IP IN DIGITAL INDIA

By Sahil Arora
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Abstract
With the rapid growth in digital economy, challenges relating to protection of IPR have emerged, there are many cases of piracy reported in world. The issue described in this paper is broadly based on copyright and patent law infringement. Moving on to the new business models like Netflix which provide online content but also increases the risk of copyright infringement and content theft, which have now and then have become the order of the day. Concentrating more on the legal aspect of the IPR India has taken many initiatives toward enhanced protection of IPR like, Copyright (Amendment) Act, 2012 and Patent Amendment Act 2005 have added to increased protection to the content creators. Further harsh punishments are to imposed on the possible offenders. These policy initiatives will go a long way ahead in securing better IP Protection. Infringement of website source code, web design/content, linking, framing, metatagging, cybersquatting are some of the new challenges in Cyberspace which country presently encounters and measures are needed to tackle these challenges. Recent relationship of IPR and FDI has been a boon to the country since reliable statistics point out that Foreign Direct Investment in India increased to 3509 USD Miln. in May from 2721 USD Miln. April 2015. The ecommerce sector in India has grown by 34% (CAGR) since 2009 to touch 16.4 billion USD in 2014. The sector is estimated to be in the range of 22 billion USD in 2015. There are good number of Cases pertaining to the jurisdiction regarding Infringement of Intellectual Property rights over Internet and Courts have time and again given directions how to avoid such type of infringements and what needs to be done in order to protect the IPR from infringement and possible identity theft. Courts have dealt with infringement from Wrestling Content from authentic sources to online series and local TV shows. There are many possible instances of content copying and displaying the same content overtime on the net, leading to more cases and which are pending adjudication. India’s IPR laws need to be internationally compliant for this change to occur it will take a long time and efforts on the part of law makers and law enforcement agencies to meet the international benchmarks set up by WIPO and other renowned IPR Organisations. India needs to boost its Protection on protecting the hard earned Intellectual Property and Software developed by our genius minds.

www.supremoamicus.org
The rights in Intellectual Property are protected by the appropriate legislations. In India, the protection of it is governed by the following legislations.

1. The Patents Act 1970 was amended in 1999 passed by the Indian Parliament on March 10, 1999 to amend the Patents Act of 1970 that provides for establishment of a mail box system to file patents and accords exclusive marketing rights for 5 years. The Patent (second amendment) Bill 1999, further amend the Patent Act 1970 and make it Trade-Related Intellectual Property (TRIP) compliant was introduced in December 1999.


4. Copyright Act 1957: The Copyright Act 1957 was enforced to protect the IPR in the print publishing era. It was amended in 1983, 1984, 1991, 1992, 1994 to keep pace with the expanding needs due to fast growth of electronic media and information technology.

The Above Patents, Trade Marks and Designs Act are under the control and supervision of the Ministry of Industry, Department of Industrial Development, Government of India, whereas Copyright Act is under the control and supervision of the Ministry of Human Resource Development, etc.

**Protection of Intellectual Property is Vital as New Business Models Emerge.**

New business models of delivery of services in the digital world are changing the world for the better, but they also throw up challenges in terms of managing problems relating to them. The range of services and reach digital platforms provide is mind blowing. But they also expose companies, service providers and users to potential misuse of intellectual property rights. Amazon, Netflix models of delivery of digital content, and said these provide wide access and market equilibrium.

However, from an enforcement point of view, it throws a number of challenges for companies and service providers from the piracy angle. Even the content sometimes uploaded on to the digital platform needs to be strictly regulated. But any violation can be tracked and addressed by the right experts.

Citing the example of Ethiopian Fine Coffee, where buyers were making huge money and coffee plantation workers hardly any in the past, she said through branding and protection of IPR, it is a win-win situation. For both of them. Now, the Ethiopian Fine Coffee is branded, it gets the right price, gets consumed in Starbucks network, the coffee sellers get right prices and in the end even the workers get their rightful due.

There have been a number of instances where free speech and trade mark related issues come in conflict. But there are ways to address them as per the laws and ensure justice is done.

**Recent Legislative/Policy Initiatives to protect IPR in India in recent years**

Important legislative & policy initiatives have strengthened India’s IP regime. Apart from the passage of Patent (Amendment) Act, 2005, significant changes were brought in other relevant statutes as well. Recent changes introduced in the Indian copyright regime has made our law stronger. The Copyright (Amendment) Act, 2012 has introduced new independent
rights to lyricists, composers and singers as authors of literary and musical works in films and sound recordings which entitles them to receive royalty and other benefits. The Act aims to protect rights of performers by permitting them to record their work for commercial reasons. The amendment has allowed free import of copyrighted works from other countries. It prescribes stringent penalties on persons that circumvent technologies that are used to protect copyrighted works. According to Section 65A any person who circumvents an effective technological measure applied to protect copyright subject to limited exceptions shall be punishable with imprisonment that may extend to two years and fine. Such exceptions include doing acts necessary to test security of a system or for law enforcement purposes or conducting lawful investigation. Any person who unauthorisedly removes digital rights information is punishable with imprisonment of upto 2 years and fine. Owner of copyright whose right is infringed can also avail remedies of injunction, claim etc.

In India, a recent development in IP protection is grant of patents for computer programs which are otherwise generally only copyrightable as literary. Recently, Google was granted patent for advertising business method wherein it could serve content targeted ads in email newsletter based on publisher unique content identifier in email content. Other statutory changes include enactment of Designs Act,2000 to comply with mandate of TRIPS Agreement.

As a result of these proactive changes in IP legal framework, there have been exponential rise in number of applications filed in India to protect IP by global stakeholders and domestic companies. There is one virtual patent office and 4 physical patent offices in India. Under the Patent Cooperation Treaty, the Indian Patent Office has been recognized as an International Searching Authority and an International Preliminary Examining Authority (ISA/IPEA) by World Intellectual Property Organization in October, 2007, which became operative since 15th October, 2013, wherein only 17 countries hold such recognition. The process of examining applications is dealt with by experts in a digitized mode, records of case are digital and ecommunications flow between department and applicants. In addition, India is signatory to the following WIPO-administered International Treaties and Conventions that protect IPR and they are :-

- Paris Convention for the Protection of Industrial Property and many more.

Initiates Taken By States

In 2017, Maharashtra followed it by setting up the Digital Crime Unit and has taken down many sites which carried infringing content. In 2018, Mimzoram became the announced the setting up of a Digital Crime Unit to combat digital fraud and copyright theft.

In 2017, the Patent Rules and the Trademark Rules were revised, to include strict timelines for disposal of cases and to streamline examination. Special discounts for filing and an expedited examination for start-ups were started. With the hiring of these examiners and these initiatives, the wait-times at the Indian Patent Office declined.

Intellectual Property in the Digital space

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In a nutshell, traditional principles of IP law which apply in offline world also apply to the virtual world. Unauthorised use of a interalia, a person’s words, trademarks, service marks, literary work, images, inventions, the functionality of the software, music, video, source code constitute infringement of owner’s intellectual property rights. It has a huge role to play in branding, advertising, selling a company’s goods or services both online and offline. Majority believed that policy makers and government have a critical role to play in creating the right IP legal framework wherein 29% felt that policy makers are performing their role satisfactorily but 75% of them commented that there is scope for improvement. 67% Members responded India lacks a sound IP policy and over 50% of the respondents pointed out that the implementation is ineffective. These findings become even more relevant in view of changing technological landscape of the country & growth of e-businesses.

New Challenges to IP Protection on Internet

Deeplinking, Metatagging, cybersquatting, Framing, Reverse engineering, Software piracy. Spreading this awareness through industry conferences along with active anti-counterfeit raids are playing a key role in curbing piracy in India. Every organization is being sensitized to periodically review their IT assets to detect IP infringements or illegal downloading of pirated software. As per KPMG India fraud survey in 2012, 53% respondents rated cybercrime and 38% rated IP theft as emerging fraud areas. Thus awareness about effective reporting, investigation, installing adequate compliance control processes, conducting surveillance and anticounterfeit raids are mechanisms been put in place to curb this problem to a large extent. Once infringements are detected, enforcement of IP may also have jurisdictional issues to invoke legal actions.

FDI AND IPR - A Boon to the Country

Strengthening of India’s laws protecting Intellectual Property has invited the attention of foreign investors. Coupled with proliferation and growth of IT Sector in India, Digital India is magnetic and ready for the ‘Make In India’ paradigm. Reliable statistics point out that Foreign Direct Investment in India increased to 3509 USD Miln. in May from 2721 USD Miln April 2015.

As per the PWC report The ecommerce sector in India has grown by 34% (CAGR) since 2009 to touch 16.4 billion USD in 2014. The sector is estimated to be in the range of 22 billion USD in 2015.
India is no longer behind but is proactive in protecting IP rights. For instance, one of the typical concerns about patent regime is evergreening of patents just when they are about expire, however, internal policies are changing.

Aside from the statutory changes in IP sector, the recent amendments to the Information Technology Act, 2000 has strengthened IP protection in India.

Hacking of data is punishable under Section 66 of IT Act, 2000 punishable with upto 3 years of imprisonment and fine upto 5 lakhs. Unauthorised accessing, downloading, copying, extracting or damaging data (including intellectual property) is punishable as per Section 66 of IT Act, 2000.

Apart from myriad legal & Policy initiatives, India is aligning its IP regime for a streamlining of security systems.

**Judicial approach in Cybersquatting cases**

Indian courts passed several judgements upholding trademark rights of its rightful owners in India. Cyberquatting has been prevalent ever since Internet was introduced. This term means where a person registers a well known domain name or trademark with view to hoard it so that he can then sell it at exorbitant rates malafidely to original rightful owner. Indian courts have dealt with catena of such matters wherein clear principles have been laid down by the courts to decide these cases. A domain name identifies a website as source of origin of goods and services and attracts same level of protection as a brand name. In Satyam Infoway v sifynetsolution, the appellant used SIFY as main component of its domain name as www.sifymall.com, www.sifyrealestate.com and respondent infringed its domain name using deceptively similar domain name such as www.sifynett.com. The Supreme court held that appellant was entitled to an injunction order restraining respondent from using domain name in dispute and held respondent guilty of passing off.

1. Satyam Infoway v sifynetsolution (2004 PTC (28) 566)

**Cases of Jurisdiction regarding Infringement of Intellectual Property rights over Internet**

In World Wrestling Entertainment, Inc. vs. M/s. Reshma Collection & Ors From the that it “carries on business” in Delhi because, according to it, its programmes are broadcast in Delhi; its merchandise and books are available for sale in Delhi; and its goods and services are sold to customers in Delhi through its website which can be accessed in Delhi over the internet.

The High Court of Delhi cleared the position of determining Internet jurisdiction in World Wrestling Entertainment, Inc. vs. M/s. Reshma Collection & Ors, where it held that mere accessibility of website in a forum state which ‘solicits’ its business, through which Defendant’s goods and services are sold, is enough to raise cause of action and in determining the personal jurisdiction in Delhi.

The same was reiterated in Choice Hotels International Inc. v. M. Sanjay Kumar and Ors by the single judge bench in the High Court of Delhi. In Banyan Tree Holding (P) Limited vs A. Murali Krishna Reddy & Anr by the Delhi High Court, in this case, decided the question of jurisdiction of the Court under Section 20(c) of Code of Civil Procedure, 1908. The Division Bench, in a well thought out judgment, laid down that in cases of passing off or infringement, where the plaintiff is not carrying on his business within the jurisdiction of the court...
and there is no long-arm statute, the question whether this court has the jurisdiction to entertain the suit would be decided if the plaintiff shows that the defendant has ‘Purposefully Availed’ the jurisdiction of the forum court to himself. Further, in order to prove this, the plaintiff will have to show real commercial transactions entered into by the Defendant with an internet user residing within the jurisdiction of the forum court. In addition to Section 20(c) CPC, the plaintiff also has an option of approaching the Court under Sections 62(2) and 134(2) of Copyright Act, 1957 and the Trademark Act, 2002 respectively. The Delhi Court referred to the decision of the Supreme Court in Bhagwandas Goverdhandas Kedia vs M/S. Girdharilal Parshottamdas and in M/S. Dhodha House vs S.K. Maingi in deciding the question of jurisdiction in this case. When a customer in Delhi accepts it, it becomes an offer made by the customer in Delhi. Further, when through the software and browser the transaction is confirmed by making the payment to the plaintiff, the plaintiff accepts the offer of the customer at Delhi. Therefore the plaintiff can be considered to be carrying his business in Delhi to some extent because the plaintiff instantaneously communicates his acceptance to the customer through the internet at Delhi. Therefore it was held that the High Court of Delhi will have jurisdiction to entertain the suit in the same capacity as if the plaintiff is considered to be carrying on business in Delhi for the purposes of suits under Trademark and Copyright Laws.

4. Banyan Tree Holding (P) Limited vs A. Murali Krishna Reddy & Anr - CS (OS) No.894/200
5. Bhagwandas Goverdhandas Kedia vs M/S. Girdharilal Parshottamdas 1966 AIR 543
services of the defendant at Hyderabad (his principal place of business), even Purposeful Availment could not be proved on the part of defendant. Therefore the Court did not exercise the jurisdiction in this case. In *Millennium & Copthorne International Limited vs. Aryans Plaza Services Private Limited & Ors*\(^8\)

In this case, the Delhi High Court relied on the Impresario case but it also highlighted the faults in the test laid down in the judgment. While dealing with the question regarding reservation and booking from a website, it is a part of carrying on the business even if it does not subsequently materialize it.

The Division bench relied on the three pronged tests laid down by the Supreme court in Dhodha House v. S.K. Maingi, namely:-(1) The agent must be a special agent who attends exclusively to the business of the principal and carries it on in the name of the principal and not a general agent who does business for any one that pays him. (2) The person acting as agent must be an agent in the strict sense of the term. (3) To constitute “carrying on business” at a certain place, the essential part of the business must take place in that place. 47 To determine whether the plaintiff could be said to carry on his business to an extent in Delhi and therefore, fulfilled the condition “carrying on business” as laid down in the Dhodha case. The Court was of the view that “due to advancements in technology and the rapid growth of new models of conducting business over the internet, it is possible for an entity to have a virtual presence in a place which is located at a distance from the place where it has a physical presence

**INTERNATIONAL SCENARIO**

The Federal District Court of Pennsylvania in the case of Zippo Manufacturing Co. v. Zippo Dot Com Inc\(^9\)(952 F. Supp. 1119 (W.D. Pa. 1997)), held that the defendant satisfied the minimum contacts rule criteria as they had entered into agreements with various internet access providers within the state of Pennsylvania, through which they had established minimum contact and also had satisfied the test under the Long-Arm statute of the State of Pennsylvania. 29 This statute includes both general and specific jurisdiction over out-of-state defendants. It also states that to establish general jurisdiction, a non-resident’s contacts with the forum must be continuous and substantial.

The Australian High Court held that the place of publication to be the point of downloading. In Dow Jones & Co Inc v. Joseph Gutnick\(^10\)([2002] HCA 56) the court considered that the focus of defamation is upon the damage which it causes to reputation. A defamation can only cause such harm when ‘comprehended by the reader, the listener, or the observer’, thus publication of a defamation is a bilateral process which can only be completed once the publisher has made the article in question available and it is available for
perusal by a third party. Internet material is not available to the reader in a comprehensible form until it has been downloaded onto the computer of an individual who has acquired it from the server using an Internet browser.


Need for Revising the Indian laws to be Internationally Compliant.
Major Reforms which are required in IP Sector and its strict implementation to attract Foreign IP Registrations
There has been concession in official fees has been made available for trademarks e-filed through the Trade Marks (Amendment) rules 2017, in line with patents and designs.

1.Reforms and initiatives to ensure Compliance with Foreign IPR laws
International programmes for the Asia Pacific and BRICS countries have been organised. A bilateral meeting was held between Controller general Patents, Designs and Trademarks and the Japan Patent Office Commissioner. Further MoUs could be signed.

2.Reforms to expedite the process of prosecution
Further, the number of adjournments for hearing has been restricted to two with the provision that each adjournment shall not be for more than thirty days.

3.Reforms for automation and digitalisation
4.Provision for auto-allocation of requests for examination and automation of process for registration and renewal has been made. FIRs and Registration certificates are sent through e-mail. The provision of SMS Alert service to stakeholders regarding examination reports has been made. e-filing facility is available with payment gateway facility and has been made compulsory for patent agents to file their applications online.

5. Reforms for the dissemination of information
- IPO website has been redesigned to improve contents and ease of access.
- IP data on a real-time basis is available in respect of filing and processing of Patents, Designs, Trade Marks and Geographical Indications. A comprehensive online search system with full-text-search capability, which was already in practice, has been updated.

6. Reforms and initiatives for IP training and awareness
- IPR help-desks and online guidance system through e-mail are available at each IPO location.
- The IP office organized and participated in public outreach activities with industrial organizations like (CII), The FCCI and The ACCI.
- Several orientation programmes have been conducted to train examiners, ther have been programmes on IPR training, and awareness. Some programmes have been launched by the government for strengthening the IPR protection among incubation centres and R&D organisations. The establishment of new incubation centers called Atal Incubation Centres that would nurture innovative start-up businesses in their pursuit to rise and sustainable enterprises have also been introduced in each state and an IPR wing has been established therein for IP protection and awareness. Cell for IPR
Promotion and Management is a professional body under the aegis of the (DIPP) Ministry of Commerce & Industry. Its mandate is to effectively implement National Intellectual Property Rights (IPR) Policy adopted in May 2016 with slogan– "Creative India; Innovative India"

The Government is working to provide strong framework in Copyrights, IP cells have been created in the Police departments and officials have been educated to foster the IP rights enforcement in the country. The over-all registration and the prosecution processes must be expedited further. Much more needs to be done to create a strong IPR network in the country.

Conclusion
Online transactions are a rather new concept for our Country right now and consequently, there is a lot of discussion and confusion surrounding it. The Judicial Precedents till now have been time and again criticized the ground that selling products/services online gives an option to the plaintiff of Forum Shopping i.e. the choice of Forum based on his convenience without paying any regard to the difficulty which the defendant might have to face. What is needed is a uniform approach to be followed in all cases of jurisdiction with respect to Online Transactions with respect to Trademarks. Therefore there is a need for a Statute which should with the question of Jurisdiction so as to enable a fair and speedy tria

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EVE TEASING: ASSAULT OR HARASSMENT BY ANOTHER NAME

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Woman is not a born women,she is made one"-Simone de Beauvoir

ABSTRACT:
Eve teasing was known as a big community downside through a community-based democratic method with 9 villages in geographical area, India. Eve teasing may be a common saying in South Asia for molestation of ladies publicly areas by men. the aim of this study was to characterize the which means of eve teasing within the rural context, particularly among feminine youth, and to develop a method to live its incidence. Mixed ways were utilised together with focus cluster discussions (FGDs), semi structured interviews, and direct observation of form administration. xxxiv folks participated in six FGDs; 2 with adolescent boys (n = 10), 2 with adolescent women (n = 15), and 2 with ladies ages twenty to twenty six years (n = 9). cardinal females, ages fourteen to twenty six years, were recruited through purposive sampling for face-to-face interviews in homes and faculties. 24 interviews were ascertained on to aid form development. Eve teasing was delineated as staring, stalking, passing comments, and inappropriate physical bit. Perceived consequences of eve teasing enclosed tight restrictions on girls’ quality, inability to attend faculty or work, women being goddamned, and inflicting family issues. FGD participants urged that eve teasing will cause depression and suicide. Among the thirty six (40.4%) interview participants WHO reported eve teasing, 61.1% reported feelings of anger, 47.2% reported feelings of shame or humiliation, and quite one third reported feelings of worry, worry, or tension. The form offers a method to assess the incidence of eve teasing that’s culturally relevant and age applicable for feminine youth in India.

KEYWORDS:
Eve teasing ,sexual, harassment, menace, psychological, tortious liability, etc.

INTRODUCTION:
Eve teasing has been a serious menace in our society. There is no uniform law in this country to curb eve teasing effectively in or within the precinct of educational institutions, places of worship ,bus stands, metro stations, railway stations, cinema theatres, parks, beaches, offices, public transport, vehicles, places of festival, etc.

ESSENTIAL CONSTITUENTS OF EVE TEASING:
- Pinching and poking by boys.
- Touching girls on the sly.
- Passing of lewd remarks.
- Singing obscene songs to embarrass them.

ORIGIN OF EVE TEASING:
Eve teasing is a euphemism used in India for public sexual harassment or molestation of women by men with the use of the word “Eve” being a reference to the biblical Eve, the first woman on this planet.899

899 www.definitions.net
• **EVE TEASING AS A TORTIOUS LIABILITY:**
  Tort is a civil wrong. Now this wrong is redressible by an action for unliquidated damages. Eve teasing is a civil wrong. The eve teaser causes injury to the plaintiff which in turn affects her both physically and mentally. It is an unlawful infringement on victim’s privacy and person.  

• **EVE TEASING AS A TRESSPASS TO PERSON:**
  Eve teasing is an unlawful infringement on victim’s privacy and person. Thus, it trespasses the right to privacy and the right to dignity of the victim.

• **PRESENT SCENARIO IN INDIA:**
  On January 1, 2017, the nation was shocked at the event that took place at the third safest city of India, in Bangalore. The girls on the street were touched and grabbed, groped, catcalled and abused without any hesitation and reluctance.

  Despite as many as 1500 policemen being present on the streets, they were not able to avoid an incident of this nature.

  This shameful display of sexual violence too place when women were leaving the pubs after celebrating on New Year’s Eve, where they ran into drunken hooligans who allegedly tried to molest them.

• **HAPPENING PLACES OF EVE TEASING:**
  Mostly around women colleges and schools, in buses and trains, at bus stands and railway stations, in places of public entertainments, crowded places and fairs and within campuses of educational institutions. In most cases those who come from educated, cultured and enlightened and affluent families, take part in eve-teasing.

• **CRIMINALIZATION OF EVE TEASING:**
  Now, take a look at Eve teasing punishment in India in Criminal Laws-

  Honestly, in Indian Penal Code, the word ‘eve-teasing’ does not exist. Eve teasing is an attitude, a mindset, a set of behaviour that is construed as an insult and an act of humiliation of the female sex. However, victims of eve teasing could take recourse to certain sections of the Indian Penal Code.

  1-The non-penetration of sexual assault u/s 354 of IPC is punishable with a maximum term of 2 years of imprisonment of either description or with fine or both.

  2-Section 509 of IPC states that words, gestures or act intended to insult the modesty of women shall be punished with simple imprisonment for a term which may extend to 1 year or with fine or both.

  3-Section 294 provides the imprisonment for either description for a term which may extend to 3 months with fine or with both.

  Thus, eve teasing is a wrong against the honour, dignity and self-respect of a woman. It hurts her at the core of the soul.

  We need a strong combating for this fast growing problem.

• **PROSECUTION:**
  Although, Indian law does not use the term eve teasing, victims earlier usually seek recourse through section 299 of the IPC

900 www.legalservicesindia.com
901 www.betterindia.com
which sentences that a man found guilty of making of girl or a woman the target of: Obscene gestures, Remarks, Songs or recitation, will be subjected to a maximum jail sentence of 3 months.

NEWS:

UP Woman, Daughter Consume Poison at SP Office over Police Inaction on Eve Teasing

Muzaffarnagar (UP): a girl and her girl tried suicide by overwhelming poison at the SP workplace in Uttar Pradesh's Shamli district allegedly over eve-teasing by some neighbours and police "inaction" on their grievance, an officer aforementioned on Thursday.

A police sub-inspector was suspended for alleged negligence of duty, the senior police official aforementioned.

According to Shamli Superintendent of Police Ajay Kumar, the incident happened} on Wednesday once the mother-daughter couple had return to his workplace to complain about eve-teasing.

The two were shifted to hospital, the SP aforementioned.

Meanwhile, a case was registered against 5 persons — Vipin, Arvind, Naresh, Sunil and Asian country below relevant sections of the Indian legal code at Khodsama village below the Jhinjhana station house limits in Shamli.

The in-charge of Chosana police outpost, Sub-Inspector Binu Singh, has been suspended for alleged negligence of duty when the victims claimed that no FIR was registered on the idea of their grievance.

Girls during this province Village square measure Opting Out of college For the concern of Harassment

Patna: In Bihar’s Saharsa district, women square measure throwing in the towel of college when being troubled daily on their thanks to the establishment.

The girls discovered that this has been happening for the past one year. "We confided in our friends, however set to not tell our oldsters. we have a tendency to feared we’d be stopped from about to faculty. however of late it's become unendurable. they'd confront US on the approach and pass lewd remarks,“ one among the scholars aforementioned.

Recently, once 3 women discovered the ordeal to their families, they were thrashed. one among the ladies suffered severe injuries and her shoulder got disjointed. the ladies failed to move to faculty when this.

An FIR has been lodged against the culprits.

Sub-divisional officer Mridula Kumari admitted that the ladies went through psychological stress over the amount of your time and ne'er told to their oldsters.

However, she assured that action are taken and a probe to nab the culprits is on. She conjointly informed that police personnel are deployed on the road resulting in faculty.

Earlier, on Gregorian calendar month half-dozen, a minimum of thirty four women were lac within the adjacent district of Sapaul district for resisting a harassment bid by the native boys.

Relatives of defendant and different locals thrashed over fifty lady students, a number of them square measure still
undergoing treatment in Triveniganj referral hospital.

- **PROTECTION: STATUTORY DUTIES OF POLICE** - Following are the statutory guidelines and procedure that the POLICE follow when dealing with cases of sexual abuse against women:
  1. Outraging Modesty - Section 354 of Indian Penal Code
  2. Sexual harassment - Section 354A & 354B of Indian Penal Code.
  3. Voyeurism - Section 354C of Indian Penal Code.
  4. Stalking - Section 354D of Indian Penal Code.
  5. Eve teasing - Section 292, 294A & 509 of Indian Penal Code.

*Other sections* - Section 154 to 174 (chapter XII) of Criminal Procedure Code, 1973

- **ERADICATION OF EVE TEASING:**
  1. Family education - This is an important aspect of eradication of eve teasing. A child is to be brought up under the good education of the family members, mainly parents. A positive education and culture by the parents helps in positive upbringing of the child. The child starts developing a positive attitude towards the society and its members.
  2. Counselling is needed to both the offender and the victim of social evil - Counselling helps in clarifying and correcting the misconceptions in the minds of both. When someone becomes such victim she needs more of mental care and support rather than anything else. Words have more healing power which is very effective to a victim. On the other hand, counseling of an offender helps to get reduce all the guilty thoughts, it’s negative aspects and all.
  3. Victims must come forward and register a complaint - Many of the times, there is less moral support and as a result they don’t take a step to lodge a complaint. But they should be encouraged as they should come forward to register a complaint.
  4. Giving straight punishment to the offender - There should not be any delay in providing punishment in such cases. The judicial system and government should come forward with new legislations in order to provide speedy punishment to the offender.
  5. Implementation of Regulations - Provision of filing a complaint online for women victim on the website of the State Police and a shortest possible response time must be achieved. Some states in India like Punjab has already launched a provision for online filing of complaints and women issues and handled by a dedicated wing under the IGP rank officer.

**THIS DATA SHOWS HOW WOMEN IN INDIA IS GETTING UNSAFE:**

The crime statistics in 2016 are unrolled by National Crime Record Bureau (NCRB) all over again stating the apparent that our country whether or not it’s the cities or the agricultural areas is very changing into unsafe for ladies. A total of 338,000 incidents of crime against ladies were recorded in 2016 against the overall of 329,000 crimes against ladies in 2015.

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902 www.euroasiapub.org
Rape, the foremost dreadful crime against ladies too have seen a surge as a complete of thirty eight,947 rapes were rumored in 2016, compared to thirty four,651 in 2015. But the statistics have set out with a worrying truth which could jolt all the methods being created to prevent crime against ladies because it has been learnt that in ninety four.6 per cent cases, the suspect was notable to the victim and in several cases they were relatives as shut as being the daddy, brother, and uncles.

Not solely ladies, however even kids don't seem to be safe and there has been rise in crime against kids. The report showed that within the year 2016, a complete of thirty eight,947 cases of rape were registered within the country below Protection of kids from Sexual Offences Act (POCSO) furthermore as Section 376 and alternative connected sections of the Indian legal code. Among these thirty eight,947 cases, in 36,859 matters, suspect square measure associated with the victims. Similarly, it is mentioned that in 630 cases, victims were allegedly raped by grand father, father, brother and son whereas in one,087 cases the suspect were acquaintances.

In 2,174 cases, the suspect square measure relatives and in ten,520 matters, it had been neighbours WHO were facing charges of rape, it said.

In 600 cases, employers and associates square measure suspect of rape, the report aforementioned.

No strategy is probably going to figure here since it’s serious breach of trust as a result of the one that is meant to be the shielder of the victim is that the suspect. however measures are often taken to support the safety for ladies generally. The steps ought to be taken to supply a powerful setting generally wherever ladies for safe, a minimum of of publicly places that isn't the case at this time.903

- **CONCLUSION:**

Eve teasing is a fast growing sexual harassment towards women in India. This problem needs speedy redressal since this leads to other serious sexual harassments and other serious social evils.

“Euphemism” is of Greek origin and refers to the utilization of fine words to forestall unhealthy luck. It's a pleasing term for a disagreeable act. we tend to use euphemisms for numerous reasons: to create one thing additional socially acceptable; to sound additional social class or au courant; to cover the severity or truth of an incident from others and even from ourselves.

In the Indian term “eve-teasing,” the word “eve” alludes to the biblical story of Eve tempting Adam to stray from the trail of morality. Associate in Nursing English language definition for “teasing” is “to tempt somebody sexually with no intention of satisfying the will aroused.” each elements of the term place the blame on the woman; she is that the adult female United Nations agency isn’t providing one thing she has secure. the person is thus absolutely among his rights to require it forcibly; or a minimum of, his actions or reactions square measure graspable.

If the Indian media makes light-weight of harassment by employing a locution, Indian widespread cinema encourages such behavior. The portrayal of sex in film industry has long been inoffensive. The couple kisses

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behind a tree; tangled feet indicate sexual intercourse; a rape is denoted by a flock of raucous birds disturbed from their peace and rising into the sky.

Women also are shown as teasing. Young girls - wearing garments way out of the social norm - jab breasts and hips at young men square measure unremarkably continual dance scenes in film industry and Tollywood movies. nearly each motion picture includes a song during which the young man pulls the dupatta (scarf) of a young woman, and though she pretends to urge angry, it's silent that on the QT she loves the eye.

Worse although is that the continued portrayal of the rape victim as fallen, devastated, hopeless and isolated. She has solely 2 decisions - either she marries the person United Nations agency raped her or she commits suicide - each to forestall any shame on her family.

As euphemisms evolve - and that they do - we tend to may decision slums “alternative habitats” or poor folks “financially disadvantaged.” Comedian patron saint Carlin quipped that someday we tend to might hear a rape victim referred to as “an unwilling gamete recipient.” He same it in jest, however “eve-teasing” is employed altogether seriousness in Asian nation.

While the utilization of euphemisms is also acceptable in some things like a personal voice communication or creative illustration, it is impeding and harmful within the public discourse of a significant issue wherever the aim is to evoke modification.

Using a locution leads US to believe we're discussing one thing abstract, hygienical and theoretical , rather than one thing visceral, dirty and immediate. generally we'd like to get rid of all the ribbons and bows and wrappings and appearance the ugly, stinking beast within the eye.

In a paper titled “Intellectual Fashion in Asian nation,” Asma Riswan, a faculty member at People's cluster in Bhopal describes locution as “linguistic dishonesty.” In India, what we tend to decision “ragging” is really the bullying of latest faculty students, whereas those we tend to tenderly decision “Widows of Vrindavan” square measure thousands of aged ladies United Nations agency, once their husbands have died, are abandoned by their families to beg on the streets of Vrindavan. What we tend to decision the “missing lady child” refers to the ample deaths by induced abortion, infanticide and murder of women underneath the age of six. then in fact there's the “eve-teasing” done by “lumpen components.”

We have to maneuver aloof from the locution “eve-teasing” to a minimum of the orthophemism “sexual harassment.” maybe even more practical is also the saying “Sita-bullying.” this could move to several Indians as Sita is that the pious adult female of the Hindu god avatar and higher than ethical reproach; she continues to be seen because the exemplary girl, wife, and mother. Bullying is Associate in Nursing unambiguous word. the complete term along – “Sita-bullying” – can be helpful and necessary in dynamic our thoughts, conversations, and actions. Our bark has to be abundant harsher if it's to possess any bite.904

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https://blogs.wsj.com/indiarealtime/2013/04/21/the-term-eve-teasing-must-die/
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www.euroasiapub.org


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INTERTWINING TECHNOLOGY AND DATA PRIVACY: BRINGING STABILITY IN FINANCIAL INSTITUTIONS

By Shashwat Srivastava and Rachi Gupta
From Gujarat National Law University, Gandhinagar and Guru Govind Singh Indraprasta University, New Delhi respectively

ABSTRACT
“The world is one big data problem.”
– Andrew McAfee, principal research scientist, MIT.

The most critical asset for financial institutions is Data and that is why Data playing such a pivotal role. Maintaining the integrity and availability of data is key to financial markets globally. Data is an ideal target for malicious adversaries, with information theft being the most expensive and fastest-rising consequence of cybercrime.905

There is sharp increase in cyber attacks and their consequences so banks & financial institutions are increasingly concerned about that. In an IIF survey of global banks, conducted in partnership with EY, both the Boards of Directors and Chief Risk Officers (CRO) deemed “Cybersecurity” to be a top strategic priority, second only to addressing new regulatory rules and supervisory expectations.906 Elder financial exploitation has been called “the crime of the 21st century.”907 Deploying effective interventions has never been more important.908 Data on cyber incidents is scarce and there have been very few quantitative analyses of cyber risk.909

India lags behind in comparison to many other countries regarding the protection of privacy & personal data because other Asian countries such as South Korea, which in 2016 strengthened its data privacy laws by imposing stricter penal provisions for violations, and Singapore, which protects privacy under the Personal Data Protection Act. As we all know India is amongst the fastest growing financial markets with a bewildering number of consumers, sustainable and appropriate measures must be given effect to attain a balance between the rights and privacy of the customers and interests of financial institutions.

Overview

India has physical boundaries in the form of international borders with other countries, but there is no such 'boundary' in the cyber world. "Our cyber boundary is yet not defined and in today’s world we do carry the obligation to protect our cyber boundaries also."910

Data privacy and rights attached to it are particularly paramount concerns for all the companies in the financial sector because banks and other financial institutions manage a large volume of sensitive information about their customers, and the breach of the same can have dangerous consequences. Data privacy refers to who's allowed access to consumer information provided to institutions with whom they have entered into a business relationship.99 Financial services, hospitality and retail have been among the industry verticals that were most affected by data breach events in 2010. Collectively these three verticals accounted for around 87% of data breach events recorded, with financial services accounting for almost 22% of total breach cases reported across industries in 2010.912

In this age of digital exchange the value of consent disappears because consumers might not realize their rights with financial institutions. A report released by Information Technology and Innovation Foundation in 2017 estimated the costs to national GDP by data localization and other barriers to data flows for certain countries as “reducing U.S. GDP by 0.1% to 0.36%; increased prices of cloud services in Brazil and the European Union to 54% from 10%, and reducing GDP by 0.7% to 1.7% in Brazil, China, the European Union, India, Indonesia, Korea, and Vietnam."913

In 2018 in USA, 8.5% of the data breach has occurred in the financial sector, including entities such as banks, credit unions, credit card companies, mortgage and loan brokers, investment firms and trust companies, payday lenders and pension funds and even financial authorities.914

Data loss or data destruction are top-rated concerns for organizations.915 For example, adversaries stole documents related to a card processing system used by around 200 banks in the United States and Latin America, which could be potentially used for future attacks.916 Manipulating credit scores, bank account numbers, and also border-data-flows.pdf.

916 Anthony Cuthbertson, Bank Robber Hackers Steal Millions of Dollars in Silent Heists Across U.S. and Russia, Newsweek, December 12, 2017 at https://www.newsweek.com/bank-robber-hackers-
market data containing the personal information on millions of consumers, healthcare patients and government workers could already be in use for various manipulation schemes.  

Emerging Global Data Privacy Trends
Data Breach Evolution
Nearly fifteen years ago serious data breaches began. This was the time when businesses began to digitize and store large databases online. But, the first major reported breach happened to internet giant AOL in 2004 when one of their employee sold details of 92 million users to the outside world. A data breach occurs when a hacker successfully infiltrates a data source and extracts sensitive information from financial institutions. The following are the steps usually involved in a typical breach operation:

A. Research: The cybercriminal looks for all the weaknesses in the company’s security.
B. Attack: The cybercriminal makes initial contact using either for a network or a social attack.
C. Exfiltration: Once having access to the computer the cybercriminal infringes upon the confidential company data by extracting the data.

The following table shows the 10 biggest incidents reported regarding Data Privacy:

<table>
<thead>
<tr>
<th>Company/Organisation</th>
<th>Number of Records Stolen</th>
<th>Date of Breach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yahoo</td>
<td>3000</td>
<td>August 2013</td>
</tr>
<tr>
<td>Equifax</td>
<td>145.5</td>
<td>July 2017</td>
</tr>
<tr>
<td>eBay</td>
<td>145</td>
<td>May 2014</td>
</tr>
<tr>
<td>Heartland Payment Systems</td>
<td>134</td>
<td>March 2008</td>
</tr>
<tr>
<td>Target</td>
<td>110</td>
<td>Decemb 2013</td>
</tr>
<tr>
<td>TJX Companies</td>
<td>94</td>
<td>Decemb 2006</td>
</tr>
<tr>
<td>JP Morgan and Chase</td>
<td>83</td>
<td>July 2014</td>
</tr>
<tr>
<td>Uber</td>
<td>57</td>
<td>Novemb 2017</td>
</tr>
<tr>
<td>U.S. Office of Personal Management</td>
<td>22</td>
<td>Between 2012 to 2014</td>
</tr>
<tr>
<td>Timehop</td>
<td>21</td>
<td>July 2018</td>
</tr>
</tbody>
</table>

Source – Trend Micro
Data breaches have gained widespread attention because financial institutions and businesses of all sizes have become increasingly reliant on digital data, cloud computing, and workforce mobility. In 2005 one of first data breaches of twenty-first century in financial sector occurred when 1.4 million credit card numbers and names on those accounts went public from DSW

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918 Chuck Lobert, Evolution of Data Breach (July 16, 2019 02:21 PM), https://www.vcsolutions.com/the-
920 Ibid.
Shoe Warehouse. Another early landmark incident occurred in 1984, when database files of the credit reporting agency Experian (then TRW Information Systems) were breached.

Regulatory Focus

Legislature is increasingly focusing on enacting laws and implementing the same as soon as possible to maximize data privacy and minimize breach impact on businesses. This can be done in a threefold way as follows -

A. Increasing government focus on law enforcement and breach notification - Globally stricter law enforcement and tougher penalties on data breach violators is needed to restrict the infringement of personal data. In the European Union, data protection authorities have power to investigate and prosecute defaulters for non-compliance. On the other hand, U.S.A. has adopted breach notification requirements very early to mitigate the breaches, while several nations are still under the process of intensifying their law enforcement policies.

B. Harmonization of data protection standards across regions - There is no unified approach in data protection across the globe. Banks, insurers and capital markets firms which have multinational operations globally and dealing with offshore outsourcing partners and local governing bodies counters major problems because of non-uniformity in the law. The EU has resolved this issue by removing excessively bureaucratic and ineffective notification requirements. In fact many emerging nations are beginning to adopt EU’s Data Protection Directive, in order to simplify their data security.

C. Outsourcing destinations adapting privacy laws to help industry - For enhancing data security standards and privacy concerns, most outsourcing destination countries (including India) have implemented new data privacy regulations. Initially, the privacy regulations in India requires institutions to obtain the consent of end customers before collecting their personal information. These kind of regulations would have carried a new set of challenges to the outsourcing business. But, with a major relief to the outsourcing businesses the Government of India have exempted outsourcing companies from such regulations in India.

India - The Reserve Bank of India time to time circulates guidelines, regulations and circulars to for maintaining confidentiality and privacy of banking customers’ information, and with regards in 2006 RBI and the Indian Banks Association established a body called the ‘Banking Codes and Standards Board of India’. The main function of the said body is to maintain a set of voluntary norms which banks must enforce themselves through all internal grievances redressal mechanisms within each bank, and these mechanisms should include a designated “Code Compliance Officer” and an Ombudsman.


922 Lily Hay Newman, The history of data breaches,
India also have Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 which serves as the privacy regulations and require companies to provide privacy policies containing measures to restrict the circulation of sensitive personal data with additional security measures, in addition to restricting international data transfers.\(^{924}\)

Moreover, Section 5 of the IT Act, barring exceptional cases where disclosure of information is required by law or consent is given by the client, provides for maintaining privacy and confidentiality of customers’ information by the banks and financial institutions where they have overtly agreed for keeping such information outside the reach of other organizations. Further, the Indian Banks Association’s (IBA) code of conduct mentions a section on ‘privacy of client’s information’ which all banks are legally bound to follow. To bolster and promote data protection, and developing security and privacy codes and standards the Data Security Council of India (DSCI), was setup as an independent self-regulatory body by NASSCOM (National Association of Software Companies). Its major formula is that consent should be free, informed, specific, clear, and capable of being withdrawn, and this consent forms the basis for processing personal data and information of clients.\(^{925}\)

Infact, DSCI has enforced best practice for data protection in lines with universal standards, and also addresses emerging disciplines of security and privacy.

**United States of America** – The federal law in USA which deals with sharing and protecting client’s private information is the Gramm-Leach-Bliley Act (GLB Act or GLBA) also known as the Financial Modernization Act of 1999. The GLBA is enforced by the Federal Trade Commission, the federal banking agencies, and other federal regulatory authorities, as well as state insurance oversight agencies.\(^{926}\) In addition to all financial industry laws and regulation, the major credit card companies require businesses process, store or transmit payment card data to comply with the Payment Card Industry Data Security Standard (PCI-DSS).\(^{927}\) The GLBA keeps stringent mandate over the banks and financial institutions to restrict transfer and sharing of customers’ Non-Public Personal Information (NPI). Further, the Safeguard Rules requires the banks and similar institutes to create written information security plan for its customers. In order to satisfy the GLBA, the Safeguard Rules also mandates the financial institutions to perform special employee management and training, among other requirements, for maintaining privacy of customers’ information. The USA also have a separate


legislation dedicated to frauds related to credit cards, called as Fair and Accurate Credit Transactions Act (FACTA), where it majorly imposes obligations on financial institutions and banks to institute programs to detect and ratify Identity theft cases.

**European Union** - On May 25, 2018, EU implemented European Commission’s General Data Protection Regulations (GDPR) for data protection, with imposition of responsibilities on financial institutions of protecting sensitive personal data of their customers. According to GDPR, banks strictly needs consent to processing a customer’s personal data with showing a “legitimate interest” in the data collected. The banks and financial institution under the regulations are obligated to take onus of data breaches that take place, accidental or otherwise, with complete transparency. The GDPR has standardized various protections for consumer and personal data of EU citizens across EU member states. Article 5 of the GDPR is the one which narrates the principle of personal data, providing lawful, fair and transparent manner of processing of personal data. The data collected can’t be used for an ulterior purpose inconsistent with the reason behind its collection.

**Technological Evolution**

New technology is increasingly being used by firms and institutions to enhance data protection and better control compliance-related costs. In order to restrict the access to sensitive information and keeping track of who has access to what information, the financial institutions and banks are investing more in identity management of the customers and clients. Moreover, nowadays financial institutions focus on simplifying data protection and controlling costs driven by the advent of new computing models, the deluge of backup applications, and the multitude of network choices because the complexity of data protection has increased for all organizations.

With the pride of world’s largest economy, USA also carries the stigma with largest data breaches in various organisations, with at least 12 incidents in past 15 years involving the personal information of millions of customers being compromised.

Some technologies increasingly used by banks and financial institutions -

**Distributed Ledger Technology**

Distributed ledger technology (DLT) is a digital system in which the transactions and their details are recorded in multiple places majorly used for recording the transaction of assets unlike traditional databases, distributed ledgers have no central data store or administration functionality.

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931 Santosh, supra, 14.


933 Margaret Rouse, Distributed Ledger Technology (July 15, 2019, 11:05 PM), https://searchcio.techtarget.com/definition/distribut
to enhance efficiencies, resilience and reliability for a variety of financial sector players and infrastructures.  

Artificial Intelligence - Nils J. Nilsson has provided a useful definition: “Artificial intelligence is that activity devoted to making machines intelligent, and intelligence is that quality that enables an entity to function appropriately and with foresight in its environment.” The major Goals of AI is to implement Human Intelligence in Machines by creating systems that understand, think, learn, and behave like humans. Using artificial intelligence techniques in the provision of financial services can increase efficiency, reduce costs, enhance quality, raise customer satisfaction levels and boost financial inclusion, mainly thanks to the possibilities they offer for automating operating processes and increasing analytical capacity. AI has helped the field to grow, blossom, and advance at an ever-accelerating pace.

Big Data - Big Data analytics is a method for analyzing large data patterns to reveal patterns, trends, and associations. Current technologies for e.g. cloud services, the Internet of Things and Big Data – as well as future technological innovations and increased connectivity through 5G networks, are all examples of technologies which can deliver enormous benefits, but along with risks for data subjects.

Cloud Computing - Cloud computing was defined by the UNCTAD Information Economy Report 2013 for enabling network access to a scalable and elastic pool of shareable physical or virtual resources with on-demand self-service provisioning and administration. The cloud computing industry had already achieved a global market worth of $127 billion in 2017. Cloud services do not present unique and different issues in data protection, rather they considerably enhances the complex nature of the current issues, especially with regards to cross-border data transfer.

Cyber Threats
The 21st century is the century of Big Data and advanced information. The government agencies are routinely using technologies which allow them to collect, store and share large quantities of data, which includes telephonic conversations, electronic payments among others. Further various business firms and financial institutions are storing personal data of their customers. This all is being done when the meaning of data privacy is under considerable
controversy. The increasing technological power with a bad combination of declining clarity on agreement of privacy have no doubt created problems concerning law, policy and ethics.\textsuperscript{940} The Information Technology Act 2000\textsuperscript{941} provides some sort of relief to Indian citizens yet there have been instances of leaking of Aadhaar information. For instance when UIDAI while filing a criminal complaint suspended all Aadhaar based transactions by 3 entities namely, Axis Bank, Suvidhaa Infoserve and eMudhra for attempted unauthorized authentication and impersonation by illegally storing Aadhaar biometric data. Such breach was caught when a single individual performed 397 biometric transactions on these 3 platforms using a single fingerprint.\textsuperscript{942} There have been some examples of such breaches globally as well. For instance in 2017 “Wanna Cry ransomware” netted 52 bitcoins or about 130000$. A group of hackers ‘Shadow Breakers’ breached the spy tools of the elite NASA-linked operation the ‘Equation Group’. Further, they also released a sample of stolen data from NASA, whose decrypted key they offered to sell against bitcoins trade.\textsuperscript{943} Another group of hackers even hacked the Central Intelligence Bureau, USA publishing 8,761 documents stolen from the CIA.\textsuperscript{944} In June 2011, Citigroup U.S. reported that hackers were able to gain unauthorized access to personally identifiable information such as customer names, account numbers, and contact information of 360,083 customers.\textsuperscript{945} Citigroup Japan suffered a similar breach affecting 92,400 customers.\textsuperscript{946} Loss to bank by an insider traitor was again reflected when the Bank of America suffered a massive breach of atleast US$10 million even customers’ data were sold criminals.\textsuperscript{947} Indeed, these banks and financial services organizations were the target of 25.7% of all malware attacks in 2018 which is more than any other industry. Direct losses due to cyber-attack are generally unrelated to the size of the financial institution targeted. Majority of banks’ and financial institutions’ operations take place with the use of technology and without concrete cyber security measures such operations and transactions are under severe danger.

Here are the five biggest threats to a banks’

so-far./

\textsuperscript{940} Jeroen van den Hoven et al., Conceptions of Privacy and the value of privacy, Privacy and Information Technology (July 20, 2019, 11:53 PM), https://plato.stanford.edu/entries/it-privacy/.

\textsuperscript{941} Information Technology Act, 2000.


\textsuperscript{943} Andy Greenberg, Hackers Claim to Auction Data They Stole From NSA-Linked Spies, (July 18, 2019, 05:26 PM), https://www.wired.com/2016/08/hackers-claim-auction-data-stolen-nsa-linked-spies/.

\textsuperscript{944} Lily Hay Newman, The Biggest Cybersecurity Disasters of 2017 So Far (July 18, 2019, 06:00 PM), https://www.wired.com/story/2017-biggest-hacks-

\textsuperscript{945} Maria Aspan el al., Citi says 360000 accounts hacked in may cyber attack, Reuters, June 16, 2011, at https://www.reuters.com/article/us-citigroup-hacking/citi-says-360000-accounts-hacked-in-may-cyber-attack-idUSTRE75F17620110616.


\textsuperscript{948} Zeljka Zorz, Which cyber threat should the financial institutions be on the lookout for? (July 19, 2019, 08:00 AM), https://www.helpnetsecurity.com/2019/04/30/2019-cyber-threats-finance/.
cyber security -949

1. Unencrypted Data – When the data is not converted into secured code, the data would be prone to unauthorized data access. Hence all data stored at financial institutions should always be encrypted, by this, even if the data is stolen, the hackers can’t immediately use them.

2. Malware – The bank’s data security comes under great risk, every-time they are connected with end user devices (such as computers and cells) which possess malware in them.

3. Third Party Services that Aren’t Secure – The most genuine mistake a bank would commit, is when in order to provide better services to their customers, they employ third party services. Sensitive data may be at risk in such situations if the third party services don’t possess authentic cyber security measures.

4. Data That Has Been Manipulated - Without stringent cyber security systems, the financial institutions are prone to serious data manipulations by the hackers. Under this attack, the hacker don’t steal the data, but rather change it, and such an attack is difficult for the financial institutions to detect and ultimately causing million dollars of damages.

5. Spoofing - A newer type of cyber security threat is spoofing in which hackers impersonate a banking website’s URL with a website that looks and functions exactly the same.

The World Economic Forum in collaboration with McKinsey, conducted a study which suggests that “if the pace and intensity of attacks increase and are not met with improved defenses, a backlash against digitization could occur, with large negative economic implications”. They estimate that “over the next five to seven years $9 trillion to $21 trillion of economic value creation, worldwide, depends on the robustness of the cyber-security environment”. 950

Balancing Innovation with Data Privacy and Information Governance
The dignity of the human person, and a healthy community can be protected only if the expansion of economic opportunity is balanced with human rights and respected mutual responsibilities.
- Bishop Paul Tighe, Secretary of the Pontifical Council for Culture, The Vatican.

The global flow of digital data has risen dramatically over the last three decades from close to zero to more than a zettabyte (one trillion gigabytes) globally. A 2017 paper by the International Data Corporation estimates that by 2025, the world “will create and replicate 163ZB of data,” which would be a tenfold increase over 2016. 951

Recent incidents like Cambridge Analytica appropriating Facebook’s data and other similar security breaches where personal

data of customers is transferred from private entities, clearly shows the loophole in data portability which is undermining people’s privacy.\textsuperscript{952}

The core of banking is to protect personal data from fraud which means safeguarding customers’ financial assets. The digitization of financial details has triggered for true data-driven activity, where rather being a liability, data is source of value for customers. However, the aim must be to achieve both, i.e., economic growth with innovative solutions for clients and fundamental right to privacy, and there must be balance between data privacy and financial institutions, instead on keeping them at odd ends.\textsuperscript{953}

Hence, for banks and financial institutions, the major challenge is to allow disclosure of data to support technological advancements, and also providing security to sensitive personal information, to counter privacy concerns of the customers.\textsuperscript{954} For this, first data privacy principles ever adopted were called “Fair Information Practices” (FIP), which provides for openness and disclosure of information along with a set personal data security framework.\textsuperscript{955}

Financial institutions need to affirm the regulators and shareholders that they carry active programs to prevent financial crime and also having a robust mechanism to manage the monetary and financial risks associated with financial crime.\textsuperscript{956}

These days banks and financial institutions use a giant tech ecosystem with partners, sharing data to build better digital experiences for the customers, which puts serious questions on privacy but without much legal guidance and rules on assuring and maintaining data privacy, they are forced to take the self-regulation route just like the crypto-currency businesses.\textsuperscript{957}

All the discussions about privacy are knitted with the use of technology. Initially Samuel D. Warren and Louis Brandeis wrote an article on privacy\textsuperscript{958} protesting against the intrusive activities of the journalists and arguing for “right to be left alone” and the principle of “inviolate personality”. Hence, after the publication of this article, for the first time the debate about privacy had erupted, considering the conflict between one’s right to decide the extent of his details being shared and the right of others in the society to know about individuals.

**Breach and Regulation**

**Indian Perspective**


\textsuperscript{958} Jeroen, supra, 32.
European Convention and Article 12 of Universal Declaration of Human Rights. The foundation of right to privacy is on line of dignity and not secrecy. Over the last few decades in India, under Article 21 of the constitution, the “right to privacy” has emerged as a well-established right. A plethora of judicial decisions, such as Kharak Singh v State of Uttar Pradesh, People’s Union for Civil Liberties v Union of India, and Gobind v State of Madhya Pradesh, rendered by the Supreme Court in the country have contributed to the recognition accorded to the right to privacy.

The judicial recognition of the need for data privacy in the banking sector can be seen in the case of Punjab National Bank v Rupa Mahajan Pahwa, in which Punjab National Bank had issued a duplicate passbook of a joint savings bank account, which held between the petitioner and her husband, to an unauthorized person. In this case while awarding compensation to the petitioner the Delhi State Consumer Disputes Redressal Commission, held that there was a deficiency on the part of the bank in issuing the passbook and passing on some other information which was not to be disclosed to another person. Another case where the Court held that the Bank had been negligent in operating sensitive data and hence awarded compensation to the customer is Umashankar Shivasubramanian v. ICICI Bank.

Even after so many developments and technological growth India still lags behind to cybersecurity and data protection in comparison to the more technologically advanced countries of the world. Recently, the Supreme Court of India, in Justice Puttaswamy (Retd.) and Anr. v. Union of India and Ors., upheld the overall validity of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (the "Aadhaar Act").

A total 50 incidents of cyber-attacks affecting 19 financial organizations have been reported from November 2016 to June 2017. These attacks have been reported majorly on payment gateways or digital payment interfaces which include e-wallets like Paytm, Jio-Money, etc. and these incidents have only been reported in relation to the financial sector with many unreported incidents also took place in other sectors. Further, the country has witnessed a total of 1.71 lakh cyber-crimes in the last three and half years, which is at least one cyber-attack being reported every 10 minutes. In the year 2012 about 112 government websites, including those of
Bharat Sanchar Nigam Ltd, Planning Commission and Ministry of Finance, were hacked in the period of just three months.\textsuperscript{969} Globally companies have developed comprehensive regulatory frameworks to protect an individual’s rights and sensitive information of clients. Considering the lack of proper legislation dedicated to protection of data privacy in the nation a Committee under the Chairmanship of Justice B. N. Srikrishna was setup in July 2017 to examine various issues related to data protection in India, and to recommend methods to address them and ultimately suggesting a draft data protection Bill.\textsuperscript{970} After one year committee came up with the Personal Data Protection Bill, 2018 dedicated towards a security regime for sensitive, private and confidential data, being applicable on both individuals and businesses. The bill has been broadly based on the lines of GDPR recently notified in European Union and landmark judgment of the Supreme Court of India declaring right to privacy as a fundamental right. The bill has given a very wide definition to sensitive personal data which also includes financial data among others.\textsuperscript{971} The Bill regulates the processing, transferring, collection and sharing of personal data within India. It will also apply to foreign data being stored or processed in India.

International Perspective

The Aadhaar verdict in India has led a tremendous change in the mindsets of citizens regarding privacy and data infringement. After Aadhaar incident people started questioning the authorities about the security of their personal information. Some more incidents regarding confidential information happened in developed countries like U.S. & U.K. e.g. “Wanna Cry ransomware”, which has already led to a lot of hues and cries because the confidential information of the citizens were at stake. Recently in United Kingdom (UK), Minister of state for Digital, Culture, Media and Sports (DCMS) spoke about the new Data Protection Law (DPL) which would include the concept of ‘Right to be Forgotten’ by companies.\textsuperscript{972} The said law would expand the ambit of “Personal Data” to include IP address, internet cookies, and DNA. On the other hand, USA is following a sectorial approach. Sensitive data of its citizen which is grouped in classes on the basis of their utility, and therefore, USA has mixed legislation for Data Protection. EU has its own Data Protection Act which is quite advance and has all kinds of laws and regulations to cope up with the requirements of this contemporary world and mitigate infringement of data privacy. Comprehensive data protection and open banking legislation has been enacted in


\textsuperscript{971} Suneeth Katarki et al., Categories of Data, The Personal Data Protection Bill, 2018 - Key Features and Implications (July 18, 2019, 09:47 PM), http://www.mondaq.com/india/x/727550/data-protection/The+Personal+Data+Protection+Bill+2018+Key+Features+And+Implications.

Europe that views protection of data as a human right and violation of the same follows stringent actions. The GDPR reinforces data protection requirements and establishes new individual rights which includes data portability and the right to be forgotten. The new rules give EU citizens far more control over the use and storage of their data and specifies punitive fines, for companies that fail to keep that data safe, up to 20 million euros or 4% of global revenue, whichever is greater.  

The United States, regulates all breaches of personal data within industries on a federal level so the Gramm-Leach-Bliley Act applies to financial institutions and to businesses that provide financial products and services. In terms of enforcement, the Federal Trade Commission (FTC) promotes consumers’ protection of personal data and can investigate and address a company’s failure to comply with their own privacy practices.  

**Data Privacy Recommendations and Solutions**

Today, data privacy laws are having their existence in almost all major countries, and are developing for the upliftment of the customers. The rules and regulations all revolve around data security, accountability, access, data integrity, consent, disclosure, and notice, the stringency levels of these laws and their enforcement differ in different jurisdictions and nations. The Wall Street Journal reported that, a record of $355 million in outstanding credit card debt is now owned by persons who didn’t even exist physically as recently as 2017. This type of synthetic identity fraud caused by fictitious people is generating harm by casting doubts on the entire consumer credit ecosystem.  

In 2017, financial services were the second most targeted industry of ransomware after healthcare. EU Data Protection Regulation (GDPR) says that “Personal data shall not be transferred to a country or territory outside the EEA unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.”  

The problem with the Indian IT Act, 2000 is that although it deals with the issue of the data protection and privacy, but not in a holistic manner rather in a partial manner. This clearly reflects a lack of actual framework in the IT Act, 2000 regarding the data protection, quality of cyber security systems and transparency of the data. The challenge faced by banks is that, at on hand they are trying to have to innovative and compelling financial services experiences for the interest of the customer, but on the other hand such innovations invites threat to data privacy for which they need to regulation stringent data privacy policies. Moreover, in order to help prevent and detect financial crime alongwith major loopholes, banks need both an integrated (and timely) data set and the ability to bring all sophisticated analytics and maintenance 

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973 Trend Micro, supra, 10.  
972 Matthew Blake et al., supra, 45.  
973 Dean Nicolls, 5 Emerging cybersecurity threats facing financial services (July 16, 2019, 09:11 PM), https://www.jumio.com/5-cybersecurity-threats-financial-services/.  
to bear on the data to generate useful insights. Three such major elements that comprise this capability are.\textsuperscript{978}

A. \textbf{Enhanced data quality} – Global banks operating in different regions using multiple data sources for their business, face this data quality issue. Hence to address this major challenge, banks need to prepare themselves to establish central data screening and reconciliation processes, and also improving their data governance.

B. \textbf{Analytics to transform data into information, and information into insight} – Most of the organizations face the problem regarding the lack of the right data and by using data-driven decision-making banks allow themselves to gain a better and smooth understanding of the various physical, societal, financial and commercial aspects of their operating environment.

C. \textbf{Application of data visualization techniques} – With increase in volume and complexity of data, key software providers are adopting data visualization techniques for allowing complex data to be viewed by business experts through a visual interface. This visual view allows investigators to view transactions flow across multiple accounts, to identify new pattern in major financial crime cases.

The primary goal for all financial institutions is to preserve customer trust and many financial institutions does not currently have a separate privacy office for combating cybercrimes. Institutions must hold an internal “privacy summit” that convenes key stakeholders from the lines of business, technology, compliance, and law to identify and understand what the data is, where it resides, how it is classified, and how it flows through various systems. For example, financial, medical, and PHI are subject to different restrictions in different area. Financial Institutions need to develop appropriate global data-transfer agreements for PHI and other data that falls under privacy requirements. Further, they need to recognize and adhere to privacy requirements when developing core business processes and cross-border data flows.\textsuperscript{979}

McKinsey and Company recommend another great tactic of “golden record” for approaching data privacy that companies can adopt to become data stewards for every personal data processing activity in a company to ensure compliance and traceability that goes “beyond documenting the system inventory and involves maintaining a full record of where all personal data comes from, what is done with them, what the lawful grounds for processing are, and whom the data are shared with.” With the right records, resources, banks, and financial institutions must also see how they can ensure data privacy into their services and offerings by design and by default.\textsuperscript{980}

Financial institutions around the world have adopted the FireEye technology which actually enables firms of all sizes to detect and defend against exploits and

\textsuperscript{978} Steve Culp, supra, 48.


advanced attacks that bypass their traditional security measures. The Consumer Financial Protection Bureau’s (CFPB or Bureau) Office for Older Americans provides recommendations for banks and credit unions to accompany the Advisory for Financial Institutions on Preventing and Responding to Elder Financial Exploitation, issued simultaneously.

Suggestions

From the above discussion the following suggestions can be made.

1. In India there is a dire need for a constitutional amendment and specific or special law too regarding data privacy and cybercrimes, whereby right to privacy can be guaranteed expressly. Such an amendment and law are necessary to give recognition to the right to privacy, and to provide a wider and meaningful definition to personal liberty enshrined under Article 21 of the Constitution.

2. We must evolve National Policy to guarantee to individuals their rights to control the collection, disclosure, transfer, process and distribution of their sensitive personal or financial information. The vital component of the policy is to legislate the basic tenets of fair information, ultimately providing them rights such as right to limit data collection, data transfers, and secondary uses of the data among others.

3. Banks and financial institutions should use encryption and multi-factor authentication process. By this, they would have control over the personal information in their database, since encrypted information is safe in transit, on the network, and even in cloud. Further, with multi-factor authentication, having more than one method process of identification to have access to data, would provide an added layer of protection to personal information saved in their database even if the system is being hacked.

4. Banks and financial institutions should engage working with a data risk security advisor, who would help them to evaluate their security system and electronic information, and at the same time, would help in identifying and rectifying the weak link of their security system which is prone to cyber threats and data leakage.

5. With regards to the employees of the banks and financial institutions, instead of allowing access to every confidential and private database, the employees should only be allowed the necessary database which falls under the part of his or her work. This has become a major preventive measure, considered numerous cases of breach of privacy where employees shares confidential information with the outside world. Further, the employees should be

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984 Cloud Carib, A layer approach to data security, What can banks and financial institutions can do to increase security (July 20, 2019, 10:04 PM), https://info.cloudcarib.com/blog/what-can-banks-financial-institutions-do-to-increase-security.
restricted to use only devices issued by
the banks or financial institutions.\textsuperscript{985}
If the above suggestions are implemented
through appropriate measures and at right
place in right manner then, it is sincerely
hoped that the right to privacy can be
protected more effectively.

\textbf{Conclusion}

\textit{Data is the pollution problem of the
information age, and protection privacy is
the environmental challenge.}
- Schneier Bruce.

India is a very fast growing economy where
lots of data and sensitive information is
being transferred from one place to other,
specifically from India to foreign
jurisdictions so there is an urgency of law
and legal framework to monitor all such
transfer, store and regulation of data. In
this cyber world where whole world is a
kind of family (Vasudhev Kutumbakam)
India do not have an adequate Data
Protection Act which becomes a slab and
this prevents India to become one of the
developed cyber economies.

Till now the only act which deals with some
sort of Data protection in India is
Information Technology Act but it is a
general act and not a special act which
covers all the issues regarding protection of
data and consumer concerns. Moreover, it
is sometimes not able to punish the cybercriminal because of loopholes in it.
So, India should introduce a new legislation
for Data Protection so that in future no
criminal can abscond from the law and
justice can be delivered. The cost
implications of a data breach from
monetary and reputational perspective are
increasing exponentially for all financial
institutions. Most importantly the risk
management team of every financial
service institute needs to play a pivotal and
active role in shaping policies regarding
data security for better results.

The Herjavec Group has predicted that the
global annual cost of cybercrime is
estimated to increase to around USD 6
trillion by 2021, from USD 400 billion in
early 2015.\textsuperscript{986} Similar estimates can be
found by organizations such as Juniper
Research and the World Economic Forum,
and in a July 2017 report, Lloyd’s of
London estimates that a single global
cyber-attack could result in damages of as
much as USD 121 billion.\textsuperscript{987} All such data
give us serious threats regarding privacy of
information and customer rights. Financial
services organizations are a critical part of
the infrastructure of the world’s economy.

Like all companies, they need to win new
customers and differentiate with innovative
products and services.\textsuperscript{988} In India the draft
of Data Protection Bill, 2018 uses global
privacy regimes and lays down key
provisions to promote transparency and
hold data fiduciaries/organizations
accountable for their actions. The Bill
allows exemptions for important purposes
such as legal proceedings, journalism,
research but on the other hand bill could be
questioned if there is necessity and

\textsuperscript{985} Infosec, The Checklist, A security checklist for
the financial institutions (July 20, 2019, 11:37 PM),
https://resources.infosecinstitute.com/a-security-
checklist-for-financial-institutions/#gref.

\textsuperscript{986} Steve Morgan et al., Digital Growth,
Hackerpocalypse: A Cybercrime Revelation (July 20,
2019, 07:11 AM),
https://www.herjavecgroup.com/hackerpocalypse-
cybercrime-report/.

\textsuperscript{987} Trevor Maynard et al., Counting the cost: Cyber
exposure decoded (July 17, 2019, 02:19 PM),
https://www.lloyds.com/~media/files/news-and-
insight/risk-insight/2017/cyence/emerging-risk-

\textsuperscript{988} Spiros Antonatos et al., Privacy by design for
financial services organizations in GDPR era (July 19,
2019, 06:08 PM),
proportionality required for infringements to an individual’s right to privacy. But some amendments regarding the privacy in finance sector and implementation of the bill is required as the cases infringement of personal information are increasing day by day. So we have to work in this arena for the betterment of society. Moreover, we must acknowledge that innovation and privacy of customers must go hand in hand, it must be like two side of the same coin otherwise India as a nation would never be able to stand globally in developed economies as well as eminent nation which actually give priority to personal rights.

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ECONOMIC GOVERNANCE: A THIRD WORLD PERSPECTIVE

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ABSTRACT
International economic governance studies the attempts at organisation and regulation of all international economic transactions, in order to control global economic development and international financial markets. After the devastation caused by the World Wars, the Allied States put in place a system of international economic governance referred to as the ‘Bretton Woods System.’ The architects of the original Bretton Woods system sought to facilitate the post war reconstruction and development of international and domestic economies. However, newly independent countries that had been recently freed from colonial rule, or Third World or developing countries, struggled to integrate into this system crafted by and for the benefit of developed nations.

This paper examines and criticises the approach of Bretton Woods institutions like the World Bank (WB), International Monetary Fund (IMF) as well as the later established World Trade Organisation (WTO) towards Third World nations. It also sheds light on the past and present efforts of Third World countries to increase their involvement, influence and funding in the international sphere through the New International Economic Order (NIEO) and Multilateral Development Banks (MDBs) respectively. The paper concludes by examining the advantages of MDB’s over the existing Bretton Woods institutions and provides suggestions of reforms for the existing institutions to better integrate Third World countries and promote their needs and development.

INTRODUCTION

I. INTERNATIONAL ECONOMIC GOVERNANCE

International economic governance refers to the efforts to organise, structure, and regulate economic interactions all over the world. In substantive terms, economic governance deals with a host of policy challenges, efforts at monetary and fiscal cooperation and regulation of financial markets internationally. There are many different institutions that are engaged in international economic governance, established following the end of the Second World War, with the advent of the Bretton Woods system. The most notable are the World Bank (WB), the International Monetary Fund (IMF) General Agreement on Trade and Tariffs (GATT) and World Trade Organisation (WTO). The study of international economic governance includes the analysis of the rationale for the establishment, operation and development of these institutions.

II. THE THIRD WORLD

The term ‘Third World’ finds its origin in French anthropologist and historian Alfred Sauvy, who used it to describe countries that were neither unaligned with the First World – USA, Canada, and other allies of the Capitalist Bloc, nor the Second World – Soviet Union, Cuba and other allies of the

990 Wesley W. Widamer, International Organisations and Economic Governance, Oxford Research
991 Manmohan Agarwal, International Economic Governance: Where We Are and How We Got Here, World Scientific Reference on Asia and the World Economy 3, 17 (1st ed. 2015)
Communist Bloc, during the time of the Cold War.\textsuperscript{992} Sauvy wrote, "This third world ignored, exploited and despised also wants to be something."\textsuperscript{993} Third World at present however, refers to the countries of Africa, South America and Asia that have less developed economies and industries.\textsuperscript{994} The modern concept of the third world serves to identify countries that suffer from high rate of mortality, poverty and dependence on industrialised nations but having low economic development and utilization of natural resources.

### III. THIRD WORLD APPROACHES TO INTERNATIONAL LAW

Third World countries include many countries in Africa, Latin America, and Asia that were colonized, and emerged as newly independent States in the 1940’s and 1950’s. Colonialism was characterized by the flow of resources from a ‘periphery’ of poor and underdeveloped states to a ‘core’ of wealthy states, enriching the latter at the expense of the former.\textsuperscript{995} As States became newly independent, they experienced severe economic hardships in integrating with the existing European economic system. Hence, these newly independent countries are commonly misclassified as underdeveloped, neglecting their historical context. However, the Dependency Theory postulated by Hans Singer and Raúl Prebisch explains that previously colonized countries are not poor because they lagged behind the international economic transformations but rather, because they were coercively integrated into the European economic system only as producers of raw materials or repositories of cheap labour and denied the opportunity to market their resources in a competitive way with dominant states.\textsuperscript{996}

Renowned scholars like R. P. Anand and B. S. Chimni, in acknowledging the postulates of Dependency Theory have pioneered a novel field of research known as Third World Approaches to International Law (TWAIL). TWAIL indicts colonial international law for legitimizing the subjugation and oppression of third world countries and their people. It lays emphasis on the fact that pre-colonial States were not strangers to international law and attempts to incorporate doctrines and principles found in third world legal systems into the international legal system.\textsuperscript{997} TWAIL does not reject the existing international law, but advocates for the inclusion of needs and aspirations of newly independent states.\textsuperscript{998} TWAIL, acknowledges that politics alone is insufficient to achieve liberation as the pre-colonial economic structure continues to disadvantage the Global South and thus it sought to inaugurate a New International Economic Order (NIEO).\textsuperscript{999} NIEO sought to make structural changes to an international economic system which disadvantages developing countries, and to regain agency and control over their natural resources.\textsuperscript{1000}

\textsuperscript{992} Alfred Sauvy, \textit{Tiers Monde}, L’Observateur, August 14, 1952  
\textsuperscript{993}id  
\textsuperscript{994} Cambridge Advanced Learner’s Dictionary (8th ed, 2002)  
\textsuperscript{996}id  
\textsuperscript{999} Mohammed Bedjaoui, \textit{Towards a New International Economic Order}, UNESCO 263, 287 (1979)  
\textsuperscript{1000} Chapter II, Article 2, Charter of Economic Rights and Duties of States, G. A. Res. 3281 (XXIX)
ANALYSIS

I. THIRD WORLD APPROACH OF BRETON WOODS INSTITUTIONS

i. World Bank and IMF

Criticism of Approach to Third World Nations

Initially, the World Bank acted as the major channel of funds from wealthy, industrialized nations to poor, non-industrialized nations. In the 1950’s and 1960’s, it assisted the developing world with respect to the infrastructure, but in the 1980’s, its main task switched to providing policy reform assistance. Due to the rise of environmental and social issues plaguing the international community, the principal functions of the World Bank lay in the fields of environment, poverty reduction, and promoting the role of women in economic development. Though these policy reforms can be of socio-political advantage, the majority of the economic structural reforms had vested interests behind them. Despite the goals of the World Bank to aid in sustainable economic development and poverty alleviation, certain aspects of its institutional structure and governance raise questions on the neutrality of the institution, regarding the upliftment of third World Nations. Firstly, the dominance of the western world is reflected in the composition of the board of governors and executive directors of the World Bank. In addition to this, disparity in terms of voting rights also strengthens this contention, as United States (US) enjoys not only seventeen percent (17%) of votes but is also the only state which can also exercise veto power over the major decisions. Moreover, the borrowing or developing countries as a whole have only thirty eight percent (38%) of votes, showing that even unified, they constitute the minority. Secondly, the Washington Consensus reinforces the influence of superpowers like the US over Bretton Woods institutions. The Washington Consensus was a policy instrument agreed upon by the IMF and World Bank with the US government in order to promote ‘openness of the world market’ by liberalisation, privatisation and deregulation of the economy. These reforms clearly benefitted developed nations, but were harmful for Third World nations. These reforms clearly aimed at suppressing their domestic economies as liberalization of market at such an early stage, would destroy them due to the huge gap between the growth and advancement of foreign and domestic markets. The enactment of this instrument was via Structural Adjustment Programs (SAP), which targeted the economic structure of developing countries by forcing them to join the IMF if they wanted membership in the World Bank. However, joining IMF included embracing a number of conditions, which included policy adjustments that would adversely affect developing nations. Further, the debt crisis in the 1980’s rendered developing countries unable to pay back loans taken from Western commercial banks which had gone

1003 Stanley Fischer, The Washington Consensus
on a huge lending binge to third world governments in the 1970’s. The economies of third world nations were already unstable and their economic sovereignty was further compromised by SAP.

Thirdly, the World Bank failed to perform its fundamental function of assisting third world countries in economic growth and instead left them in worse debt-ridden conditions. This was supplemented by high interest rates on developmental loans. Between 1980 and 1995, the debt of nearly every developing nation increased substantially. These tactics adversely affected African nations like Tanzania, Nicaragua and Ivory Coast. Aid provided by Bretton Woods institutions came from former colonial monopolies to strengthen bilateral ties between the former colonies and their colonial rulers. However, these efforts did more bad than good for the developing economies.

Finally, IMF continues to impose unachievable economic conditions on lending to third world countries. Particular episodes saw it lending to highly indebted developing countries in Latin America in the aftermath of the 1980’s Third World Debt Crisis and even to Brazil and Russia during the financial crisis of 1997–99. The incongruent side of the IMF is that it imposes measures, terming them necessary to control the budgetary imbalances. For instance, during the Indian economic crisis in 1990, the IMF was reluctant to provide assistance, until India agreed to a conditional bail out to cover balance of payments debts, which prompted the Indian government’s policy of liberalisation in 1991. Similarly, in Latvia, the government was forced to cut its budget by forty percent (40%), and is planning to close some public hospitals and schools in order to make the IMF’s targets.

ii. GATT and WTO

Background
The General Agreement on Tariffs and Trade (GATT) is a legal agreement, which was signed by 23 nations, with the overarching purpose of “entering into reciprocal and mutually advantageous arrangements for the substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce.” It was intended to promote international trade by reducing or eliminating trade barriers such as tariffs or quotas.

The history of General Agreements on Tariffs and Trade (GATT) has never been favourable towards developing nations. In comparison to the UN-System, the third world interest in the initial years of GATT was not taken into consideration. When assessed by way of the Havana Charter, where a number of compromises were made with respect to the demands of developing countries, the ostensibly ‘temporary’ GATT made very few such concessions. As a result of being sidelined by GATT, developing countries

1008 Mark Weisbrot, The IMF is Hurting Poor Countries, The Guardian (May 13, 2009, 10:00 PM) https://www.theguardian.com/commentisfree/cifamerica/2009/may/13/imf-us-congress-aid
1009 Preamble of GATT, 1947
1010 id
1011 Craig VanGrasstek, Part V: Relations With Other Organisations and Civil Society, The History
decided to bypass the GATT system and chose to rely on alternate negotiating forums. In 1964, efforts were made to establish these forums through United Nations Conference on Trade and Development (UNCTAD). Initially, creating a strong rival to GATT seemed achievable but it fizzled out due to strong objections by developed countries on various issues, such as reluctance in making permanent bodies to cater to the economic needs of developing countries.\footnote{Understanding the WTO, World Trade Organisation websitehttps://www.wto.org/english/thewto_e/what_is_e/tif_e/fact5_e.htm}

However, at the end of the Cold War, the GATT emerged as the sole forum for trade negotiations, with UNCTAD's existence being undercut. The World Trade Organisation (WTO) replaced GATT, but it still exists as the WTO’s umbrella treaty for trade in goods.\footnote{Committee for Development Policy & United Nations Department of Economic and Social Affairs, Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures (November, 2008)}

\textbf{Affirmative Measures Taken by WTO}

The fundamental aim behind the adoption of the WTO was to improve international trade by providing unequivocal market access, including removal of voluntary export restraints that were adopted by nations as barriers to trade and create an equal playing field for all nations. To this effect, these provisions and enactments of the WTO offer certain additional refuge to third world interests. \textit{Firstly, although the Marrakesh Treaty obligates members to comply fully with the WTO obligations, it still recognises flexibility with respect to the developing countries.} For instance, least developed countries (LDCs) can express acknowledgement of their needs in the Ministerial Decision on Measures and are only obligated to respect commitments consistent with their development needs.\footnote{Special and Differential Treatment, Briefing Notes, World Trade Organisation websitehttps://www.wto.org/english/tratop_e/dda_e/status_e/sdt_e.htm}

\textit{Secondly, WTO facilitates the interests of the third world countries through ‘Special and Differential Treatment’ (S&D) provisions.} These provisions were inserted to provide a helping hand to the growing economies by providing them additional time for implementing standards adopted by WTO agreements as well as other additional benefits. There are a number of examples of positive differential treatment awarded to developing countries. First, custom duties that can be imposed by developed countries are far less than by developing countries, as developing countries need to protect their domestic market and are allowed to impose higher barriers to restrict free market access.\footnote{Peter Van Den Bossche & Werner Zdouc, The Law and Policy of the World Trade Organization 93, 145 (4th Ed., 2012)} Second, products from developing countries are favoured and given preference over those of developed nations.Further, special and differential treatment and other affirmative measures are provided such as measures to help developing countries build the infrastructure to undertake WTO work, handle disputes, and implement technical standards.\footnote{Article XXVII: 1 of GATT, 1994}

\textit{Lastly, taking into consideration the
changing needs, the ministerial conference of WTO is reorganised every two years. In this way, the diverse composition of the highest decision making body of the forum can discuss new trade opportunities or barriers from the perspective of the third world nations.

**Criticism of Approach to Third World Nations**

Although the WTO has provided ostensible advantages to developing nations, there have been a number of criticisms against it as well. Firstly, the trade negotiations in WTO are based on the principle of reciprocity or ‘trade-offs.’ That is, one country gives a concession in a certain area, in exchange for another country acceding to a certain agreement. This type of bartering exclusively benefits large and diversified economies, because they can get more by giving more. Although developing countries make up three-fourths of the WTO membership and can in theory influence trade negotiations by their votes, in reality they have never used this in their favour. This is for the simple reason that most developing economies are in one way or another dependent on developed economies like the US or UK and are well aware that any obstruction at the WTO might threaten the overall security of dissenting developing nations.

Secondly, the dispute settlement mechanism of the WTO is not autonomous and at times is bend by the developed nations this can be observed by the blockade being performed by USA in appointment of judges of the Appellate Body. The process of dispute settlement includes consultation, followed by litigation and in case of non-compliance, the country emerging as victorious in the process can impose retaliatory trade barriers against others. The Dispute Settlement Understanding (DSU) allows member states who have prevailed in dispute settlement to impose high tariffs against non-complying nations. For developed nations like USA or China, such a hindrance on trade by another smaller nation does not act as an effective deterrence. Further, it cannot be denied that the DSU of the WTO favours the trade giants because of its low level of deterrence for non-compliance with the dispute settlement process.

Finally, there are other factors such as the expanding and dynamic nature of trade, requiring constant revision of the WTO Agreement. For instance, the growing concept of trans-national subsidies can neither be deterred nor be validated due to lack of jurisprudence on it.

**II. PAST EFFORTS AT THIRD WORLD FUNDING AND DEVELOPMENT**

In the past, several newly independent third world countries joined forces to leverage their combined influence to create institutions to affect changes in the existing international economic regime to their advantage. The reason behind the emergence of these institutions was the undemocratic nature of the previous efforts that were taken up. However, these

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Institutions too failed to consider the needs of the developing nations.

i. New International Economic Order

History
In order to advocate for a new international economic system that incorporated the challenges and aspirations of third world countries, a coalition of third world countries was indispensable. This bond developed through various international associations and conferences. Firstly, the Bandung Conference (1955) which was a meeting of newly independent Asian and African countries to foster solidarity to achieve common goals. Secondly, the Asian-African Legal Consultative Organisation (AALCO), established a year after Bandung in 1956, to advise on international law and initiatives for the fulfilment of objectives of its member States. Thirdly, the Group of 77 (G-77), established in 1964, the largest intergovernmental organisation of developing countries in the UN, which served as means for the developing countries of the South to promote their collective economic interests and enhance their joint negotiating capacity. Finally, this led to the United Nations Conference on Trade and Development (UNCTAD) in 1964 to deliberate on concerns of developing countries over the international market and disparity with their developed counterparts.

Demands
The Bretton Woods system was born out of Anglo-American negotiations, following the end of the Second World War. It was advantageous to its creators, while neglecting the needs and aspirations of Third World countries. However, having formed a strong coalition, newly independent countries put forward a set of proposals in the form of a New International Economic Order (NIEO) to promote their interests. The NIEO became necessary to ensure that developing countries enjoy an increased share of global trade and international decision making. The tenets of NIEO are simplistic in nature, and as follows:

- Regulation of Foreign Investment and MNC’s: To regulate, supervise and exercise authority over foreign investment and transnational corporations within its national jurisdiction and ensure compliance with policies of the State;
- Regulation of Foreign Property: To nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State;
- Formation of Primary Associations: All States have the right to associate in organisations of primary commodity producers in order to achieve stable financing for their development;
- Regulation of International Trade: It is the duty of States to contribute to the equitable development of international trade and share the responsibility to promote the regular flow and access of all commercial trade.

1021 About the Group of 77, G-77 website, http://www.g77.org/doc/
Failure
In 1974 the UN General Assembly adopted a ‘Declaration on the Establishment of a New International Economic Order’. Further, in Dec 1974, the Charter of Economic Rights and Duties of States was also adopted by the UN General Assembly. However, due to the radical nature of the demands in the NIEO, it was never fully implemented. This can be attributed to a number of factors such as lack of political dominance of developing countries and reluctance of developed countries to support a complete overhaul of an economic system that already serves their interest and agenda. Further, the NIEO was replaced by the Washington Consensus, a standard reform package for crisis-wracked developing countries, the objectives of which were diametrically opposite to those of the NIEO, including promoting the spread of globalization, and widening operations of multinational corporations.

III. PRESENT TRENDS IN THIRD WORLD FUNDING AND DEVELOPMENT
The efficacy of Bretton Woods institutions has come into question, in light of the development of the concept of Multilateral Development Banks (MDB). Multilateral development banks are supranational institutions set up by sovereign states, who are their shareholders. They have the common task of fostering economic and social progress in developing countries by financing projects, supporting investment and generating capital for the benefit of all global citizens. Given MDB’s focus on reducing poverty and economic inequality, they often lend at low or no interest rates, or provide grants to fund projects in the fields of infrastructure, education and other areas that promote development. Hence, developing countries have started preferring banking institutions such as the Asian Development Bank, New Development Bank, African Development Bank and Islamic Development Bank to the likes of IMF and WB.

i. New Development Bank
Background
Formerly referred to as BRICS Bank, this multilateral development bank was established by the BRICS states of Brazil, Russia, India, China and South Africa in 2013. The initial authorized capital of the bank was USD 100 billion divided into 11 million shares. Keeping in mind the unmet needs of developing countries, the leaders of the BRICS nations formed a bank with an aim to fund short and long-term investment in infrastructure and to felicitate sustainable development.

Approach to Third World Nations
There has been a great deal of global appreciation for a Southern-led monetary fund. As it has been built on the experience of various other regional

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1025 Chapter II, Article 6, Charter of Economic Rights and Duties of States, G. A. Res. 3281 (XXIX)
1028 Powell, Anita, BRICS Leaders Optimistic About New Development Bank, Voice of America (March 27, 2013, 09:56 AM)
1029 History, New Development Bank Website, https://www.ndb.int/about-us/essence/history/
Southern institutions and complements their objectives. Examples of the these Southern institutions projects includes the original Chang Mai Initiative – which has evolved into the 10+3 foreign-exchange reserves pool established by the Association of South-East Asian Nations (ASEAN), with a size of 240 billion US dollars, called CMIM, or Chang Mai Initiative Multilateralizationand even the smaller-scale Fondo Latinoamericano de Reserva (FLAR).

ii. Asian Development Bank

Background

The Asian Development Bank was established in 1966 under the initiative and sponsorship of the Japanese Government. It is a poignant example of regional development institution. Regionalism is a phenomenon in international trade where states of the same region, create groups for the purposes of trade and to collectively reduce barriers to trade. Regional economic co-operation and integration are now generally viewed as having a positive effect on a region's holistic development. Regional Trade Agreements (RTA) are reciprocal preferential trade agreements between two or more regional states, who have allowed countries to negotiate rules and commitments that go beyond multilateralism. Its shareholders consist of 48 developing and developed countries, largest of which are Japan (15.6%), the United States (15.6%), China (6.4%), India (6.3%), and Australia (5.8%).

Approach to Third World Nations

Asian Development Bank performs similar functions to the World Bank, but at the region-specific level by providing financial and technical assistance to Asia's developing countries with the principal objective of alleviating poverty. These institutions are free from the control of western world to a great extent and contribute to the growth of developing economies, without restricting them from exercising their economic sovereignty. For instance, the loans that were granted by ADB to India for growth of mid-level companies or those granted for growth of infrastructural companies are only for economic assistance. On the other hand, World Bank and IMF force nations to change their socio-economic policies for the same economic support.

Various other development projects that have been recently felicitated by ADB are Solar Power Deal with Afghanistan worth USD 4 billion, Railway Track Electrification Project in India - which is the first ever non-sovereign fund worth USD 750 million. These recent projects have been adopted taking into consideration environmental sustainability, which shows the holistic approach that these regional development banks.

1031 Griffith-Jones, supra, 47
1034 Regionalism: Friends or Rivals?, World Trade Organisation website https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey1_e.htm
1037 India and ADB, Asian Development Bank website, https://www.adb.org/countries/india/main
1038 Funds and Resources, Asian Development Bank website, https://www.adb.org/site/funds/main

www.supremoamicus.org

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iii. African Development Bank

Background

Following the end of the colonial period, the newly independent African nations were experiencing dire economic circumstances which led to the demand for a centralised bank for nations within the continent. The African Development Bank (AfDB) was established by an agreement signed by the leaders of 23 founding member nations in 1963. The AfDB has an authorized capital of UA 66.98 billion, and paid up capital of UA 4.98 billion.1039 The leading international rating agencies such as Standard & Poor’s, Fitch, Moody’s, and Japan Credit Rating Agency have awarded the AfDB an excellent AAA credit rating.1040

Approach to Third World Nations

The overarching objective of the AfDB is to spur sustainable economic development and social progress in its regional member countries, thus contributing to poverty reduction. In 2015, all the institutions under the AfDB parent institution formulated a set of Sustainable Development Goals, which include promotion of gender equality, education, renewable energy, etc. The Bank Group achieves this objective by mobilizing and allocating resources for investment in the regional member countries and providing policy advice and technical assistance to support development efforts.1042 The developmental impact of projects completed in 2018 has been expansive with 8.5 million people receiving improved agricultural technologies, and 8.3 million people having better access to water and sanitation.1043 Amongst other efforts, the AfDB in 2019 alone has invested nearly USD 1.4 billion in social and economic development in Morocco,1044 as well as USD 9,95,000 investment in development of renewable energy sources in Ethiopia.1045 AfDB is financing projects and programmes that create jobs, support small and medium enterprises and deliver inclusive growth.

iv. Islamic Development Bank

Background

The Islamic Development Bank (IsDB) is a multilateral development bank focused on funding of Islamic nations, with 57 shareholding nations. It was founded in 1975, with the pioneering support of King Faisal of Saudi Arabia. Saudi Arabia holds nearly one fourth of the paid up capital of the bank, with Algeria, Iran, Egypt, Turkey and UAE holding significant shareholding (nearly 10%) as well.1046 As per the 38th Annual Meeting, at the end of 2018, the subscribed capital stood at ID50.2 billion, and the Board of Governors approved an increase in authorized capital to ID100

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1040 id
1042 id
1043 supra, 58
The IsDB has received an ‘AAA’ credit rating from firms like Standard & Poor’s, Moody’s and Fitch. The IsDB also holds the position of ‘observer’ in the United Nations General Assembly.

**Approach to Third World Nations**
The IsDB works to improve and promote social and economic development in member countries and Muslim communities worldwide. The activities of the IsDB focus development assistance for poverty alleviation, emergency relief, trade financing, funding academic scholarships, and many others. The IsDB investment in agriculture and rural development in member nations stood at USD 12.6 billion as of the end of 2017. Further, a number of investments were sanctioned for development projects that commenced in 2018, such as USD 134.5 million for natural gas transmission project in Tunisia, USD 19.2 million for the construction of rural roads in Senegal and many others. One of their most notable projects is the Gao Bridge across the Niger River, which provides a vital trade link between the isolated Goa region and the Mali heartland. The bridge lessens poverty and has a number of socioeconomic benefits like boosting agricultural production, creating jobs, and providing access to healthcare and other services.

**CONCLUSION**
International economic governance has changed significantly since the first time it gained focus after the First World War. With the evolving needs and aspirations, the methods and means of fulfillment have also evolved. These needs vary from developed to developing and under developed nations. For instance, the need for imposition of higher custom duties in developing nations is not the same for developed nations as their domestic markets do not need major government efforts for their protection. These disparities in national economic status gives rise to different approaches that are needed for growth of international trade as a whole. International economic governance has transformed over time and it has taken several positive steps towards achieving the goal of sustainable development in third world countries. However, that goal is still far away and the present efforts and initiatives that have been taken are not nearly enough to achieve such lofty objectives. The authors have provided some recommendations of an elementary nature in the institutional structure, composition and functioning of these well-established Bretton Woods institutions as well as regarding newly established Multilateral Development Banks which can facilitate balanced economic growth that is inclusive of third world nations.


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1047 id
1050 The Islamic Development Bank Approves...
i. WTO

In the case of the WTO, the development needs of its members must be made a top priority as the two third members are still developing or LDC’s, and the development of these countries will in turn result into better trade opportunities at a global level. Further, measures such as amendment of dispute settlement undertaking and increasing the power of Panel and Appellate body can help it grow as an individual institution. Developed countries’ domination should end, and decision making should be democratic by involving the developing countries and considering their interests. Additionally, it is believed that there should be a regular revision of the benefits provided to developing nations, so that these measures can help in attaining the ultimate objective without falling prey to malicious schemes. For instance, there is a major need to review whether or not China, which is one the largest trade economy in the world, is still eligible for benefit which are provided to developing countries.

ii. IMF

In case of IMF, mechanisms need to be put in place to ensure better transparency in procedures and expectations of aid from its programmes. Furthermore, in order to ensure its sustainability in the fast-changing world, the IMF could engage with multilateral banking institutions in terms of providing better analysis to the developing countries and increasing their representation as stakeholders. For the continued relevance of the IMF, it must make itself flexible enough to cope with the changing world economic order.

iii. World Bank

In the World Bank, important reforms are needed to enhance the transparency in the decision-making system. The weightage voting system requires revision so as to allow the developing countries a larger influence upon the outcome of voting. There is still a need for an institution that balances the interests of the developed and the developing countries.

iv. Maintenance and Development of Multilateral Development Banks

As has been stated earlier, there has been a trend of third world financing through the instruments of multilateral development banks (MDBs). Lending through multilateral development banks needs to continue, as it plays an important role in the international development architecture. MDB’s perform a number of indispensable functions such as - Firstly, providing concessional loans to low income countries, at low or no interest rates. The IMF and World Bank however, attach conditionalities to their loans. These conditionalities promote the interests of the developed countries in the developing nations by intervening with their economic sovereignty and forcing them to open up their economies to various transnational corporations (TNC), privatization etc. which are in the interest of developed countries.

Further, developing countries have vastly

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1053 Amanda Lee, China Refuses to Give up ‘Developing Country’ Status at WTO Despite US Demands, South China Morning Post (April 6, 2019, 01:00 AM)

1054 Wayne, supra, 44

different needs from developed countries, due to disparity in available resources. MDB’s are needed to help fund sectors or activities where important externalities exist, implying that social returns are higher than market returns, such as education, infrastructure and primary healthcare as well as protection of indigenous industries and cultivation of small businesses.\footnote{Van Den Bossche & Werner Zdouc, supra, 33} The IMF and the World Bank can provide the same funding, but do not possess the social and cultural awareness of the region or camaraderie of upliftment that regional MDB’s share.\footnote{Wayne, supra, 44} Secondly, they provide long-term financing to middle and small income countries, which due to lack of credit worthiness, do not enjoy adequate access to private funds.\footnote{Wayne, supra, 44} Thirdly, they act as a counter-cyclical offset to fluctuations in private capital market financing in low and medium income countries.\footnote{Griffith-Jones, supra, 47} Fourthly, MDB’s provide the benefits of diversification, which leads to less systemic risk and contribute to financial stability.\footnote{Griffith-Jones, supra, 47} In addition to these functions, they also provide a dynamic vision or strategy of growth and guidance to developing nations to structure their economic development.\footnote{Stephany Griffith-Jones, The Positive Role of Good Development Banks, Addis Ababa Conference on Financing for Development (May 20, 2015)} However, while MDB’s have their advantages, institutions like the IMF and World Bank are not obsolete, if only due to their sheer size and volume of funds – which is far more than regional MDB’s can provide.

It is the opinion of the authors that combining the efforts of MDB’s and Bretton Woods institutions like the IMF and World Bank is the best way to serve the developmental agenda of third world nations. The ability to combine what these institutions have to offer creatively, ideally working constructively together, is essential for a financial system that serves the needs of inclusive and environmentally sustainable economic growth and development in third world nations.\footnote{Stephany Griffith-Jones, Development Banks and Their Key Roles, Discussion Paper 59 (August, 2016)} When third world countries develop their social and economic conditions, this in turn improves the conditions for international trade and the global financial market. Thus, it is important for not only upcoming multilateral development banks, but also long standing Bretton Woods institutions to encourage the growth of third world nations, rather than suppressing the development of third world economies in favour of personal economic advantage to developed nations and institutions.

\footnote{https://www.un.org/esa/fdf/fdf3/blog/positive-role-development-banks.html}
\footnote{http://www.stephanygj.net/papers/Development_banks_and_their_key_roles_2016.pdf}
CRININALISATION OF MOB ASSAULTS AND LYNCHING: A CRITICAL ANALYSIS

By Shruti Mandhotra
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“For me, no ideological or political conviction would justify the sacrifice of a human life. For me, value of life is absolute, with no concessions. It’s non-negotiable.”

Edgar Ramirez

Currently the world has become a dejected place to live in, a place where humans are killing other humans for no reason. Importance of human life has downgraded to a whole new level. Mob violence is one such phenomenon which has increased manifold in the recent past. The anguish against this recent mob violence has been very evident amongst a larger section of the citizenry. Private individuals, how exalted so ever may be their station and influence in the community, or how grievous so ever the offence, they cannot constitute to be the executors/agents of the judiciary for punishing those guilty. India has in the recent past witnessed a humongous increase in this barbaric behaviour that is being demonstrated by the human race in the 21st century. Lynching involves causing injury or even murder of a person who is accused of a crime against the community.

INTRODUCTION
The origin of the word ‘lynch’ traces its root back to the time of the American Revolution termed as ‘Lynch Law’ which is accompanied by an extra-judicial punishment. The sources of the terms ‘lynch’ or ‘lynch law’ have been two Americans known as Charles Lynch and William Lynch who belonged to Virginia. During 1782, Charles Lynch had wrote that the ‘Loyalist’ or ‘Tories’ who were supporters of British side were given the framework of Lynch Laws to handle any ‘Negroes’ related issues. A mob under the pretext of administering justice puts a presumed offender through various kinds of tortures and even corporal mutilation instead of following due process of law. This phenomenon of violence is known as lynching. How is the death of the accused been executed is least of the concerns and does not matter; mobs have used Fire, clubs, ropes, guns, and probably ample number of such other means in order to end the victims’ lives. Every lynching is grim; even the simplest hanging can be agonizingly slow, choking the victim to death over a half-hour or longer.

Lynching is not a recent phenomenon, but has always existed across the world. Men and women in Massachusetts were ruthlessly hanged during Salem Witch Trials in 17th century; typical lynching in America during 1870s was meant to terrorise Black Americans into submission, and into an inferior racial caste decision; systematic violence against Jews; atrocities committed by Ku Klux Klan is yet another example from the history.

Lynching has been prevalent in the society since time immemorial and our vedas provide for such events. To many people

1064 16 ROBERT W. THURSTON, LYNCHING AMERICAN MOB MURDER IN GLOBAL PERSPECTIVE (2016).
lynching was not an everyday act but back in the 19th century to the whites it served a purpose. They believed it was an essential activity to protect white women. Lynching’s originated in America with an intention of white mobs of instilling a fear in the minds of Black Americans of not crossing any historically embedded boundaries. It has been what you can call the most horrendous of custom followed by these lynching mobs were they would assault the victim with the most flagrant public display. For instance, just to draw attention of majority of white families in the executions by guillotine in medieval times, lynching’s would often be advertised in newspapers. This was that phase of vigilantism where the southern white men assumed themselves to be at this powerful position and felt as if it was their duty to protect the women of their society and their way of living. 1066 With all these incidences in the past lynching had creeped into our society and has since then spread all throughout. The recent wave of lynching is a decentralised communal violence. Earlier the organised acts of mass violence used to be seen. Currently decentralised acts are coming with a few are being attacked at a place. 1067 It is being done by a few over different places. The perpetrators want the violence to be known to the people, circulating the information, an intended warning of controlling the social behaviour expected from the minority community. It is a kind of violence that can pop up anywhere. It is never a mass killing but a decentralised violence of a large extent. 1068 In India, the majority population through lynching tries to display to the minorities that law is incapable of protecting them. According to various studies the intent behind such mob lynching’s is a social intent of establishing a sense of superiority socially, politically and economically.

**DECODING THE RATIONALE BEHIND THE OCCURRENCE OF MOB VIOLENCE**

As a society aiming at vanishing crimes like mob lynching it becomes essential for us to understand and figure out the reasoning that lies behind criminology of these mob lynching’s. It becomes vital to understand the psychology as to why these mobs come together and commit such horrendous crimes. The irregular behaviour of the crowd is seen during crisis. When class hatred and suspicion become overburdened, when persuaded with passion and prejudice and blew by an iniquitous crime, the erstwhile law abiding community of a society turns into a destructive force that become deaf to the voice of reasoning, humanity and mercy. 1069 Strong Partisanship is a leading factor of collective violence. For strong partisanship among the mob it becomes necessary that the third parties of the mob (1) support one side over the other and (2) solidarity among themselves. 1070 The partisanship tends to be weak from a side and strong from another side. If the partisanship is strong or weak on both sides lynching is unlikely to occur. 1071 Mob lynching being a collective group

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1068 Seema Chishti, Lynch Mobs Seem to Know Nothing will Happen to Them, They’re Implicitly

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1070 Shrashti Jain, supra note 6, at 245.
crime makes the identities of all individuals to appear as one entity making it difficult to figure out the pattern of emotions and intentions that each person possessed while committing the wrong. This is precisely the reason why such mobs gather the courage to indulge into such a ghastly act with complete impunity. All others also take part in this process of violence with acquiescence. A mob just needs an igniting factor which is now-a-days provided through the rumours. This simply leads in attacking the victim and assaulting him to death. Often mob lynching or mob violence is a resultant of instigation by extremist groups. They acts are not always spontaneous. These violent attacks are created by the political campaign which is being considered as spontaneous actions of aggressive groups. The consistent atmosphere of hatred and suspicion against the minorities or the targeted communities make them a product of mob anger. According to Vishwanathan, it is the silence of the state that has made the conditions worse, “You will notice there is never any investigation, no follow up. Silence is bought with monetary compensation. The only people who remember a lynching after 15 days are the family members of the victim. State silence becomes a chorus for the mob.” Pratap Bhanu Mehta says, “Even the hypocrisy of the top leadership set the norm. Condemning these violent incidents even for the sake of it can influence the followers on the ground, which is lately absent.”

As per the statistics broadcasted by the recent analysis of Pew Research Centre Analysis, India has a shambolic record of religious violence. Nimesh Desai who is currently a psychiatrist and a director of the Institute of Human Behaviour and Allied Sciences in Delhi, had a very interesting statement to make in regard of the recent happenings where he said, “For centuries, emotional or ideological issues have acted as a vehicle for violent behaviour that individuals won’t resort to themselves,” Mr. Desai also insisted on portrayal of his analysis as a sociological deduction and not as a political analysis. He went on further to say that the phenomenon of lynching is not a phenomenon in India. Conflict between majorities and minorities or tension between social groups has historically been the ground for most mob violence across the globe.”

Dehumanising is one such element that has accounted as a major reason for mob frenzy. Homer-Dixon says dehumanisation de-individuates and externalise members of the other group and does not regard them as participants of his/her moral community. In the instances of mob lynching, it is seen that the disregarded members suffer a strong sense of alienation caused by a group of people who distance themselves to the extent of forming a strong sense of condemnation which often translates in brutal violence. In Less Than Human: Why We Demean, Enslave, and Exterminate Others, Homer-Dixon says those commit mob violence are guided by

1072 Shrashti Jain, supra note 6, at 245.
1073 Apoorvanand, What is Behind India’s Epidemic of Mob Lynching?, AL JAEEERA, October 8, 2019.
1077 Snigdha Poonam, supra note 13.
1078 Ibid.
1079 G.S Bajpai, Decoding the anatomy of mob lynching, TRIBUNE INDIA, Jul 16, 2019.
group loyalties consider themselves as higher and the others a less than humans. Further, a theory by Allport suggests a common stimulus prepares two individuals for the same response and when they are so prepared, the sight of one making that response releases and heightens that response in the other. The second principle is that of inter stimulation.\textsuperscript{1080}

The very prominent yet basic of all reasons that stand behind these ever increasing hate crimes is exemption from punishment. A sense of impunity prevails in the minds of these mobs that they have the superpowers to commit any kind of wrong and no one inclusive of the government would be able to have a catch hold of them assuming everyone especially the government to be inferior to them.\textsuperscript{1081} Some of the elements that lead and ignite mob violence are: Breaking the law of the land based on some meaningless rumours and hearsay under the pretext of justice; Based on their whims and fancies assuming an individual to be guilty because of his appearance and way of life; Most interestingly the law and peace bearers and our governmental authorities would turn their faces around and just give it the name of law and order breakdown because of the situations created by the opposition government.\textsuperscript{1082}

**A FESTIVAL OF VIOLENCE IN INDIA?**

"India is slipping beyond the pale. It is unfathomable that the ancient Hindu horror at the taking of life, any life - the very same doctrine of ahimsa, or non-violence that governed the beliefs of men like Mahatma Gandhi and the Rev Dr Martin Luther King Jr - should in our time be used as a justification for murder"\textsuperscript{1083} Lynching is a blot on our Indian society and the entire human civilization. It degrades the civic and morality standards not only in the society but also amongst the foreign nations being an insult and menace to the law of the land.\textsuperscript{1084} India has always been a victim of this dreadful poison. Lynching in India include that of those accused of petty crimes, individuals accused of murder and rape, also the individuals perceived by mob as deviants. Apart from these, about 2097 lynching deaths have been a result of witch-hunts\textsuperscript{1085} barbaric caste system in the country is another prominent reason behind lynching.\textsuperscript{1086}

Lynching is just another name for the brutal crime of murder. What encourages them to act so brutal? Are only perpetrators at fault? Why are law enforcers not able to combat these increasing incidents of lynching?\textsuperscript{1086} One of the major reasons for a mob taking the law in its own hands can be linked back to the lack of trust of the citizens in the State's competence in delivering justice. The widespread corruption in law enforcement agencies, unconscionable delays in the disposal of cases by the judiciary and the unfair advantages to the rich and the dominant in the judicial system contribute to the people's complete loss of trust in the system.\textsuperscript{1087}

\begin{thebibliography}{9}
\bibitem{1080} *Ibid.*
\bibitem{1082} Tabish Khair, *The pathology of lynching*, THE HINDU, April 16, 2017.
\bibitem{1084} Gibbons, J., *supra* note 1.
\bibitem{1086} Dr. Shilpa Jain & Nikita Aggarwal, *supra* note 4.
\bibitem{1087} *Ibid.*
\end{thebibliography}
Spates of mob lynching’s roots were traced back to messages that had been circulated on WhatsApp groups. With the data that is available at hand these events of violence have been given the name of rumours that are being spread over various social media platforms especially WhatsApp which are about child kidnappings and this has given these mobs the inducement of attacking strangers. Lynching has been a new trend in India. We have been observing a number of cases regarding lynching in India. Some of the reasons are fair yet some are valueless. Many innocent have been brutally tortured and some even lost their lives. One of the most prominent reasons for lynching presently is cow slaughter, cattle smuggling or beef consuming. Mostly the victims of Lynch in India are minorities of that particular area such as Dalit’s and Muslims.

**MAJOR REASONS FOR A SUDDEN INCREASE IN LYNCHING IN INDIA:**
In the recent past there have been several incidents of mobs attempting at endangering someone else’s life based on their religious or cultural beliefs. Sadly, many of these lynching’s have all been based on some baseless rumours. Other entities like media have also played a vital role in being worldwide platforms to spread such rumours and hate amongst the entire country. What aggravates the crime of Lynch law is the circumstance that not unfrequently it sentences to death an innocent person, while the guilty person escapes.

**RISE OF COW VIGILANTE**
India is a Hindu dominated country. Hindu’s consider cow as their holy animal and hence worship it. In order to respect the religious sentiments of the community cow slaughter is forbidden majorly in India. However, over the past some Hindu nationalists have been complaining and leading campaigns over the fact that the government authorities have not taken sufficient steps to ensure the enforcement of the ban that was put and neither have they taken care of the cattle smuggling situation. Where on one hand the judiciary is taking steps and declaring that even animals have fundamental rights now on other hand these vigilantes are taking away the fundamental right of life of their fellow human’s. These mobs are beating cattle traders and transporters which have resulted in life threatening injuries. These so called gau-rakshaks have left no stone unturned to trouble and assault some of the Muslim men and women at all possible places.

On 1.04.2017 Pehlu Khan along with his sons Arif and Irshad were returning to their village in a pickup van which had two cows which all three intended to sell. At 7 pm while on their way, at Bethroad approximately 200 people forcefully stopped their van and assaulted all three of them. While the assault some names were called out which were pointed out by Mr. Pehlu in his statement. Meanwhile, another pick up van which was being driven by Ajmat and Rafiq reached there with three more cows and they were also assaulted by this mob. Pehlu khan died after staying critical for some days in the hospital. What should have been an open and shut case surprisingly resulted in acquittal of the six people against whom FIR was registered.

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1090 Violent Cow Protection in India Vigilante Groups Attack Minorities, Feb 18, 2019.
1092 *Supra* note 29.
In an another heart-breaking incident where on September 2015, a mob killed Mohammad Akhlaq, who was 50 years old, in the state Uttar Pradesh, India. The old man was and critically injured and so was his beloved son who had just turned 22-years old, over mere allegations that the Muslim family had been dealing in selling of cow meat and had recently slaughtered a calf for selling his meat. Which further lead to a chaotic situation as some Hindu supporters decided to respond to the situation by causing damage to public property and went ahead to burn a police van and some other vehicles. It was alleged that some of the eminent BJP leaders had acted is support of these people and had backed their actions. As a consequence of which the victim’s family had to no other option but to leave the village under fear for their own safety and welfare. Three years flew by and the trial is yet to begin. For now all of the accused have been released on bail, which has increased the fear in the mind of the victims’ families.¹⁰⁹⁴

Living in a democracy yet having not a soul answerable or accountable for such horrifying events makes India see the shallowest of its days so far. And this does not end here the vigilante attacks by these gau rakshak groups and more stringent laws on cow slaughter and transportation have led to noting but disruption of the conditions in which the cattle’s are and degraded India’s rural agriculture economy and also the cattle trade.

In July 2018, the Apex Court in Tehseen S. Poonawalla & Ors¹⁰⁹⁵ asked the central and state governments to publicly make statements and spread the message that “lynching and mob violence of any kind shall invite serious consequence under the law.”

It wouldn’t be wrong to conclude with the given situation at hand that it is the failure on the part of Indian government as they have failed in their duty to protect the minority communities from such horrendous communal attacks by the cow vigilantes. Also, the executive, judiciary and legislative organs of our country who have failed to take adequate steps to prosecute those who are behind these acts snatching the rights to life, equal protection and treatment of law, non-discrimination and to freely be able to pursue a livelihood.

SILENCE OF POLITICAL CLASS
Since 2010, these mob lynching’s have gained a rise. Till the passing of some bills by some states in the country the government, political parties and the bureaucrats remained silent. But some politicians did not remain silent instead they chose to fuel the fire of hate amongst such mobs more by passing certain statements publically. The Indian government in order to make their job easier have just shifted the entire blame and have put the onus of such a heinous crime on the pillar of “fake news”, asking WhatsApp to come up with some remedies.¹⁰⁹⁶ However, this blame game is doing no favour at solving the problem existent in the status-quo. In the Alwar lynching case the current UP chief minister Yogi Adityanath publically announced quite blithely that the Congress is making a mountain out of a molehill with reference to lynching’s per se, as though such incidents are no big deal. He further went on to say that “Humans are important,

¹⁰⁹⁴ Supra note 29.
The most heart-breaking incident of lynching was witnessed on in June 2017 when the Chief Minister of Thoubal district, Manipur, Mr. Nongthombam Biren Singh posted a video clip on his Facebook page of a 19 and a 20 year old boy being lynched.

And examples, of such insensitivity demonstrated by politicians all over India is a never ending list. These politically eminent personalities on whose shoulders lies the responsibility of our nation doing nothing but simply instilling fear and doubt in the minds of citizens and giving an open license to these bloodthirsty mobs.

RUMOURS OF CHILD LIFTERS
Another source of ignition for mob violence is owed to the hearsay and rumours of child kidnappers that is alleged to have been circulated on WhatsApp groups which consist of over more than a hundred people. This has been witnessed by the states of Odisha, Karnataka, Telangana, West Bengal etc. These rumours have claimed various precious innocent lives. A 32-year-old Google employee in Karnataka's Bidar was lynched by a mob of over 30 people over rumours of child lifting. As per the statistics released by the home ministry 54,723 child kidnapping cases have occurred in 2016, 41,893 in the year 2015 and 37,854 cases in the year 2014. The executive organ here has been majorly at fault as the police has not only been able to detect the source of these rumours but also failed in getting hold of these kidnappers.

FAKE NEWS TO BE HELD RESPONSIBLE?
“A lie can travel halfway around the world while the truth is putting its shoes on” Technology has become the new source of hearsay and rumours that are being spread faster than lightning. Rumour’s connection with violence has already been explored by Indian scholars in relation to the violence against Sikhs in 1984. The literature on this relationship continues to be relevant even though rumour now travels in new vehicles. In another way, it is just to say that the idea behind the thought that a rumour withholds the power so strong that it can trigger violence is older than the inception of WhatsApp, and digital communication.

In the year 2013 during the Muzaffarnagar communal riots there was a high number of people who suffered causalities, the reports showed that a total of sixty people had died and thousands of them were displaced, social media platforms have been reported to have played a significant role in spreading false news and baseless propagandas. For no sound reason an anonymous source had posted a video online mentioning incorrect facts stating that a Muslim mob was lynching a bunch of Hindu’s and the video expressly displayed two men being assaulted and the beaten to death. In certain similarly, a Muslim man was beaten to death by a mob in Pune after which some morphed images of him were circulated all over the social media especially through Facebook and with the

1097 Bikram Vohra, Lynching cases in India: Politicians’ inaction and silence has turned peaceful symbol like the cow into cause of illogical brutality, Jul 26, 2018.


1099 Chinmayi Arun, supra note 35.
1100 Wajahat Habibullah, Social media fanning communal intolerance, misuse needs checking, DNA INDIA, Jan. 13, 2014.
help of various Internet messaging applications on smartphones.\textsuperscript{1102} Currently there are over more than 200 million users of WhatsApp in India. WhatsApp permits about 256 users to be a part of one group where users exchange various kinds of messages, photo and videos.\textsuperscript{1103} This practice is being followed maximum in India. There are majorly two flaws with rumour that are being spread over WhatsApp: \textit{one} is disinformation and \textit{second} is incitement to violence. Both are grave in their respective ways, but for different reasons.\textsuperscript{1104} Nine out of ten times the violence can be traced back to these fake social media messages. Inevitably these mob attacks and vigilantism are on an unstoppable rise in India and the primary reason for fuelling these actions have been fake messages being circulated on various social media platforms.

One sad incident on the 29\textsuperscript{th} September, 2006, the first case of lynching in India was reported. The disappointing incident took place because of a land dispute in Bhandara, Maharashtra. A mob of approximately fifty villagers barged into the house of the accused and assaulted all four family members and it did not end here. The wife and the daughter of the accused were forced to walk naked in the entire village before being murdered.\textsuperscript{1105} Another incident of lynching because of fake news was seen in UP in 2017. Namely seven men were being alleged of child lifting were assaulted badly out of which four were Muslim and the other three were Hindus.\textsuperscript{1106} All these cases of lynching mentioned seem to have been based on disinformation—false information circulated deliberately to deceive people\textsuperscript{1107} rather than fake news. This from nowhere implies that “fake news” never causes violence. Blaming WhatsApp or any other social media platform for these lynching’s would not be just. As clearly, violence is a much bigger problem with a more complex solution that social media can offer.\textsuperscript{1108}

Why these mobs are doing such things and the major reason for these lynching’s needs to be traced. It is a state of shame for us to have witnessed incidents like a cow carcass being responsible for triggering violence amongst the mass, such events where transportation vehicle driver being attacked for a reason that they were carrying buffalo, and then the minority groups like that of Dalits being attacked for skinning a dead cow.\textsuperscript{1109} All such incidents are lacking the influence of WhatsApp. This clearly establishes the fact that not all lynching incidents can be solely attributed to WhatsApp or other social media. However, whatever role and contribution social media has in igniting such incidents needs to stop.

\textbf{WHAT ARE THE CURRENT PROVISIONS OF LAW REGULATING MOB LYNCHING'S?}

Presently, there is no specific law dealing with mob lynchings. However, there have

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\textsuperscript{1102} Amruta Byatnal, \textit{Techie dies after attack by Hindutva group}, \textit{The Hindu}, June 4, 2014.
\textsuperscript{1103} Seema Uikey & Nidhi Dubey. \textit{supra} note 4.
\textsuperscript{1104} Arun, Chinmayi & Nahul Nayak: \textit{Preliminary Findings on Online Hate Speech and the Law in India}, The Berkman Klein Center for Internet & Society Research Publication Series (2016).
\textsuperscript{1105} Vivek Surendran, \textit{Politics of lynching, the new normal in India}, Jun 27, 2017.
\textsuperscript{1107} Lazer et al 2018.
\textsuperscript{1108} Chinmayi Arun, \textit{supra} note 35.
\textsuperscript{1109} Rai, Sandeep: \textit{Mob Attacks UP Village after Cow’s Carcass Found in Pond}, \textit{TOI} (Meerut News), 26 August, 2017.
\end{flushleft}
been efforts from the judiciary and the state governments to pass certain guidelines or laws which pertain specifically to mob lynching.

PRESENT CRIMINAL PROVISIONS - The Criminal law of India has certain provisions currently in practice which according to the author are sufficient for dealing with the mischief at hand. For instance, under the Indian Penal Code, 1860 we have provisions covering hate speech and hate crime under Sections 153A and 153B and also Section 147 which talks about riots, Section 148 which covers rioting armed with deadly weapons, Section 149 which talks about unlawful assembly, Section 302 which prescribes punishment for murder, Section 307 which talks about attempt for murder, Section 323 covering punishment for voluntarily causing hurt, Section 325 which covers punishment for voluntarily causing grievous hurt and finally Section 505 which prescribes to statements conducing to public mischief. Then under the Code of Criminal Procedure, 1973 we have Section 223(a) which talks about a mob involved in same offence in the same act can be tried together. Apart from these laws we have certain anti-lynching bills that have been passed by several states to protect their resident’s from any kind of violence.

PROTECTION PROVIDED UNDER THE CONSTITUTION - Mob lynching and vigilantism are in direct contradiction with the provisions laid down in the law of the land of India and they are also violating the fundamental rights of individuals and curbing all their freedoms. Article 14 guarantees all people within India equality before laws along with equal protection of laws. Then there is Article 15 which condemns discrimination of communities based on caste, sex, race or religion. Most importantly we have Article 21 which talks about right to life—“No person shall be deprived of his life or personal liberty except under procedure established by law.”

INTERNATIONAL CONVENTIONS RATIFIED BY INDIA - Apart from the domestic laws of India there are certain International treaties that India has ratified which makes these activities of lynching violative of such treaties and conventions. Universal Declaration of Human Rights which is founded on the principles of equality and fraternity amongst all humans. International Covenant of Civil and Political Rights provides “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

JUDICIAL PRONOUNCEMENTS - In 2018, the Supreme Court condemned the increasing number of incidents of mob lynchings across the country, calling them “horrendous acts of mobocracy” and had then asked the Parliament to make lynching a separate offence. The Apex Court in the case of Tehseen S. Poonawalla laid down guidelines which were punitive, remedial and deterrent in nature to tackle the incidents of mob lynching and said “vigilantism cannot, by any stretch of imagination, be given room to take shape, for it is absolutely a perverse notion.” In a separate pronouncement the apex court

1111 Art. 15, Constitution of India, 1950.
1112 Art. 21, Constitution of India, 1950.
1115 Vijaitha Singh, Two anti-lynching Bills being examined by Centre, Sept. 11, 2019.
1116 Supra note 34.
declared in the case of Nandini Sundar\footnote{Nandini Sundar v. State of Chhattisgarh (2011) 7 SCC 547.} that the state owes a duty to the citizens to take any such steps that are required to prevent internal disturbance and to take steps to ensure public order. The same has been provided under Article 355\footnote{Art. 355 Constitution of India,1950.} which clearly establishes the duty of the Union to protect states against any external aggression or internal disturbance. Further the Supreme Court\footnote{Mohammad Haroon and others v. Union of India (2014) 5 SCC 252.} gave the state along with intelligence agencies to prevent recurrence of communal violence. It also directed the negligent officers who either do or abstain from doing any negligent act which results in agony for the victims of lynchings. This judgment was upheld in the case of Arumugal Servai\footnote{Arumugal Servai v. State of Tamil Nadu (2011) 6 SCC 405.} in the state of Orissa owing to the failure on part of the police to maintain law and order which lead to unrest in the district of Kandhamal and murder of Swami Laxmananda. The Supreme Court\footnote{Archbishop Raphel Cheenath v.State of Orissa (2016) 9 SCC 682.} laid down some guidelines in this case for restoring the peace and order in the society and to make sure that no individual’s fundamental rights are infringed. In the case of National Human Rights Commission v. State of Gujrat and others\footnote{(2009) 6 SCC 342.} the Apex Court held that: “Communal harmony is the hallmark of a democracy. The Constitution of India, in its Preamble refers to secularism. Religious fanatics are ‘no better than terrorists who kill innocent for no rhyme or reason in a society which as noted above is governed by the rule of law.”

The draft defines “lyching\footnote{The Draft of the Protection from Lynching Act, 2017.}” as: “Any act or series of acts of violence, whether spontaneous or planned, committed to inflict extra judicial punishment, or as an act of protest and caused by the desire of a mob to enforce upon a person or group of persons any perceived legal, societal & cultural norms/prejudices.” The draft has clearly laid down that the punishment for hurt due to lynching, grievous hurt due to lynching and death due to lynching shall all be punished separately. The draft is nowhere dealing with the offence of massacre. The offence of massacre and lynching can be equated to be equally heinous in nature and it can be said without a doubt that the degree and nature of these offences make them almost similar kind of offences.\footnote{MOB-LYNCHING AND MASSACRE, THREATS TO THE NATION: CAN “MASUKA” ADDRESS THE ISSUE? RLR Volume IV Issue II.} MASUKA also mentions the duties of a police officer under Section 3 and 4 failing which he shall face punishment. According to the proposed draft under Section 196 and 197\footnote{The Code of Criminal Procedure, 1973.} no sanction of the government is required by the court in order to take cognizance of the offence against any police officer. The draft
provides witness protection schemes and also about rehabilitation of the victims and/or their families by providing them with certain compensation packages. And this shall be the duty of the State government as a mandatory measure to be adhered to and an optional fee collection process is to be carried, from the accused, if found guilty. Fast track courts for the same have also been suggested with an idea of getting the cases of mob lynching to be solved at the earliest possible.

Currently, the central government is examining two bills on anti-lynching laws passed by the state of Rajasthan and West Bengal. On 5th August, 2019 the state assembly of Rajasthan passed an anti-lynching law called the Rajasthan Protection from Lynching Bill, 2019.1126 The bill prescribes a punishment of life imprisonment and a fine of Rupees 1 lakh to 5 lakh for those held guilty of being the cause of victim’s death. In those cases where the victim suffers from grievous hurt the punishment would be a fine of Rupees 25000 to 3 lakh and jail for a period of 10 years. In cases of simple injuries it would be jail for 7 years with a fine up to Rupees 1 lakh. Definition of the term “lynching” under the bill is as follows: “an act or series of acts of violence or those of aiding, abetting or attempting an act of violence, whether spontaneous or pre-planned, by a mob on the grounds of religion, race, caste, sex, place of birth, language, dietary practices, sexual orientation, political affiliation or ethnicity”.

The West Bengal (Prevention of Lynching) Bill, 2019 was passed by the West Bengal Assembly on 30th August, 2019. It provides for a punishment of three years to life imprisonment for any individual who is involved in assaulting and injuring a victim.1127 These have been some efforts on the part of the states to curb this increasing menace of mob lynching’s and vigilantism. However, no separate act has been passed until present neither have other steps been taken to reduce these lynching’s.

CONCLUSION

A peaceful society is the answer to a progressive nation and a practical efficient criminal law is the answer to a peaceful society. Living in the 21st century yet witnessing barbaric actions is an embarrassing condition for any country to witness. The current state of violence in the Indian society is dangerously alarming and requires urgent attention. The author is of the belief that it would be a better idea to remove a cause than to repair its evil effects. We need to act upon the identified reason for these lynching’s and vigilantism and eradicate it. From the data at hand it can be seen that there have been countless killings of innocents under the pretext of religion, faith and baseless rumours. If somehow these deep-rooted beliefs amongst Indians regarding their personal biased can be removed and some awareness is spread then maybe something can be done about the situation. Currently India is a lawlessness state. There are just some bills that have been passed by the states and another bill i.e. MASUKA that is into consideration for anti-lynching laws. But the author is of the view that the current penal provisions are sufficient to deal with this mischief. For the parts of the mischief which aren’t covered in the present laws can be introduced through

1126 PTI, Rajasthan Assembly passes anti lynching Bill, Aug05, 2019.
1127 Supra note 54.
amendments instead of introducing a whole new law. Also, this should be done centrally instead of approving bills of separate states in order to have parity in the laws of the country for a crime. India in the past with introduction of mischief specific laws like POSCO has seen that the problem cannot be ended with it. So, instead of investing time, money and energy on introduction of a new law the country should focus on better enforcement of the current laws and ensure:

- Effective implementation of the laws;
- Speedy trial of the cases concerning mob lynching which can be achieved by establishing fast track courts;
- Registration of FIR without any delay;
- Efficiency of the police administration should be drastically improved as they are the important pillars of the justice system;
- Imposition of penalties on the public servants who fail to perform their duties;
- Rehabilitation and free legal aid should be provided to all the victims and also to the immediate family members of the dying individual;
- Creation of a compensation scheme for the victims;
- Actions should be taken over curbing the practice of spreading fake news, messages and videos and community awareness through multimedia campaigns should be organized to check fake news;
- Efficient checks and balance system with appropriate strict punishments establishing a fear in the mind of the wrong-doers.

To ensure the protection of the rule of law and the democratic characteristic of the nation, mob lynching needs to put to an end. All those at power should use their position to create awareness, rising above your own political motives and bias; the citizens need to gather courage and should step forward to stop these hooligans; the media needs to be more careful while portraying such sensitive incidents and most important of all, the executive branch should ensure effective implementation of the laws. Also, the larger and most important responsibility lies on the shoulders of the State to rebuild citizen's trust in itself so that it does not tread onto the path of jungle justice.

The government needs to realise that one main reason that people have taken law into their hands is because of the fact that they have lost faith in the justice system. With the giving increase in the rate of crimes public is not to be blamed solely. Now is the time that the government should take corrective measures to end this horrendous condition that the country is in.

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EFFICACY OF CRIMINAL LAW AMENDMENT 2018 ON THE ANVIL OF PRACTICALITY

By Simran Kaur
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The crime of Sexual Abuse within the realm of crimes against children specifically encompasses various degrees of unpardonable violence. These crimes are apart from being acts considered to be against the State are deep seated psychologically violent crimes ravishing the soul of victim. Certain crimes shock the conscience of the country and pressurize the law makers of the country to enact stricter penal provisions for dealing with such crimes. Public opinion overweights what one would claim to be a patient legislative law making most of the times.

Criminal Law Amendment 2013 was one such result of a huge country wide uproar arising as a result of the brutality with which the gang rape of a girl was committed on a moving bus in the posh area of Delhi. While the biggest takeaway perhaps from the Amendment was that there was large scale reportage of the incidents of sexual assault perpetrated on women yet there was no marked reduction in the crime rate, which makes it a point for consideration, whether there does exist a nexus between aggrandizing stricter penalties and striking at the mounting menace of the horrendous crimes against women and children?

Criminal Law Amendment 2018 was one such enactment in the nature of change to criminal law which was brought as a result of the dire need to address this range of crimes stemming from the plagued roots of the society. In order to understand the nuances of the Amendment and its working within the framework of the norms of criminal jurisprudence it is essential to understand a criminal trial pertaining to the crime of rape. Judicial Precedents over the years has interpreted and adjudged the evidence of rape victims and has evolved with a broadly two pronged approach, characterized by judicial sensitivity while guarded by cautious prudence at the same time.

To elucidate on this, it was held in the case of Gugan v. State (Govt. Of NCT Delhi)1128, “that the conviction of an accused can be founded on testimony of prosecutrix alone unless there are such compelling reasons for seeking corroboration.” The Courts shall not have any difficulty in basing a conviction on the sole testimony of the victim of the sexual assault if it inspires confidence of reliability. Under sparingly given circumstances corroboration is needed to such a testimony and clearly it is not the norm. The Court can overlook minor and unimportant contradictions accruing from the testimony which is not the basis to throw out a legitimate prosecution altogether. However certain cryptic exceptions arise as regard to the judicial reliance on such a testimony that if there are circumstances of doubt and suspicion created around the testimony of the victim during the trial, the Court may form an opinion in discrediting such testimony. However given the rise of horrendous crimes being perpetrated on infants and young children, the Court doesn’t choose to go with the latter approach.

Since the Amendments aims to reduce sexual crimes against children below the age of 16 years it is important to ascertain the evidentiary value accorded to the testimony of a child witness and the rules of

1128 2018 ALLMR (Cri) 92
evidence surrounding the child witness. A child of tender age is competent to be a witness before a court but it must have intellectually and sufficiently developed to understand what it has seen and also to tell the court about the same. Whether a child is sufficiently developed or not may be tested in examination-in-chief. The child must be capable of giving rational answers. It is left to the discretion of the court to decide the competency of the child. In criminal cases, it has been held, that, the conviction of the accused cannot be based solely on the solitary evidence of a child, due to material discrepancies. They are potentially vulnerable to be greatly influenced by fear of punishment, by hope of reward and by a desire of notoriety.

However, courts do act upon the corroborated testimony of children as a rule of prudence. Courts do accord a lot of legitimacy and relevancy to the testimony of the child witness who understands the crime and its repercussions. As the golden rule of evidence says that relevancy is the test of admissibility in the trial, in order to make punishment for such heinous crimes as stringent as Death Penalty it is pertinent to revitalize the nuances of the criminal justice system.

In Sohan Lal v. State of Himachal Pradesh it was held that in a criminal Trial it is well settled that the evidence of the eye witness requires a careful assessment and needs to be evaluated for its credibility. Hon’ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that “no man is guilty until proved so”, utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. The Apex Court noted that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. The evidence in criminal cases needs to be evaluated on the touchstone of consistency.

Russel stated that in all cases of rape actual violence need to be proved. The case of Rv. Hallett at stretch dealt with the situational aspect of the crime of rape of a juvenile under the age of 16 years holding that if non-resistance on the part of a prosecutrix proceeds merely from her being overpowered by actual force, or from her not being able from want of strength to resist any longer, or from the number of persons attacking her she considered resistance dangerous and absolutely useless, the crime is complete. Even if the woman succumbed to violence the offence of rape is said to be committed if her consent is procured by instilling in her fear of death or assault. Since the Amendment of 2018 specifically mentions about children below the age of 16, it is pertinent to add a pivotal dimension that the person assaulted may be too young to comprehend the nature of the act, hence the Court can cast a doubt on the testimony of the child. Hence submission by the child to an elder and naturally stronger person under the influence of fear or of a sense of harshly enforcing authority is not tantamount to giving consent. Prior to the amendments section 375 in its clause six (6) accords specific penal emphasis on sexual intercourse with a girl the wife below the age of sixteen years is rape regardless of whether the girl consented or not to the

1129 Indian Evidence Act
1130 2017 Cri Lj 4088
1131 Russel on Crime Volume 1st 12th Edition
sexual intercourse. The consent of the girl below sixteen becomes immaterial. Several cases decided by the High Court and Apex Court, even without having accurate physical evidence at the trial, convictions have been upheld. It reflects the judicial approach in dealing with crimes as horrendous as child rapes. However, the Amendment deals with aggravated forms of sexual assault making it unpardonable as an offence met with death penalty. After analyzing the Amendment in relation to the rules of Evidence, the procedural aspect in sync with the mandate of the Law is also crucial to be examined.

Recently the Supreme Court ordered the Central Government to set up Child exclusive courts under the POCSO Act all over India and has given the Centre 60 days time to develop infrastructure and funds in that regard.1133 Recently in the Rajya Sabha, the Minister of Woman and Child Development announced in the House that the Court proposes a designated one thousand and twenty three fast track courts exclusively trying child sexual abuse cases in a fast track manner.1134 The policy is to invest in the infrastructure which is child friendly as the crude legal system of the country comes across as hostile and unconducive for a child to adduce evidence in the form of testimony and then be cross examined is nothing but a ruthless manner to establish the veracity of the testimony as well as the evidence.

India’s NCRB report which was last and latest published in the year 2016, ‘Crime in India 2016’, states that in over 94% of such cases the perpetrators of child sexual abuse were known to the victim, including the father, grandfather, relative or neighbor. The hidden and systematic abuse of children largely goes unreported as the victims and their family members are, for incomprehensible reasons, hesitant to report against their own.1135 In Indian society and general terminology of sociology, Family as a tight knit institution adherent to values are the first and worst oppressors towards its members. Prestige determines position in the society and a society which holds values flowing from the institution of family and bonds within in such high esteem; the crime meets with inexplicable stigma and social abandonment at the same time of the victim.

While death penalty has been made as a plausible solution to confront the crimes, the ground level problems remain unaddressed. The pillars of the Amendment mainly speedy trial, timely investigation and disposal of appeals need to work in consonance. In order to unerroneously afflict death penalty there has to be full and seamless appreciation of evidence for which a huge burden lies on the prosecution.

The current state of the working of our courts and law enforcement agencies are deplorably reflected in the India Justice Report 20191136 which points out that India ranks at 77th position on the index of rule of law vis-a-vis Criminal Justice delivery system. The report implores on the lack of court infrastructure and pendency in disposal of cases across the states. Furthermore, in the NCRB Data of 2016, the conviction rate in POCSO cases is at a meagre rate of 29.6% while pendency peaks

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www.supremoamicus.org
at 89%. This clearly shows that the ground level working of legal system is not in sync with the requirement of the law.

The reflections on inculcating of the pillars of criminal justice system in the Amendment can be understood by with the case law in which “Judicial response to human rights cannot be blunted by Legal Bigotry” was the remark given by Justice Krishna Iyer in the case of Rafiq vs State of U.P. The finding manifested into conclusions that rape laws in order to be of great deterrence must have a cooperative victim, professional investigation, diligent prosecution and an expeditious trial. While the Amendment envisages a framework for timely completion of investigation and disposal of trial it cannot be said that all the considerations shall be working in full compliance.

The legislative intent is to deal with crimes against children with an iron hand and annihilate all possible reasons which give rise to crimes against children as horrendous as brutal rapes and grievous assaults. But the true test lies in assessing its efficacy on the anvil of the practicality of death penalty as an actual deterrent. To quote from the case of State of M.P v. Munna Chaubey the concept of punishments offers a pragmatic view as it was held that in case of rape of small children the punishment should be so severe and stern that no leniency shall be shown but in some rare cases lesser sentenced can be imposed by a reasoned judgment. Hence the sense of reasoning in choosing punishment over death penalty cannot be evaded notwithstanding the Amendment. The point is not the quantum of punishment but its practicality in putting an end to the menace of crime. Such a judicial precedence is in sync with the reasoning behind awarding a punishment which is proportionate with the gravity and magnitude of the offence and its impact on the society as well as ensuring a stable social order by not conforming to “an eye for an eye and a tooth for a tooth”. Sexual crimes are possibly the most dehumanizing crimes that there are leaving scars on the victim. Owing to this the Courts have undertaken the approach of severe punishments rather than the reformatory approach to meet the ends of justice. There are catena of decisions which have upheld the death penalty expounding conscience of the society being shaken as justified to

The Amendment cements the negation of consent as in the previous Criminal Amendment of 2013, that is the case of a victim below the age of twelve years, as the rationale behind this is that giving consent means applying mental faculties of reasoning, intelligence, judgment and entire knowledge which is totally absent in the situation when a child below a certain age is involved. An impetus was given in the matters of child sexual abuse in the case of Shankar Kisanrao Khade v. State of Maharashtra wherein it was held that the non reporting of the crime by anyone who knows that a minor child below the age of 18 years was subjected to any form of sexual assault and wilfully conceals that fact from the Law enforcement agencies is guilty of the crime of protecting the offender from Legal punishment. The Criminal Law Amendment 2018 states about fast tracking the process of trying

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1137 A point to ponder over in the POCSO Bill, The Hindu https://www.thehindu.com/opinion/op-ed/a-point-to-ponder-over-in-the-pocos-bill/article28964831.ece
1138 1981 AIR 559
1139 https://tripurainfo.com/pgDetailSpecialArticle.aspx?WhatId=6872
1140 2005, CrLj 913 SC
1141 (2013) 5 SCC 546
offenders accused of sexual crimes committed against children. Reporting of such crimes spins the wheels of the whole Act and the sustainability of the Act rests on this.

Section 42 of the POCSO Act¹¹⁴² which states that “Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 3540, 370, 370A, 375, 376, 376A, 376C, 3760, 376E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree” was amended to include section 376D, DA, DB, A, AB, B, C and section 376 A, C, D shall be removed. Meaning thereby it has overridden provisions of the POCSO Act by means of more stringency. The POCSO Amendment Act 2019 lends further legislative credence to the Criminal Law Amendment Act.

There are ample of counter theories of punishment in the form of alternatives which exist. The plausibility of Death Penalty is challenged on several legal and social grounds. Recently the Chairperson, Centre for Criminology and Victimology, NLUD¹¹⁴³ at length writes and examines the possibility of deploying restorative justice in dealing with cases of crimes under the POCSO Law. One of the pivotal points he bases his argument is that Punishment is actually an idea of state and does not resonate with the idea of justice. The entire purpose of criminal justice system is frustrated if the offender is not likely to experience remorse or a sense of guilt for the crime committed. The victims are made to endure an altogether persistent system of pain and trauma by the unjust criminal justice system. The harsh procedure of cross examination does more harm to the victim than to anyone else. It generates the fear of not reporting. This approach may appear as an offense to the sentiments of the victims and may seem as a form of disgust to the roar of people fighting against such crimes. However this theory finds its traces in some of the mitigating factors which may be relied upon by the Courts in awarding punishment. The Justice Malimath Committee Report which is a monumental work on the study of criminal justice system argues in favour of not employing Death Penalty on the grounds of certainty of punishment being more effective¹¹⁴⁴. The combined reading of the report as well as the reasoning provided by the Stockholm Declaration¹¹⁴⁵ which implores that it is a brutalizing process for the whole trial not having an impact on existence of crimes in huge numbers. This brings us to a critical observation made by the Apex Court in Delhi Domestic Women’s Forum v. Union of India¹¹⁴⁶ in which court noted that “Rape is an experience which shakes the foundations of the lives of the victims. It has a lasting effect on the capacity of the victim to negotiate personal relationships and altering behaviour in many senses. The agony suffered by the prolonged and harsh legal proceedings adds to the suffering of the victim of the crime. Although the

¹¹⁴² https://wcd.nic.in/sites/default/files/childprotection31072012.pdf
¹¹⁴³ Indian Express, Justice that Heals, 15th June 2019
¹¹⁴⁶ (1995) 1 SCC 14
amendment adds the new substantive provisions of severe punishments and sets time limits for completion of proceedings in a trial within a period of two months from the date of filing of the charge sheet under section 309 of the Crpc and as per the mandate of section 173 investigation into the offences committed under section 376, 376A, 376AB, 37B, 376C, 376D, 376DA, 376DB or 376E IPC, shall be completed within two months from the commission of the crime. Not only in pre-trial and during the trial elaborate provisions have been made but also under section 377 crpc which deals with the appeals by the state government against sentence on grounds of inadequacy, pertaining to cases under the abovementioned sections shall be disposed off within a period of six months from filing of the appeal. The bail provision as defined in section 438 crpc has been amended by adding an exception in the form of sub section (4) that the section of evoking the bail provision on being arrested for a non bailable offence placing some amount of reliance on the accused person’s previous criminal record cannot be availed by a person involved in the arrest of commission of offence under the above stated provisions. Similarly under section 439 crpc which gives special power to the High Court as well as the Court of Sessions in matters of bail. The Amendment states that a proviso fixing a time limit as to the notice of the application for bail to the Public prosecutor within a period of fifteen days from the date of receipt of the notice of such application as well as the presence of the informant authorized by the accused shall be obligatory at the time of hearing the application of the person accused or convicted under the provisions namely section 376AB or section 376DA or section 376DB IPC. Taking a cue from all the amendments made in the various provisions, the idea is to fast track the procedures in case of sexual crimes against children. However specifically in the aspect of appeals same amount of adjudication is fixed for offences punishable differently. Taking a cue from the judgement in Shri Ram Krishna Dalmia vs Shri Justice S. R. Tendolkar in which it was held that in order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on various kinds of bases. The pertinent point is that there has to be a nexus between the basis of classification and the object which the legislation purports to achieve. Article 14 of the Constitution was further interpreted and it was stated that it strikes at the discrimination in substantive as well as procedural laws. One of the observations made by the Court was that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds and that the legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest. The underlying policy and object of the Act is the primary approach in considering the act as a whole. Reasonableness of a classification made by a statute has to be adjudged in light of the realities of law as the effect of the law is considered to be decisive than the

\[1147\] Amendment 2018

\[1148\] 1958 AIR 538
phraseology of the statute. With the adding of provisions which define offences and are punishable differently as well as giving them the same span of time of six months for the appeal to be disposed off strikes at the consistent and coherent policy which is the need to adjudge on a case pertaining to awarding a death penalty. There is an altogether difference between the differentia forming the basis of classification and the inherent object of the Act. If the classification works out to be discriminatory cannot advance the contention of having achieved the lawful objective of the Act. The edifice of the Law is to curb the crimes against children. The Courts have adopted the ‘rarest of rare doctrine’ over the years as defined in the case of Bachan Singh vs State of Punjab in which the Court held that the instrumentality of Law shall be resistant on taking life of a person and if to do so it has to be in the rarest of rare cases, based on the absolute impossibility of any other form of punishment or solution which is foreseeable. A principled and consistent rule shall be applied while deciding on death penalty. However the Judiciary itself has stated that the judicial principles for imposition of death penalty cannot be said to be uniform. A sound sentencing policy is an essential facet of social justice. To accentuate it as in the case of Dhananjoy Chatterjee v, state of W.B it was held that the imposition of appropriate punishment is the manner in which the court responds to the society’s cry for justice as against the criminals. The demands of justice are so that the punishment so inflicted shall display public abhorrence and condemnation of the crime. The Courts have to strike a correct balance between the rights of the criminal as well as the rights of the victim of the crime as crimes are committed not just against an individual but the whole society at large. Commenting on the modus operandi of death penalty in the case of Deena v. Union of India it was held that death penalty is the least painful of all the state sanctioned modes of taking a citizen’s life away. And it was not violative procedurally or reasonably on account of its execution. It is awarded in exceptional circumstances. The golden thread of reasonableness which runs through the fundamental rights of our venerated Constitution as laid down in the case of Maenka Gandhi vs Union of India which mentions about the arbitrariness at which Article 14 strikes, reasonableness in Article 19 and fairness of procedure in Article 21. On these three grounds and the most fundamental requirement of Article 14 which is the intelligible differentia which the Amendment has applied in adding a provision into Section 377 cpca contradicts the principles enshrined and laid down by the Article. In the amended provision aggravated penetrative sexual assault has been made punishable with death if committed on a woman who is under twelve years of age with not less than twenty years extending to life imprisonment and punishable with death as defined under section 376AB. Further section 376DB defines the offence of gang rape committed against a woman below twelve years of age and each one of them will be liable for the crime with either imprisonment for life or death. The Amendment makes a clear distinction between the victims aged below 12 and 16 years of age. When of 16 years of age under section 376 DA, the offence of

\begin{footnotesize}
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\item[1149] AIR 1980 SC 898
\item[1150] O.P Srivastava’s Principles of Criminal Law
K.A Pandey 7th edition EBC PAGE NO 129
\item[1151] (1994) 2 scc 220
\item[1152] (1983) 4 SCC 645
\item[1153] 1978 SCR (2) 621
\end{itemize}
\end{footnotesize}
gang rape is punishable with life imprisonment as well as under section 376© (3) offence of rape punishable with imprisonment of life. The awarding of death penalty is an inherently complex procedure and to club with other forms of sexual assault and forms of rape punishable differently, in the appeal provision fixing the same span of six months to decide on the appeal comes across as a procedure bypassing the mandate of Article 14 which stands for a clear nexus between the basis of classification and object of the Act. Such a scenario is the one in which it gives ample of space for manifest arbitrariness by Law enforcement agencies. As noted by the Justice Verma Committee formed in the year 2013\(^{1154}\) in which it was stated that uncertainty in law prevails when approaches as to death penalty dwindle on the ambiguity of varying culpabilities and circumstances. The making of the amendment had also dejected the death penalty as a purpose entirely opposed to the purpose of criminal justice as well as the varied natures of crime like sexual offences, penetrative sexual assaults and aggravated forms of penetrative sexual assaults, which the Amendment 2018 precisely seeks to define and punish accordingly.

The practicality of the Amendment is fraught with a combination of legal and social problems as awarding death penalties not only because of its lack of uniform consistent policy but also the tardiness in the legal system. Recently across the nation so many High Courts have awarded death penalty for example the Indore Bench of the Madhya Pradesh High Court the decision of which was stayed by the Apex Court. However the question of accessibility to justice, giving a fair trial to both the sides, witness protection, sensitive evidence tampering are the important facets which the amendment does not address. What was needed was to revitalize the criminal justice system in order to improve its efficacy in curbing such crimes. While the difference in the principles behind doctrine of rarest of rare cases as applicable on murder cases and considerations revolving around the imposition of death penalty in cases of rape on child and minor are notably distinct, the issue of deterrence of the heinous crime and substantiation perhaps remains the same.

Children are the most vulnerable after the infliction of crime for if death penalty is the punishment the offender is most likely to wipe away the trace of his offence in order to be safe. The chances of vulnerability increases by leaps and bounds when in the case of a known offender who happens to be a relative or a kin of the victim. The desired outcome of the Amendment and the nexus between the differentia, as far as the purpose of distinguishing various essentials of crimes with different punishments is concerned with the object of the act is not possible without our institutions undergoing a reform. In a country as diverse and hierarchies prevalent within society on lines of caste specifically, death penalty does not fit into the narrative of true justice delivery mechanism.

The pertinent question which needs to be addressed is whether our social institutions are inherently built up in such a manner to enable a child to be forthright about narrating sexual violence which has been perpetrated against them. The paper does not argue the abolition of death penalty rather it examines the practical problems underlying it by a multifaceted approach

\(^{1154}\)https://www.prsindia.org/uploads/media/Justice\%20verma\%20committee/js\%20verma\%20commit
rummaging through the Trial. The Amendment can potentially serve as a twin pronged attack which has implications on a Fair Trial which is the ultimate purpose of criminal law as well as lowering down the conviction rates. In the context of the amendment to POCSO and bringing in colossal changes to the criminal statues pertaining to child rapes, the questionability of death penalty arises more from the procedural point of view than the aggravating circumstances in calculating imposition of death penalty, which weigh against the culprit in inexplicably spine chilling cases.
POVERTY, INEQUALITY AND MARGINALISED COMMUNITIES

By Sonali Sharma
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INTRODUCTION

In this Paper the Social Exclusion of the Marginal communities, keeping in view the Inequality they are subject to, is demonstrated by examination of data from a No. of surveys. More than 60 years after the idea of Equality translated into India’s Constitution, Social Exclusion remains a central Dimension of Poverty in our country. Social Exclusion(Marginalization) has been by and large , described as the Blatant Action or tendency of Human societies whereby certain sections in our community are Removed or Excluded from the prevalent systems of protection and integration, thus limiting their opportunities and means of survival. Marginalization lies at the core of all social, political and Economic conflict wherein Vulnerable Groups undergo Victimization. This concept which has entered Recently in our Vocabulary covers a wide Variety of Discriminations, Deprivations and Denials of Equal social opportunities to different groups or sections of the society. Broadly speaking, it refers to the exclusion of the groups of people from access to such things as are considered normal or taken for granted for other sections of the society. It covers far more than the exclusion rooted in India’s historical divisions on lines of caste, religion and gender; it includes discrimination against Minorities, Dalits, Tribals, widows, migrants, nomadic tribes, poor etc. Much of the responsibility for not only persistence but also extension of such social Inequalities and deprivations in our society may be traced largely to the inability or failure of the state in meeting its constitutional obligations. Poor people and marginalised communities suffer a remarkably wide range of social and economic problems much graver than just living in poverty. So, Social exclusion is basically a social disadvantage and
relegation to the fringe of society a social phenomenon by which minority or subgroup is socially excluded.

It is evident that the processes of Marginalization either give birth to their socio-economic inequalities or overlap in various domains of development. History is itself a mirror-process which puts narratives in the world picture of Marginalization, Exclusion, Poverty and inequality. Marginalization deprives the marginalised communities which include poor, under-privileged, etc from many opportunities in life. They face unfair treatment in terms of Employment opportunities, business opportunities, housing among various others. Such process further moulds into Inequality that creates distinct feelings of being left out or being exploited. Vulnerable, poor and Marginal communities often live without the fundamental freedom of action and choice that many other take for granted. They lack adequate food shelter, education, Health care access and other social and political opportunities that keep them from leading a fulfilling life of their choices. Due to Marginalisation these communities face extreme vulnerability to ill health, economic dislocation, and natural disasters. Discrimination and Inequality affects them in their communities and they are often exposed to poor treatment by institutions of the state rendering them powerless to influence key decisions affecting their lives. Alienation or disenfranchisement resulting from Social Exclusion can be connected to a person’s social class, race, skin colour, religious affiliation, ethnic origin, educational status, childhood relationships living standards, or appearances. Such exclusionary forms of discrimination may also apply to people with disability, minorities, LGBTQ people, drug users, institutional care leavers, elderly and the young. Anyone who appears to deviate in any way from perceived norms of a population may thereby become subject to coarse or subtle forms of social exclusion.

Marginalisation affects millions of people throughout the world. People who are marginalized have relatively little control over their lives and the resources available to them. This results in making them handicapped in delving contributions to the society. Marginalization deprives a large majority of people across globe from participating in development. It is a complex problem and there are many factors that cause marginalization. This complex and serious problem need to be addressed at the policy level.

HIGHLIGHTING INEQUALITIES: DALITS, MUSLIMS, TRIBALS, WOMEN AND THE POOR

While India has attained primary school enrolment according to official data, the percentage of girls who never attended school was just above 25% among Muslim, Dalits, and Tribals and between 13 and 16 percent for boys. In fact numerous studies show the discrimination these marginal communities are subject to. Poverty trends exemplify these inequalities. With an estimated 22 percent population below the official poverty line, India is nearly on track to having poverty over the last two decades. Repeated revisions of the poverty line over the recent years amidst heated political debates have raised scepticism about this figure. The marginalised groups suffer from discrimination and subordination, they have physical or cultural traits that set them apart and which are disapproved of by a dominant group, they share a sense of collective identity and burdens, they have
shared social rules about who belongs and who does not. Thus marginalization is a complex as well as shifting phenomenon linked to social status. Marginalisation of these communities has resulted in poverty among them, low levels of education, poor health and reduced access to health services when required. They are practically deprived from many civic facilities and isolated from modernized way of living from so many centuries. As it is rightly defined by The Encyclopedia of Public health , Marginalised groups as, “to be marginalised is to be placed in margins and thus excluded from the privilege and power found at the centre” Marginalised groups comprises of the people who are marginalise, from a group or community for their protection and integration.

DRIVING INEQUALITIES: FOUR DYNAMICS OF SOCIAL EXCLUSION:

These social outcomes point out at different but overlapping dynamics of social exclusion. India’s tribes have lived historically in a multiplicity of relatively small and cohesive groups at the geographical and cultural margin of the major society. In contrast dynamics of social exclusion against Dalits, play out with Hindu majority. The historic discrimination based on occupation, continues to be starkly felt. Cases of direct discrimination remain frequent despite the introduction of series of law aimed at preventing them. Violence against dalits has not disappeared; caste identities continue to determine prospects in the employment market; and the discrimination in the provision of essential services remains widespread. Despite this enduring, the group’s social mobilisation and the policies introduced as a response to it are showing results: legal safeguards are providing leverage to the organisation working on Dalits rights; reservation policies have supported the development of an educated and empowered middle class. Yet indirect discrimination continues to deepen the gap between a majority of dalits and Better off sections of society. The absence of land and other assets tremendously limit their opportunities. Muslims of India cumulate vulnerabilities. Yet because of sensitivities linked to the country’s emergence as a Nation, the effects of the faith based discrimination have played out far from political will and public Interest historically deprived of Assets, many of them share the vulnerability of Dalits.

Gender discrimination cuts across lines and becomes acute when accumulated with group wise dimensions of social Exclusion mentioned above. Women constitute more than one third of the working place, but the overwhelming majority of them do not have a say in decisions within the household: without assets they are unable to convert this financial resource into empowerment. Outside their homes, their exposure to violence also contributes to limiting their access to employment and government schemes.

The group wise lens should not divert attention from the commonalities between them. Muslims, Dalits and Tribals constitute 38% of the Indian population, and a major share of country’s poorest. As such they share a core set of interests and challenges : they are for example excessively impacted by the pitiful state of India’s essential public services ; furthermore, while they play out differently across groups , land rights or crude physical insecurity , historic lack of assets, poor access to government schemes and quality employment, as well as lack of economic opportunities affect all of them , similarly
the group wise focus should not divert attention from deep inequalities that run through each of them. The four dimensions therefore acts as axes of vulnerability that interact among themselves and with other factors that not highlighted in this paper. Gender in particular acts as a cumulated factor of vulnerability across Muslims, Dalits, and Tribals. The forms of Marginalization vary from country to country. Being excluded from economic, social and political means of promoting one’s self determination can have adverse effects on Individual and community. Poverty, dependency and feeling of shame are everyday aspects of Economic dislocation and social marginalization.

EXPLANATION OF THE WORD MARGINALIZED COMMUNITIES AND MARGINALIZATION

In general, the term Marginalization describes the overt actions or tendencies of human societies, where people who they perceive to be undesirable or without useful function are excluded i.e., marginalized. All this limits their opportunities and means of survival. Peter Leonard defines marginality as "being outside the mainstream of productive activity and social reproductive activity". Latin observes that, Marginality, is thoroughly demeaning, for economic well being, for human dignity, as well as for physical security. Marginal groups can always be identified by members of dominant society and will always face irrevocable discrimination. These definitions are mentioned in different contexts and show that marginalization is a slippery and multi layered concept. Marginalization has aspects in sociological, economic and political debates. Marginalization may manifest itself in forms varying from genocide /ethnic cleansing and other xenophobic acts at the end of the spectrum, to more basic economic and social hardships at the unitary (Individual/ Family) level. Marginalization has been by and large defined as blatant action or tendency of human societies whereby certain sections in our community are removed or excluded from the prevalent systems of protection and integration, thus limiting their opportunities and means of survival. Marginalization lies at the core of all social, political and economic conflicts wherein
vulnerable groups undergo victimization. The historical discrimination and exclusion countered by various communities have been sought to be ameliorated by the Indian constitutional provisions of exclusion and positive discrimination. Steps of great magnitude, for the empowerment of these excluded and marginalized groups have been institutionalized under the Indian Constitution leading to the social restructuring of the entire socio-political-economic system. In spite of the express rights that have been embodied in the Indian Constitution, question still loom about the sidelined fate of unorganized sector. The condition of the unorganized sector bring forth the, important question as to whether there is inadequacy in the living of rights , or inadequacy in terms of protection of already existing rights. Matter of serious consequence is the empowerment and integration of the disabled persons. The issues faced by these groups also question the veracity of the rights guaranteed to them.

Marginalization is a complex as well as shifting phenomenon linked to social status. It is also called as Social Exclusion, i.e. the process by which a person or group of persons are made marginal or become relegated to the edge of society. There are different social structures that impact Exclusion i.e. Race, Geographic location, class structure, Globalization, social issues, education, Religion, politics, economic status etc. Marginalized group is viewed with Hostility and fear

Social exclusion is a multidimensional process of progressive social rupture, detaching groups and individuals from social relations and institutions and preventing them from full participation in the normal, normatively prescribed activities of the societies in which they live. In an alternative conceptualization, social exclusion or marginalization theoretically emerges at the individual level or group level on four correlated dimensions: insufficient access to social rights, material deprivation, limited social participation and lack of normative integration. The issues faced by these groups often questions the veracity of the rights guaranteed to them. Another pertinent questions relates to that are given to, what would become the backbone of our country i.e. children. The questions related to legal safeguards guaranteed to women and the achievement of gender justice in Indian climate is one that has not been fully settled till this date. The constitutional provisions, legislative actions and the issues faced by the Migrant, displaced persons and refugees are an area of utmost importance especially considering the diverse populous of our country.

MARGINALIZATION AND INEQUALITY:
The Fundamental Human Rights guarantees and non-discrimination are legally binding obligations and do not need instrumental justifications. That said there is a growing body of evidence the Human-rights based approaches and these key guarantees, in particular can lead to more sustainable and inclusive development results. This is to show that all the indigenous people have been living in what may be termed as frontier region right from the pre-historic period. What have actually emerged today are the two unequal societies or two different worlds.

PROBLEMS OF MARGINALISED COMMUNITIES
Most vulnerable marginalized communities in almost every society can be summarized as below: Women: under different economic conditions, and under the influence of specific historical, cultural, legal and religious factors, marginalization is one of the manifestations of gender Inequalities. In other words, women may be excluded from certain jobs and occupations, incorporated into certain others, marginalized in others. In general, they are always marginalized about men, in every country and culture. Women don’t represent a homogenous category where members have common interests, abilities, or practices. Women belonging to lower classes, illiterate, and the poorest region have different level of marginalization than their better-off counterparts.

DIFFERENT TYPES OF MARGINALISED COMMUNITIES IN INDIA

Women, People with Disabilities, Dalits, Aged people, children, Minorities, poor, sexual minorities etc are the most vulnerable marginalized groups in almost every society. In every Nation there are some sections of the people deprived of socio-economic opportunities for their development and they are victims of social, cultural and political exclusion. They are the marginalized, and the marginalized communities are Women, people with Disabilities, Dalits, Aged people with disabilities, Dalits, Aged people, poor, the Downtrodden, etc.

In India, the caste system is a strictly hierarchical social system based on underlying notions of purity and pollution. The Indian society is broadly classified into upper cast and lower cast. Brahmins are on the Top of the Hierarchy and Dalits or the depressed class constitutes the bottom of the hierarchy. Among them, there are also some sub-caste, caste based discrimination entails social and economic exclusion, segregation in housing, denials and restrictions of access to public and private services and employment and enforcement of certain types of jobs on Dalits. Dalits in India have existence as if they have their Island in the same society. The Geographical, cultural, social, educational, existence of Dalits is different from the upper caste Indians.

They include:

1. Women: under different economic conditions and under the influence of specific historical, cultural, legal and religious factors, marginalisation is one of the manifestations of gender inequality, in other words women may be excluded from certain jobs and occupations, incorporated into certain others, and marginalised in others. In general they are always marginalised relative to men, in every country and culture. Women belonging to lower classes, lower castes, illiterate and the poorest region have different level of marginalization than their counterparts.

2. People with Disabilities: people with disabilities have had to battle against centuries of biased assumptions, harmful stereotypes, and irrational fears. The Stigmatization of disability resulted in social and economic marginalization of generations with Disabilities and thus has left people with disabilities in a severe state of impoverishment for centuries.

3. Elderly or aged people: Being passed middle age and approaching old age; rather old age; rather old. Ageing is an inevitable and inexorable process in life. For most nations, regardless of their geographical location or development stage, the 80- years old, or over-age group is growing faster than any younger segment of the older
5. Tribes: In India, the Population of Scheduled Tribes is around 84.3 million and is continued to be socially and economically disadvantage group. They are mainly landless with the little control over resources such as land, forest and water. They constitute agricultural, casual, plantation and industrial labourers. This has resulted in poverty, low levels of education and poor access to health care services. In the Indian context the marginalized are categorized as the Scheduled castes, Scheduled tribes, denoted tribes, and other backward classes.

7. Sexual Minorities: Another group that faces stigma and discrimination are the sexual minorities. Those identify as gay, lesbian, transgender, bisexual, kothi and hijra, experience various forms of discrimination within the society and health system. Due to the dominance of heteronomous sexual relations as the only form of acceptable relations within the society, individuals who are identified as having the same sex sexual preferences are ridiculed and ostracized by their own family and are left with very limited support structures and networks of community that provide them conditions of care and work.

EFFECTS OF MARGINALIZATION

The effects of Marginalization are extremely large. Those who are marginalized suffer from a crisis of identity, and this perhaps leads to rising in Social Inequality. Deprivation in various aspects of life is the common result of Marginalization. Material resources such as food, shelter, etc are unfairly dispersed in society, and the Marginalised individuals or minority groups are excluded from employment. It is true that marginalization is the unfair or unjust treatment of individual or minority groups by the majority or stronger group. Making
marginalization refers to making separated from the mainstream society and being marginalized refers to being separated from the rest of the society or forced to remain on the Fringes or outskirts and not to be at the centre of social or National life. Sometimes marginalized people are not considered as an ingredient or part of the society rather they are thought to be unwanted or negligible in the building of society or nation.

UNTTOUCHABILITY AND DISCRIMINATION:

The practice of untouchability and a large no. of Atrocities inflicted on Dalits continue even today mainly because of hidden prejudices and neglect on the part of officials responsible for the implementation of special legislations; i.e. Protection of Civil Rights Act (PCRA) and The Prevention of Atrocities act (POA). The government should take meaningful intervention in this regard so as to mitigate the sufferings of Dalits due to the practice of Untouchability and atrocities inflicted upon them and should also treat this matter on priority basis to ensure that the official and the civil society at large are sensitized on these issues.

Thus the need of the day is to , well equip these marginal communities in terms of basic education i.e., awareness + knowledge = better utilization which is a pre-requisite for building up a self secure individual who not only being active, participate in community development but also in the development of whole globe as a village.

Though there has been some improvement in certain spheres and despite some positive changes, the standard of living for the marginalised communities has not improved. Thus there is a great need of the hour to take these following steps:

1. **ACTIVE ROLE OF STATE IN PLANNING**

   It is necessary to recognise that for the vast majority of the discriminated groups, state intervention is crucial and necessary. Similarly, the use of economic and social planning as an instrument of planned development is equally necessary. Thus planned state intervention to ensure fair access and participation in social and economic development in the country is necessary.

2. **IMPROVED ACCESS TO CAPITAL**

   The poverty level among SC and ST cultivators is 30% and 40% respectively, which is much higher compared with non-scheduled businesses. The viability and productivity of self employed households need to be improved by providing adequate capital, information, technology and access to markets. It is a pity that though the STs do own some land, they lack the relevant technological inputs to improve the productivity of their agriculture.

3. **IMPROVED EMPLOYMENT IN PUBLIC ANG PRIVATE SECTORS:**

   There is a need to review and strengthen employment guarantee schemes both in rural and urban areas, particularly in drought prone and poverty- ridden areas. Rural infrastructure and other productive capital assets can be generated through large-scale employment programmes. This will serve the dual purpose of reducing poverty and ensuring economic growth.
through improvement in the stock of capital assets and infrastructure.

4. EDUCATION AND HUMAN RESOURCE EMPLOYMENT

Firstly lower literacy rates and level of education and the continual discrimination of SC/STs in educational institutions pose a major problem. The government should take a second look at the education policy and develop major programmes for strengthening the public education system in villages and cities on a much larger scale than today. There is necessity to relocate government resources for education and vocal training. For millions of poor students located in rural areas, the loan schemes do not work. We should develop affordable, uniform and better quality public education system is our strength and needs to be further strengthened. Promotion of such private education systems that creates inequality and hierarchy should be discouraged.

5. EDUCATION LEVEL AMONG SOCIAL GROUPS:

The differences in the level of education among the different social groups are examined on the basis of the data shown. It presents the area wise and sex-wise educational levels among the social groups in India during 2009-10. It is observed that among the rural Males, the rate of illiteracy ranges from 35.8% among the ST, 25.3% among the other backward classes (OBC) and 17.4% in case of others. This indicates that the portion of an illiterate population is considerably higher among the ST and SC communities than among the OBC and others. Among the literates, the proportion of those with primary level of education is higher among the ST (26.4%) and SC (27.6%) than among the marginalised section (ST and SC); educational level is mostly centred at the primary level. This is underscored more so by the fact that at higher levels of education, the rate is less among the marginalised section than among the OBC and others. Among the literates, the proportion of those with primary level of education is higher among the ST (26.4%) and SC (27.6%) than among the marginalised section (ST and SC); educational level is mostly centred at the primary level. This is underscored more so by the fact that at higher levels of education, the rate is less among the marginalised section than among the OBC and others.

6. FOOD SECURITY PROGRAMS:

The public distribution system should also be revived and strengthened. In distributing Fair price shops in villages, priority should be given to the SC/ST female and male groups, as some studies have pointed out that they are discriminated upon in the public distribution system and mid-day Meal schemes.

7. PUBLIC HEALTH SYSTEM:

The public health system in rural areas has been by and large neglected. Therefore, the primary health system in rural areas and public health system in urban areas must be revived and more funds should be allocated for the same.
CONCLUSION:

To sum up making sure that everyone has a chance to develop their potential through education is an important challenge for all countries. Equal opportunity in education is a basic Human right. Moreover, Fair and inclusive education is one of the most powerful levers available for making societies more equitable, innovative, and democratic. Overcoming the extreme and persistent disadvantages that Marginalized Groups experience is the vital element in the wider agenda for inclusive education. Extending opportunity to these groups requires more than the general expansion of education and the improvement of average learning achievement levels. It requires the policies that target the underlying causes of disadvantage in education and beyond.

The pertinent question, therefore, is where do the marginalized groups stand today? Though there has been some improvement in certain spheres and despite some positive changes, the standard of living for the marginalized communities has not been improved. Therefore, what minimum needs to be done? The reason of high incidences of poverty and deprivation among the marginalized social groups are to be found in their continuing lack of access to income earning capital assets, heavy dependence on wage employment, high unemployment, low education and other factors. Therefore there is a need to focus on policies to improve the ownership of income earning capital assets, employment, human resource and health situation and prevention of discrimination to ensure fair participation of the marginalized community in the public and private sectors.

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MOB LYING IN INDIA

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ABSTRACT:

We live in a country where cows are more secure than women. In the recent times, the increasing instances of mob lynching in the name of cow vigilance have grown massively and have become everyday news. However, an interesting question is that how are these vigilantes united in the “national cause” of protecting cows? How are these mobs formed? Also, how do people shed off their humanity and behave in a way that is unjustified? Mob lynching in India is divided mainly in two parts: cow vigilance and suspicion of child abduction, witchcraft and so on. This paper focuses on the Psychology behind such mob formations and the pattern of lynchings throughout India. An important reason behind such lynchings is the misleading social media, the most powerful as it has the power to influence millions of mind with just one click. The author tries to unfold whether Politics has a role to play in such crimes. The author also tries to shed light on some suggestions and steps that can be taken to prevent such heinous crimes.

INTRODUCTION:

India is a diverse country and we take pride in our diversity. However, incidents of Mob Lynchings all over the country have created a divide in the nation. In India, cows are more looked after by so called protectors of religion, whereas we neglect the security of women. Such self-proclaimed protectors are actually doing more harm than good, as it has led to a state of lawlessness. This lawlessness is giving society a message that you can be the judge and decide what is just and fair for you or your community! The increasing incidents of Mob Lynching are an indication and extension of this thought. Various regional leaders and protectors of religion have made such claims that they need to take immediate action because the process of law will take years and that doesn’t serve their purpose.

It is a shame that not only the seeds of this thought are sown but also reaped. People have started to become Judges in their own cause and started lynching people on mere suspicion. As criminal law states no one is guilty until proven, mob lynching is the exact opposite of the ideology. Not only is this against humanity, but this is also fueling the Hindu-Muslim divide in our country. It is therefore of utmost importance to regulate this crime and bring justice to the people who were innocent victims of egoistic and religious ideologies. The advent of such a crime in India is posing the question whether India is a Democracy or a Mobocracy? The Government and the Judiciary have not taken a staunch stand against this crime, this has made the protectors of religion feel more empowered and supported.

Decoding the Mob Mentality:

A branch of psychology called Social Psychology studies about how people behave in a society. The realm of social psychology revolves around two aspects: the personality of the individual and the social situation around him. Depending on both these factors, we can fairly predict how one might behave. When many

individuals come together and form a mob, it becomes a mob mentality, and this is a very powerful influence on the individual’s character and also how he/she will behave in the situation. This might be the answer to why seemingly harmless common men, when coming together can commit a heinous crime of mob lynching. The outbreak of such an act is questionable at many levels, is it because the law and order is not in place? Is it because a certain sect of the society wants to establish its supremacy by use of fear? There are no definite questions and no definite answers.

There are three theories that talk about mob and violence and its interrelation, they are **Contagion Theory**: It proposes that crowds exert a hypnotic influence on their members that results in irrational and emotionally charged behavior often referred to as crowd frenzy.

**Convergence Theory**: It that argues the behavior of a crowd is not an emergent property of the crowd but is a result of like-minded individuals coming together. If it becomes violent is not because the crowd encouraged violence yet rather people wanted it to be violent and came together in a crowd.

**Emergent-Norm Theory**: It combines the two above arguing that a combination of like-minded individuals, anonymity and shared emotions leads to crowd behavior.

The above stated theories give us three different social settings and tell us about individual differences as well. In the first case, people might come together and Lynch someone just because of the social pressure and an influential presence within the group.

In the second case, people who had already planned on committing the offense, with same mentality will come together and form a mob which has a common goal.

In the third case, few people of the mob may or may not have the same agendas but they will still commit the offense because the mob offers an anonymity of the individual. When an individual is a part of a social group his thought is not expressed overtly, rather it is the groupthink that comes into the picture.

Psychology states that there are various elements that determine the mob mentality like conformity, deindividuation, groupthink and so on. However once the mob is reduced back to individuals the process of re-humanization takes place. Rehumanization is when people regain their individuality. If these people are generally good individuals, then they will likely try to justify their actions in order to more closely

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1157 Nyla R. Branscombe & Robert A. Baron, Social psychology (2017).
1158 Conformity :Conformity can also be simply defined as “yielding to group pressures” (Crutchfield, 1955). There are various factors that for their lead to conformity like unanimity, similar cultural backgrounds and so on.

1159 Deindividuation: Deindividuation occurs when a person’s identity with a group overrides his or her own identity and self-awareness. It can lead to a mob mentality because deindividuation tends to prevent critical thinking and dissent.(http://changingminds.org/explanations/theories/deindividuation.htm)
1160 Groupthink: Groupthink occurs when a group of well-intentioned people make irrational or non-optimal decisions that are spurred by the urge to conform or the discouragement of dissent( source: www.psychologytoday.in)
align their actions with their beliefs about their own individual personality.\textsuperscript{1161}

A group of people will often engage in actions that are contrary to the private moral standards of each individual member of that group. Otherwise decent individuals can be swept up into “mobs” that commit looting, vandalism, even physical brutality\textsuperscript{1162}. The paper by Cikara also talks about how individuals will show more violent tendencies in a group rather than when alone. When there are cases of explicit contestations the mob mentality tends to be more aggressive as compared to individuals of the opposite group.

An important aspect of such crime is the “us” versus “them” thought. In India, most of the incidents of mob lynching have taken place between Hindu and Muslims. It is this us versus them conflict that is leading to immoral behavior. Inter group contestations bring out the worst and the best of an individual. It is an attempt of a group to make itself superior and not only that but also to make the opposite group look inferior.

**UNDERSTANDING LYNCHING:**

Politics has played a major role in the events of mob lynching worldwide. Politicians have the power to influence people, they are also known to be charismatic personalities, but when such a power is misused it can cause blunders in the society.

The greatest example of such a political influence is Hitler, when he led a whole nation to believe, the Jews were an inferior race and will be the reason for the downfall of the superior Germany. A political leader like Hitler, though with the wrong ideology but with his charisma and leadership skills swayed the masses and hence these people allowed the Holocaust, or rather initiated it. And this is a classic example of how politicians can influence the mob mentality and lead them to commit crimes that put humanity to shame. Holocaust was an incident that changed the history of mankind.

Similarly, politicians in India have publicly issued statements in favor of protection of cows and encouraged the inhumane act. There are two types of lynching, namely classical lynching and communal lynching.\textsuperscript{1163} Classical lynching are the type of lynching that take place due to the status of a person, they occur due to the exclusive mindset of any sect or society. According to Black(1998), this type of lynching was done by villagers on the Northern Philippines, where the villagers would even Lynch a foreigner to their village if he committed a petty offense of theft. The idea behind classical lynching is unfamiliarity or no ties that bind a person to another. If a person is a complete stranger to the

\textsuperscript{1161} According to Leon Festinger(1957), Cognitive dissonance refers to a situation involving conflicting attitudes, beliefs or behaviors. This produces a feeling of mental discomfort leading to an alteration in one of the attitudes, beliefs or behaviors to reduce the discomfort and restore balance. (Saul McLeod, 2018)


ideology, place, he/she can be lynched even for a petty offense or for saying something against the ideology.

For example: Even in India, there are Hindu organizations that claim to be the well wishers of the Hindu society, they have influenced the crowd to a major extent. The first reported incident of lynching in India was the Dadri Lynching\textsuperscript{1164}, which was done on the basis of a suspicion that the victim had slaughtered a cow. The Hindus consider cow as a holy animal, whereas the Muslims don’t. India was the second largest exporter of beef in the world in 2018\textsuperscript{1165}. But the Hindus were charged with the emotion of holiness and lynched the victim in the name of protection of their religion and cow vigilance. This was just the starting point, many incidents have taken place over the phrase “Jai Shree Ram” too, where people were lynched and assaulted for not chanting the same.

Not only the Hindu-Muslim divide, but the caste system is also seen in play in such crimes. Dalits and Adivasis have also been lynched because of their inferior status in the society. These acts are not just out of the love for one’s religion, rather they are committed to establish one’s superiority over the other. It’s the need for power and affiliation\textsuperscript{1166} and to establish supremacy. The historical constructed “clash” between Muslims and Hindus has been used by members of the far right—such as the Rashtriya Swayamsevak Sangh (RSS) and the Bajrang Dal (BD)—to present the Muslim community as outsiders and evil others with sinister plans to subjugate the Hindu masses.\textsuperscript{1167}

The second type is Communal lynching where the lynching of an insider takes place. Unlike Classical lynching, there is a bond, a familiarity with the victim, but if the victim distances himself either by act or conduct he is creating an atmosphere for his own lynching. For example, Recidivists\textsuperscript{1168}, in a community, distance themselves by their conduct and even a small act thereof, can lead to lynching as no one in the community now accepts him or believes him, there is a distant or non-existent bond, while there is still familiarity with the victim. Lindblom (1972) talks about African Lynching, it’s a form of lynching that takes place in East Africa among certain tribes. It is done for a person who keeps on committing the offense of theft and thus distances himself from the Tribe.

Such type of lynching is also common for witches\textsuperscript{1169}, they are lynched in the suspicion of carrying out witchcraft. Usually such individuals are deemed as unlucky and are separated from society stating that they bring misfortune. Such people are ignored and outcasted by society at large on the basis of blind faith.

For example: The lynching is 65 year old woman named Mandevi, in Agra, Uttar Pradesh. The victim belonged to a lower caste and she was lynched by men of the

\textsuperscript{1164}Abhimanyu Kumar, The lynching that changed India AlJazeera (2017), https://www.aljazeera.com/ (last visited Aug 20, 2019).


\textsuperscript{1166}See McClellanand’s Need Theory. The need for peer is the need to have dominance over the other whereas the need for affiliation is the need to be liked by the group and fit in.


\textsuperscript{1168}According to the Cambridge Dictionary, a recidivists are criminals who continues to commit crimes even after they have been punished.

\textsuperscript{1169}Witch in this sense means a woman who uses black magic and intends to cause harm to other people.
Baghel caste, an upper caste in the village of Mutnai. She was lynched on the suspicion that she was cutting off women’s braids and was performing witchcraft.\textsuperscript{1170}

The pattern of lynching in India can be divided into two blocks: Block one consisting of cow vigilance and Block two consisting of child abduction and other reasons such as religion, caste, etc.

\textit{The rise of cow vigilante:}

Cow is considered as a holy animal in the Hindu religion, therefore the Hindus also worship the cow. Religion is a very sensitive issue and with the current scenario politicians have used it to their benefit. They are interested in creating a vote bank for themselves and so they use their platforms to divide the masses on such basis, they approach to the ethos of the public at large.

Organizations like Rashtriya Swayamsewak Sangh (RSS) and Bajrang Dal (BD) have gone one step ahead and declared themselves as the protectors of the Hindu Culture. The incident that was most highlighted was the lynching of Mohammad Akhlaq on September 28, 2015\textsuperscript{1171} also known as the Dadri lynching incident. He was lynched on the mere suspicion of cow slaughter, because an announcement was made in his name at the temple that he had killed a cow and eaten it. To add to the fuel, the villagers also filed an FIR against Akhlaq’s family on the grounds of cow slaughter.

The Preamble to the Indian Constitution clearly states that India is a Secular country and the Constitution also guarantees each person several Fundamental rights. The rise of cow vigilance is not only immoral but also unconstitutional. India being a secular nation has no official religion and has given an equal status to every religion. Killing a person just because he/she has a different faith, or he does not consider an animal holy is not only immoral but also unconstitutional. Being a nation with diversity we must accept that people have different views, ideologies and practices. These incidents only make us question whether we are moving towards Mobocracy.

There are various victims of such anti democratic and anti secular individuals who become self proclaimed “gau rakshaks” like Zahid Ahmad Bhat,\textsuperscript{1172} Mokati Elisa\textsuperscript{1173}, Mohammad Hussain.

Pehlu Khan’s case is noteworthy. He was a dairy owner in Alwar, Rajasthan, while returning from Jaipur after buying a cattle he was stopped by the self appointed Cow vigilantes. Even after showing the necessary documents he was lynched on suspicion of being a cattle smuggler. After which an FIR was filed, even CID took probe in the matter, but this case was taken over by the Rajasthan Police and the perpetrators were given a clean chit.

\textsuperscript{1170} Dalit woman lynched in Agra, becomes first victim of braid-chop fear and rumour, The Indian Express (2017), http://indianexpress.com/ (last visited Aug 20, 2019).

\textsuperscript{1171} Abhimanyu Kumar, The lynching that changed India AlJazeera (2017), https://www.aljazeera.com/ (last visited Aug 20, 2019).

\textsuperscript{1172} Zahid Ahmad Bhat(2015): Bhat, in his 20s, was ferrying cow carcasses when a group of self proclaimed cow vigilantes allegedly hurled petrol bombs at him. Bhat died of severe burns ten days later. A forensic report later revealed that the carcasses in the truck were of cows that had died of food poisoning, not slaughter.(The Quint)

\textsuperscript{1173} Mokati Elisa(2016): Mokati was tied to a tree and lynched by self appointed cow vigilantes who found him skinning a dead cow. Later it was found that the cow died of electrocution and was given to Maolati by the owner to skin it. Mokati was murdered on mere suspicions.
Recently a case was filed against Pehlu Khan accusing him for cattle smuggling. \(^{1174}\)

“Jab raja apna kaam nahin karega, toh praja ko karna padega” (When the ruler fails to do his duty, then the public will have to step in), Acharya Yogendra Arya, the head of Haryana’s Gau Raksha Dal. \(^{1175}\) This mentality indicates that people have now become the judges and juries of the society and will do what they deem fit.

The current scenario in our country is only leading towards a Hindu-Muslim divide which is against the essence of our culture. Any religion when practiced in extremism becomes dangerous and one which goes against its own principles. Cow is considered holy in Hindu culture but that does not give any Hindu the right to Lynch a human on consumption of beef. People taking advantage of such situations are fueling the divide by sowing the seeds of suspicion and mutual tension between the communities, of this is continued then India will no longer be a place we take pride in for its welcoming and inclusive culture, but be ashamed of how it fails to protect its own.

Suspicions of Child abduction, Witchcraft and the problem of Caste:

Technology is a boon and a bane. India witnessed the progressive side of technology as well as the regressive side of it. Apps like WhatsApp that help us connect to people worldwide, brought nothing but doom to certain village areas in India. Certain messages relating to Child Abduction and organ harvesting started doing the rounds on WhatsApp, the messages had specific details and videos attached to them. This led to the lynching of many people in Dhule as well as Jharkhand and even Karnataka. An article by BBC \(^{1176}\) titled, “How WhatsApp helped turn an Indian village into a lynch mob” narrates the story of an assualted victim who talks about the traumatizing incident and the lynching of his friend. This is the influence of social media on humans, as it led to deindividuation and a mob mentality.

Bharat Malwe, Bharat Bhosale, Dadarao Bhoasale, Raju Bhosale and Aappa Ingole were the victims of such WhatsApp forwards that led the villagers in Dhule district of Maharashtra to believe they were child abductors. The villagers took Law in their hands and lynched them mercilessly.

Witchcraft or rather suspicion of witchcraft is another reason for which people have been lynched in India. Many women continue to be killed in parts of India on suspicion of witchcraft. About 2000 women have been killed by mobs between 2000-2012 in 12 states on suspicion of having indulged in witchcraft practices. \(^{1177}\) Wasim Ahmad Tantray, a mentally disabled person was lynched in Kashmir, on the suspicion of cutting off braids \(^{1178}\). India is religious as well as superstitious, people believe in the practices of witchcraft and some people have been known to perform them too. However, one can never be sure whether or

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\(^{1178}\) Supra 23
not a person is indulging in these practices. But, village vigils take matters into their own hands under the name of protecting people and commit such heinous crimes.

Caste has always been an issue in Indian society. People believe in the caste system and also talk about the mention of such a system in old scriptures written by scholars. There have been mob killings in the name of caste, the concept of honor killing wherein the family/families of either the bride or groom or both decide to end the lives of the couple who married against their wishes or in a different caste can be seen as a first step towards the mob mentality fueling the wrong ideology. There has been a lot written about the plight of Dalits and similar to them are various lower castes that reside in different parts of India. The tribals or the Adivasis are also a victim of lynching because of the same reasons. Piyush Parmar, Madhu Chindaki are few of the many victims that have been lynched because they were of lower castes.

**CURRENT STATUS & CONCLUSION:**

At present India has no laws for Lynching however according to current laws, provisions of Indian Penal Code (IPC) are applied to deal with instance of mob killing like Section 302 (murder), 307 (attempt to murder), 323 (causing voluntary hurt) 147 (rioting), 148 (rioting armed with deadly weapons) and 149 (unlawful assembly. Similarly, under Section 223 (a) of the Criminal Procedure Code (CrPC), it is allowed to try two or more accused for conducting a crime as a “same transaction”.

The ongoing debate in this matter is whether or not lynching has come up during the Modi regime or not. A website by the name India Spend has collected the data on lynching but only for one aspect i.e. Cow related crimes. According to the website, there has been a remarkable 57.8% of cow related crime during the Bharatiya Janta Party regime, followed by 13.7% during the Congress regime(in a state wise breakdown).

The silence of the political realm on this issue is a cause of concern. Politicians not speaking up on this issue or rather being diplomatic has led to an encouragement of such crimes. These people need to be called out for what they have done. Politicians are quite because there is an issue of unfavorableness involved, they might not get votes or might even be highly criticized for their views, but if people in power will not start using their power to help the needy and be a voice for those who need it , India will surely become a Mobocracy.

The Judiciary has been taking an active stance against mob lynching, the Apex Court has stated that it condemns Cases of Mobocracy. Therefore in the landmark judgement of Tehseen Poonawalla and Others v. Union of India the court ordered all states to take stern measures against violence in the name of cow protection. Despite such judgements people

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179 Piyush Parmar(2017): Belonging to a Dalit community, he was assaulted for sporting a moustache
180 Madhu Chindaki(2018): A 30 year old tribal man was beaten to death on suspicion of theft. The attackers took selfies with the victim before killing him.

182 Tehseen S. Poonawalla v. Union of India (2018) 6 SC 72
always find a loophole and get out scott free like in case of Pehlu Khan and also Mohammad Akhlaq were the perpetrators were released on bail in a short period of time.

Following the directives given by Supreme Court, Manipur, Madhya Pradesh and Rajasthan have drafted an anti-lynching Law.

A bill called Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011, or the Anti-Communal Violence Bill was presented in the Parliament and it suggested various measures to curb communal violence, especially after various outbreaks of such incidents in Gujarat\textsuperscript{1183}. But the bill was not passed because it somehow undermined the authorities of the State. It was a Bill that talked about measures to curb such communal violence and fixed responsibility for the same.

The work done by the National Campaign Against Mob Lynching is noteworthy. They have come up with a draft called MASUKA (Manav Suraksha Kanoon) which is a law against mob lynching. It is a law that demands speedy and fair trials for such victims and compensation for the families of the victims from the state government. Apart from this, it also demands a stronger witness protection program for the witnesses of such incidents.

The fight against the crime of mob lynching is still a long one, rather it has only begun. The rise of cow vigilante across the nation and the spread of rumors through social media has taken a lot of innocent lives. There is need of the leaders of the country to speak up and protect the masses, so that such acts are discouraged. However, the silence of politicians is rather sending off a cryptic message to the masses and indirectly supporting such acts. The theories of social psychology also help us understand when does individual thought vanish and an individual completely blends with the mob indulging in groupthink that results in loss of individual ethics and moral behavior. Indian Judiciary has stepped up to the rescue of the victims and urged the center and the State governments to draft laws relating to lynching.

India lacks a healthy political environment, the opposition will always find a way to blame the ruling party or vice versa. What India needs the most is an atmosphere where every person feels safe despite his religious affiliation or the food choices or gender! We need leaders that give us solutions instead of blame. Mob lynching is one of the heinous hate crimes that is growing every day and many incidents being unreported, all in the name of religion. The Hindu religion was never based on such values, but the agendas of people made it so.

SUGGESTIONS:

- It is of utmost importance for education to reach to the grassroots level of the country, so that they can understand the true value of democracy and secularism. With education they will not be blinded by the views of any political or religious authority.

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\textsuperscript{1183} Pankaj Mishra, The Gujarat massacre: New India’s blood rite The Guardian (2012), https://www.theguardian.com/ (last visited Aug 20, 2019). The riots began after 60 Hindu pilgrims died when a train carrying them was set on fire. Responding to reports that Muslims had set fire to a train carriage, killing 58 Hindu pilgrims inside, mobs rampaged across the state. More than 2,000 Muslims were murdered, and tens of thousands rendered homeless in carefully planned and coordinated attacks of unprecedented savagery.
We need to draft a special law that deals with Mob lynching.

According to me, four new sections can be added to Indian Penal Code, 1860:

**Attempt to commit Mob Lynching:** Because such an attempt is as heinous as the crime itself.

**Causing death by Mob Lynching:** This section can define mob lynching, and also describe about the what act constitutes mob lynching.

**Punishment for Attempt to commit Mob Lynching:** This section can constitute punishment can get sentence of upto 10 years in Jail along with heavy compensation.

**Punishment for Mob Lynching:** This section can constitute a sentence of life imprisonment and a fine upto 10 lacs.

There can also be a comprehensive law that deals with not only mob lynching but all hate crimes such as honor killings specifically too. This lacunae in law should be filled.

Social media websites like WhatsApp should become more vigilant in terms of what information should be circulated through their medium. They should have stringent signing up policy that holds people accountable for spreading hate and rumors.

Looking at this lacunae in our system we can either make new laws or implement the current Indian Penal Code provisions in a way that can provide justice to the victims of such hate crimes.

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Abstract
Cyber forensics is the application of technological knowledge to resolve legal issues. It involves the investigation, analysis, authentication and recovery of digital evidence from a digital device or medium used to commit a crime.

With the advancement in technology, things have become more convenient with quick and easy digital access. However at the same time, cyber-crime has increased exponentially and has become a threat to society which needs to be resolved. The legislations such as the IT act, 2000 and the Indian Evidence Act, 1872 has codified laws which penalises any offender involved in cyber-crime, but the constant advancement in technology and the cunning yet intelligent brains of the offenders sometimes paves a way out.

Nevertheless, a criminal leaves footprints after commission of a crime. A cyber forensic expert is the one who traces the digital footprints left behind and further digs into the root of the crime committed in the cyber-space.

This research paper will cast light upon the techno-legal aspect of cyber forensics; steps involved in investigation into cyber-crime; pre-eminent role of cyber forensic experts and cyber forensic analysis tools, with an emphasis on email tracer, a cyber analysis tool, which helps track down an offender in the cyber space and other cyber-crimes related thereto. Further, the concept of email forensics will be discussed, which is an offshoot of cyber forensic in itself.

Keywords: Cyber forensics; cyber-crime; techno-legal; digital footprints; cyber forensic expert; email tracer; email forensics

Research methodology:

Primary sources: Interview; relevant statutes; Judgements; Newspaper articles
Secondary sources: Books; Internet

Introduction
In this 21st century of fast-paced technological advancement we might leave electronic traces behind while using the internet. Whatever someone does online they leave behind digital footprints that can easily reveal who they are, what they did, and when they did it. Therefore, as we live more and more of our lives online cyber forensics becomes more critical than ever to keep us safe because as technology becomes more advanced so do the criminal activities.

Cyber Forensics is a field that merges the elements of computer science and law to analyse and realize digital evidence from computer systems, computer networks, wireless communications and storage devices in a way that is acceptable in the court of law. It can be referred as the science of locating, collecting, protecting, analysing and reporting of digital evidence from electronic devices like computer systems, hard disk, mobile phones etc. that is used to commit a crime.

A cyber forensic expert can discover data in different ways that reside in a digital device that has been used to commit a cyber-crime. They can recover encrypted, deleted and
damaged file Information using the appropriate tools and techniques. The recovered data is then used in solving the crime and plays an important role in litigation process. After the discovery of hidden files and recovery of deleted files an overall analysis containing an overview of the computer system displaying every conspicuous pattern is created by the forensic experts. The forensic expert then assists in investigation or litigation as a consultant.

In short, Cyber or Computer forensics is concerned with obtaining the proof of a cyber-crime or breach of policy in such a way that could lead to the prosecution of the criminal.

The Information Technology act, 2000 acts as the supreme legislation regulating cyber laws of India. The motto behind enacting the act was to facilitate and acknowledge e-commerce and to penalise the offenders who committed cyber-crimes. However with the boom in technology, cyber related crimes increased and a need was felt to amend the law, and with that, the information technology amendment act, 2008, was passed by the parliament, so as to provide legal remedy to curb cyber-crimes. Further, the provisions of the Indian Penal code, 1860, Indian evidence act, 1872, etc., were also amended, so as to make it pliant with technology and support the admissibility of ‘electronic documents/records’ as digital or electronic evidence in court. Section 2(1) (t) of the Information Technology Act, 2000 defines “electronic record” as, means “data record or data generated, image or sound stored, received or sent in an electronic form or micro-film or computer generated micro-fiche”.

Further, According to Wikipedia, “an Electronic evidence is any probative information stored or transmitted in a digital form”, which is admissible in court and serves as proof against offenders in the cyber-space.

Cyber-Crimes and its Legal Implications:
Cyber-crimes have increased exponentially with the passage of time. With the wake in technology, the criminal minds have become sharp and cunning with several crimes being committed on the digital platform. Although, the technology is fast driven than the law, nevertheless, law finds the key to unlock such crimes and further prevent them.

The information technology act, with its 2008 amendment lays down almost every sort of cyber-crime and prevention from such crimes in term of punishments in its chapter XI.

1. Denial of Access:
DOS attack is used to make the online services unavailable to the user by flooding it with traffic from a variety of sources. Organizations such as commerce, banking, media, government and trade organizations are often targeted.

Legal implications:  
Section 43(e), 43(f) and 43(g) r/w section 66 of the IT act, 2000 lays down provision w.r.t., dos attack. Section 65 of the IT


1186 India Tech Law. January 31, 2017. Denial of Service (DoS) attack and relevant Indian Laws. Access from:
act also punishes for tampering with computer source document.\(^{1187}\)

If a person without the consent of the owner or the in-charge of the computer system, disrupts or causes disruption of any computer, computer system or computer network\(^{1188}\); or denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means\(^{1189}\); or provides any assistance to any person to facilitate access to a computer, computer system or computer network; then he/she shall be held liable to be imprisoned for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.\(^{1190}\)

2. Hacking:

It usually refers to unauthorized intrusion into a computer or a network. A skilled programmer who performs hacking is known as a hacker. Hacking is done to alter systems. This hacker may alter the system or change the security features to commit fraudulent activities such as stealing personal/professional data, identity theft, Privacy invasion etc.

Legal implications:
The term hacking had a place under the IT act, 2000, pre 2008’s amendment\(^{1191}\). Hacking as under section 43 and 66 of the IT act\(^{1192}\) was removed after the amendment, so as to secure the interest of ethical and legal hacking done by experts in good faith. It drew a distinction between ethical hacking and malicious hacking, where malicious hacking is specifically known as cracking in layman’s term.\(^{1193}\)

Although, the IT act, 2000 does not cover the term hacking, it does lays down provision for unauthorised and malicious cracking/hacking under sections 43 and 66 of the act.

Section 43 r/w section 66 of the IT Act, 2000, applies to this particular offence. Further, section 66 acts as an extension to section 43 of the act by stating that, “If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both “.\(^{1194}\)

3. Identity theft:

It refers to impersonating a person in order to steal important data about that person such as credit card information, banking details etc. Identify thrives can use someone else's name whenever they commit a crime like drug trafficking, money laundering, smuggling or any cyber-crime.

Legal implications:

According to section 66C of the Information Technology Act, 2000, A person who fraudulently or dishonestly, uses someone else’s electronic signature, password or any other unique identification feature, shall be punished with imprisonment for a term, which may extend to three years and shall also be


\(^{1188}\) Section 43(e). IT act, 2000.

\(^{1189}\) Section 43(f). IT act, 2000

\(^{1190}\) Section 43(g). IT act, 2000

\(^{1191}\) Information Technology (Amendment) Act, 2008 (Act No. 10 of 2009).

\(^{1192}\) Information Technology Act, 2000 (Act No. 21 of 2000).

\(^{1193}\) Ipleader. July 1, 2016. Laws Against Hacking In India. available from: https://blog.ipvleaders.in/laws-hacking-india/

\(^{1194}\) Section 66. IT act, 2000
liable to fine which may extend to one lakh rupees.

Further, section 378 r/w section 379 i.e., ‘theft’, section 405 r/w section 406, i.e., ‘criminal breach of trust’ and section 420 i.e., ‘cheating and dishonestly inducing delivery of property’ under the Indian Penal Code, 1860, is also applicable for the offence.

4. Child Soliciting & Abuse:
A person is below the age of 18 years is regarded as a child. Child soliciting and abuse takes place online by soliciting the children for the purpose of pornography. This type of crime is strictly prohibited by the law. Sometimes files containing illegal images are labelled incorrectly in order to trap individuals into visiting internet sites that they didn’t intend to.

Legal implications:
According to section 67B of the IT Act, 2000,

- Publishing or transmission, creating, facilitating, recording, collecting, seeking, browsing, downloading, advertising, promoting, exchanging or distributing, material depicting children in obscene, indecent or sexually explicit manner, in an electronic form;

- Further, cultivating, enticing or inducing, children to engage in online relationship with one another for sexually explicit act or in a manner that may offend a reasonable adult on the computer resource, shall be punished on first conviction with an imprisonment of a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction, with an imprisonment, for a term which may extend to seven years and also with fine which may extend to ten lakh rupee.

In the case of Raghuraj Singh v. Air Force Bal Bharti School (2001) 76, filed in the Juvenile Court, Delhi, a class 12th student created a pornographic website with an intention of revenge from classmates and teachers, and listed the names of his 12 schoolmate’s girls and teachers in sexually explicit manner. School authorities suspended him and the court charged him under S. 67 of I.T Act, S. 292-294 of IPC and Indecent Representation of Women Act.

5. Pornography and its legal implications
The IT Act, 2000 lays down stringent provisions w.r.t ‘publishing or transmitting obscene material, punishable with an imprisonment, which may extend to 3 years and fine which may extend to five lakhs rupees on 1st conviction, whereas on second or subsequent conviction, the offender shall be liable with a fine and imprisonment which may extend to 10 lakhs rupees and 7 years respectively’ and ‘material containing sexually explicit act(s), punishable with fine and imprisonment which may extend to 10 lakh rupees and 5 years respectively on first conviction and 10 lakh rupees and seven years on second or subsequent conviction,’ in electronic form.

Further section 66E of the act ensure, imprisonment which may extend to three years or fine not exceeding two lakh rupees, or both on the offender who intentionally captures, publishes or transmits the image of a private area of any person without his or her consent, violating the privacy of a person.

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1195 Section 67. IT act, 2000
1196 Section 67A. IT Act, 2000
1197 IT Act, 2000
Section 354C i.e., voyeurism, and section 293, i.e., Sale, etc., of obscene objects to young person as under as under the, Indian penal code, 1860, are also applicable. ‘Voyeurism’ is the watching, capturing, or disseminating of a woman engaging in a private act.\(^{1198}\)

6. Ransomware:
It refers to the malicious use of software that blocks the victims data or threatens to publish the confidential data unless a ransom is paid to the person committing the crime. Ransomware attacks are carried out by injecting a Trojan disguised as a legitimate file which the user is tricked into opening or downloading. The WannaCry is a ransomware attack that caused chaos across the world by infecting the computers run by windows operating system by encrypting the victim's data. This attack spread automatically through worms, without any participation from the victim's side. To decrypt the files, the attackers demanded a ransom payment of between $300 to $600 in Bitcoins within three days.\(^{1199}\)

Legal implications:
The offence is punishable under the IT act with an imprisonment for a term which may exceed to three years and with fine, under Section 66A of IT Act, 2000. Section 383 r/w section 384 of the Indian Penal code, 1860 is also applicable for the particular offence. (extortion)

6. Email Spoofing and IP address spoofing:
Email spoofing is the process of creating a forged email address and sending emails which appears to have originated from a reliable source. Email spoofing is a very common cyber crime to trick the victims, as the information needed to make a forged email address is very easily available online. Therefore, we should always double check the sender's email address before opening the email or before downloading any data.

While email spoofing revolves around the user, IP spoofing is performed to attack a network. The attacker generally sends a message with a fake or spoofed IP address to the victim to make it look like the message has originated from a reliable source. Thus is done to steal the victim's personal information such as banking details.

Legal implications:
Section 66D of the IT act, 2000, applies in case of email and ip address spoofing. Any person, who cheats by personating via any communication device or computer resource, cheats by personating, shall be punished with imprisonment, which may extend to three years and shall also be liable to fine which may extend to one lakh rupee.\(^{1200}\) Ipc- 465(2 yrs) or fine, 468(7yrs+fine)

7. Phishing:
Phishing is a cybercrime in which the victims are lured into providing their sensitive information such as banking details, credit card details, passwords etc. by masquerading as a reliable entity in an electronic communication. It's one of the oldest types of cyberattacks and is

\(^{1198}\) Section 354C. IPC, 1860.
\(^{1199}\) csoonline.com. Josh Fruhlinger. August 30th, 2018. What is WannaCry Ransomware, how does it infect and who was responsible?
Available from: https://www.csoonline.com/article/3227906/rans
\(^{1200}\) Section 66D. IT act, 2000
becoming increasingly sophisticated with time.

**Legal implications**
The crime of Phishing is nowhere defined in the IT act, nevertheless, **Section 66A(c)** covers the offence with an imprisonment of 3 years with fine. Further, **section 420 of IPC** is also applicable.

**Cyber Forensic Investigation Process**
A cyber forensic investigation is digging into and analysing the digital footprints left behind by the offender. Eoghan Casey, a forensic researcher defines it as ‘a number of steps from the original incident alert through to reporting of findings’.

The provisions of the code of criminal procedure, provides for the basic structure of investigation into the crime. Cybercrime investigation, requires both technical and legal skills, nevertheless, it is more technical than legal in nature. The power to investigate a cyber-crime lies with the police, not below the rank of an inspector.

Almost every police departments in India have a cybercrime investigation cell, under whose authority, the cyber forensic experts along with police, untangles cyber-crimes. Such cybercrime cells are usually equipped with a Cyber Lab having cyber forensic capabilities such cyber forensic analysis tools, forensic servers, portable forensic tools for on-site examination.

There are technically four steps involved in the cyber forensic investigation namely, Search and seize; Acquisition; Analysis and Reporting.

1. **Search and seizure**
The search and seizure should be done with compliance to the provisions as established in the code of criminal procedure and IT act, 2000. A police officer, not below the rank of an inspector may enter any public place, and further, search and arrest without warrant. The cyber forensic expert handles the technical details, while the investigating officer i.e., the police handles the legal formalities on site.

First, the set-up is labelled and photographed so as to aid legal and technical process. All the connectors and plugs should be labelled properly so as to ensure easy and accurate re-assembly. Thereafter, the system should be checked if turned on or on sleeping mode and thereafter be powered down through operating system and then unplugged, so as to protect it from any loss of e-evidence. After turning off, the device should be disconnected from any network connections. Thereafter, the device is be dismantled into separate components. Lastly, seizure of the device, its software, operating system etc., should be accomplished.

2. **Acquisition**

http://www.cybercelldelhi.in/

Section 80. IT act, 2000


Section 78. IT act, 2000.

Once the device and data is recovered, the expert images, duplicates, and replicates it. The duplication is usually done via a write blocking device and is known as acquisition or imaging. The software imaging tools such as TrueBack, EnCase, FTK Imager etc., are used for duplication and further the image is verified using hash function or SHA.

3. Analysis
Analysis involves recovery of e-evidence through different techniques and tools such as EnCase, FTK etc., Different types of data such as, chats, images, internet history, email, or documents can be recovered, from within the operating system, depending upon the nature of investigation. Keywords, type of files, deleted spaces etc., gives clues in analysis. Further, conclusions are reached via the recovered data.

4. Reporting
The final step of investigation is the preparation of report of the acquired e-evidence and further submitting it to the authority, who prepares a charge sheet to be submitted in the court. The forensic expert also acts as an expert witness and present and explains the evidence in court. According to Section 65-A, the contents of electronic records can be proved and is admissible in accordance with the provisions of Section 65-B (2), which lays down the requirements to be fulfilled for an electronic evidence to be admissible in the court of law.

Role of Forensic Experts
Forensic experts are able to decrypt the password protected documents and encrypted files used by cyber criminals to make the files unreadable in order to conceal the digital evidence. Experts can retrieve deleted computer files and emails. Downloaded files and website visits can be identified that can be used for further investigation of the crime scene.

Roles & responsibilities of a cyber-forensic expert during the forensic investigation are:
1. Protection of the digital device from data corruption, tampering, damage, or any kind of cyber-attacks.
2. The forensic expert ensures that the digital device is not damaged in any way.
3. Discovery of hidden, encrypted, deleted, and password protected data.
4. Data recovery, data analysis and proving a printout of the overall analysis of digital evidence.
5. Providing testimony and acting as an expert consultant to provide information about the corrupted digital system.
6. The forensic expert has vast amount of knowledge about the different type of formats in which the evidence can exists.


1209 Justice Yatindra Singh. Fifth edition. Universal
1211 Dr. Avtar Singh. 22nd Edition. Central law publishing co. Cyber laws. p 38
The detection of hacking attacks, extracting electronic evidence to report a crime and carrying out audits to prevent future attacks is known as Computer Hacking Forensic Investigation. CHFI investigators have high level expertise to use a variety of methods for discovering the data residing in a computer system that can be used as digital evidence. A CHFI certified professional has an expertise in various skills. Some roles & responsibilities of the CHFI are mentioned below:

- Performing incidence response, evidence collection, forensics, and digital forensic acquisitions.
- Ensuring that the investigation is handled with confidentiality.
- Identifying the origin of incidence.
- Checking the computer hard disk drives and storage media thoroughly in order to recover data beneficial for the investigation.
- Responsibility of conducting audit trails and evidence integrity mechanisms in order to prevent the data from any sort of modifications by internal or external entities.
- Collecting information from different operating systems such as Windows, Mac and Linux.
- Using forensic technology methods
- Executing anti-forensics detection processes.
  - Identification of data, images and activities required for internal investigations.
- Being able to recover deleted files and encrypted files.

Computer Forensic Tools

Computer forensic tools (CFT’s) are used by forensic experts to conduct the investigation process by collecting data from the computer systems, to analysing the data for obtaining information that may not be immediately obvious and for making a true copy of that data such that it can be used in legal proceedings.

Types of Data:

1. Active Data is the data that we can see with our naked eyes like programs, data files, and files used by the operating system. It is the easiest type of data to discover.
2. Archival Data is the data that has been backed up and stored in hard drives, CDs, backup tapes, floppies etc.
3. Latent Data is the data that can be obtained using only specialised tools and software such as deleted or partially overwritten data. It’s very hard to obtain latent data as it is very costly and time consuming.

Some popular computer forensic tools are:

1. EnCase Software
   It is a widely used and reliable tool developed by guidance software. It consists of a single software having multiple packages and supports a variety of operating systems. The user can write scripts for automated tasks. It can also perform file signature analysis. It has MD5 Forensics Process. Available from: https://newyorkcomputerforensics.com/computer-forensics-process/

message-digest encryption algorithm, a database to crack encrypted files with passwords. It usually supports windows platform but can analyse any other operating system. It has a built-in imager with software Write blocker which allows only read instructions and blocks all the write instructions it helps to prevent the evidence from any kind of modifications by unauthorised entity. Encase provides very good results for disk imaging, volume image and memory and logical files.

2. **FTK Imager**

Forensic Toolkit or FTK imager provides a data preview and imaging tool that allows to view the discovered information in window explorer. It can examine files and folders on local and network drives and can also review the content of memory dumps. The software is developed by AccessData. Its is a free tool and occupies around 30mb of memory and also provides support for different file systems. It safely mounts forensic image as a physical device or logically, as a drive. FTK imager can be used to recover deleted files. This tool has built in MD5 calculator ensuring integrity, the deleted files can be searched easily using this tool.

3. **Sleuth Kit**

The Sleuth kit is a very popular open-source tool that provides a command line interface. It has built-in commands to investigate the disk images. The Sleuth kit examines volumes of data, and allows the content to be accessed manually or automatically. The entire tool is written in C language library. It can be used to investigate Linux, Windows, Mac, Solaris and some other operating systems. It also supports Unicode and ASCII structure. It provides wide access to metadata and file attributes and also provides an extensive investigation of file systems. It also provides additional features such as keyword searching and timeline analysis.

4. **DEFT**

Digital Evidence & Forensics Toolkit or DEFT contains a bundle of popular free forensic tools including tools for mobile and network forensics, data recovery, and hashing. It is Ubuntu based live operating system along with a collection of several forensic tools. It provides best windows forensic tools. It is very stable and professional and is widely used by police, military etc.

5. **Volatility**

It is one of the popular tool in memory forensics, it is a fast and comprehensive open-source tool built in python coding language, it reduces complexity in the whole extraction process while remaining independent of the target system. It can be used to investigate the content of RAM. Malware present in the RAM can be identified by experts using volatility. It is available for different operating systems such as windows, Mac, Linux.

6. **CAINE**

Computer Aided Investigative Environment or CAINE, is a user friendly way to create reports for your investigations. It contains a variety of useful forensic tools. It executes on an Ubuntu based live CD and consists of a collection of forensic tools. It provides the user with a complete forensic environment that organizes existing software tools as software modules and to provide a friendly graphical interface. It has user friendly interface and tools it has a built in blocker so there’s no possibility of accidental damage to evidence. Caine provides an optimized environment which is a good example of resource management. It has the ability to generate and export reports so the user gets essential summary of the case.

7. **LastActivityView**

To know the last user actions and events that occurred on a machine, the LastActivityView is the appropriate tool.
The information it uncovers can be easily exported to an HTML file. It is for windows Operating system. It collects information from various sources on a running system and displays a log of actions made by the user and the events occurred in the computer.

8. **HXD**

It is a user friendly low level hex editor that can be used on a raw disk or main memory. It has a variety of features, including exporting file, file shredding, and splitting of files. It is a free tool it is simple hex editor of disk image and RAM. It is very useful to analyze disk or file systems manually. It can handle file of any size directly provides access to specified address.

9. **Mandiant Redline**

In order to examine a specific host, Mandiant Redline will do that by collecting a huge amount of information on running processes, drivers, file systems, meta-data, event logs, and many other elements. It is a free tool that provides host investigative capabilities to users to find malicious activities by memory and file analysis. Using it we can analyse the process that was running on the system when the memory image was acquired. It shows full details about the process such as the process id, path arguments and user names.

10. **PlainSight**

It is a live CD that allows to perform forensic tasks such as gathering data on USB device usage, accessing internet histories, hashes, extracting password and many more. It has a comprehensive forensic environment with powerful open source tools which allow the investigator to grab vital information from the target system. It also provides essential information about the storage devices.¹²¹⁵

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¹²¹⁷ cyberforensics.in. Online EmailTracer. Available from: http://www.cyberforensics.in/OnlineEmailTracer/index.aspx
5. At the bottom right corner, an option of “copy to clipboard” appears, click on the button.

6. Open to cyber forensics online email tracer page in a different tab, paste the copied content to the space provided.

7. The sender’s IP Address and the path traced by mail appears on the below the pasted content as depicted below.

The image below shows the IP address of the sender.

The mail appears to be originated from the computer with IP address 209.85.221.42 (mail: supremonews@gmail.com).

The contact information of the ISP for the above IP address is:

NETWORK-ABUSE@GOOGLE.COM
+65-355-000
MOUNTAIN VIEW
UNITED STATES

The sender’s email address is mail@ultrasnap.com.
The message id of the mail is: ORaM7677-9793b-6b-406-cf5x-9f3eEUWtv@mail.google.com.

The image shows the path traced by the mail.

Conclusion

The IT Act has become a key to untangle cyber-crimes, post 2008 amendment, nevertheless, the technological advancements and the quick and cunning brains of the criminals, sometimes paves a pay out of the grips of law. Cyber cells have been formed in almost every police department of the country.

Almost every police departments in India have a cyber-crime investigation cell, wherein the cyber forensic experts along with police, untangles cyber-crimes with the help of several computer forensics tools, following a systematic mechanism of search & seizure, acquisition, analysis and reporting.

However, In the case of Dilipkumar Tulsidas Shah v. UoI [W.P.(C).No. 97 of 2013], it was observed that, “Conventional investigative methods unsuited to dealing with complex cyber-crimes are nevertheless being followed, leading to police harassment of citizens.” Many other writ petitions as of Tulsidas, are also being filed to seek formulation of an appropriate regulatory framework for effective investigation of cyber-crimes.

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RAPE

By Vidisha Kaul and Renu Beniwal
From Amity University Rajasthan

ABSTRACT
A four letter, single syllable word that can destroy the life of women. Rape is when a sexual intercourse is non-consensual, when a person forces himself on any woman to have sex can be termed as rape. Rape is a heinous offence and is defined in Indian Penal Code. Section 375 of Indian Penal Code defines rape and the punishment that would be given to the offender is defined under section 376. Section 375 further defines the consent of a woman. Without the will or consent\textsuperscript{1218} of a woman, she cannot even be touched; the consent is necessary to show her will and if it is not granted than any move sexually towards her is punishable under Indian Penal Code. This offence has given birth to an environment of rape culture. The rape culture is prevalent in the society where the violence against the women is normalized. The rape culture is perpetuated through the continuous use of misogynistic language and objectification of women body and is driven by the fear in women’s heart.

This article will focus on the scenario of Indian women in the society and the statistics and figures that demonstrate the rate of rape victims and how it is increasing every year. We will also emphasis on the acts and laws that are made to prevent this offence and severe punishments which are made to punish the offenders. We will also state some of the cases that were abominable and monstrous to be called as a human act and the amendments which were made in the Indian Penal Code due to such acts to reduce the ambiguity in the sections and many more sections were inserted to cover all possible crimes that could be done by the human kind.

Given the fact that rape and sexual assault cases, registered and unregistered, have increased with time and India is a country where rape convicts are not given strict punishments, we believe that the topics and issues covered in our article will make a difference in the minds of the readers and the society in general.

Rape: A Deadly Crime
Crimes have been a part of the society since the human kind came to its existence. Rape is one of the most serious offences which are being committed since many ages and India has a long history of brutal and spine killing rapes. Rape is a crime that can never be justified in any way if committed. It has been prevalent in Indian society from a long time now. It is the fourth most common crime against women in India. The women are not confident out there because the fear keeps eating them that if they are safe or not, whether they can move out alone or not, whether they can work late at night or not and this graph is not going down, rather is increasing at an alarming rate. Rape has become a crime that is not only against the women but it has also engulfed little girls and babies. They have become the prey of these offenders and the age does not bar a rapist anymore. In every 60 minutes two women are raped and in India an average of 106 cases are reported on a daily basis and approximately 32,559 cases are reported annually in police stations. This number has rapidly increased over the years and is still not anywhere near to slow down. The

\textsuperscript{1218} consent is defined as clear, voluntary communication that the woman gives for a certain sexual act.
National Crime Records Bureau\textsuperscript{1219} (NCRB) is a body that keeps the record of information about the crimes and the criminals. It is a governmental body that releases annual reports about the crimes and its rate in the country. It maintains the figures of cases reported in the police station and the statistical change in the rate of crime over the years. According to NCRB the report that is made by the organisation is solely based on the cases which are reported, there are many more cases which are not reported because of the fear and threat caused by the criminal. The data by the NCRB reveals that the rape against the women in India is on the rise. According to the reports it has also been seen that in 95\% of the cases the offender is known to the victim this means that a woman is not even safe in her own surroundings. In India the most unsafe place for women has been recorded according to the cases reported which is Madhya Pradesh with approximately 5000 cases followed by Maharashtra with approximately 4000 cases. The rapes which are happening in the nation prove that the country is no more a safe place to live.

\textsuperscript{1219} established in year 1986.

\textsuperscript{1220} The section reads as A man is said to commit "rape" if he—

a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any - of body of such woman or makes her to do so with him or any other person; or

d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven description.

First.—Against her will.  
Secondly.—Without her consent.

Definition and Amendments

Rape is a crime that needs to be severely punished with no mercy. Rape in India is a cognizable offence. It is precisely defined in section 375\textsuperscript{1220} of Indian Penal Code, 1862 which briefly states all the essentials and its provisions. Penetration of a penis or any object to any extent into the vagina, urethra or anus of a woman will constitute the offence of rape and the insertion of penis to any extent is sufficient to call it rape, how far the penis has gone into the vagina is immaterial. The rape law in India has gone through many amendments and the most recent amendment was made after the Nirbhaya rape case\textsuperscript{1221}, where a 23 year old woman Jyoti Singh was tortured, beaten and brutally raped by six men in the bus at night and was thrown out to rot on the road, naked in very severe condition. Jyoti was gang raped, where a woman is raped by one or more persons and back then in 2012, the Indian Penal Code did not have any provision related to gang rape and the previous section of rape was highly ambiguous. The rape was so inhumane, they pulled out the organs of the girl and

\textsuperscript{1221} December 16, 2012, New Delhi

Third/y.— With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourth/y.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifth/y.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.  
Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.
inserted an iron rod through her vagina after repeatedly raping her, that Nirbhaya case shook the whole nation. The section was then amended in year 2013, which gave it a broader and a clearer view. The section defining gang rape was inserted (sec 376D of IPC) where a woman is raped by one or more persons who constitutes a group or persons acting upon a common intention, each and every person shall be deemed to have committed the offence and is punishable under this section. The punishment should be rigorous and shall be for term not less than 20 years which may extend to life imprisonment. The six culprits were under trial where the court pronounced them guilty of such barbaric crime, out of whom one was a minor who did not face any severe charges and for the rest a judgement of death sentence was passed in year 2017. The amendment of 2013 also inserted some new sections which were 376A, 376B, 376C, 376D. These sections were inserted in order to cover all possible situations under which an offender can be severely punished for its commission of the crime according to the provisions stated in these sections.

The act of rape is punishable under section 376 of Indian Penal Code. Any person who commits rape irrespective of his position, designation, will be punished for imprisonment of either description for a term not less than 7 years which may extend to life imprisonment and will also be liable to fine. Over the years many cases have come forward where the victim ended up dying or resulting in persistent vegetative state because of continuous torture caused by the offender. Another case that remained in light for years was the case of Aruna Ramchandra Shanbaug, 1973; she was a nurse at a hospital where she was attacked by a ward boy in hospital. He wrapped a dog chain around her neck and tried to rape her but when he found out she was menstruating, he sodomized her. The chain was tightly twisted around her neck and she was found unconscious lying on the floor the next day. This led her to a vegetative state. The ward boy was punished under section 307 of attempted murder and robbery under section 392 of Indian Penal Code for an imprisonment for the term of 7 years. It was never reported by the authorities that she was sodomized by him so he was not punished for rape. She was in vegetative state for 42 years and was granted passive euthanasia in year 2015. This case is also known as the incomplete case of Aruna Shanbaug.

In the cases where the victim dies or lands in a vegetative state, the offender is punished with rigorous imprisonment for a term which shall not be less than 20 years, which may extend to life imprisonment which is stated under section 376A of the Indian Penal Code.

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122 The minor in Nirbhaya case was punished with the imprisonment of 3 years.
1223 Punishment for causing death or resulting in persistent vegetative state of victim.
1224 Sexual intercourse by husband upon his wife during separation.
1225 Sexual intercourse by person in authority.
1226 Gang rape: Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine.
1227 Either rigorous imprisonment or simple imprisonment.
1228 A vegetative state is absence of responsiveness and awareness due to overwhelming dysfunction of the cerebral hemispheres, with sufficient sparing of the diencephalon and brain stem to preserve autonomic and motor reflexes and sleep-wake cycles.
Victims of Rape
Why is rape prevalent in India? What is it that drives men to rape women? Why women are the victim of such offences?....There are such endless questions that pops up in the head but the answers are difficult to find. A rapist can give numerous excuses and justifications but can it reverse back his heartless act, No. rape is prevalent in India because here they consider that the judicial system can do no wrong to the offender. The trials go on and on for years and justice is delayed to the victim. The offenders try to have control over women and if they lose the control they forcefully gain in by sexually assaulting them, this is the reason that consent has been defined in Indian Penal Code under section 375. It has to be a clear communication by a woman that she voluntarily agrees to a specific sexual act. Consent is not something which a person can forcibly obtain. A man cannot go against the will of a woman; her consent is required to get involve with a man sexually. The offenders live with a presumption that they have a right over person’s body and do not consider it a crime to use a woman’s body for their sexual pleasure without their consent. Therefore, a person is obligated to obtain the consent without any force or threat. The consent if obtained by coercion, fear of hurt or death or by putting any person under a fear of hurt, whom she is interested in, under such circumstances the consent obtained would be unlawful. The consent of a minor or of an unsound mind will also be not considered valid. Any sexual act done against the consent of a woman is punishable under this code. With the existence of these kinds of people it has become difficult for women to survive in the society. The most common offenders of this crime are men since the maximum number of cases is reported against men and the victim of such offences are women. Women are constantly becoming the prey of such sexual predators who ruthlessly exploits them.

Other Laws related to Rape
Many laws are made and amended from time to time due to the increasing severity of crime in the nation. There are provisions made for Custodial Rape which is defined under section 376(2) of IPC where it is punishable when a person who is held in the custody of any public servant is sexually exploited. If the rape is committed in the custody than the person shall be imprisoned with a term which shall not be less than 10 years which may extend to life imprisonment, which means that he will be imprisoned for the remainder of the person’s natural life. There were many cases of custodial rape where a woman went to the police station to file an F.I.R against a person and return back with bruises and sexual assault. Therefore, the punishment in such cases is rigorous. The law also protects the women who are the rape victim under section 228A of Indian Penal Code where the name of the victim cannot be disclosed in public and if that happens, he shall be liable to fine and an imprisonment that may extend to a term of two years.

The rape victim can file a complaint against the offender and the police are bound to take actions against the complaint. The police can collect the evidence from the

1229 Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, section 376B, section 376C or section 376D is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.
crime scene and all possible witnesses and can arrest the accused for examination. According to section 53\textsuperscript{1230} of the Code of Criminal Procedure, the police officer can request a medical examination of the alleged accused if there is a reasonable ground to believe that such examination will produce significant evidence against the accused. Medical examination plays an important role in collection of forensic evidence; therefore, the examination of the victim is as necessary as the examination of the accused. The medical examination of the victim is also important to assess and treat the injuries and also prevent pregnancy. The medical examination will also help in collection of forensic evidence which can further be used to penalise the offender. This provision is covered under section 164A\textsuperscript{1231} of the Criminal Procedure Code where a medical examination of the victim should be done within 24 hours of the receiving the information about the commencement of the offence of rape so that the traces are still present on the body. Any delay in the examination will result in demolition of such traces from the body of the victim. The medical examination should be done by the medical practitioner of a hospital of a government or local authority and the exact date and time of the examination should be recorded in the report\textsuperscript{1232} which will be counted as evidence.

The law safeguards the women against whom such offences are committed and have the right for their trial to be recorded in court. The trials which are conducted in court are required to be recorded in the camera which is defined under section 327(2)\textsuperscript{1233} of the Code of Criminal Procedure.

**Juvenile offenders**

Rape is a crime which is committed by the men of the society and each and every rape case should be acknowledged with utmost responsibility and strictness. There are a lot of cases where accused are juveniles which is why they are set free after a short period of time which is completely unacceptable. A rapist in all means is a rapist if found guilty and should be not be treated differently if they are under 18 years of age. Numerous cases that have surfaced up over the years has shown that the juvenile have equally been a part of such offences constituting rape, sexual assault and violence against women. The juveniles in most of the previous cases were set free even after committing such heinous crimes. If they have knowledge of how to commit a

\textsuperscript{1230} When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

\textsuperscript{1231} Where during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of a woman with whom the rape is alleged or attempted to have been committed, examined by a medical expert, such examination shall be conducted by a registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.


\textsuperscript{1233} The inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code shall be conducted in camera.
crime then they shall be punished as an adult. If they are committing rape then they shall be prepared for the consequences that come along. Same amount of rigorous punishment should be awarded to the juvenile so that such crimes are repeated neither by him nor by any juvenile offender. The New Juvenile Justice Act of 2016 was enacted by parliament of India by considering the number of offences of rape and sexual assault committed by juvenile were rapidly increasing. It replaced the previous Juvenile Justice Delinquency act of year 2000. The act stated that the juvenile between the age group of 16 to 18 who are indulge in commission of such heinous crimes like rape, will be treated as adult in the eyes of law and will be punished as a major person in punished for such offences. For the cases where juvenile is an offender, the panel must contain a psychologist and a sociologist to study about the offender and the cause of his actions.

Violence against Women
Violence is any physical force exerted on any person in order to cause hurt and pain to the person. Violence is used against women when a person intends to commit rape. Violence includes both physical and sexual violence. In the cases of rape, the offenders feel powerful when they use violence against woman, when they take the control over their body by strangulating them. Rape does not stop after the non-consensual intercourse; it extends to the beating, torture, and thrashing to the victim. Such offenders wants women to be submissive so that they can use their power against them, they do not consider them a human rather consider their property which they can use in whichever way they want. The sexual and physical violence against the women is increasing day by day and the cases which are nowadays reported are of rape with grievous hurt or attempt to murder accompanied with acid attacks etc. These cases are increasing against women which have created an environment where women and children are not safe to live in. Women’s lives are shattered by beatings and sexual assaults against them.

Recent Cases
- A gut-wrenching incident took place in Hyderabad on 27th of November, 2019 where a 27 year old veterinarian Dr. Potula Priyanka Reddy was brutally raped, smothered and completely burned by the offenders. Priyanka was scared that day because she felt that 4 men were there who were standing waiting for her, she called her sister to tell her that she was afraid to go out there and since her scooty was also punctured. She hung up the phone and was then returning from her clinic at night when 4 men of 20 years of age brutally raped her and these monsters did not stop there, they smothered and burnt her. They even tried to get her drunk before raping her. She was found dead the next day with half burnt body by the police. The police arrested all four accused within two days of the incident and the trial went to the court. This case again shook the nation to its core and reminded everybody about the Nirbhaya gang rape case of 2012.
- The Kathua rape case is an abduction, rape and murder of an 8 year old girl named Asifa Bano in January 2018. The case was very disturbing to hear since the victim was an 8 year old kid. The little girl was abducted by 8 men out of whom one was a

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1234 Section 320 of Indian Penal Code.
1235 Section 307 of Indian Penal Code.
1236 Section 326A of Indian Penal Code.
juvenile. The men were arrested by the police out of whom one was a temple priest; four of them were the police officers. The post mortem report of the forensic scientists revealed that the little girl was drugged i.e. she was on a sedative before she was raped. The main accused of the case was the temple priest who was accompanied by his son and his nephew (juvenile). The trial of the case began in Jammu and Kashmir after the police caught the accused of the rape and murder case. The court found all the accused guilty and pronounced the judgement against them and were convicted according to their commission of crime. The three accused were sentenced to imprisonment for a term of 25 years; the other three accused were sentenced to imprisonment for a period of 5 years for destroying the evidence. It was also held that the juvenile will be tried in the juvenile court and the last accused was acquitted because of lack of evidence against them. The case remained in the news for a long time; it filled the headlines with distress and widespread condemnation. People were out on roads in Jammu and Kashmir soon after the dead body of the girl was found which also speeded the trial in the court and the convictions were pronounced in the subsequent year.

- The Unnao rape case of 2017 was again very terrifying and terror-struck case where a 17 year old girl was gang raped in Unnao, Uttar Pradesh. She was a minor. The girl was kidnapped and raped and one of the accused was a former leader and Member of the Legislative Assembly of the political party, BJP. The politician was convicted for the offence of rape on 16 December 2019 and was sentenced to imprisonment for a term of 20 years on 20 December 2019.

- Shakti Mills gang rape case was a Mumbai gang rape which refers to the incident in which a 22 year old photo journalist was gang rape in August, 2013 by five people out of whom one was a juvenile. She and her colleague were in Shakti Mills compound for an assignment. The accused there tied her colleague with a belt and then raped her in front of him and took pictures of her during the sexual assault and threatened them to leak them in public if they tried to file a complaint against them. On 20 March, 2014, a Mumbai Sessions court convicted all the five accused. The court awarded death penalty to the three repeat offenders, the other offender was given the punishment of life imprisonment, the juvenile gets a punishment of a term which extended to 3 years in a reform school.

When such events happen, the belief of a person on humanity shakes from its ground. There are many cases which happen on the daily basis. The number has increased so much that it is difficult to even keep a count of it. Some of the cases draw national interest while others remain covered and suppressed. The cases trembles the victim and shatter them to the ground and they are unable to revive from this pain if they survived through such heinous offence. There are many more cases which are recent, the counting is endless.

**Conclusion**

We live in a patriarchal society where male desire to dominate. It has now become there nature to dominate and suppress women and as a result, this narcissist behaviour directs them towards the commission of sexual assault. Men are not raised to hear no as an answer and when women resist them, they overpower them sexually without their consent. This sexual assault traumatises them badly from which they are never able to recover. We live in a society where women are considered as a weak object that
needs a support of men to govern them. The mentality of the people of our nation is so narrow that they cannot see women standing alongside them and marching together with them. Most of the men want women behind them, working under and in accordance to their orders and when women rebel against this they are frustrated and cannot take this in. As a result they rape women to show that they have regained their control over them. The women, minors, kids have all come in the category where the equal number of cases are filed where the victims are the female of all the ages.

The courts should increase speedy trials so that the justice is not delayed to the victim and the family. Rape cases should be severely punished without any mercy the same way he committed the crime. The biggest drawback in our system where we are lacking is that the laws are not as strict as they should be. International laws are so illiberal and unbending that the all the criminals get a shiver down there spine seeing the punishment for crimes that the crime rate is low. The crime is spreading in our society like a disease which if not treated will bring a state of complete devastation. We should adopt the deterrence theory of punishment where the criminal resist from committing the crime because of the threat of the punishment. For rape offenders deterrence punishment should be given so that it can be rooted out of the society.

We should make a nation which is safe and secure for a woman to live in. They should be respected and should be regarded a place in the society. The crimes of sexual assault kill the soul of a woman which makes it difficult for them to live with it. Rape and all sexual offences against the women should be stopped. Women have lived with all this from decades and now these crimes against them should be severely punished in equivalence to the pain they have suffered.

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WATER MAFIA: A BURGEONING MENACE

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ABSTRACT

Fresh air and potable water are connatural requirements of human life. Deprivation of these will make survival direful. In India, water scarcity is a prevailing crises and one of the integral parts of the crises is the depletion of ground water. Ground water acts as the largest source of fresh water to the world. The trend of illegal encroachment of public property, water bodies and water resources and impeding the development of our great Nation has largely increased. This article will scrutinize the phenomena of ‘Water Mafia’. We narrow down our subject matter towards these groups of organized criminals who carry illegal trafficking of water as their livelihood and fostering serious threat to millions of people. In India, more than one in ten people are deprived of access to clean water which led to the rise of Water Mafia. Unauthorized extraction of ground water poses grave problems as the groundwater is extensively used and exhausted. Inconsistent laws and lack of its proper implementation paves way to increase in trend of such illegal trafficking of water. Authors herein will shed light on how Water Mafia affects the public at large and its aggravating factors.

DEFINITION

‘Water Mafia’ is a term coined recently. But the definition is age old since it is an organization for identifying particular organized groups’ trade water illegally. Thereby, the authors define water mafias as "a gloomy coalition of thugs, politicians and fewer water department employees showcasing a parallel run and private water supply network bordered by black marketeers."

SHADES OF WATER MAFIA

Water Mafia has become a lubricative business. Illegal trafficking of water is performed in numerous ways. The two predominant modes in which Water Mafia is carried out are enlisted below:
Unauthorized institution of borewells - Digging borewells without acquiring prior mandated permission from the state and extracting water through the constituted unauthorized borewell.

Unlawful encroachment on water bodies - Pumping out water from ponds, lakes and other such water bodies and engage in trading it.

The mechanism opted by these two modes are analogous in nature as it involves the same mechanism when it pertains to trading. They deploy enough number of private tankers and circulate the extracted water all over the targeted city. Water tankers and tanker businesses that deliver and extract ground water through trucks and tractors at an exorbitant price have become trivial sight in most of the Indian cities.

TRACES OF WATER MAFIA

In India

Appallingly, 75% of households are deprived of access to drinking water on their premise, while 85% of rural households are even divested of potable water. This increase in demand and decrease in supply of water are mitigated through these external agents by people for their survival leaving no other alternatives. The mafia works to abridge the gap between demand and supply, under the cover of darkness.

Delhi

The Nation’s capital is experiencing an unprecedented water crisis and is estimated to arrive at ‘Day Zero’ by 2020. One of the main aggravating factors for depletion of ground water is the unauthorized and exhaustive usage of ground water by these organized groups of criminals. The streets of Delhi are under the predominance of Water Mafia. A queue of tankers snake through every nook and corner of the streets, more prevalent in areas such as Sangam Vihar. Men leap out and quickly heave thick pipes which are then erected hastily into the tanks. The other end of the pipe is fastened to borewells set deep into the ground and pumping out thousands of litres. The residents are highly dependent on private tankers. The operators charge nearly twenty to fifty rupees per bucket to meet their ends. To ease out the situation, the Delhi Jal Board instituted GPS trackers to all of 250 tankers to have a check on water theft and will aid the consumers to track them. Yet, due to increase in demand for water at times DJB goes out of tankers to meet the demanded supply.

Mumbai

Mumbai is a home to many of the largest slums in the world. It is impossible to discern water mafias without having an understanding of the state. As per India’s last census in 2011, appallingly 5.1 million people, almost half of the 12.5 million Mumbai populations reside in slums. Dharavi, is the largest slum in Asia. Under the cover of darkness, dozens of dwellers leap out of their shanties and clamber over railing fence, amid fist fights and verbal blows, they take turns to fill their tankers from the valve and manage to refill the same. Stealing water has become rampant across this coastal metropolis. And it is also menacing now as Mumbai struggles to satisfy the thirst of its ever-growing population. The demand for water has tremendously increased its rate. Mumbai's


12.5 million people is demanding minimum 4,550 million litres a day, but the city could suffice only 2,900m litres. Water is a huge business in Mumbai and so the water mafias are in the middle of it. In 2018, an audit devised the Municipal Corporation was unable to account for 27% of the 3,800 million litres of water used in Mumbai per day. It has been referred as ‘non-revenue water’ and the report in a way attributed it to leaks, default in meter, illegal tapping, damage in pipe lines and maintenance. While the audit does not specify on what percentage of the water was stolen.

- **Chennai**
  Illegal extraction of water had taken gigantic rate in the city’s southern suburbs having Keelkattalai and Nanmangalam lakes as the cynosures of water mafias. Deploying more than 70 tankers, around 25 lakh litres of water are being stolen and sold on a daily basis. It has been witnessed that this plunder could go on till the end of June. Innumerable commercial pipes connect the Keelkattalai lake bed while some even snake towards large wells in the wasteland yonder the lake and many even end abruptly in the lake itself. This evidently throws light on the amount of water being sourced directly from the lake. The modus operandi of water mafias are: pumping out water from large wells beside the lake bund. The pipes lead to rough and ready filling stations along the Nanmangalam main road, easing the tankers to go multiple trips. As per their reports of water suppliers, 12,000 litre tanker goes for at least a minimum of three trips a day near the Nanmangalam and Keelkattalai lakes. Each load prices around `1000 and is expected to increase. Residents of Chennai have started to purchase ‘Yellow Water’; the private tanker marks rupees of 3,500 for the so called ‘Yellow Water’. And private water tankers charge rupees 4,500 for purified water. The corporation is facilitating water only for a period of five minutes per day, since there is a huge demand for water, even small sections of people are deprived of water from corporation, so they are left with no choice than to depend on Private water tankers. Icing to that even the residents are reluctant to file a complaint against the tankers since they act as their only source for water.

- **Bangalore**
  Water crises exist in several parts of Bengaluru and leaving the residents of the city no option than to surrender them to water mafia. Reports very well elucidate that this water crises has become a boon to water tanker mafias facilitating to charge exorbitant price to deliver the pilfered water. Bellandur, an area comprised of high-rise buildings and huge population ratio. Residents are trying to outbid each other to suffice their own need of water. Bellandur is home to many who work in IT sector. The cost of supplying a 6,000-litre tanker of water has hiked from rupees 800 to rupees 1400. The water prices are also likely to increase even more in the next three months. The borewells have all dried, water mafias are now auctioning the water supplied by them to whichever group is willing to bid the highest price. There are nearly 1,000 apartment buildings that right now have no access to water. Bengaluru has

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1239 [https://www.thenational.ae/world/asia/mumbai-succumbs-to-a-new-underworld-the-water-mafia-1.533677](https://www.thenational.ae/world/asia/mumbai-succumbs-to-a-new-underworld-the-water-mafia-1.533677)

faced water problems for a long time, yet water mafias increased its pace only in recent times.

**In Pakistan**
Inspite of sufficient water resources: water flowing down the Himalayas and glaciers, the country is facing severe shortage of water.

**Karachi**
The city is comprised of more than 15 million people and currently Karachi’s water board allocates only around half of the required water to the people of Karachi. Karachi is in need of minimum 850 gallons of water per day, the water board does not facilitate more than 400 gallons approximately and this failure of Karachi’s municipal authorities leads to Karachi’s burgeoning Water Mafia.

**WATER MAFIA IS A CRIME**
Extraction of water from riverbed, ponds, lakes or through unauthorized borewells, without lease or permit constitutes an offence under Section 378 read with Section 379 of IPC, as natural resources belong to the State and public. Hence, the state derives its meaning from article 12 of Indian Constitution and it also acts as its trustee. Icing to that it is also an offence punishable under Sections 120B read with Section 34 of Indian Penal Code 1860. This empowers the police to lodge an FIR under IPC and Cr.P.C. to investigate it and file charge sheet to invoke the provisions of Section 378 and 379 of IPC in every case of theft of public property. The Madras High Court, in the case of Konambedu Gramma Pothu Nalla v. State of Tamilnadu\(^\text{1242}\) held that illegal encroachment of water bodies by water mafias and illegal extraction of water are unlawful and bad under the eyes of law. The Hon’ble court allowed the writ petition filed by the petitioner under article 226 for issuance of Writ of Mandamus and directing the respondents to inspect the entire stretch of land in the Konambedu Narayanpuram Villages, in Parthipattu, Avadi Taluk, Thiruvallur District of Tamil Nadu and direct the Respondents to remove all illegal encroachments on these public bodies which include thrashing lands, pathways, village and illegal water filling stations exploiting water and run illegally by illegal tanker mafias. Subsequently, the Madras High Court in the case of Vimalesh Mishra v. SDM, GNC\(^\text{1243}\) passed orders to monitor and shut down those de-sealed borewells which are run by water mafias and also issued directions to the collectors of Kancheepuram and Tiruvallur districts for proper implementation of the Chennai Metropolitan Area Ground Water Regulation Act. As to maintain a register of existing well, borewells and to restrict any vehicle to transport ground water without obtaining a valid license under section 5 of CMAGW Act and to seize those vehicles indulging in illegal transportation according to section 12 and 12A of the CMAGW Act, upon the PIL filed by V. Sheela\(^\text{1244}\). The Central information commission, In the case of Abdul Mabood


\(^\text{1242}\) Konambedu Gramma Pothu Nalla v. State of Tamilnadu, W.P.No.18881 of 2018

\(^\text{1243}\) Vimalesh Mishra v. SDM, GNC, RTI. No. 199 of 1122015

\(^\text{1244}\) V. Sheela v. State of Tamilnadu, WP.No.15304 of 2019
v. PIO\textsuperscript{1245}, Delhi Jal Board, found that the DJB did not impose the conditions along with the sanction and thereby leading to unrestricted extraction of ground water and illegal trade in that water by the water mafias. Water laws curb the so-called ‘Water Mafia’ in its initial stages. Despite few state governments have come forward to devise separate groundwater law, the states of Andhra Pradesh, Goa, Himachal Pradesh, Karnataka, Kerala, Tamil Nadu, Uttar Pradesh and West Bengal have introduced laws to regulate and conserve groundwater from being exploited by these unlawful external agents.

\textbf{WATER LAW}

Water rights are intrinsically linked to land rights. Traditionally, water rights were derived from land rights.

\textbf{Riparian Doctrine}

Riparian area is the point of interaction between the land and river or a stream. Riparian water rights are a mechanism of allocation of water among Riparian owners. Riparian doctrine elucidates the water rights of an Individual. The doctrine guarantees that the water of a territorial terrain bordered belongs to the individual who possess or own the terrain. Even now, this principle marks an important evolution in water law.

\textbf{Position in India}

India does not have any specific law pertaining to ownership and rights over water resources. The rights are derived from several legislations and customary beliefs. The legal position on whether groundwater is a source meant for public use is perplexed. India has no law that clearly expounds groundwater ownership. Limited grounds for deriving groundwater rights are provided through the Indian Easement Act of 1882. An ‘easement’ is a right that the owner or occupier of an estimated land possesses for beneficially exercising his enjoyment over the land. Instances of easements are right of way, right to light and air. Section 7(g) of the Indian Easement Act elucidates that every owner of the land has the right to “collect and dispose” of all water beneath the individual’s land within his own limits, and all water present or flowing on the surface which does not pass in a precised channel. By virtue of this Act, the owner of an estimated piece of land does not possess ownership over the groundwater under the land or on the surface of the individual’s land; the individual only possess the right to collect and use the water. Traditionally, it is accepted across India that a well on an extended area of land belongs to the person who owns the land, and the rest possess no legal right to extract water from the well or prohibit the landowner from exercising his right to use the water. This belief and practice is indirectly purported to various laws such as land Acts and irrigation Acts that enlist all subject matter in which the government can exercise its right. Lucid interpretations of the Land Acquisition Act of 1894 and the Transfer of Property Act of 1882 also support this position that a landowner has proprietary rights to groundwater\textsuperscript{1246}.

\textbf{Common Law Rule}

Common law contemplates groundwater as a part and parcel of the land. The legal consequence of the common law rule is that

\textsuperscript{1245} Abdul Mabood v. PIO, Delhi Jal Board, CIC/SA/A/2016/001685

\textsuperscript{1246}https://www.indiawaterportal.org/sites/indiawaterportal.org/files/Legal\%20Aspect\%20of\%20Ground\%20Water.pdf
the owner of the land acquired unlimited rights over the extraction of the ground water. The liability of the land owner over any damage caused to water due to exhaustive extraction of water was not legally binding. Common law principle is still an ancillary part of the groundwater laws in India. It shall remain as a part of groundwater law until the state governments make separate or distinguished groundwater laws. The applicability of common law principle on groundwater is still a heated debate.  

Entry 17 under List II of Seventh Schedule mandates that the subject matter pertaining to water supplies, irrigation, canals, drainage, embankments, and water storage and water power subject to the provisions of Entry 56 of List I lies under the ambit of State legislature. Only the State possesses the authority to deal with this subject matter as it comes under the list II of Seventh Schedule. Certain laws enacted on groundwater by various states are enlisted:

- **Bihar** - The Bihar Ground Water (Regulation and Control of Development and Management) Act, 2006 enacted and enforced on 29.01.07 by the state government of Bihar.

- **Delhi** - The Delhi Water Board Act, 1998 and The Delhi Water Board (Amendment) bill, 2002 had been placed before the assembly.

- **Goa** - The Goa Ground Water Regulation Act, 2002 has been enacted by the state legislature on 25.01.02 and enforced on 17.03.2003.

- **Himachal Pradesh** - The Himachal Pradesh Ground Water (Regulation and Control of Development and Management) Act, 2005, enforced on 28.10.05.

- **Karnataka** - The state cabinet has approved the Karnataka Ground Water (Regulation and Control of Development and Management) bill, 2007, to be enforced.

- **Kerala** - The Kerala Ground Water (Control and Regulation) Act, 1997 has been enacted.

- **Punjab** - The Punjab Ground Water (Control and Regulation) Act, 1998 was prepared on the basis of model bill and was submitted to Punjab State water resources committee. This system is failure and they suggested system of incentive is better.

- **Tamilnadu** - The Tamilnadu Ground Water (Development and Management) Act, 2003, which was repealed and currently, the Chennai Metropolitan Area Ground Water Regulation Act, 1987 is only in force.

- **West Bengal** - The West Bengal Ground Water Resources (Management, Control and Regulation) Act, 2005 came into effect on 15.09.05.

- **Andhra Pradesh** - The Andhra Pradesh water, Land and trees act, 2002, enforced on 19.04.02

### RIGHT TO WATER

As stated before, fresh air and potable water are connatural requirements of human life. Deprivation of these will make survival direful. The Supreme Court in various adjudications has interpreted Article 21 of Indian Constitution and has taken a stand that right of access to clean drinking water...
is fundamental to life\textsuperscript{1249}. Duty lies on State to provide clean drinking water to its citizens. In various pronouncements, this view has been recapitulated by the Supreme Court. In the case of Dhanajirao Jivarao Jadhav and others vs. State of Maharashtra and others\textsuperscript{1250}, the Hon’ble Court took a view that the right of access to clean drinking water is essentially a fundamental right and State is bound to supply potable water to its citizens. Precisely, the Supreme Court in Re: Ramlila Maidan v. Home Secretary, Union of India & Ors\textsuperscript{1251}, had a juncture to interpret Article 21 of Indian Constitution and a new dimension is given to Article 21 of Indian Constitution that an individual is entitled to sleep as comfortably and as freely as he breathes. Sleep is essential for a human being to maintain a fine balance of health necessary for its living and survival. As stated earlier, supply of drinkable water and access to it is a fundamental right of the citizens of this country and they cannot be deprived of this right guaranteed under Article 21 of the Indian Constitution. Adding to the above precedents, the Supreme Court reiterated that right to life includes right to get water in the case of M.K. Balakrishnan and Ors v.Union of India and Ors\textsuperscript{1252}. Yet, in case of A.P. Pollution Control Board II v. Prof. M.V. Nayudu\textsuperscript{1253}, the Hon’ble Court extended a different dimension to Article 21 of Indian Constitution that right of access to clean drinking water is fundamental to life and so the duty lies on State to provide clean drinking water to its citizens. Icing to all of that the Hon’ble Supreme Court in Hinch Lal Tiwari v. Kamala Devi\textsuperscript{1254}, clearly pronounced that the material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature’s bounty. They need to be secured for a proper and healthy environment which sanctions people to enjoy a quality of life which is the essence of the guaranteed right under Article 21 of Indian Constitution.

**STATE OBLIGATION**

It is an undisputable fact that ensuring clean water to the citizens of this great Nation is an integral part of Article 21 of the Indian Constitution\textsuperscript{1255}. Yet, the State is bound by the duty to provide not only clean water to the citizens but also to take necessary steps to ensure that water bodies and water resources are protected. If the Officials are inoperative and insensitive towards the illegal encroachments in public lands and water bodies it would amount to the breach of constitutional rights of the citizens of India, who are residing in the yonder places from water bodies as the same would affect the other citizens to get sufficient water. Rivers are not merely passages that transport water; they are dynamic ecosystems that change over time in response to hydrological and biological processes and human intrusion. Therefore, all those anthropogenic activities performed directly or indirectly vandalize the river or degrade the water quality also need to be barred or regulated by the Water (Prevention and Control of Pollution) Act, which also include; flow regulation, divergence and extraction of water.

**Public Trust Doctrine**

\textsuperscript{1249} Dhanajirao Jivarao Jadhav and others vs. State of Maharashtra and others, 1998(2) Mh.L.J. 462  
\textsuperscript{1250} Re: Ramlila Maidan v. Home Secretary, Union of India & Ors, (2012) 5 scc cp379.11 1  
\textsuperscript{1251} M.K. Balakrishnan and Ors. v.Union of India and Ors, AIR 2009 SC (Supp) 1916  
\textsuperscript{1252} A.P. Pollution Control Board II v. Prof. M.V. Nayudu , (2001) 2 SCC 62  
\textsuperscript{1253} Hinch Lal Tiwari v. Kamala Devi, (2001) 6 SCC 496  
\textsuperscript{1254} Yakub v. State of Tamilnadu, W.P.No.38625 of 2004
The Public Trust Doctrine fundamentally focuses on the principle that resources such as air, sea, waters and the forests are of great importance to people at large that it would be unjustifiable to deem them a subject of private ownership. The resources being nature’s bounty, it should be made in such a way that it is freely accessible to everyone indiscriminative of their status in life. The doctrine entails the Government to protect the resources for the healthy enjoyment of general public rather than to authorize their use for private entities entitling ownership over those resources. The Supreme Court in M.C. Mehta v. Union of India took a view that our Indian legal system, which is constructed on English common law, embraces the public trust doctrine as a feature of its jurisprudence. The State acts as the trustee of all natural resources, which are innately meant for public use and enjoyment. The citizens of the Nation are the beneficiary of the seashore, running waters, airs, forests and ecologically frail lands. The State is the trustee and is under a legal duty to ensure protection to the natural resources. These resources which are meant for public use cannot be transmuted into private ownership. The rivers, forests, minerals and such other resources embody a nation's natural wealth. These resources are not ought to be misused in any way and exhausted by any generation. Every generation is obliged to all succeeding generations to develop and preserve the natural resources of the country in utmost possible way. The Public Trust doctrine is an essential feature of the law of the land. The court also construed that there is no any justifiable reason to rule out the application of the public trust doctrine in the ecosystems of India. The Public Trust Doctrine elucidates the means for increasing the effectiveness of environmental laws. Thereby, under this doctrine, the state is obliged to act as a trustee under Article 48A to protect and improve the environment and safeguard the forests and environmentalism of the country. While applying Article 21, the state is under the duty to take account of Article 48A, though it’s a Directive Principle of State Policy. The state's trusteeship entitles a right to a healthy environment when it is construed under the light of Article 21 and Article 48A of Indian Constitution.

Precautionary principle

The Supreme Court of India, in Vellore Citizens Forum Case, envisaged three concepts for the precautionary principle. When "Precautionary Principle" is construed with regards to the municipal law elucidates three concepts:

- Environment measures taken by the State Government and the statutory Authorities must anticipate, avert and strike the causes of environmental deterioration.
- Where there are menaces of serious and irreversible injury due to failure of scientific mechanisms certainly should not be used as the reason for postponing, measures to prevent environmental depredation.
- The "Onus of proof" is on the developer or the actor or the industry to show that their action is environmentally benign.

The Precautionary Principle propounds that where there is a perceptible threat of serious or irreversible injury includes even extinction of species, widespread toxic pollution and major threats to essentially vandalize ecological processes, it shall be...
pertinent to place the onus of roof on the person or entity performing the activity that is potentially grave to the environment. In light of the above mentioned constitutional and statutory provisions we could witness that precautionary principle is a part of the environmental law of the country.

Violation of the Doctrine of Public Trust and Precautionary Principle by the State, on the account of inefficiency of implementation of these laws will also constitute a colourable action of the State upon breaching Article 14 and 21 of the Indian Constitution. When it is construed with regards to Water Mafia, the State has failed to enact and implement stringent laws to curb this menace. Thereby, if this inaction persists, it would amount a colourable action by the State infringing the citizens constitutional rights.

INTERNATIONAL PURVIEW

The Human Right to Water and Sanitation was conceded as a human right by the United Nations General Assembly on 28 July 2010. The lucid definition to the human right to water was issued by the United Nations Committee on Economic, Social and Cultural Rights in General Comment No.15 drafted in 2002. "The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses." Adding to that, as per the settled principles of Environmental Jurisprudence, civilization of man was simply an intrinsic part of natural system. Inhabiting and utilizing a small portion of its energy and material needs. As the population count increased eventually the culture and technology transformed, it was difficult to parallel with the framework of existing natural system. Hence, the natural system was simplified into an artificial, vibrant, vivid and highly productive system. Developed technology and new innovations provoked the humans to extract more and more from natural system. No doubt that any kind of advance plays a vital role in developing the standards of society but the same entails associated damages, many of which are environmental injuries. Balancing ecology and development was reconciled in UN Conference on the Human Environment, Stockholm whereby it was observed that a mark has been attained in the past where we must start shaping our actions throughout the world with a more common sensical care for their environmental gloomy upshots.

The following principles laid down are relevant for our objective:-

Principle § 6: The release of toxic materials, release of heat or any such substances, in such amount or concentrations as to be over the magnitude of the environment to make them less harmed, must be forbidden in order to make sure that serious or irreversible damage is not directly or indirectly inflicted upon the ecosystems and the just grapple of the citizens of those affected countries against pollution should be assisted with support.

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Principle § 11: The environmental policies devised by all the States should be enhancing rather than adversely affecting the development of those developing countries, nor should restrict the growth of better living standards for the public at large, and necessary steps should be taken by the Government and the International organizations with a motive of reaching to an agreement on meeting the plausible national and international economic upshots resulting from the serious implementation of environmental measures.

Principle § 13: In the pursuit for attaining a more rational management of resources and to improvise the environment, States must take a view of an integrated and coordinated approach to devise their enhancement planning so as to make sure that these developments are compatible with the duty to secure and enhance environment for the benefit of the public at large.

Principle § 14: Wise planning constitutes as an integral tool to harmonize any conflict aroused between the necessity for development and the duty to secure and enhance the environment.

Principle § 21: States, with accordance of the Charter of the United Nations and the principles of international law, the derived sovereign right of exploiting their own resources pursuant to their own environmental policies, also possess the duty to make sure that those activities are within their jurisdiction or control wherein it does not cause injury or any harm to the environment of other Nations or of areas across the limits of the State’s territorial jurisdiction.

Principle § 22: States must unite and comply with the request to develop further the international law pertaining to liability and damages awarded for those sufferers of pollution and other environmental damage caused by various actions perform within its territorial jurisdiction.

The prominent principles of the 1992 Rio Declaration on Environment and Development pertaining to this subject matter are enlisted below:

Principle § 3: The right to development must be satisfied in a manner so as it meet developmental and environmental necessities of present and future generations in a harmonized approach.

Principle § 4: Environment protection constitutes an integral part of the development process in order to achieve sustainable development and thereby, it cannot be left in isolation.

Principle § 6: International actions in the field of environment and development should address the interests and needs of all countries but special priority must be given to developing countries especially the least developed and those most environmentally vulnerable courtiers.

Principle § 8: Unsustainable structures of production and consumption must be removed and lessened by the States. It must also promote appropriate demographic plans to acquire healthy, sustainable development and high life standards for all people.

Principle § 15: In order to secure and safeguard the environment, the precautionary approach must be widely adopted by States having accords to their capabilities. Where there are serious threats or irreparable damage, lack of complete scientific certainty shall be prohibited from

http://www.unesco.org/education/pdf/RIO_E.PDF
being used as a reason for delaying cost-efficient measures to prevent environmental hazards.

Principle §17: Activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority should undergo the Environmental impact assessment and it must be considered as a national instrument.

With regards to the 1992 Rio Declaration on Environment and Development, it elucidates upon the rights of the public at large to be involved in the enhancement of their economies, and the prevailing duties of human beings to protect the trivial environment. The declaration structured upon the standard ideas pertaining to the attitudes of individuals and States towards the development and environment. It was recognized at the United Nations Conference on the Human Environment 1972. The Rio Declaration elucidates that interminable economic progress is guaranteed only if it acquires a nexus concerning the protection of the environment. A new global partnership involving governments, people of their nation and key sectors of society has to be established to achieve this milestone. Jointly the human society should congregate international agreements that protect and safeguard the global environment with commonsensical enhancements.

CONCLUSION

Water Mafia, a burgeoning threat to whole of Nation must be put to an end. It is no surprise that ‘Day Zero’ has arrived in India marching straightaway from the Cape Town. The Constitutional philosophy envisaged in Article 21, Article 48A and Article 51A (g) of Indian Constitution must be implemented. Article 48A reads as under “The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country”, the framers of the Constitution clearly expressed their concern and inevitability of protection and improvement of forests, rivers, wild life and lakes for safeguarding the environment from man-made hazards. Article 51A (g) clearly illuminates the fundamental duty of every citizen of the nation “to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures”. The spirit of the Constitution delegates the bounden duty to protect our natural environment to the public at large and the State as it is the trustee. The dwindling ground water levels must be mitigated by the Government through adopting precautionary approach and implementing stringent laws to curb such illegal activities of exhausting the ground water. Thereby, preserving justice, equity, good conscience, and the principle of isonomy.
IS CRYPTOCURRENCY A BOON OR BANE OF TECHNOLOGY?

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INTRODUCTION

Transactions between one another have reached an unprecedented level wherein transformations have become elusive, uncertain and convoluted that has caused a lot of reverberations over a stipulated period of time. The evolution of Cryptocurrency has proliferated ever since its inception and has caused a lot of discrepancies in the eyes of the law. In recent years, it has brought a phenomenal change within investors that is yet to be fathomed by a man of ordinary prudence. There are ample of queries that are either unanswered or left in the dark. The authors would be explicating a comparative analysis of cryptocurrency regulation across the globe and repercussions behind it.

Cryptocurrency refers to a wide array of technological advancements that utilize the indigenous systems of public and private digital keys. It is defined as “a purely peer-to-peer version of electronic cash that would allow online payments to be sent directly from one party to another without going through a financial institution”. Cryptocurrencies are wholly in the cloud and there is absolutely no plausibility to attain a physical form. However, it has a digital value that is commensurate of cash which is accepted by retailers and other businesses. Bitcoin is one of the prominent currency that has brought a tremendous change in the virtual currency platform. It is the first cryptocurrency generated, post-failure of B-money and Bit Gold. Bitcoin (BTC) is a decentralized, digital, anonymous currency that got no regulatory authority, and cannot be exchanged with gold or any other commodity. It got triumphed in the aeon of digital payment even though it is erratic in nature i.e., unpredictable and volatile because Bitcoin does not store value in a predictable fashion. The anonymity character is preferred towards Dark web, which has no access to the search engine as most of the illegal transactions are transpired through it. After installing the relevant software, the interested parties commence to transmogrify the transactions to the ledger and creating the network of blockchain.

Blockchain is an idiosyncratic mechanism which operates an encryption method known as cryptography through Distribute Ledger Technology (DLT). DLT is the mode of sharing and recording of data through the ledger, which is identical and is functioned in a distributed network of computer servers. When the technologies get augmented simultaneously it will lead to security risks. The cyber traducers may target the blockchain by operating through

malware, social engineering and manipulate it.

The first launch of blockchain to the virtual world was in the year 2009 which brought exhilaration among the researchers, technologists and other intruders. Initially, it tends to be a sensible solution to ensure a network of peer transactions but subsequently, the balance came down by an increase in the security risks. The lack of traceability and non-regulatory body created a virtual platform for the hackers to squander the blockchain network and mostly the victims of such mistreat are the developing countries. This is the key reason behind the ban of cryptocurrencies in many developing countries.

LEGALITY OF CRYPTOCURRENCY IN INDIA

Determination of legal status of cryptocurrency was a tedious task and a never-ending debate. The provisions proposed in the Indian Statutes clearly regulate ‘Bitcoins’ as a currency and it is confined for it to be legalized under different legislations. The term 'Virtual Currency' has not been defined under any of the statutes. However, as per Section 2(h) of the Foreign Exchange Management Act (FEMA), 1999, the term ‘currency’ is defined as, all currency notes, postal notes, postal orders, money orders, cheques, drafts, traveler’s cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank. Based on the aforesaid definition, it is clear that ‘Bitcoin’ does not come under the ambit of currency but it does not ostracize the same from authorizing it to be a currency by the Reserve Bank. In Japan, Bitcoin and numerous other cryptocurrencies were accepted as a legal tender1265, i.e., it can be used as a method of payment in the said country but it has enforced stringent restrictions on use. Thus, it has been declared that Currency other than ‘Indian currency’ is termed as ‘foreign currency’ under the said Act and will have to acquiesce with the foreign exchange rules and guidelines. As per Section 2(fic) of the Copyright Act, 1957, a ‘Computer Programme’ is defined as, a set of instructions expressed in words, codes, schemes or in any other form, including a machine-readable medium, capable of causing a computer to perform a particular task or achieve a particular result. Considering the cryptocurrency in a wider perspective, the above-mentioned definition which includes a set of instructions expressed in codes or any other form will be sufficing to bring virtual currencies within its purview. From the aforesaid definitions, it can be construed that Bitcoins can be legalized as a legal tender in India. This puts forth the thought of why the cryptocurrency is still not regulated in India and the rationale behind the prohibition.

Cryptocurrencies were not legalized in India when it was intercalated into the market. The entrance of cryptocurrencies brought about a drastic change in the Indian market. To date, Virtual currency trade has been carried by unregulated digital exchanges that have led to innumerable consequences. As much as virtual currencies are advantageous it has equal drawbacks considering the risk factors pertaining to it. One of the prime reason behind the non-regulation of Bitcoins and other digital currencies in India is that many people who are investing are not well aware

1265 In Japanese, the term 仮想通貨 (“virtual currency”) is used.
of the pit they are going to fall in and blindly pave the way for the hackers. The investors tend to indulge themselves in illicit activities unintentionally for none other than the profits that they would incur from it. Furthermore, the investments made are anonymous with no significant recipient and reception which is one of the major impediment. Virtual currencies are used as a medium for unlawful practices without the knowledge of the investors such as money laundering, ransomware payments, drug deals and targeted assassinations on the dark web. Given the risk factors embroiled in Bitcoins and other cryptocurrencies, the Reserve Bank of India (RBI) contended such currencies cannot be recognized as a legal tender in India. The investors were warned with respect to the usage of digital currencies from the year 2013 and ultimately the RBI had to take the issue in their own hands that promulgated a ban on cryptocurrencies in India from July 2018 effective immediately.

REGULATION OF CRYPTOCURRENCY OVER THE GLOBE

- THE UNITED STATES

The United States is favouring towards manoeuvring of cryptocurrency, however, in order to avert the illegal transaction of Bitcoin, there are a plethora of government agencies. The U.S Department of treasury’s Financial Crimes Enforcement Network (FinCEN) has been announcing guidance on Bitcoin since 2013. Bitcoin is deemed to be as a money services business (MSB) but not as a currency by the treasury. According to Bank Secrecy Act, 1970, there are certain provisions that comply the transactors of Bitcoin to keep an account on the ledgers, reports and Internal Revenue Service (IRS) categorized Bitcoin as property for taxation.

- THE EUROPEAN UNION

EU does not have any specific legislation regarding cryptocurrencies, however, cryptocurrencies are broadly contemplated legal across the bloc. Since there are no central regulatory rules each European Union countries draw their own stance regarding Bitcoin. The European Commission on March 8th, 2018, proposed an Action Plan on how to take advantage of the opportunities presented by technology-enabled Financial Services (FinTech) like blockchain, intelligence, and cloud service. On October 22nd, 2015, in Hedqvist the European Court of Justice held that transaction to exchange a traditional currency for Bitcoin or other virtual currencies and vice versa constitute the supply of service for consideration but fall under the exemption from Value Added Tax.

- AUSTRALIA

Cryptocurrency is having the status as that of other official currency. With regard to the business transactions, the Australian Taxation Office (ATO) declared, the guidance for the exchange of Bitcoin in place of the Australian dollar on various transactions should be recorded as similar to that of non-cash transaction under the barter system\textsuperscript{1269}. According to the news report from January 2018, the ATO is parleying with the tax experts to assist them in tracking and oversee the cryptocurrency transaction and ensure all the taxes are paid\textsuperscript{1270}. Under the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill, 2017,\textsuperscript{1271} the digital currency transactions need to be recorded in a register maintained by AUSTRAC (Australian Transaction Reports and Analysis Centre)\textsuperscript{1272}.

- JAPAN

In Japan, cryptocurrency transactions are regulated and are considered to be a legal tender. The amended Payment Service Act defines “cryptocurrency”\textsuperscript{1273} as property value that can be used as payment for the purchase or rental of goods or provision of services by unspecified persons, that can be purchased from or sold to unspecified persons, and that is transferable via an electronic data processing system; or property value that can be mutually exchangeable for the above property value with unspecified persons and is transferable via an electronic data processing system.

- SWITZERLAND

Switzerland considers cryptocurrency as a legal currency, and it is formulating to be the center for the Bitcoins and Fintech transactions. On November 2, 2017, the Commercial Register Office in the Canton of Zug started welcoming Bitcoin for the payment of administrative cost\textsuperscript{1274}. The Swiss State Secretariat for International Finance announced the establishment of a working group on blockchain and ICOs in January 2018\textsuperscript{1275}. The working group will be working in harmony with the Federal


\textsuperscript{1273} Supra Note 3.


\textsuperscript{1275} Press Release, Arbeitsgruppe Blockchain/ICO wird ins Leben gerufen [Working Group Blockchain/ICO Set Up], Eidgenössisches Finanzdepartement [EFD] [Swiss Federal
NON-RGULATION OF CRYPTOCURRENCIES IN OTHER COUNTRIES

- ARGENTINA

As per the National Constitution of Argentina, the Central Bank has the sole authority to determine the matters with regard to legal currency. The Central Bank has not legalized cryptocurrencies as a legal tender however, in a country that has stringent rules over foreign currencies, virtual currencies are still persisting.

- BRAZIL

Brazil’s Securities Exchange Commission, Comissão de valores mobiliários (CVM), has determined that the digital currency, Niobium Coin (NBC) is not a financial asset. Based on the risks that are originating trading virtual currencies, the Brazilian Federal Reserve Bank (Banco Central do Brazil) issued Notice No. 31,379 on November 16, 2017 stating that ‘there is no specific provision governing virtual currencies in legal and regulatory frameworks associated with the National Financial System and BACEN, in particular, neither regulates nor supervises transactions involving virtual currencies’.

- ECUADOR

The Central Bank of Ecuador declared that Bitcoins and other decentralized digital currencies are not authorized payment method in Ecuador. It reiterated that digital currencies are not legal tender and are not an authorized payment method for goods and services according to the Código Orgánico Monetario y Financiero (Organic Monetary and Financial Code).

Additional, virtual currencies...

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1278 El Banco Central Argentino Considera Riesgoso Operar con Bitcoins [Central Bank of Argentina Considers Risky Operations with Bitcoins], INFOTECNOLOGÍa (May 28, 2014), http://www.infotechnology.com/internet/El-


1282 CÓDIGO MONETARIO Y FINANCIERO [MONETARY AND FINANCE CODE] art. 94, REGISTRO OFICIAL [R.O.], Sept. 12, 2014,

www.supremoamicus.org 417
are not bolstered by any authority as they are not controlled, supervised or regulated by any Ecuadoran entity and also it is implicated with financial risks for the investors.  

- EGYPT

The Central Bank of Egypt banned the trading of cryptocurrencies due to high-risk factors associated with it. It was also stated that commerce within the Arab Republic of Egypt is only circumscribed to the official paper currencies authorized by the Bank. The primary Islamic legislator, Egypt's Dar al-Ifta had promulgated a religious decree that segregated commercial transactions in digital currencies as haram (prohibited under Islamic law). The legislator also held that cryptocurrencies could cause havoc in national security and central financial systems.

- IRAQ

The Central Bank of Iraq has prohibited the use of cryptocurrencies and pronounced that, traders who carry out transactions involving virtual currencies will be punished by penalties cited in the country’s Anti-money laundering law.

- PAKISTAN

There is no specific law that regulates digital currencies in Pakistan. In May 2017, the State Bank of Pakistan (SBP) proclaimed that digital currencies are not recognized in Pakistan. On April 6, 2018, the SBP published a press release that admonished the public on the risk of virtual currencies i.e.,

“The General Public is advised that Virtual Currencies/Coins/Tokens (like Bitcoin, Litecoin, Pakcoin, OneCoin, DasCoin, Pay Diamond, etc.) are neither recognized as a Legal Tender nor has SBP authorized or licensed any individual or entity for the issuance, sale, purchase, exchange or investment in any such Virtual Currencies/Coins/Tokens in Pakistan. Further, Banks/ DFIs/ Microfinance Banks and Payment System Operators (PSOs)/ Payment Service Providers (PSPs) have been advised not to facilitate their customers/account holders to transact in Virtual Currencies/ Initial Coin Offerings (ICOs)/ Tokens vide BPRD’s Circular No. 03 of 2018”

- QATAR

The Supervision and Control of Financial Institution Division at Qatar’s Central Bank


1283 Supra note 10.


in February 2018, had issued a circular elucidating Bitcoin as illegal and it is unsupported by any central bank or government. Furthermore, the circular had also stated that trading of digital currencies involves high risks of price volatility and the risk of being used in financial crimes. It proscribed all banks operating in Qatar from dealing with such currencies, subject to penalties for violators. 1289

IS BANNING CRYPTOCURRENCY ACROSS THE GLOBE AN ELIXIR?

There are mushroom of challenges faced by the Government agencies in regulating the decentralized digital currencies as it is embroiled with severe shortcomings. The Tax implications have played a vital role in legitimizing Bitcoin. Many people face a lot of hardship from the persuasion of cryptocurrency in the market. Regulating cryptocurrency would only create havoc on the *people* in the end. Prior to the regulation, the Government must peruse the hazards pertaining to Bitcoin. A man of ordinary prudence must understand the pros and cons before investing in Bitcoins and other cryptocurrencies. The investors tend to indulge themselves in unlawful criminal activities such as money laundering, hawala transactions, evasion of tax, etc. that they were not cognizant in the first place. The transactions are entirely in the cloud and there is zero possibility for it to be in physical form but each and every cryptocurrency has a value that can be liquidated to cash. One of the foremost element that must be considered is, the whole process is not undertaken or maintained by a central authority based on the procedure established by law. Hence, any kind of misfeasance or disparity that would arise must be solely borne by the investors and the Government will not be held liable and not come for the rescue. Countries that have regularized cryptocurrencies are in the infant stage as the intricacies involved are still unexplored. Considering the advancement of technologies, regularizing cryptocurrency would be futile. Regulations per se is an arduous task that cannot be consummated based on the whims and fancies of the people.

CONCLUSION

Cryptocurrencies are the products of the cutting edge technology, but it’s a transgression due to its attribute of being untraceable and anonymous. With innovative policies and framework in the real world, itself tend to have a profusion of social—legal issues, then considering the virtual era which is a mysterious world it is palpable to face the adverse consequences of security issues and other social issues. Countries which regulated cryptocurrencies need to delve into the risks involved in its exchange. The authors would like to conclude by stating that, with the prodigious development of technologies, the Governments are facing serious challenges by regularizing what comes to their platter instead of taking necessary measures towards it. Framing of appropriate laws based on technological advancement has now become the need of the hour.

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Industrial Design and IPR

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Introduction:

What is an Industrial Design?
An industrial design may consist of three dimensional features, such as the shape of an article, or two dimensional features, such as patterns, lines or colour.

An Industrial Design Right is an intellectual property right that protects the visual design of objects that are not purely utilitarian. An industrial design consists of the creation of a shape, configuration or composition of pattern or colour, or combination of pattern and colour in three-dimensional form containing aesthetic value. An industrial design can be a two- or three-dimensional pattern used to produce a product, industrial commodity or handicraft.

Under the Hague Agreement Concerning the International Deposit of Industrial Designs, a WIPO-administered treaty, a procedure for an international registration exists. To qualify for registration, the national laws of most member states of WIPO require the design to be novel. An applicant can file for a single international deposit with WIPO or with the national office in a country party to the treaty. The design will then be protected in as many member countries of the treaty as desired. Design rights started in the United Kingdom in 1787 with the Designing and Printing of Linen Act and have expanded from there.

Industrial Design protection is provided for a shape, configuration, surface pattern, colour, or line (or a combination of these), which, when applied to a functional article, produces or increases aesthetics, and improves the visual appearance of the design, be it a two-dimensional or a three-dimensional article. As per Indian Law, under the Design Act of 2000, Industrial Design protection is a type of intellectual property right that gives the exclusive right to make, sell, and use articles that embody the protected design, to selected people only. Protection rights are provided for a period of 10 years. They can then be renewed once for an additional period of 5 years. Design protection provides geographical rights, like Patents and Trademarks do. To obtain Design Protection in India, the same has to be registered in India.

The pre-requisites for a design to qualify for protection are as follows:

- It should be novel and original.
- It should be applicable to a functional article.
- It should be visible on a finished article.
- It should be non-obvious.
- There should be no prior publication or disclosure of the design.

The Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) is the forum where WIPO's member states and observers meet to address issues relating to the development of the international legal framework for industrial designs. SCT members are currently seeking agreement on a number of key issues relating to international designs. An industrial design may constitute the ornamental or aesthetic aspect of an article. It may consist of 3-D features such as the shape of an article, or
2-D features, such as patterns, lines or colour, India has seen the evolution of design as an important fragment of the intellectual property family in protecting the aesthetic value of the articles.

How to Obtain Industrial Design Protection in India?

The application procedure for Design protection is fairly simple. The Design office provides a paper filing option as well as an online filing option. All designs are categorized as per the Locarno Classification for Industrial Designs, and filing is done as per the class that pertains to the design in question. An application is to be submitted to the design office with the desired designs, with a classification code and a description of the design.

The application then goes through an examination process, after which the applicant receives a communication from the Design office regarding any objections, if present. After rectifying the application based on the objections and responding to the Design Office, the application will be granted if all the requirements are met. Once granted, and if there is no objection from any third party sources, the design is exclusive to the owner for the time period mentioned above.

Why Should One Look Into Filing for Industrial Design?

The outer appearance of a product makes it visually more appealing and attractive. This acts as a value-adding aspect, which in turn increases the marketability of the product. This leads to the need to protect your creation from third parties’ use, in order to prevent them from taking advantage of your rights in this world of competition.

In many cases, the design itself becomes the identity of a brand. Some of the most famous examples are Coca Cola’s contour bottle, the contours of the iPhone/iPad/iPod, and the shape of the Volkswagen Beetle and the Mini Cooper. When a product’s design is protected, it stops illegitimate products from destroying the brand’s efficacy and safety. Protection of industrial designs also encourages creativity in the manufacturing and industrial sectors, which leads to an expansion in commercial activities.

Paris Convention for the Protection of Industrial Property:

The Paris Convention, adopted in 1883, applies to industrial property in the widest sense, including patents, trademarks, industrial designs, utility models, service marks, trade names, geographical indications and the repression of unfair competition. This international agreement was the first major step taken to help creators ensure that their intellectual works were protected in other countries.

The Paris Convention, concluded in 1883, was revised at Brussels in 1900, at Washington in 1911, at The Hague in 1925, at London in 1934, at Lisbon in 1958 and at Stockholm in 1967, and was amended in
1979. The Convention is open to all States. Instruments of ratification or accession must be deposited with the Director General of WIPO.

Each Contracting State must refuse registration and prohibit the use of marks that constitute a reproduction, imitation or translation, liable to create confusion, of a mark used for identical and similar goods and considered by the competent authority of that State to be well known in that State and to already belong to a person entitled to the benefits of the Convention.

**Berne Convention for the Protection of Literary and Artistic Works:**
The Berne Convention, adopted in 1886, deals with the protection of works and the rights of their authors. It provides creators such as authors, musicians, poets, painters etc. with the means to control how their works are used, by whom, and on what terms. It is based on three basic principles and contains a series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries that want to make use of them.

As to the duration of protection, the general rule is that protection must be granted until the expiration of the 50th year after the author's death. There are, however, exceptions to this general rule. In the case of anonymous or pseudonymous works, the term of protection expires 50 years after the work has been lawfully made available to the public, except if the pseudonym leaves no doubt as to the author's identity or if the author discloses his or her identity during that period; in the latter case, the general rule applies. In the case of audio-visual (cinematographic) works, the minimum term of protection is 50 years after the making available of the work to the public ("release") or – failing such an event – from the creation of the work. In the case of works of applied art and photographic works, the minimum term is 25 years from the creation of the work.

**Hague Agreement Concerning the International Registration of Industrial Designs:**
The Hague Agreement governs the international registration of industrial designs. First adopted in 1925, the Agreement effectively establishes an international system – the Hague System – that allows industrial designs to be protected in multiple countries or regions with minimal formalities.

Two Acts of the Hague Agreement are currently in operation – the 1999 Act and the 1960 Act. In September 2009, it was decided to freeze the application of the 1934 Act of the Hague Agreement, thus simplifying and streamlining overall administration of the international design registration system.

An international design registration may be obtained only by a natural person or legal entity having a connection – through establishment, domicile, and nationality or, under the 1999 Act, habitual residence – with a Contracting Party to either of the two Acts.

The Hague Agreement allows applicants to register an industrial design by filing a single application with the International Bureau of WIPO, enabling design owners to protect their designs with minimum formalities in multiple countries or regions. The Hague Agreement also simplifies the management of an industrial design registration, since it is possible to record subsequent changes and to renew the international registration through a single procedural step.
The TRIPS Agreement is a minimum standards agreement, which allows members to provide more extensive protection of intellectual property if they so wish. Members are left free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice.

**TRIPS and India’s IPR Regime:**
The TRIPs (Trade Related Intellectual Property) regime has emerged as the basic framework for ensuring intellectual property rights across the world. It is not the universal Intellectual property law. But it provides a basic framework. Every member of WTO should include TRIPs provisions in their domestic intellectual property legislations. Intellectual property regime is anchored by legislations in the corresponding fields. With the establishment of WTO and the international enforcement of its various provisions; India also has made corresponding changes in the intellectual property regime. The intellectual property right regime of the country has been modified by a number of legislation since 1995. For India, the WTO’s TRIPs agreement became binding from 2005 onwards as the country has got a ten-year transition period (1995-2005) to make the domestic legislation compatible with TRIPs. Here, India has got additional five-year transition period because of not having product patent regime in critical sector like pharmaceutical. Hence, existing laws were amended and fresh legislations were introduced during this period.

**Citations:**
- **Cello Household Products v. M/S Modware India and Anr.** [2]
The case was filed by popular ‘household products’ production company ‘Cello’ against Modware India seeking an injunction for design infringement and passing off. The dispute was over the copying of design of the bottle name PURO launched by the plaintiff in the year 2016, the bottle was a two-toned colour with certain specific phrases and words. The defendant launched a similar bottle called ‘KUDOZ’ in the following year for which they were sued by the plaintiff. Thus, here the subject matter is the infringement of the design of the bottle launched by Cello for which a company has invested ample money in the market for selling and marketing purposes.

The court on the basis of merits decided that the plaintiff was justified in filing the suit against the defendant as Modware India introduced a bottle which is deceptively similar to the bottle of Cello and denied defendant’s contention of lack of jurisdiction of Bombay High court to decide the case following a grant of injunction and relief to be given by the defendants to the plaintiff as damages keeping the loss faced by the plaintiff as the base. Therefore, cello won the case.

- **M/S Crocs Inc. USA v. Liberty Shoes Ltd. & Others**
The recent case filed by crocs against numerous footwear companies has established the importance of design act and given a verdict against crocs on the basis of prior publication of design. The case was filed in the Delhi High Court and was taken up by Hon’ble Justice Valmiki J. Mehta.
Crocs USA filed cases against shoe manufacturers alleging infringement of their design which is related to perforated and non-perforated shoe design. The plaintiff claimed the design as registered from 25.8.2003, the defendant contended that the design registration is subject to cancellation as it does not qualify under the category of ‘new’ or ‘novel’.

The Delhi High Court held that the registered design of the plaintiff with respect to its footwear, does not have the necessary newness or originality for the same to be called a creation or innovation or an Intellectual Property Right. The Court accordingly observed that the registered design of the plaintiff is liable to be cancelled as per Section 19(1)(d) [1] of the Act read with Section 4(a) [2] of the Act. The Court in the case also awarded litigation costs as well present to costs incurred by them towards time and man hours spent by these defendants for conducting their defences in the present suits. An appeal filed in the Supreme Court by the plaintiff was dismissed, upholding the orders of the Delhi High court in January, 2019.

Conclusion:

More judicial decisions means better interpretation and more usage of the law, thus establishing the increasing significance of design law. It is an imminent fact that Patents is not the only important IP that an organization should focus on, Design in itself holds significant place in the commercial value of a product. Design as an IP holds immense value because customers may also associate a product with a company or a particular quality standard based on product aesthetics. For companies, the design is the simplest way of differentiating one’s products from competing products.

As a result, it becomes important to protect the design from being copied. Thus, it is pertinent to note that businesses and companies are taking active step to protect the aesthetic value of their products under the Designs Act, 2000. Design as an intellectual property right holds as much value as any other subject matter under the umbrella of intellectual property rights.

The old saying goes ‘the first impression is the best impression’. In the case of a product, the first impression is inadvertently made by the appearance of the product, before the user even explores its functionality. In this era of creativity, aesthetics and presentation, the overall design and visual appeal of any product is very significant. Hence, the ability to design a creative appearance is a marketable talent in itself. So why not protect your creativity and efforts, without allowing others to use your novel creations? Think beyond just functionality, and look into eye appeal too!

When a product’s design is protected, it stops illegitimate products from destroying the brand’s efficacy and safety. Protection of industrial designs also encourages creativity in the manufacturing and industrial sectors, which leads to an expansion in commercial activities.

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